



# Professional and Ethical Dilemmas in Litigation

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David Lefkowitz graduated from Columbia University with a B.A. in 1985 and earned his J.D. from Emory University School of Law in 1988. The Lefkowitz Firm, LLC, represents individuals and corporations in their claims for legal malpractice (legal negligence) and similar claims such as breach of fiduciary duty, executor misconduct and ethical misconduct by attorneys and other fiduciaries. The firm also represents attorneys and law firms with regard to risk management and attorney's fee disputes. David is an adjunct professor of legal malpractice law at the University of Georgia School Of Law and is a frequent speaker at continuing legal education seminars. David has offices in Atlanta, Georgia and Athens, Georgia.

Avoiding claims for legal malpractice and ethical violations requires more than merely following the law and exercising the appropriate standard of care. While meeting those criteria likely would allow you to prevail at a trial, it is important for an attorney to understand how to keep a client from contemplating such a claim, let alone threatening one or filing one.

Most legal malpractice claims (and awards) are not related to an attorney's knowledge of the law. Substantive and procedural law is not hard to find, as long as you know that you need to look for it. The statute of limitations for a personal injury suit in Georgia is 2-years, and it has been for decades. If a lawyer misses that deadline, it isn't because he did not know the law. The fact is, however, that bar complaints and malpractice claims arise out of a large group of administrative-type errors, including a failure to screen clients properly, monitor deadlines, analyze conflict issues, communicate effectively with clients, etc. The process of avoiding malpractice claims begins before you enter into an attorney-client relationship and continues after the relationship ends. If you think about the things that would aggravate you if a doctor did it to you, you can come up with a good list of things to avoid doing to your client. In other words, don't keep you client waiting for an hour in the waiting room. Don't wait 3 days to return a phone call. Don't be dismissive of a client's concerns. If the client thinks you don't care about their case or their feelings, they are going to be more likely to conclude that you did not work hard or obtain the best result possible.

### **Choosing Clients**

Choose your clients carefully. You can avoid a claim for legal malpractice by considering a few factors, including: (a) the client's experience with prior attorneys—has

the client threatened or pursued legal action or filed a bar complaint against a former attorney? (b) the client's motives and goals—can you achieve those goals for your client? Does the client seek revenge or some other remedy that you either cannot or are prohibited from achieving? (c) the client's use of alcohol or drugs—will this impair the judgment of the client? (d) the client's financial condition, including bankruptcy or outstanding judgments—can the client afford to pay the fees which will be incurred during the representation? You always want to avoid a potential dispute over fees, as discussed below; (e) the client's prior legal problems—does the client have a criminal record (including felonies, which may impact credibility at trial)?

## **Formalize**

Formalize your attorney-client relationship. You should have a written agreement with your client regarding the representation. If you are using an engagement letter, it should be signed by the client. (Contrary to popular belief, The Georgia Rules of Professional Conduct do not require that a contingency fee agreement be signed by the client. The Rules simply require that the agreement be in writing. Nonetheless, be sure the agreement is signed by the client. One day you may need to prove what the terms/limitations of the attorney-client relationship were, and there is no better way to prove the terms of an agreement than to have a signed copy).

It never ceases to surprise me that many lawyers fail to have fee contracts with their clients. The contract is the best opportunity you have to set forth the duties you and your client owe to one another, as well as the limitations on the representation. Some lawyers feel that a long contract may scare/concern a prospective client. A

contract is too important; don't limit it. All the terms of the representation should be disclosed in the agreement, including the scope of the representation, the fees that will be charged, whether a retainer is required, etc.

The fee agreement should specifically discuss the hourly rate to be charged by each attorney (or other professional working on the matter, such as a legal assistant) or other form of fee, such as a contingency fee. Any plaintiff attorney's contingency fee should be accurately described in the fee agreement, be it a form used for many clients or an engagement letter. For instance, does the fee vest upon the agreement to settle with the opposing party or upon the receipt of the settlement proceeds? Under Georgia law, you can protect yourself from the possibility that a client, in attempt to deny you your contingency fee, may discharge you after settlement offers have been made. In Morrow v. Stewart, 197 Ga. App. 689, 399 S.E. 280 (1990), the Court of Appeals approved of (and enforced) the following language from an attorney-client contingency fee contract:

"I understand that I may dismiss my attorney at anytime, for any reason, upon written notice to him and payment of unpaid expenses and services rendered to the date of the receipt of such notice; payment to be based upon time devoted to my case at any hourly rate of \$80.00 per hour, or the applicable percentage of fee due him under the terms of this agreement of any offers which have been made by any adversary or collateral party, whichever is greater."

A contingency fee attorney should also contemplate whether she wants her fee arrangement to reference the possibility that an appeal may be filed. Attorneys should

take into consideration whether they will charge an additional fee or whether such post-trial/appellate work is included in the contingency. Note that Georgia Rule of Professional Conduct 1.5 requires that a contingency fee be in writing and shall state the method by which the fee is to be determined, including the percentages, whether interest will be charged on out-of-pocket expenses that are advanced by the firm, etc.

Expenses that will be billed to the client should be discussed in the fee contract. This is true whether the expenses will be billed (and paid for) each month or whether the attorney is paying the expenses and expects to be reimbursed from the anticipated recovery. In a contingency fee context, the client should be informed whether he will be responsible for the expenses of litigation even if there is no recovery. If the attorney is going to charge interest on the funds that are used for out-of-pocket expenses, the interest rate should be clearly set forth in the contract. The contract should also be clear as to whether the expenses will be paid out of the client's portion of the settlement proceeds or from the top, before the attorney and client's portions are determined.

If an attorney will be billing by the hour, the contract should clearly set forth the frequency of the billing and when the client will be expected to pay the bill. The monthly statement is an excellent opportunity to describe to the client the work that is being performed, not only for purposes of asking to be paid, but for purposes of making sure the client knows that you are, in fact, performing the work for which you were retained.

If an attorney performs any work for a prospective client, but ultimately decides not to enter into a formal attorney-client relationship, the attorney should send a **nonengagement letter**. A nonengagement letter protects the attorney from a

subsequent claim that the client expected certain work to be performed. A nonengagement letter may not be practical for every situation in which an attorney converses with an individual with regard to prospective representation, but there are certain situations in which the failure to send a nonengagement letter can lead to disaster. One situation occurs when an attorney conducts a consultation regarding the merits of a particular case. For instance, consider the situation in which a family member of a resident of a nursing home hires an attorney to review medical records, consult with an expert witness, conduct research and do whatever else is necessary to determine whether a valid claim for medical malpractice exists. Should the attorney decide that no such claim exists (or, perhaps, that a claim does exist, but it is not a claim which his firm will handle), the attorney should send a nonengagement letter to the prospective client stating that the firm will not be representing the client and providing any information which the client may need, particularly the date when the applicable statute of limitations will expire. The letter should suggest that the client consult with another attorney as soon as practicable.

Should an attorney find himself in a situation in which he has been engaged and later decides to withdraw, a **disengagement letter** should be sent to the client. This letter may discuss the reason why the attorney-client relationship is ending, whether the attorney will work with/consult with subsequent counsel, and whether any additional attorney's fees are owed. The attorney should confirm that the client receives a written notice of the disengagement. This means that the letter should be sent by certified mail (or some other means such that the client's receipt of the letter can be confirmed). It can also be sent by email, as long as the client responds to the email and confirms it was

received. While this information will be helpful to the client, the written confirmation that the client is aware of the disengagement may be extremely important to the attorney. There have been several legal malpractice cases arising out of the running of the statute of limitations, followed by the client suing the attorney. The attorney claimed that he had withdrawn and told the client that he would not be filing suit, and the client claimed that he had no such knowledge of a withdrawal and expected that suit would be filed in a timely manner. Why risk this 'he said-she said?' Document the withdrawal.

One final point: do not wait until the statute of limitations is about to expire to decide to withdraw. It is not uncommon for an attorney to agree to review a file when there are several months remaining before the statute of limitations (or other filing deadline) will expire. Given the lack of an imminent deadline, the file is placed on the back burner. As the deadline for filing approaches, the attorney decides, for some reason, that he does not want to handle the case after-all. An attorney is inviting a claim for legal malpractice if he withdraws at such a late date, and the client cannot find substitute counsel. The duty to withdraw in an appropriate manner is particularly important in a complicated case. It is not reasonable to expect that you can tell a client you decided not to take her medical malpractice case three days (or weeks) before the statute expires, leaving the client without adequate opportunity to find replacement counsel.

## **Impressions**

Impressions are extremely important. Malpractice actions are not filed for every error or every negligent act. Developing a rapport with your client may not prevent



malpractice, but it can assist in preventing malpractice claims. If a client values the attorney-client relationship, it might outweigh the perceived value of a malpractice claim. Always avoid the impression that you are being neglectful. Georgia ethical rules require that an attorney keep a client reasonably informed about a matter. This is a minimum threshold, and in emotional cases (such as those involving divorce or child custody issues, for instance), additional communication is helpful. An attorney should provide the client with the impression that the legal matter is being given the attention that it requires. This is best handled through quality communication. This communication can take many forms, including effective billing (in which the work performed is itemized), phone calls to the client, letters/emails to the client and sending copies of pleadings to the client. See the section entitled "Communicate," below.

## **Expectations**

Preparing quality documents, meeting deadlines and understanding the law are obvious ways to avoid malpractice claims. In certain areas of law, however, it is inevitable that a client will be disappointed from time-to-time. This is particularly true in cases in which there is a trial: one party is going to lose. In addition, legal matters such as divorce and criminal cases are rife with emotion and disappointment, sometimes misdirected at the attorney. It is important that the client understand the difference between losing and substandard representation. This potential for confusion on the part of the client should be addressed from the beginning of an attorney-client relationship through its conclusion.

One important way for an attorney to avoid having a disappointed client (and thus one who might pursue a legal malpractice claim) is to set realistic expectations.

Many clients will enter the attorney-client relationship with certain expectations in mind. However, most clients form expectations regarding the outcome of a legal matter based on conversations with their lawyer. An attorney should avoid the temptation to set unreasonably high expectations during the initial interview process (when the lawyer knows that the prospective client may be choosing between several attorneys). Of course, you should never give the client the idea that you are guaranteeing a successful result.

An attorney who has had no experience with legal malpractice might be surprised to learn that many clients who are considering a legal malpractice claim think that their attorney was “paid off” by the opposing attorney or party. Why would a client feel like he has been “sold out?” This feeling is often caused by the failure of the attorney to meet the expectations he has helped to set. If you tell your client (or prospective client) that his claim is worth \$100,000, and it ultimately settles for \$5,000, you have some explaining to do. However, if you keep the client informed as to the status of the matter you are handling, and you promptly let the client know of any important developments, you can continue to manage the expectations of your client throughout the representation. By doing so, the chances of surprise and bitter disappointment are reduced.

## **Communicate**

It is not possible to overstate the importance of effective communication with your client. Clients’ phone calls should be returned promptly. If the primary attorney handling the file cannot return the call, then another attorney at the firm, a legal

assistant or a legal secretary should return the call. When clients feel that they are being treated as unimportant, it is inevitable that they will feel that their case is not being handled zealously. A less-than-favorable conclusion to the case will be blamed on this perceived lack of attention.

Communicating with a client is not only a good way to keep attorney-client relations healthy; there is an affirmative ethical duty to keep clients apprised of the status of their case. Georgia Rule of Professional Conduct 1.4 is entitled "Communication" and reads as follows:

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.

This ethical rule can become a problem when the attorney knows, or suspects, that he has made a mistake in the course of representing the client. The attorney may feel that he can repair the error and will therefore decide not to tell the client that their case is in peril. This decision can rise to the level of fraud in a subsequent legal malpractice lawsuit, and is not worth the risk. Tell the clients the good, the bad and the ugly. It's often a difficult task, but the alternative is unacceptable: the client sues you for hiding the error from him. Additionally, hiding the error can extend the statute of limitations, as certain types of fraud will toll the statute of limitations until such time as the client knew, or reasonably should have known, of the fraud. Furthermore, it should be noted that fraud committed after the negligence can support a claim for punitive

damages, even if no monetary damages were caused by such fraudulent concealment. The Court of Appeals has held that such behavior constitutes a breach of fiduciary duty, which can give rise to punitive damages. (Holmes v. Drucker, 201 Ga. App. 687 (1991)).

### **Keep Yourself Apprised of the Status of a Case**

In addition to keeping your client apprised of the status of his case, the attorney has a duty to keep himself apprised of the status. This may seem self-evident, but attorneys can be held liable for the failure to diligently follow the status of their cases. In Hipple v. Brick, 202 Ga. App. 571 (1992), a client sued his lawyer for failure to protect his right of appeal in the prior action. In the underlying case, the client had a \$39,000 judgment against him. The attorney then moved for judgment notwithstanding the verdict or, in the alternative, a new trial. When the court denied the motion 13 months later, the attorney did not receive notice of the entry of the order. After 35 days had expired, the attorney learned of the order in a telephone call from opposing counsel. At that point, the 30-day filing period for a notice of appeal had expired, and the attorney took no action to resurrect the case (such as filing a motion to set aside the judgment in order to gain a new 30-day period, under O.C.G.A. § 9-11-60 (d)). The client's malpractice claim was predicated on attorney Hipple's alleged negligence in failing to monitor the status of the case and timely to inform Brick of the order so that an appeal could have been taken. Attorney Hipple claimed he was entitled to summary judgment on the theory that, as a matter of law, he breached no duty to his client in relying on the court to provide notification to him of entry of the court's order on the motions, as it is standard practice for attorneys to do so. The Court of Appeals held that O.C.G.A. §15-6-21 does not relieve an attorney from keeping informed of the progress of a client's case.

(O.C.G.A. §15-6-21(c) places a duty on the judge to file his or her decision on a motion for new trial with the clerk of the court in which the cases are pending and to notify the attorney or attorneys of the losing party of his or her decision). According to the Court of Appeals, the attorney has a separate and independent duty that arises from the contract with the client. Therefore, even if the trial court had failed to send the notice, it would not have relieved the attorney of his obligation to check for over one year. The Court of Appeals noted that in Bragg v. Bragg, 225 Ga. 494, 496 (1969), the Georgia Supreme Court had held that, “[i]t is fundamental that it is the duty of counsel who have cases pending in court to keep themselves informed as to the progress of the cases so that they may take whatever actions may be necessary to protect the interests of their clients.”

### **Explain the Meaning of Legal Documents to Clients**

A general premise of Georgia law is that if a client signs a document, he is held to have understood it and is subsequently bound by it. However, there are reported cases in which a lawyer presented a document to his client for signature and was subsequently sued because of the legal ramifications of the language. For instance, in Little v. Middleton, 198 Ga. App. 393 (1991), the defendant attorney had represented a client in a personal injury case arising out of a car accident. The case settled against the tortfeasor for his \$25,000 liability limits. The settlement agreement released the tortfeasor and his “heirs, executors, administrators, agents and assigns, and all other persons, firms or corporations liable or who might be claimed to be liable....” The injured driver’s own underinsured insurance carrier subsequently refused to pay the plaintiff based on her execution of the release. The plaintiff then sued her attorney for legal malpractice,

based on her attorney's failure to read her policy to determine whether there was UM insurance, the failure to properly pursue the UM claim, and the failure to advise her as to the legal effect of the release on her UM claim. The attorney filed a motion for summary judgment asserting that the language of the release was clear, that the client should have understood it and that the client was thus barred from suing him for any misunderstanding regarding the effects of the release. The trial court granted the motion for summary judgment. However, the Court of Appeals reversed, holding that a question of fact existed as to whether the legal effect of the release posed to the plaintiff "a legal technicality that she was unequipped to appreciate as a non-lawyer." *Id.* at 395. [The Georgia Supreme Court granted *cert.*, but subsequently vacated *cert.* after briefs were filed and the Supreme Court heard oral argument.] The practical effect of Little is that an attorney must explain the meaning of documents that are presented to a client for signature. While the need to explain language varies depending on the sophistication and education of the client, the safe approach is to explain language, including boilerplate that attorneys see on a daily basis.

## **Fee Disputes**

At least 25% of all legal malpractice claims arise out of fee disputes (some claim it is as high as 75%). If you file a suit against a client for fees, any claim for legal malpractice becomes a *compulsory* counterclaim, and an invitation to be sued. When you apply for errors and omissions coverage, you likely will be asked whether you have sued a client for legal fees within the past year. You are asked this question because insurance companies know that fee disputes are a common cause for legal malpractice claims (legitimate or not) to be filed. You are entitled to be paid for the legal services you

provide. But when deciding to file suit, keep in mind that your client may file a counterclaim that will cost you time and money. You will have to pay your deductible on your policy, and your insurance premiums may rise. You might suffer from bad publicity or damage to your reputation. Make sure that the decision to sue a client is made with an understanding of the professional and financial risks. Consider arbitration as an option.

Georgia case law currently allows you to put a clause in your attorney-client fee agreement which limits the time within which a client may object to an invoice. You can further limit the client's right to object by requiring that the objection be in writing. As the law currently is enforced, the client's failure to object within the specified time period will forever bar the client from objecting to the invoice. Typical language used in a fee agreement reads as follows: "Your failure to object in writing to any bill within thirty (30) days of the date of each such bill shall constitute a waiver on your part of the right to challenge the charges made for legal services and expenses on each billing statement." In Loveless v. Sun Steel 206 Ga. App. 247, 424 S.E.2d 887 (1992), the Court of Appeals addressed a situation in which an attorney sued for unpaid legal fees. The former client contended that he had verbally complained about the fees, and further, that he and the attorney had an understanding that the fees would only be due under certain circumstances. The Court of Appeals held that the written contract was binding and that any 'understanding' would constitute parol evidence and be inadmissible within the context of a dispute regarding a written attorney-client fee agreement. It is also important to note that this type of contractual provision limits the rights of the client, is of questionable ethical propriety and has never been approved by the Georgia

Supreme Court. If your contract contains this type of provision, you should be very careful about seeking to enforce it.

This concern arises out of the fact that Georgia law does not allow an attorney to contractually limit the time in which a client may complain about legal malpractice [ie: the statute of limitations for a legal malpractice claim is 4 years (or maybe six, if you had a written fee contract), and an attorney generally may not decrease that time frame by contractually limiting the time for a complaint to 30-days or some other time similar to the above Loveless time limit]. It seems contradictory that a client can be limited to the amount of time within which she may complain about substandard legal work vis-à-vis the invoices, but may not be limited to the amount of time she may complain about substandard work in the context of a legal malpractice claim. That is a topic for an entire paper. My best advice is: be careful when you attempt to limit your client's rights/remedies, as it can easily be construed as your placing your own interests ahead of your client's interests.

## **File Materials**

Attorneys often hesitate to turn over their file materials to clients, particularly clients who have not paid their bills or are threatening to file suit. Attorneys have a statutory lien on clients' papers and money in their possession, and they "may retain the papers until the claims are satisfied." O.C.G.A. §15-19-14 (a). However, Formal Advisory Opinion of the State Bar of Georgia No. 87-5, states that an attorney "may not to the prejudice of a client withhold the client's papers or properties upon withdrawal from representation as security for unpaid fees."



In Swift, Currie, McGhee & Hiers v. Henry, 276 Ga. 571 (2003), the Georgia Supreme Court phrased the issue as follows: "Boiled down to its essence, the question is this: Does a document created by an attorney in the course of representing a client belong to the attorney or the client?" The answer fell squarely on the side of the client and relied up the above-referenced Formal Advisory Opinion:

"An attorney's fiduciary relationship with a client depends, in large measure, upon full, candid disclosure. That relationship would be impaired if attorneys withheld any and all documents from their clients without good cause, especially where the documents were created at the client's behest. See State Bar of Georgia, Formal Advisory Opinion No. 87-5 (September 26, 1988) (attorney may not, to the prejudice of client, withhold client's papers as security for unpaid fees)."

(Id. at 573)

What is "good cause?" The Supreme Court held that good cause to refuse to turn over the documents "would arise where disclosure would violate an attorney's duty to a third party. Good cause might also be shown where the document assesses the client himself, or includes "tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation."

(Id.)

Missing from the Court's definition of good cause was "the client hasn't paid his bill."

Most clients can make an argument that your retention of their files is causing them damage. The better choice is not to give the appearance that you are holding the file hostage.

## **Bar Complaints**

If a client has filed a Bar Complaint against you, hire counsel to respond. There are many defenses that may cause the State Bar to dismiss a complaint at the first stage. It is not uncommon for a Bar Complaint that has no merit on its face to become a serious matter because the responding attorney says too much, or, even worse, lies, in the initial response. Hire someone who is experienced in these matters. It can save you a lot of stress, and for a serious allegation, it can save your license.

## GEORGIA RULES OF PROFESSIONAL CONDUCT

### CHAPTER 1

## GEORGIA RULES OF PROFESSIONAL CONDUCT AND ENFORCEMENT THEREOF

### **Rule 4-101. Enforcement of the Georgia Rules of Professional Conduct.**

The State Bar of Georgia is hereby authorized to maintain and enforce, as set forth in rules hereinafter stated, Georgia Rules of Professional Conduct to be observed by the members of the State Bar of Georgia and those authorized to practice law in the State of Georgia and to institute disciplinary action in the event of the violation thereof.

### **Rule 4-102. Disciplinary Action; Levels of Discipline; Georgia Rules of Professional Conduct.**

(a) The Rules of Professional Conduct to be observed by the members of the State Bar of Georgia and those authorized to practice law in Georgia are set forth herein and any violation thereof; any assistance or inducement directed toward another for the purpose of producing a violation thereof; or any violation thereof through the acts of another, shall subject the offender to disciplinary action as hereinafter provided.

(b) The levels of discipline are set forth below. The power to administer a more severe level of discipline shall include the power to administer the lesser:

(1) Disbarment: A form of public discipline removing the Respondent from the practice of law in Georgia. This level of discipline would be appropriate in cases of serious misconduct. This level of discipline includes publication as provided by Rule 4-219(b).

(2) Suspension: A form of public discipline which removes the Respondent from the practice of law in Georgia for a definite period of time or until satisfaction of certain conditions imposed as a part of the suspension. This level of discipline would be appropriate in cases that merit more than a public reprimand but less than disbarment. This level of discipline includes publication as provided by Rule 4-219(b).

(3) Public Reprimand: A form of public discipline which declares the Respondent's conduct to have been improper but does not limit the right to practice. A public reprimand shall be administered by a judge of a superior court in open court. This level of discipline would be appropriate in cases that merit more than a Review Panel reprimand but less than suspension.

(4) Review Panel Reprimand: A form of public discipline which declares the Respondent's conduct to have been improper but does not limit the right to practice. A Review Panel Reprimand shall be administered by the Review Panel

at a meeting of the Review Panel. This level of discipline would be appropriate in cases that merit more than an Investigative Panel reprimand but less than a public reprimand.

(5) Investigative Panel Reprimand: A form of confidential discipline which declares the Respondent's conduct to have been improper but does not limit the right to practice. An Investigative Panel Reprimand shall be administered by the Investigative Panel at a meeting of the Investigative Panel. This level of discipline would be appropriate in cases that merit more than a formal admonition but less than a Review Panel reprimand.

(6) Formal Admonition: A form of confidential discipline which declares the Respondent's conduct to have been improper but does not limit the right to practice. A formal admonition shall be administered by letter as provided in Rules 4-205 through 4-208. This level of discipline would be appropriate in cases that merit the lowest form of discipline.

(c)

(1) The Supreme Court of Georgia may impose any of the levels of discipline set forth above following formal proceedings against a Respondent; however, any case where discipline is imposed by the Court is a matter of public record despite the fact that the level of discipline would have been confidential if imposed by the Investigative Panel of the State Disciplinary Board.

(2) As provided in Part IV, Chapter 2 of the State Bar Rules, the Investigative Panel of the State Disciplinary Board may impose any of the levels of discipline set forth above provided that a Respondent shall have the right to reject the imposition of discipline by the Investigative Panel pursuant to the provisions of Rule 4-208.3;

(d) The Table of Contents, Preamble, Scope, Terminology and Georgia Rules of Professional Conduct are as follows:

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**PREAMBLE, SCOPE AND TERMINOLOGY**  
**PREAMBLE: A LAWYER'S RESPONSIBILITIES**

[1] A lawyer is a representative of clients, an officer of the legal system and a citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and

obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

[3] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the these Rules or other law.

[4] A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the law, the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[5] As a citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[6] A lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as by substantive and procedural law. A lawyer also is guided by conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[7] Reserved.

[8] In the nature of law practice conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict among a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

[9] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested in the Supreme Court of Georgia.

[10] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[11] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[12] The fulfillment of a lawyer's professional responsibility role requires an understanding by them of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

## **SCOPE**

[13] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the terms "may" or "should," are permissive or aspirational and define areas under the Rules in which the lawyer has professional discretion. Disciplinary action shall not be taken when the lawyer's conduct falls within the bounds of such discretion. The Rules are thus partly obligatory and disciplinary and partly aspirational and descriptive. Together they define a lawyer's professional role. Comments do not add obligations to or expand the Rules but provide guidance for practicing in compliance with the Rules.

[14] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely



defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[15] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under *Rule 1.6: Confidentiality of Information*, that may attach when the lawyer agrees to consider whether a client-lawyer relationship will be established. Whether a client-lawyer relationship exists for any specific purpose depends on the circumstances and may be a question of fact.

[16] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government entity may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized by law to represent several government entities in intergovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

[17] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[18] The purpose of these Rules is not to give rise to a cause of action nor to create a presumption that a legal duty has been breached. These Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to

augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

[19] Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

[20] Reserved.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

## **RULE 1.0. TERMINOLOGY**

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

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

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

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

(e) “Firm” or “law firm” denotes a lawyer or lawyers in a private firm, law partnership, professional corporation, sole proprietorship or other association authorized to practice law pursuant to Bar Rule 1-203(4); or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

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

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

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

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

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

(k) "Nonlawyer" denotes a person not authorized to practice law by either the:

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

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

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

(l) "Partner" denotes a member of a partnership, a shareholder in a law firm organized pursuant to Bar Rule 1-203(4), or a member of an association authorized to practice law.

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

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

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

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

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

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

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

#### Comment

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

#### *Confirmed in Writing*

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

#### *Firm*

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

Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved.

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

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

### *Fraud*

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

### *Informed Consent*

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

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

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

### *Screened*

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

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

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

### *Writing*

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

## PART ONE CLIENT-LAWYER RELATIONSHIP

### RULE 1.1. COMPETENCE

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

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

Comment

#### *Legal Knowledge and Skill*

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

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

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

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however,

assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

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

#### *Thoroughness and Preparation*

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

#### *Maintaining Competence*

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education.

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

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the scope and objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent, nor knowingly assist a client in such conduct, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.



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

Comment

*Allocation of Authority between Client and Lawyer*

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

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. *See Rule 1.16(b)(4)*. Conversely, the client may resolve the disagreement by discharging the lawyer. *See Rule 1.16(a)(3)*.

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

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

*Independence from Client's Views or Activities*

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

### *Agreements Limiting Scope of Representation*

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

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

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

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

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. *See Rule 1.16(a).* In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. *See Rule 4.1.*

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

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

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

### **RULE 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.* The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load should be controlled so that each matter can be handled competently.

[3] 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. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, 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) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(h), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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

#### Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

#### *Communicating with Client*

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's informed consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. *See Rule 1.2(a)*.

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations – depending on both the importance of the action under consideration and the feasibility of consulting with the client – this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of

the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged. The timeliness of a lawyer's communication must be judged by all 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.

### *Explaining Matters*

[5] 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. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, where there is time to explain a proposal made in a negotiation, 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 are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not 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. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(h).

[6] Ordinarily, the information to be provided is that 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 diminished capacity. *See Rule 1.14.* 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.* Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

### *Withholding Information*

[7] 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 or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client.

### **RULE 1.5. FEES**

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

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

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c)

(1) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.

- (2) Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the following:
- (i) the outcome of the matter; and,
  - (ii) if there is a recovery, showing the:
    - (A) remittance to the client;
    - (B) the method of its determination;
    - (C) the amount of the attorney fee; and
    - (D) if the attorney's fee is divided with another lawyer who is not a partner in or an associate of the lawyer's firm or law office, the amount of fee received by each and the manner in which the division is determined.
- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
- (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
  - (2) a contingent fee for representing a defendant in a criminal case.
- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
- (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
  - (2) the client is advised of the share that each lawyer is to receive and does not object to the participation of all the lawyers involved; and
  - (3) the total fee is reasonable.

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

Comment

### *Reasonableness of Fee and Expenses*

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



house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

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

#### *Basis or Rate of Fee*

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

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances.

#### *Terms of Payment*

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

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

services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

### *Prohibited Contingent Fees*

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns. *See Formal Advisory Opinions 36 and 47.*

### *Division of Fee*

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. Joint responsibility for the representation entails financial and ethical responsibility for the representation.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

### *Disputes over Fees*

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the Bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

## **RULE 1.6. CONFIDENTIALITY OF INFORMATION**

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

(b)

(1) A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:

(i) to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law;

(ii) to prevent serious injury or death not otherwise covered by subparagraph (i) above;

(iii) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(iv) to secure legal advice about the lawyer's compliance with these Rules.

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

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

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

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

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

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

#### Comment

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

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

[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

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

[4A] Information gained in the professional relationship includes information gained from a person (prospective client) who discusses the possibility of forming a client-lawyer relationship with respect to a matter. Even when no client-lawyer relationship ensues, the restrictions and exceptions of these Rules as to use or revelation of the information apply, e.g. Rules 1.9 and 1.10.

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

#### *Authorized Disclosure*

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

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

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

not impliedly authorized paragraph (b)(1)(iv) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

### *Disclosure Adverse to Client*

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

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

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

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

[12] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b) (1) does not violate this Rule.

### *Withdrawal*

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

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

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

*Dispute Concerning a Lawyer's Conduct*

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

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

*Disclosures Otherwise Required or Authorized*

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

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

### **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 informed consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected client or former client gives informed consent, confirmed in writing, to the representation after:

(1) consultation with the lawyer, pursuant to Rule 1.0 (c);

(2) having received in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation; and

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

(c) Client informed 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.

(d) Though otherwise subject to the provisions of this Rule, a part-time prosecutor who engages in the private practice of law may represent a private client adverse to the state or other political subdivision that the lawyer represents as a part-time prosecutor, except with regard to matters for which the part-time prosecutor had or has prosecutorial authority or responsibility.

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

Comment

### *Loyalty to a Client*

[1] Loyalty and independent judgment are essential elements 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] Loyalty to a client is 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 (a) 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.

[3] If an impermissible conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. *See Rule 1.16*. 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. As to whether a client-lawyer relationship exists or, having once been established, is continuing, *see Comment 4 to Rule 1.3 and Scope*.

[4] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's informed consent. 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. Paragraph (d) states an exception to that general rule. A part-time prosecutor does not automatically have a conflict of interest in representing a private client who is adverse to the state or other political subdivision (such as a city or county) that the lawyer represents as a part-time prosecutor, although it is possible that in a particular case, the part-time prosecutor could have a conflict of interest under paragraph (a).

Simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require informed consent of the respective clients.

### *Consultation and Informed Consent*

[5] A client may give informed consent to representation notwithstanding a conflict. However 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 informed 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 informed consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to give informed consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to give informed consent. If informed consent is withdrawn, the lawyer should consult Rule 1.9 and Rule 1.16.

[5A] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. *See Rule 1.0(b)*. *See also Rule 1.0(s)* (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. *See Rule 1.0(b)*. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

### *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 and 1.5*. 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 (c)(2) prohibits representation of opposing parties in the same or a similar proceeding including simultaneous representation of parties whose interests may conflict, such as co-plaintiffs or co-defendants. 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 co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal, the requirements of paragraph (b) are met, and consent is not prohibited by paragraph (c).

[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 give informed consent as required by paragraph (b). 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 gives informed consent and the arrangement does not compromise the lawyer's duty of loyalty to the client. *See Rule 1.8(f)*. 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 give informed consent 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 material and 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*.

[16] For the purposes of 1.7 (d), part-time prosecutors include but are not limited to part-time solicitors-general, part-time assistant solicitors-general, part-time probate court prosecutors, part-time magistrate court prosecutors, part-time municipal court prosecutors, special assistant attorneys general, part-time juvenile court prosecutors and prosecutors *pro tem*.

[17] Pragmatic considerations require that the rules treat a lawyer serving as a part-time prosecutor differently. See *Thompson v. State*, 254 Ga. 393, 396-397 (1985).

#### *Special Considerations in Common Representation*

[18] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See Rule 1.4*. The lawyer should, at the outset of the common representation and as part of the

process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

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

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

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

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

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

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

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

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

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

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

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

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

(1) the client gives informed consent;

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

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

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for or against the clients, nor in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include 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, grandparent, child, grandchild, 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 unless his or her client gives informed consent regarding the relationship. The disqualification stated in this paragraph is personal and is not imputed to members of firms with whom the lawyers are associated.

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

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

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

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

## Comment

### *Transactions Between Client and Lawyer*

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

### *Use of Information to the Disadvantage of the Client*

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

### *Gifts from Clients*

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

### *Literary Rights*

[3] An agreement by which a lawyer acquires literary or media rights concerning the subject of the representation creates a conflict between the interest of the client and the personal interest of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph

(d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and Paragraph (j) of this Rule.

#### *Financial Assistance to Clients*

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

#### *Settlement of Aggregated Claims*

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

#### *Agreements to Limit Liability*

[7] 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, 1.9, and 1.10.

### *Acquisition of Interest in Litigation*

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

## **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 gives informed consent, confirmed in writing.

(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 and 1.9(c), that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(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 or Rule 3.3 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 or Rule 3.3 the Tribunal would permit or require with respect to a client.

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

Comment



[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also 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 nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. *See Comment [9]*. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a “matter” for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer’s involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. 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.

[3] Matters are “substantially related” for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person’s spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client’s policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk

that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

### *Lawyers Moving Between Firms*

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). 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)* for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, 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; it should be inferred 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; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] 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 and 1.9(c)*.

[8] Paragraph (c) provides that 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.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). *See Rule 1.0(b) and (h)*. With regard to disqualification of a firm with which a lawyer is or was formerly associated, *see Rule 1.10*.

### **RULE 1.10. IMPUTED DISQUALIFICATION: GENERAL RULE**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7: Conflict of Interest: General Rule, 1.8(c): Conflict of Interest: Prohibited Transactions, 1.9: Former Client or 2.2: Intermediary.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6: Confidentiality of Information and 1.9(c): Conflict of Interest: Former Client that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7: Conflict of Interest: General Rule.

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

Comment

#### *Definition of "Firm"*

[1] For purposes of these Rules, the term "firm" includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement

between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to the other.

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

[3] Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

[4] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b): *Successive Government and Private Employment*; where a lawyer represents the government after having served private clients, the situation is governed by *Rule 1.11(c)(1): Successive Government and Private Employment*. The individual lawyer involved is bound by the Rules generally, including *Rules 1.6: Confidentiality of Information, 1.7: Conflict of Interest: General Rule and 1.9: Conflict of Interest: Former Client*.

[5] Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences and, therefore, to the protections provided in *Rules 1.6: Confidentiality of Information, 1.9: Conflict of Interest: Former Client, and 1.11: Successive Government and Private Employment*. However, if the more extensive disqualification in *Rule 1.10: Imputed Disqualification* were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations and, thus, has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if *Rule 1.10: Imputed Disqualification* were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in *Rule 1.11: Successive Government and Private Employment*.

*Principles of Imputed Disqualification*

[6] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by *Rules 1.9(b): Conflict of Interest: Former Client*, and *1.10(b): Imputed Disqualification: General Rule*.

[7] *Rule 1.10(b): Imputed Disqualification* operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate *Rule 1.7: Conflict of Interest*. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by *Rules 1.6: Confidentiality of Information* and *1.9(c): Conflict of Interest: Former Client*.

#### **RULE 1.11. SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT**

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government entity gives informed consent, confirmed in writing. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is duly given to the client and to the appropriate government entity to enable it to ascertain compliance with the provisions of this Rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government entity.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

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

#### Comment

[1] This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

[2] A lawyer representing a government entity, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government entity may give consent under this Rule.

[3] Where the successive clients are a public entity and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government entity should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

[4] When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

[5] Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[6] Paragraph (a)(2) does not require that a lawyer give notice to the government entity at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government entity will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

[7] Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[8] Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government entity when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[9] Paragraph (c) does not disqualify other lawyers in the entity with which the lawyer in question has become associated.

## **RULE 1.12. FORMER JUDGE OR ARBITRATOR**

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer or arbitrator. In addition, the law clerk shall promptly provide written notice of acceptance of employment to all counsel of record in all such matters in which the prospective employer is involved.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

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

#### Comment

This Rule generally parallels Rule 1.11. The term “personally and substantially” signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. The term “adjudicative officer” includes such officials as judges *pro tempore*, referees, Special Masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge *pro tempore* or retired judge recalled to active service, may not “act as a lawyer in any proceeding in which he or she served as a judge or in any other proceeding related thereto.” Although phrased differently from this Rule, those rules correspond in meaning.

#### **RULE 1.13. ORGANIZATION AS CLIENT**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.



(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

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

Comment

*The Organization as the Client*

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(i), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant consideration. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter

reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

#### *Relation to Other Rules*

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyers' representation of the organization. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in

circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

### *Governmental Organization*

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. *See Scope [16]*. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. *See Scope [16]*.

### *Clarifying the Lawyer's Role*

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

### *Dual Representation*

[12] Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

### *Derivative Actions*

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in

the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

#### **RULE 1.14. CLIENT WITH DIMINISHED CAPACITY**

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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

#### Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is

recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the lawyer should consider such participation in terms of its effect on the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. *See Rule 1.2(d)*.

### *Taking Protective Action*

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

#### *Disclosure of the Client's Condition*

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

#### *Emergency Legal Assistance*

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective

action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

[11] This Rule is not violated if a lawyer acts in good faith to comply with the Rule.

### **RULE 1.15(I). SAFEKEEPING PROPERTY - GENERAL**

(a) A lawyer shall hold funds or other property of clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own funds or other property. Funds shall be kept in one or more separate accounts maintained in an approved institution as defined by Rule 1.15(III) (c) (1). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.

(b) For the purposes of this Rule, a lawyer may not disregard a third person's interest in funds or other property in the lawyer's possession if:

- (1) the interest is known to the lawyer, and
- (2) the interest is based upon one of the following:
  - (i) A statutory lien;
  - (ii) A final judgment addressing disposition of those funds or property; or
  - (iii) A written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property.

The lawyer may disregard the third person's claimed interest if the lawyer reasonably concludes that there is a valid defense to such lien, judgment, or agreement.

(c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(d) When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and a client or third person claim interest, the



property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or property as to which the interests are not in dispute.

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

#### Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration or interpleader. The undisputed portion of the funds shall be promptly distributed.

[3] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[3A] In those cases where it is not possible to ascertain who is entitled to disputed funds or other property held by the lawyer, the lawyer may hold such disputed funds for a reasonable period of time while the interested parties attempt to resolve the dispute. If a resolution cannot be reached, it would be appropriate for a lawyer to interplead such disputed funds or property.

[4] A "clients' security fund" provides a means through the collective efforts of the State Bar of Georgia to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

**RULE 1.15(II). SAFEKEEPING PROPERTY – TRUST ACCOUNT AND IOLTA**

(a) Every lawyer who practices law in Georgia, whether said lawyer practices as a sole practitioner, or as a member of a firm, association, or professional corporation, and who receives money or property on behalf of a client or in any other fiduciary capacity, shall maintain or have available one or more trust accounts as required by these Rules. All funds held by a lawyer for a client and all funds held by a lawyer in any other fiduciary capacity shall be deposited in and administered from a trust account.

(b) No personal funds shall ever be deposited in a lawyer's trust account, except that unearned lawyer's fees may be so held until the same are earned. Sufficient personal funds of the lawyer may be kept in the trust account to cover maintenance fees such as service charges on the account. Records on such trust accounts shall be so kept and maintained as to reflect at all times the exact balance held for each client or third person. No funds shall be withdrawn from such trust accounts for the personal use of the lawyer maintaining the account except earned lawyer's fees debited against the account of a specific client and recorded as such.

(c) All client's funds shall be placed in either an interest-bearing account at an approved institution with the interest being paid to the client or an interest-bearing (IOLTA) account at an approved institution with the interest being paid to the Georgia Bar Foundation as hereinafter provided.

(1) With respect to funds which are not nominal in amount, or are not to be held for a short period of time, a lawyer shall, with notice to the clients, create and maintain an interest-bearing trust account in an approved institution as defined in Rule 1.15(III) (c) (1), with the interest to be paid to the client.

(i) No earnings from such an interest-bearing account shall be made available to a lawyer or law firm.

(ii) Funds in such an interest-bearing account shall be available for withdrawal upon request and without delay, subject only to any notice period which the institution is required to reserve by law or regulation.

(2) With respect to funds which are nominal in amount or are to be held for a short period of time, such that there can be no reasonable expectation of a positive net return to the client or third person, a lawyer shall, with or without notice to the client, create and maintain an interest-bearing, government insured trust account (IOLTA) at an approved institution as defined in Rule 1.15(III) (c) (1) in compliance with the following provisions:

(i) No earnings from such an IOLTA Account shall be made available to a lawyer or law firm.

(ii) Funds in each IOLTA Account shall be available for withdrawal upon request and without delay, subject only to any notice period which the institution is required to reserve by law or regulation.

(iii) As required by Rule 15-103, the rate of interest payable on any IOLTA Account shall not be less than the rate paid by the depositor institution to regular, non-lawyer depositors. Higher rates offered by the institution to customers whose deposits exceed certain time periods or quantity minimums, such as those offered in the form of certificates of deposit, may be obtained by a lawyer or law firm on some or all of the deposited funds so long as there is no impairment of the right to withdraw or transfer principal immediately.

(iv) Lawyers or law firms shall direct the depository institution:

(A) to remit to the Georgia Bar Foundation interest or dividends, net of any allowable reasonable fees as defined in Rule 15-102 (c), on the average monthly balance in that account, at least quarterly. Any allowable reasonable fees in excess of interest earned on that account for any month, and any charges or fees that are not allowable reasonable fees, shall be charged to the lawyer or law firm in whose names such account appears, if not waived by the approved institution;

(B) to transmit with each remittance to the Georgia Bar Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the applicable IOLTA Account number, the rate of interest applied, the average monthly account balance against which the interest rate is being applied, the gross interest earned, the types and amounts of service charges or fees applied, and the amount of the net interest remittance;

(C) to transmit to the depositing lawyer or law firm periodic reports or statements in accordance with the approved institution's normal procedures for reporting to depositors.

(3) No charge of ethical impropriety or other breach of professional conduct shall attend the determination that such funds are nominal in amount or to be held for a short period of time, or to the decision to invest clients' funds in a pooled interest-bearing account.

(4) Whether the funds are designated short-term or nominal or not, a lawyer or law firm may, at the request of the client, deposit funds into a separate interest-bearing account and remit all interest earned, or interest earned net of charges, to the client or clients.

The maximum penalty for a violation of Rule 1.15(II) (a) and Rule 1.15(II) (b) is disbarment. The maximum penalty for a violation of Rule 1.15(II) (c) is a public reprimand.

#### Comment

[1] The personal money permitted to be kept in the lawyer's trust account by this Rule shall not be used for any purpose other than to cover the bank fees and if used for any other purpose the lawyer shall have violated this Rule. If the lawyer wishes to reduce the amount of personal money in the trust account, the change must be properly noted in the lawyer's financial records and the monies transferred to the lawyer's business account.

[2] Nothing in this Rule shall prohibit a lawyer from removing from the trust account fees which have been earned on a regular basis which coincides with the lawyer's billing cycles rather than removing the fees earned on an hour-by-hour basis.

[3] In determining whether funds of a client or other beneficiary can earn income in excess of costs, the lawyer may consider the following factors:

- (a) the amount of funds to be deposited;
- (b) the expected duration of the deposit, including the likelihood of delay in the matter with respect to which the funds are held;
- (c) the rates of interest or yield at financial institutions where the funds are to be deposited;
- (d) the cost of establishing and administering a non-IOLTA Trust Account for the benefit of the client or other beneficiary, including service charges, the costs of the lawyer's services and the costs of preparing any tax reports that may be required;
- (e) the capability of financial institutions, lawyers, or law firms to calculate and pay earnings to individual clients; and
- (f) any other circumstances that affect the ability of the funds to earn a net return for the client or other beneficiary.

[4] The lawyer or law firm should review the IOLTA Account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client or third party.

#### **RULE 1.15(III). RECORD KEEPING; TRUST ACCOUNT OVERDRAFT NOTIFICATION; EXAMINATION OF RECORDS**

(a) Required Bank Accounts: Every lawyer who practices law in Georgia and who receives money or other property on behalf of a client or in any other fiduciary capacity shall maintain, in an approved financial institution as defined by this Rule, a trust account or accounts, separate from any business and personal accounts. Funds received by the lawyer on behalf of a client or in any other fiduciary capacity shall be deposited into this account. The financial institution shall be in Georgia or in the state

where the lawyer's office is located, or elsewhere with the written consent and at the written request of the client or third person.

(b) Description of Accounts:

(1) A lawyer shall designate all trust accounts, whether general or specific, as well as all deposit slips and checks drawn thereon, as an "Attorney Trust Account," "Attorney Escrow Account," "IOLTA Account" or "Attorney Fiduciary Account." The name of the lawyer or law firm responsible for the account shall also appear on all deposit slips and checks drawn thereon.

(2) A lawyer shall designate all business accounts, as well as all deposit slips and all checks drawn thereon, as a "Business Account," a "Professional Account," an "Office Account," a "General Account," a "Payroll Account," an "Operating Account" or a "Regular Account."

(3) Nothing in this Rule shall prohibit a lawyer from using any additional description or designation for a specific business or trust account including fiduciary accounts maintained by the lawyer as executor, guardian, trustee, receiver, agent or in any other fiduciary capacity.

(c) Procedure:

(1) Approved Institutions:

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

(A) Such institutions shall be located within the State of Georgia, within the state where the lawyer's office is located, or elsewhere with the written consent and at the written request of the client or third person. The institution shall be authorized by federal or state law to do business in the jurisdiction where located and shall be federally insured. A financial institution shall be approved as a depository for lawyer trust accounts if it abides by an agreement to report to the Office of the General Counsel whenever any properly payable instrument is presented against a lawyer trust account containing insufficient funds, and the instrument is not honored. The agreement shall apply to all branches of the financial institution and shall not be canceled except upon 30 days notice in writing to the Office of the General Counsel. The agreement shall be filed with the Office of the General Counsel on a form approved by the Investigative Panel of the State Disciplinary Board. The agreement shall provide that all reports made by the financial institution

shall be in writing and shall include the same information customarily forwarded to the depositor when an instrument is presented against insufficient funds. If the financial institution is located outside of the State of Georgia, it shall also agree in writing to honor any properly issued State Bar of Georgia subpoena.

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

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

(2) Timing of Reports:

(i) The financial institution shall file a report with the Office of the General Counsel of the State Bar of Georgia in every instance where a properly payable instrument is presented against a lawyer trust account containing insufficient funds and said instrument is not honored within three business days of presentation.

(ii) The report shall be filed with the Office of the General Counsel within 15 days of the date of the presentation of the instrument, even if the instrument is subsequently honored after the three business days provided in (2) (i) above.

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

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

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

(e) Availability of Records: A lawyer shall not fail to produce any of the records required to be maintained by these Rules at the request of the Investigative

Panel of the State Disciplinary Board or the Supreme Court of Georgia. This obligation shall be in addition to and not in lieu of the procedures contained in Part IV of these Rules for the production of documents and evidence.

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

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

#### Comment

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

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

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

#### *Waivers*

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

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

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

## *Audits*

[7] Every lawyer's financial records and trust account records are required records and therefore are properly subject to audit for cause. The audit provisions are intended to uncover errors and omissions before the public is harmed, to deter those lawyers who may be tempted to misuse client's funds and to educate and instruct lawyers as to proper trust accounting methods. Although the auditors will be employed by the Office of the General Counsel of the State Bar of Georgia, it is intended that disciplinary proceedings will be brought only when the auditors have reasonable cause to believe discrepancies or irregularities exist. Otherwise, the auditors should only educate the lawyer and the lawyer's staff as to proper trust accounting methods.

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

### **RULE 1.16 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 1.17. SALE OF LAW PRACTICE**

A lawyer or a law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

- (a) Reserved.
- (b) The practice is sold as an entirety to another lawyer or law firm;
- (c) Actual written notice is given to each of the seller's clients regarding:
  - (1) the proposed sale;
  - (2) the terms of any proposed change in the fee arrangement authorized by paragraph (d);
  - (3) the client's right to retain other counsel or to take possession of the file; and
  - (4) the fact that the client's consent to the sale will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale. The purchaser may, however, refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.

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

#### Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when another lawyer or firm takes over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See *Rules 5.4: Professional Independence of a Lawyer* and *5.6: Restrictions on Right to Practice*.

#### *Termination of Practice by the Seller*

[2] The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the purchaser. The fact that a number of the seller's clients decide not to be represented by the purchaser but take

their matters elsewhere, therefore, does not result in a violation. Neither does a return to private practice as a result of an unanticipated change in circumstances result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office.

[3] Reserved.

[4] Reserved.

### *Single Purchaser*

[5] The Rule requires a single purchaser. The prohibition against piecemeal sale of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchaser is required to undertake all client matters in the practice, subject to client consent. If, however, the purchaser is unable to undertake all client matters because of a conflict of interest in a specific matter respecting which the purchaser is not permitted by *Rule 1.7: Conflict of Interest* or another rule to represent the client, the requirement that there be a single purchaser is nevertheless satisfied.

### *Client Confidences, Consent and Notice*

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

[7] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered *in camera*.

[8] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

#### *Fee Arrangements Between Client and Purchaser*

[9] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser, unless the client consents. The purchaser may, however, advise the client that the purchaser will not undertake the representation unless the client consents to pay the higher fees the purchaser usually charges. To prevent client financing of the sale, the higher fee the purchaser may charge must not exceed the fees charged by the purchaser for substantially similar services rendered prior to the initiation of the purchase negotiations.

[10] The purchaser may not intentionally fragment the practice which is the subject of the sale by charging significantly different fees in substantially similar matters. Doing so would make it possible for the purchaser to avoid the obligation to take over the entire practice by charging arbitrarily higher fees for less lucrative matters, thereby increasing the likelihood that those clients would not consent to the new representation.

#### *Other Applicable Ethical Standards*

[11] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see *Rule 1.1: Competence*); the obligation to avoid disqualifying conflicts, and to secure client consent after consultation for those conflicts which can be agreed to (see *Rule 1.7: Conflict of Interest*); and the obligation to protect information relating to the representation (see *Rules 1.6 and 1.9*).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see *Rule 1.16: Declining or Terminating Representation*).

#### *Applicability of the Rule*

[13] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

## **PART TWO**

### **COUNSELOR**

#### **RULE 2.1. ADVISOR**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. A lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

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

Comment

##### *Scope of Advice*

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation. Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can

involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

### *Offering Advice*

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4: Communication may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

## **RULE 2.2. INTERMEDIARY**

### Reserved

## **RULE 2.3. EVALUATION FOR USE BY THIRD PERSONS**

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client gives informed consent.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

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

### Comment

### *Definition*

[1] An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government entity; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government entity action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.

[3] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

#### *Duty to Third Person*

[4] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

#### *Access to and Disclosure of Information*

[5] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to



have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

### *Financial Auditors' Requests for Information*

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

## **RULE 2.4. LAWYER SERVING AS THIRD-PARTY NEUTRAL**

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

(c) When one or more of the parties in a mediation is a current or former client of the neutral lawyer or the neutral's law firm, a lawyer may serve as a neutral only if the matter in which the lawyer serves as a neutral is not the same matter in which the lawyer or law firm represents or represented the party and all parties give informed consent, confirmed in writing.

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

### Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle

certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike non-lawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (*see Rule 1.0(r)*), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

## **PART THREE**

### **ADVOCATE**

#### **RULE 3.1. MERITORIOUS CLAIMS AND CONTENTIONS**

In the representation of a client, a lawyer shall not:

(a) file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another;

(b) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.

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

#### Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] It is not ethically improper for a lawyer to file a lawsuit before complete factual support for the claim has been established provided that the lawyer determines that a reasonable lawyer would conclude that there is a reasonable possibility that facts supporting the cause of action can be established after the filing of the claim; and provided further that the lawyer is not required by rules of procedure, or otherwise to represent that the cause of action has an adequate factual basis. If after filing it is discovered that the lawsuit has no merit, the lawyer will dismiss the lawsuit or in the alternative withdraw.

[4] The decision of a court that a claim is not meritorious is not necessarily conclusive of a violation of this Rule.

### **RULE 3.2. EXPEDITING LITIGATION**

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

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

#### Comment

[1] Dilatory practices bring the administration of justice into disrepute.

[2] The reasonableness of a lawyer's effort to expedite litigation must be judged by all of the controlling factors. "Reasonable efforts" do not equate to "instant efforts" and are sufficient if reasonable under the relevant circumstances.

### **RULE 3.3. CANDOR TOWARD THE TRIBUNAL**

- (a) A lawyer shall not knowingly:
- (1) make a false statement of material fact or law to a tribunal;
  - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
  - (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  - (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- (d) In an ex parte proceeding, other than grand jury proceedings, a lawyer shall inform the tribunal of all material facts known to the lawyer that the lawyer reasonably believes are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.

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

#### Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. *See Rule 1.0(r)* for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(4) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting

as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

### *Representations by a Lawyer*

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. *Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).*

### *Legal Argument*

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

### *Offering Evidence*

[5] Paragraph (c) allows that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer may refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit from the witness the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a), (b) and (c) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. *See also Comment [9].*

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. *See Rule 1.0(i)*. Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(4) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. *See also Comment [7].*

### *Remedial Measures*

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving

the court, thereby subverting the truth-finding process which the adversary system is designed to implement. *See Rule 1.2(d)*. Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

### *Preserving Integrity of Adjudicative Process*

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so.

### *Duration of Obligation*

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

### *Ex Parte Proceedings*

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

### *Withdrawal*

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also *see Rule 1.16(b)* for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with

a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

### **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; or

(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; or

(ii) reasonable compensation to a witness for the loss of time in

(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 the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; and

(2) the information is not otherwise subject to the assertion of a privilege by the client;

(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.*

[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.

### **RULE 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL**

A lawyer shall not, without regard to whether the lawyer represents a client in the matter:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
  - (b) communicate ex parte with such a person except as permitted by law;
  - (c) communicate with a juror or prospective juror after discharge of the jury
- if:

- (1) the communication is prohibited by law or court order;
  - (2) the juror has made known to the lawyer a desire not to communicate; or
  - (3) the communication involves misrepresentation, coercion, duress or harassment.
- (d) engage in conduct intended to disrupt a tribunal.

The maximum penalty for a violation of paragraph (a) or paragraph (c) of this Rule is disbarment. The maximum penalty for a violation of paragraph (b) or paragraph (d) of this Rule is a public reprimand.

#### Comment

[1] Many forms of improper influence upon the tribunal are proscribed by criminal law. All of those are specified in the *Georgia Code of Judicial Conduct* with which an advocate should be familiar. Attention is also directed to *Rule 8.4: Misconduct*, which governs other instances of improper conduct by a lawyer/candidate.

[2] If we are to maintain the integrity of the judicial process, it is imperative that an advocate's function be limited to the presentation of evidence and argument, to allow a cause to be decided according to law. The exertion of improper influence is detrimental to that process. Regardless of an advocate's innocent intention, actions which give the appearance of tampering with judicial impartiality are to be avoided. The activity proscribed by this Rule should be observed by the advocate in such a careful manner that there be no appearance of impropriety.

[3A] The Rule with respect to *ex parte* communications limits direct communications except as may be permitted by law. Thus, court rules or case law must be referred to in order to determine whether certain *ex parte* communications are legitimate. *Ex parte* communications may be permitted by statutory authorization.

[3B] A lawyer who obtains a judge's signature on a decree in the absence of the opposing lawyer where certain aspects of the decree are still in dispute, may have violated *Rule 3.5. Impartiality and Decorum of the Tribunal.*, regardless of the lawyer's good intentions or good faith.

[4] A lawyer may communicate as to the merits of the cause with a judge in the course of official proceedings in the case, in writing if the lawyer simultaneously delivers a copy of the writing to opposing counsel or to the adverse party if the party is not represented by a lawyer, or orally upon adequate notice to opposing counsel or to the adverse party if the party is not represented by a lawyer.

[5] If the lawyer knowingly instigates or causes another to instigate a communication proscribed by *Rule 3.5. Impartiality and Decorum of the Tribunal.*, a violation may occur.

[6] Direct or indirect communication with a juror during the trial is clearly prohibited. A lawyer may not avoid the proscription of *Rule 3.5. Impartiality and Decorum of the Tribunal.*, by using agents to communicate improperly with jurors. A lawyer may be held responsible if the lawyer was aware of the client's desire to establish contact with jurors and assisted the client in doing so.

[7] A lawyer may on occasion want to communicate with a juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[8] While a lawyer may stand firm against abuse by a judge, the lawyer's actions should avoid reciprocation. Fairness and impartiality of the trial process is strengthened by the lawyer's protection of the record for subsequent review and this preserves the professional integrity of the legal profession by patient firmness.

### **RULE 3.6. TRIAL PUBLICITY**

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a person would reasonably believe to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Reserved.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government entity with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

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

#### Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the

result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Reserved.

[5A] There are, on the other hand, certain subjects which are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(b) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(c) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(d) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(e) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(f) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[5B] In addition, there are certain subjects which are more likely than not to have no material prejudicial effect on a proceeding. Thus, a lawyer may usually state:

(a) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(b) information contained in a public record;

(c) that an investigation of a matter is in progress;

(d) the scheduling or result of any step in litigation;

(e) a request for assistance in obtaining evidence and information necessary thereto;

(f) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(g) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

### **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 3.8. SPECIAL RESPONSIBILITIES OF A PROSECUTOR**

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) refrain from making any effort to prevent the accused from exercising a reasonable effort to obtain counsel;
- (c) Reserved.
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense;
- (e) exercise reasonable care to prevent persons who are under the direct supervision of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under subsection (g) of this Rule;
- (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
  - (1) the information sought is not protected from disclosure by any applicable privilege;
  - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
  - (3) there is no other feasible alternative to obtain the information; and
- (g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

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

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of

sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of *Rule 8.4: Misconduct*.

[2] Reserved.

[3] Reserved.

[4] Paragraph (f) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (g) supplements *Rule 3.6: Trial Publicity*, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with *Rule 3.6(b)* or *3.6(c): Trial Publicity*.

### **RULE 3.9. ADVOCATE IN NONADJUDICATIVE PROCEEDINGS**

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3 (a) through (c), 3.4(a) through (c), and 3.5.

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

Comment

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule making or policy making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedures.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to



regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental entity; representation in such a transaction is governed by Rules 4.1 through 4.4.

## PART FOUR

### TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

#### RULE 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

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

Comment

#### *Misrepresentation*

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

#### *Statements of Fact*

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Comments which fall under the general category of "puffing" do not violate this rule. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

#### *Fraud by Client*

[3] Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by *Rule 1.6: Confidentiality of Information*.

## **RULE 4.2. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL**

(a) A lawyer who is representing a client in a matter shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.

(b) Attorneys for the State and Federal Government shall be subject to this Rule in the same manner as other attorneys in this State.

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

### Comment

[1] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government entity and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government entity to speak with government officials about the matter.

[2] Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions.

[3] This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[4A] In the case of an organization, this Rule prohibits communications with an agent or employee of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the

organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. See Formal Advisory Opinion 87-6. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). Communication with a former employee of a represented organization is discussed in Formal Advisory Opinion 94-3.

[4B] In administering this Rule it should be anticipated that in many instances, prior to the beginning of the interview, the interviewing lawyer will not possess sufficient information to determine whether the relationship of the interviewee to the entity is sufficiently close to place the person in the “represented” category. In those situations the good faith of the lawyer in undertaking the interview should be considered. Evidence of good faith includes an immediate and candid statement of the interest of the person on whose behalf the interview is being taken, a full explanation of why that person’s position is adverse to the interests of the entity with which the interviewee is associated, the exploration of the relationship issue at the outset of the interview and the cessation of the interview immediately upon determination that the interview is improper.

[5] The prohibition on communications with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. *See Rule 1.0*. Such an inference may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by ignoring the obvious.

[6] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer’s communications are subject to Rule 4.3.

[6A] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] The anti-contact rule serves important public interests which preserve the proper functioning of the judicial system and the administration of justice by a) protecting against misuse of the imbalance of legal skill between a lawyer and layperson; b) safe-guarding the client-lawyer relationship from interference by adverse counsel; c) ensuring that all valid claims and defenses are raised in response to inquiry from adverse counsel; d) reducing the likelihood that clients will disclose privileged or other information that might harm their interests; and e) maintaining the lawyers ability to monitor the case and effectively represent the client.

[8] Parties to a matter may communicate directly with each other because this Rule is not intended to affect communications between parties to an action entered into independent of and not at the request or direction of counsel.

### **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; and

(b) give advice other than the advice to secure counsel, if a lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

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. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, *see Rule 1.13(f)*.

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

### **RULE 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS**

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

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

#### Comment

[1] 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 third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships.

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an e-mail or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, e-mail and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

## PART FIVE

### LAW FIRMS AND ASSOCIATIONS

## **RULE 5.1. RESPONSIBILITIES OF PARTNERS MANAGERS AND SUPERVISORY LAWYERS**

(a) A law firm partner as defined in Rule 1.0(l), and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Georgia Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Georgia Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Georgia Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

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

### Comment

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. *See Rule 1.0(e)*. This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Georgia Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a

small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. *See Rule 5.2.* Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members, and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. *See also Rule 8.4(a).*

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Georgia Rules of Professional Conduct. *See Rule 5.2(a).*

## **RULE 5.2. RESPONSIBILITIES OF A SUBORDINATE LAWYER**

(a) A lawyer is bound by the Georgia Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Georgia Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

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

#### Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under *Rule 1.7: Conflict of Interest*, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

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

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Georgia Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or



(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; and

(d) a lawyer shall not allow any person who has been suspended or disbarred and who maintains a presence in an office where the practice of law is conducted by the lawyer to:

(1) represent himself or herself as a lawyer or person with similar status; or

(2) provide any legal advice to the clients of the lawyer either in person, by telephone or in writing.

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

#### Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Georgia Rules of Professional Conduct. *See Comment [1] to Rule 5.1.* Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Georgia Rules of Professional Conduct if engaged in by a lawyer.

[3] The prohibitions of paragraph (d) are designed to prevent the unauthorized practice of law in a law office by a person who has been suspended or disbarred. A lawyer who allows a suspended or disbarred lawyer to work in a law office must exercise special care to ensure that the former lawyer complies with these Rules, and that clients of the firm understand the former lawyer's role.

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

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

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

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

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

(4) a lawyer who undertakes to complete unfinished business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

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

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

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

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

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

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

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

(e) A lawyer may:

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

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

(3) The activities permitted under the preceding portion of this paragraph (e) are subject to the following:

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

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

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

#### Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

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

### **RULE 5.5. UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW**

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A Domestic Lawyer shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the Domestic Lawyer is admitted to practice law in this jurisdiction.

(c) A Domestic Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the Domestic Lawyer, or a person the Domestic Lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted to practice.

(d) A Domestic Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the Domestic Lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the Domestic Lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) A Foreign Lawyer shall not, except as authorized by this Rule or other law, establish an office or other systematic and continuous presence in this jurisdiction for

the practice of law, or hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. Such a Foreign Lawyer does not engage in the unauthorized practice of law in this jurisdiction when on a temporary basis the Foreign Lawyer performs services in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal held or to be held in a jurisdiction outside the United States if the Foreign Lawyer, or a person the Foreign Lawyer is assisting, is authorized by law or by order of the tribunal to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceedings held or to be held in this or another jurisdiction, if the services arise out of or are reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice;

(4) are not within paragraphs (2) or (3) and

(i) are performed for a client who resides or has an office in a jurisdiction in which the Foreign Lawyer is authorized to practice to the extent of that authorization; or

(ii) arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or

(iii) are governed primarily by international law or the law of a non-United States jurisdiction.

(f) A Foreign Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction subject to the following conditions:

(1) The services are provided to the Foreign Lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; and

(2) The Foreign Lawyer is and remains in this country in lawful immigration status and complies with all relevant provisions of United States immigration laws.

(g) For purposes of the grants of authority found in (e) and (f) above, the Foreign Lawyer must be a member in good standing of a recognized legal profession in a

foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority.

(h) A person who is not a member of the State Bar of Georgia, but who is allowed to practice law in Georgia on a limited basis pursuant to Supreme Court of Georgia Rules Part XXI, Rule 121, Provision Of Legal Services Following Determination Of Major Disaster, may provide legal services in this state to the extent allowed by said Rule.

(i) A person who is not a member of the State Bar of Georgia, but who is allowed to practice law in Georgia on a limited basis pursuant to Supreme Court of Georgia Rules Part XV, Rules 91-95, Student Practice Rule, may provide legal services in this state to the extent allowed by said Rule.

(j) A person who is not a member of the State Bar of Georgia, but who is allowed to practice law in Georgia on a limited basis pursuant to Supreme Court of Georgia Rules Part XVI, Rules 97-103, Law School Graduates, may provide legal services in this state to the extent allowed by said Rule.

(k) A person who is not a member of the State Bar of Georgia, but who is allowed to practice law in Georgia on a limited basis pursuant to Supreme Court of Georgia Rules Part XX, Rules 114-120, Extended Public Service Program, may provide legal services in this state to the extent allowed by said Rule.

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

#### Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See *Rule 5.3*.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent

nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a Domestic Lawyer violates paragraph (b) and a Foreign Lawyer violates paragraph (e) if the Domestic or Foreign Lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the Domestic or Foreign Lawyer is not physically present here. Such Domestic or Foreign Lawyer must not hold out to the public or otherwise represent that the Domestic or Foreign Lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a Domestic or Foreign Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances for the Domestic Lawyer. Paragraph (e) identifies five such circumstances for the Foreign Lawyer. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a Domestic Lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a Foreign or Domestic Lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c) or paragraph (e). Services may be "temporary" even though the Foreign or Domestic Lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the Domestic Lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to Domestic Lawyers. Paragraphs (e) and (f) apply to Foreign Lawyers. Paragraphs (c) and (e) contemplate that the Domestic or Foreign Lawyer is authorized to practice in the jurisdiction in which the Domestic or Foreign Lawyer is admitted and excludes a Domestic or Foreign Lawyer who while technically admitted is not authorized to practice, because, for example, the Domestic or Foreign Lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a Domestic Lawyer associates with a lawyer licensed to practice in this jurisdiction. Paragraph (e)(1) recognizes that the interests of clients and the public are protected if a Foreign Lawyer associates with a lawyer licensed to practice in this jurisdiction. For these paragraphs to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Domestic Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a Domestic Lawyer does not violate this Rule when the Domestic Lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a Domestic Lawyer to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the Domestic Lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a Domestic Lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the Domestic Lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the Domestic Lawyer is authorized to practice law or in which the Domestic Lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a Domestic Lawyer may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the Domestic Lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a Domestic Lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate Domestic Lawyers may conduct research, review documents, and attend meetings with witnesses in support of the Domestic Lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a Domestic Lawyer, and Paragraph (e)(3) permits a Foreign Lawyer, to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the Domestic or Foreign Lawyer's practice in a jurisdiction in which the Domestic or Foreign Lawyer is admitted to practice. The Domestic Lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a Domestic Lawyer to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers. Paragraph (e)(4)(i) permits a Foreign Lawyer to provide certain legal services in this jurisdiction on behalf of a client who resides or has an office in the jurisdiction in which the Foreign Lawyer is authorized to practice. Paragraph (e)(4)(ii) permits a Foreign Lawyer to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to a matter that has a



substantial connection to the jurisdiction in which the Foreign Lawyer is authorized to practice. These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted. Paragraphs (e)(3) and (e)(4)(ii) require that the services arise out of or be reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice. A variety of factors may evidence such a relationship. These include but are not limited to the following:

(a) The Domestic or Foreign Lawyer's client may have been previously represented by the Domestic or Foreign Lawyer; or

(b) The Domestic or Foreign Lawyer's client may be resident in, have an office in or have substantial contacts with the jurisdiction in which the Domestic or Foreign Lawyer is admitted; or

(c) The matter, although involving other jurisdictions, may have a significant connection with the jurisdiction in which the Domestic or Foreign Lawyer is admitted; or

(d) Significant aspects of the Domestic or Foreign Lawyer's work in a specific matter might be conducted in the jurisdiction in which the Domestic or Foreign Lawyer is admitted or another jurisdiction; or

(e) A significant aspect of the matter may involve the law of the jurisdiction in which the Domestic or Foreign Lawyer is admitted; or

(f) Some aspect of the matter may be governed by international law or the law of a non-United States jurisdiction; or

(g) The lawyer's work on the specific matter in this jurisdiction is authorized by the jurisdiction in which the lawyer is admitted; or

(h) The client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their Domestic or Foreign Lawyer in assessing the relative merits of each; or

(i) The services may draw on the Domestic or Foreign Lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a Domestic Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a Domestic Lawyer who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a Domestic Lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's

officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The Domestic Lawyer's ability to represent the employer outside the jurisdiction in which the Domestic Lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the Domestic Lawyer's qualifications and the quality of the Domestic Lawyer's work.

[17] If an employed Domestic Lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the Domestic Lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a Domestic Lawyer may provide legal services in a jurisdiction in which the Domestic Lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. Paragraph (e)(4)(iii) recognizes that a Foreign Lawyer may provide legal services when the services provided are governed by international law or the law of a foreign jurisdiction.

[19] A Domestic or Foreign Lawyer who practices law in this jurisdiction pursuant to paragraphs (c), (d), (e) or (f) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a Domestic Lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the Domestic Lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4.

[21] Paragraphs (c), (d), (e) and (f) do not authorize communications advertising legal services to prospective clients in this jurisdiction by Domestic or Foreign Lawyers who are admitted to practice in other jurisdictions. Whether and how Domestic or Foreign Lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

## **RULE 5.6. RESTRICTIONS ON RIGHT TO PRACTICE**

A lawyer shall not participate in offering or making:

- (a) a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

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

Comment

[1] An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to *Rule 1.17: Sale of Law Practice*.

### **RULE 5.7. RESPONSIBILITIES REGARDING LAW-RELATED SERVICES**

(a) A lawyer shall be subject to the Georgia Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

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

Comment

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to

maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] *Rule 5.7: Restrictions Regarding Law-Related Services* applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed. The Rule identifies the circumstances in which all of the Georgia Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., *Rule 8.4: Misconduct*.

[3] When law-related services are provided by a lawyer under circumstances that are distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services need not adhere to the requirements of the Georgia Rules of Professional Conduct as provided in *Rule 5.7(a)(1): Restrictions Regarding Law-Related Services*.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Georgia Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with *Rule 1.8(a): Conflict of Interest*.

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Georgia Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by *Rule 5.3: Responsibilities Regarding Nonlawyer Assistants*, that of nonlawyer employees in the distinct entity which the lawyer controls complies in all respects with the Georgia Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(b) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of *Rule 1.6: Confidentiality of Information* relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Georgia Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also *Rule 8.4: Misconduct*.

## PART SIX

### PUBLIC SERVICE

#### **RULE 6.1. VOLUNTARY PRO BONO PUBLICO SERVICE**

A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial portion of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means; or

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

No reporting rules or requirements may be imposed without specific permission of the Supreme Court of Georgia granted through amendments to these Rules.

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

Comment

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but who nevertheless cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory lawyers' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remain unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims.

Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

## **RULE 6.2. ACCEPTING APPOINTMENTS**

For good cause a lawyer may seek to avoid appointment by a tribunal to represent a person.

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

### **Comment**

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See *Rule 6.1: Voluntary Pro Bono Publico Service*. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.



### *Appointed Counsel*

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see *Rule 1.1: Competence*, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

[4] This Rule is not intended to be enforced through disciplinary process.

### **RULE 6.3. MEMBERSHIP IN LEGAL SERVICES ORGANIZATION**

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

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

#### Comment

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

#### **RULE 6.4. LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS**

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

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

#### **Comment**

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. See also *Rule 1.2(b): Scope of Representation*. Without this Rule, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly *Rule 1.7: Conflict of Interest*. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

#### **RULE 6.5. NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS**

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client, normally through a one-time consultation, without expectation by either lawyer or the client that the lawyer will provide continuing representation in the matter and without expectation that the lawyer will receive a fee from the client for the services provided:

(1) is subject to Rules 1.7 and 1.9 (a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9 (a) with respect to the matter.

(b) Except as provided by paragraph (a) (2), Rule 1.10 is inapplicable to a representation governed by this Rule.

(c) The recipient of the consultation authorized under paragraph (a) is, for purposes of Rule 1.9, a former client of the lawyer providing the service, but that lawyer's disqualification is not imputed to lawyers associated with the lawyer for purposes of Rule 1.10.

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

#### Comment

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services—such as consultation clinics for advice or help with the completion of legal forms—that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides free short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2 (c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9 (c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9 (a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9 (a) in the matter.

[4] Because the limited nature of services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a) (2). Paragraph (a) (2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9 (a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9 (a) and 1.10 become applicable.

## **PART SEVEN**

### **INFORMATION ABOUT LEGAL SERVICES**

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

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

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

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

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

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

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

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

(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 ensure 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 7.2. ADVERTISING**

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

- (1) public media, such as a telephone directory, legal directory, newspaper or other periodical;
- (2) outdoor advertising;
- (3) radio or television;
- (4) written, electronic or recorded communication.

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

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

- (1) **Disclosure of identity and physical location of attorney.** Any advertisement shall include the name, physical location and telephone number of each lawyer or law firm who paid for the advertisement and who takes full personal responsibility for the advertisement. In disclosing the physical location, the responsible lawyer shall state the full address of the location of the principal bona fide office of each lawyer who is prominently identified pursuant to this paragraph. For the purposes of this Rule, a bona fide office is defined as a physical location maintained by the lawyer or law firm from which the lawyer or law firm furnishes legal services on a regular and continuing basis. In the absence

of a bona fide physical office, the lawyer shall prominently disclose the full address listed with the State Bar of Georgia or other Bar to which the lawyer is admitted. A lawyer who uses a referral service shall ensure that the service discloses the location of the lawyer's bona fide office, or the registered bar address, when a referral is made.

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

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

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

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

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

#### Comment

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

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language

ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

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

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

#### *Record of Advertising*

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

### **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 lawyer referral service, if the service:

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

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

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

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

(i) the lawyer referral service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer or other agencies that can provide the assistance the clients need. Such organization shall file annually with 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 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 nonlawyer who has not sought advice regarding employment of a lawyer.

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

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 Written Solicitation*

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

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

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

[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.

[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.

### **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.

[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.

## **PART EIGHT MAINTAINING THE INTEGRITY OF THE PROFESSION**

### **RULE 8.1. BAR ADMISSION AND DISCIPLINARY MATTERS**

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact; or
- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

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

#### Comment

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's

own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

## **RULE 8.2. JUDICIAL AND LEGAL OFFICIALS**

(a) Reserved.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

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

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

## **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 8.4. MISCONDUCT**

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

(1) violate or knowingly attempt to violate the Georgia Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(2) be convicted of a felony;

(3) be convicted of a misdemeanor involving moral turpitude where the underlying conduct relates to the lawyer's fitness to practice law; or

(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;

(6)

(i) state an ability to influence improperly a government agency or official by means that violate the Rules of Professional Conduct or other law;

(ii) state an ability to achieve results by means that violate the Rules of Professional Conduct or other law;

(iii) achieve results by means that violate the Rules of Professional Conduct or other law; or

(7) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(8) commit a criminal act that relates to the lawyer's fitness to practice law or reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, where the lawyer has admitted in *judicio* the commission of such act.

(b)

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

(i) a guilty plea;

(ii) a plea of *nolo contendere*;

(iii) a verdict of guilty; or

(iv) a verdict of guilty but mentally ill.

(2) The record of a conviction 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 any of the Georgia Rules of Professional Conduct for which there is no disciplinary penalty.

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

Comment

[1] The prohibitions of this Rule as well as the prohibitions of Bar Rule 4-102 prevents a lawyer from knowingly 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 cannot.



Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

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

[4] Reserved.

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

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

## **RULE 8.5. DISCIPLINARY AUTHORITY; CHOICE OF LAW**

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs. A Domestic or Foreign Lawyer is also subject to the disciplinary authority of this jurisdiction if the Domestic or Foreign Lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer or Domestic or Foreign Lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer or Domestic or Foreign Lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer or Domestic or Foreign Lawyer shall not be subject to discipline if the lawyer's or Domestic or Foreign Lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer or Domestic or Foreign Lawyer reasonably believes the predominant effect of the lawyer or Domestic or Foreign Lawyer's conduct will occur.

Comment

### *Disciplinary Authority*

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to Domestic or Foreign Lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rule 9.4: Jurisdiction and Reciprocal Discipline. A Domestic or Foreign Lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the Domestic or Foreign Lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

### *Choice of Law*

[2] A lawyer or Domestic or Foreign Lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer or Domestic or Foreign Lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer or Domestic or Foreign Lawyer is licensed to practice. Additionally, the lawyer or Domestic or Foreign Lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies

having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer or Domestic or Foreign Lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers or Domestic or Foreign Lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer or Domestic or Foreign Lawyer conduct relating to a proceeding pending before a tribunal, the lawyer or Domestic or Foreign Lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer or Domestic or Foreign Lawyer shall be subject to the rules of the jurisdiction in which the lawyer or Domestic or Foreign Lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer or Domestic or Foreign Lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer or Domestic or Foreign Lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer or Domestic or Foreign Lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer or Domestic or Foreign Lawyer reasonably believes the predominant effect will occur, the lawyer or Domestic or Foreign Lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer or Domestic or Foreign Lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer or Domestic or Foreign Lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers or Domestic or Foreign Lawyer engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

## **PART NINE**

### **MISCELLANEOUS**

#### **RULE 9.1. REPORTING REQUIREMENTS**

(a) Members of the State Bar of Georgia shall, within sixty days, notify the State Bar of Georgia of:

(1) being admitted to the practice of law in another jurisdiction and the dates of admission;

(2) being convicted of any felony or of a misdemeanor involving moral turpitude where the underlying conduct relates to the lawyer's fitness to practice law; or

(3) the imposition of discipline by any jurisdiction other than the Supreme Court of Georgia.

(b) For the purposes of this Rule the term "discipline" shall include any sanction imposed as the result of conduct that would be in violation of the Georgia Rules of Professional Conduct if occurring in Georgia.

(c) For the purposes of this Rule the term "jurisdiction" shall include state, federal, territorial and non-United States courts and authorities.

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

Comment

[1] The State Bar of Georgia is the regulatory authority created by the Supreme Court of Georgia to oversee the practice of law in Georgia. In order to provide effective disciplinary programs, the State Bar of Georgia needs information about its members.

## **RULE 9.2. RESTRICTIONS ON FILING DISCIPLINARY COMPLAINTS**

A lawyer shall not enter into an agreement containing a condition that prohibits or restricts a person from filing a disciplinary complaint, or that requires the person to request dismissal of a pending disciplinary complaint.

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, this Rule prohibits a lawyer from entering into any agreement containing a condition which prevents a person from filing or pursuing a disciplinary complaint.

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

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

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

#### Comment

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

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

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

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

(b) Reciprocal Discipline. Upon being suspended or disbarred in another jurisdiction, a lawyer admitted to practice in Georgia shall promptly inform the Office of the General Counsel of the State Bar of Georgia of the discipline. Upon notification from any source that a lawyer within the jurisdiction of the State Bar of Georgia has been suspended or disbarred in another jurisdiction, the Office of the General Counsel shall obtain a certified copy of the disciplinary order and file it with the Clerk of the State Disciplinary Board. Nothing in the Rule shall prevent a lawyer suspended or disbarred in another jurisdiction from filing a petition for voluntary discipline under Rule 4-227.

(1) Upon receipt of a certified copy of an order demonstrating that a lawyer admitted to practice in Georgia has been disbarred or suspended in another jurisdiction, the Clerk of the State Disciplinary Board shall docket the matter and forthwith issue a notice directed to the lawyer containing:

(i) A copy of the order from the other jurisdiction; and

(ii) A notice approved by the Review Panel that the lawyer must inform the Office of the General Counsel and the Review Panel, within thirty days from service of the notice, of any claim by the lawyer predicated upon the grounds set forth in paragraph (b)(3) below, that the imposition of the substantially similar discipline in this jurisdiction would be unwarranted and the reasons for that claim.

(2) In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this jurisdiction shall be deferred until the stay expires.

(3) Upon the expiration of thirty days from service of the notice pursuant to the provisions of paragraph (b)(1), the Review Panel shall recommend to the Supreme Court of Georgia substantially similar discipline, or removal from practice on the grounds provided in Rule 4-104, unless the Office of the General Counsel or the lawyer demonstrates, or the Review Panel finds that it clearly appears upon the face of the record from which the discipline is predicated, that:

(i) The procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(ii) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept as final the conclusion on that subject; or

(iii) The discipline imposed would result in grave injustice or be offensive to the public policy of the jurisdiction; or

(iv) The reason for the original disciplinary status no longer exists; or

(v)

(a) the conduct did not occur within the state of Georgia; and,

(b) the discipline imposed by the foreign jurisdiction exceeds the level of discipline allowed under these Rules.

(vi) the discipline would if imposed in identical form be unduly severe or would require action not contemplated by these Rules.

If the Review Panel determines that any of those elements exists, the Review Panel shall make such other recommendation to the Supreme Court of Georgia as it deems appropriate. The burden is on the party seeking different discipline in this jurisdiction to demonstrate that the imposition of the same discipline is not appropriate.

(4) The Review Panel may consider exceptions from either the Office of the General Counsel or the Respondent on the grounds enumerated at Part (b)(3) of this Rule, and may in its discretion grant oral argument. Exceptions in briefs shall be filed with the Review Panel within 30 days from notice of the Notice of Reciprocal Discipline. The responding party shall have 10 days after service of the exceptions within which to respond.

(5) In all other aspects, a final adjudication in another jurisdiction that a lawyer, whether or not admitted in that jurisdiction, has been guilty of misconduct, or has been removed from practice on any of the grounds provided in Rule 4-104 of the State Bar of Georgia, shall establish conclusively the misconduct or the removal from practice for purposes of a disciplinary proceeding in this state.

(6) Discipline imposed by another jurisdiction but of a lesser nature than disbarment or suspension may be considered in aggravation of discipline in any other disciplinary proceeding.

(7) For purposes of this Rule, the word "jurisdiction" means any state, territory, country or federal court.

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

#### Comment

[1] If a lawyer suspended or disbarred in one jurisdiction is also admitted in another jurisdiction and no action can be taken against the lawyer until a new disciplinary proceeding is instituted, tried, and concluded, the public in the second jurisdiction is left unprotected against a lawyer who has been judicially determined to be unfit. Any procedure which so exposes innocent clients to harm cannot be justified. The spectacle of a lawyer disbarred in one jurisdiction yet permitted to practice elsewhere exposes the profession to criticism and undermines public confidence in the administration of justice.

[2] Reserved.

[3] The imposition of discipline in one jurisdiction does not mean that Georgia and every other jurisdiction in which the lawyer is admitted must necessarily impose

discipline. The Review Panel has jurisdiction to recommend reciprocal discipline on the basis of public discipline imposed by a jurisdiction in which the Respondent is licensed.

[4] A judicial determination of misconduct by the Respondent in another jurisdiction is conclusive, and not subject to relitigation in the forum jurisdiction. The Review Panel should recommend substantially similar discipline unless it determines, after review limited to the record of the proceedings in the foreign jurisdiction, that one of the grounds specified in paragraph (b)(3) exists. This Rule applies whether or not the Respondent is admitted to practice in the foreign jurisdiction. *See also, Rule 8.5, Comment [1].*

[5] For purposes of this Rule, the suspension or placement of a lawyer on inactive status in another jurisdiction because of want of sound mind, senility, habitual intoxication or drug addiction, to the extent of impairment of competency as an attorney shall be considered a disciplinary suspension under the Rules of the State Bar of Georgia.

#### **RULE 9.5. LAWYER AS A PUBLIC OFFICIAL**

(a) A lawyer who is a public official and represents the State, a municipal corporation in the State, the United States government, their agencies or officials, is bound by the provisions of these Rules.

(b) No provision of these Rules shall be construed to prohibit such a lawyer from taking a legal position adverse to the State, a municipal corporation in the State, the United States government, their agencies or officials, when such action is authorized or required by the U. S. Constitution, the Georgia Constitution or statutes of the United States or Georgia.

#### **Rule 4-103. Multiple Violations.**

A finding of a third or subsequent disciplinary infraction under these Rules shall, in and of itself, constitute discretionary grounds for suspension or disbarment. The Review Panel may exercise this discretionary power when the question is appropriately before that Panel. Any discipline imposed by another jurisdiction as contemplated in Rule 9.4 may be considered a disciplinary infraction for the purpose of this Rule.

#### **Rule 4-104. Mental Incapacity and Substance Abuse.**

(a) Want of a sound mind, senility, habitual intoxication or drug addiction, to the extent of impairing competency as an attorney, when found to exist under the procedure outlined in Part IV, Chapter 2 of these Rules, shall constitute grounds for removing the attorney from the practice of law. Notice of final judgment taking such action shall be given by the Review Panel as provided in Rule 4-220(a).

(b) Upon a finding by either panel of the State Disciplinary Board that an attorney may be impaired or incapacitated to practice law due to mental incapacity or



substance abuse, that panel may, in its sole discretion, make a confidential referral of the matter to the Lawyer Assistance Program for the purposes of confrontation and referral of the attorney to treatment centers and peer support groups. Either panel may, in its discretion, defer disciplinary findings and proceedings based upon the impairment or incapacitation of an attorney pending attempts by the Lawyer Assistance Program to afford the attorney an opportunity to begin recovery. In such situations the Program shall report to the referring panel and Office of the General Counsel concerning the attorney's progress toward recovery.

(c) In the event of a finding by the Supreme Court of Georgia that a lawyer is impaired or incapacitated, the Court may refer the matter to the Lawyer Assistance Program, before or after its entry of judgment under Bar Rules 4-219 or 4-220 (a), so that rehabilitative aid may be provided to the impaired or incapacitated attorney. In such situations the Program shall be authorized to report to the Court, either panel of the State Disciplinary Board and Office of the General Counsel concerning the attorney's progress toward recovery.

**Rule 4-105. Deceased, Incapacitated, Imprisoned and Disappearing Attorneys.**

When it appears to the Investigative Panel that an attorney's death, incapacity, imprisonment or disappearance poses a substantial threat of harm to his or her clients or the public, the Investigative Panel shall immediately investigate the matter. If the Investigative Panel determines that such threat exists and that no partner, associate or other appropriate representative is available to prevent the harm, it shall file its findings and recommendation of action in the Supreme Court of Georgia and shall seek judgment as provided in Rule 4-219.

**Rule 4-106. Conviction of a Crime: Suspension and Disbarment.**

(a) Upon receipt of information or evidence that an attorney has been convicted of any felony or misdemeanor involving moral turpitude, whether by verdict, plea of guilty, plea of nolo contendere or imposition of first offender probation, the Office of the General Counsel shall immediately assign the matter to a State Disciplinary Board docket number and petition the Supreme Court of Georgia for the appointment of a Special Master to conduct a show cause hearing.

(b) The petition shall show the date of the verdict or plea and the court in which the Respondent was convicted, and shall be served upon the Respondent pursuant to Rule 4-203.1.

(c) Upon receipt of the Petition for Appointment of Special Master, the Clerk of the Supreme Court of Georgia shall file the matter in the records of the Court, shall give the matter a Supreme Court docket number and notify the Coordinating Special Master that appointment of a Special Master is appropriate.

(d) The Coordinating Special Master as provided in Rule 4-209.3, will appoint a Special Master, pursuant to Rule 4-209 (b).

(e) The show cause hearing should be held within 15 days after service of the Petition for Appointment of Special Master upon the Respondent or appointment of a Special Master, whichever is later. Within 30 days of the hearing, the Special Master shall file a recommendation with the Supreme Court of Georgia which shall be empowered to order such discipline as deemed appropriate.

(f) If the Supreme Court of Georgia orders the respondent suspended pending the appeal, upon the termination of the appeal the State Bar of Georgia may petition the Special Master to conduct a hearing for the purpose of determining whether the circumstances of the termination of the appeal indicate that the suspended respondent should:

- (1) be disbarred under Bar Rule 8.4, or
- (2) be reinstated, or
- (3) remain suspended pending retrial as a protection to the public, or
- (4) be reinstated while the facts giving rise to the conviction are investigated and, if proper, prosecuted under regular disciplinary procedures in these Rules.

The report of the Special Master shall be filed with the Review Panel or the Supreme Court of Georgia as provided hereinafter in Rule 4-217.

(g) For purposes of this Rule, a certified copy of a conviction in any jurisdiction based upon a verdict, plea of guilty or plea of nolo contendere or the imposition of first offender treatment shall be prima facie evidence of an infraction of Rule 8.4 of Bar Rule 4-102 and shall be admissible in proceedings under the disciplinary rules.

**Rule 4-107.**

This rule is reserved.

**Rule 4-108. Conduct Constituting Threat of Harm to Clients or Public; Emergency Suspension.**

(a) Upon receipt of sufficient evidence demonstrating that an attorney's conduct poses a substantial threat of harm to his or her clients or the public and with the approval of the Immediate Past President of the State Bar of Georgia and the Chairperson of the Review Panel, or at the direction of the Chairperson of the Investigative Panel, the Office of the General Counsel shall petition the Supreme Court of Georgia for the suspension of the attorney pending disciplinary proceedings predicated upon the conduct causing such petition.

(b) The petition for emergency suspension shall state the evidence justifying the emergency suspension.

(c) The petition for emergency suspension shall be served upon the Respondent pursuant to Bar Rule 4-203.1.

(d) Upon receipt of the petition for emergency suspension, the Clerk of the Supreme Court of Georgia shall file the matter in the records of the Court, shall assign the matter a Supreme Court docket number and shall notify the Coordinating Special Master that appointment of a Special Master is appropriate.

(e) The Coordinating Special Master will appoint a Special Master pursuant to Bar Rule 4-209(b) to conduct a hearing where the State Bar of Georgia shall show cause why the Respondent should be suspended pending disciplinary proceedings.

(f) Within fifteen days after service of the petition for emergency suspension upon the Respondent or appointment of a Special Master, whichever is later, the Special Master shall hold a hearing on the petition for emergency suspension.

(g) Within twenty days of the hearing, the Special Master shall file his or her recommendation with the Supreme Court of Georgia. The Court sitting *en banc* may suspend the Respondent pending final disposition of disciplinary proceedings predicated upon the conduct causing the emergency suspension, or order such other action as it deems appropriate.

#### **Rule 4-109. Refusal or Failure to Appear for Reprimand; Suspension.**

Either panel of the State Disciplinary Board based on the knowledge or belief that a Respondent has refused, or failed without just cause, to appear in accordance with Bar Rule 4-220 before a panel or the superior court for the administration of a reprimand may file in the Supreme Court of Georgia a motion for suspension of the Respondent. A copy of the motion shall be served on the Respondent as provided by Bar Rule 4-203.1. The Supreme Court of Georgia may in its discretion, ten days after the filing of the motion, suspend the Respondent until such time as the reprimand is administered.

#### **Rule 4-110. Definitions.**

(a) Respondent: A person whose conduct is the subject of any disciplinary investigation or proceeding.

(b) Confidential Proceedings: Any proceeding under these rules which occurs prior to a filing in the Supreme Court of Georgia.

(c) Public Proceedings: Any proceeding under these rules which has been filed with the Supreme Court of Georgia.

(d) Grievance/Memorandum of Grievance: An allegation of unethical conduct filed against an attorney.

(e) Probable Cause: A finding by the Investigative Panel that there is sufficient evidence to believe that the Respondent has violated one or more of the provisions of Part IV, Chapter 1 of the Bar Rules.

(f) Petition for Voluntary Surrender of License: A Petition for Voluntary Discipline in which the respondent voluntarily surrenders his or her license to practice law in this State. A voluntary surrender of license is tantamount to disbarment.

(g) He, Him or His: Generic pronouns including both male and female.

(h) Attorney: A member of the State Bar of Georgia or one authorized by law to practice law in the State of Georgia.

(i) Notice of Discipline: A Notice by the Investigative Panel that the respondent will be subject to a disciplinary sanction for violation of one or more Georgia Rules of Professional Conduct unless the respondent affirmatively rejects the notice.

**Rule 4-111. Audit for Cause.**

Upon receipt of sufficient evidence that a lawyer who practices law in this State poses a threat of harm to his or her clients or the public, the State Disciplinary Board may conduct an Audit for Cause with the written approval of the Chair of the Investigative Panel of the State Disciplinary Board and the President-Elect of the State Bar of Georgia. Before approval can be granted, the lawyer shall be given notice that approval is being sought and be given an opportunity to appear and be heard. The sufficiency of the notice and opportunity to be heard shall be left to the sole discretion of the persons giving the approval. The State Disciplinary Board must inform the person being audited that the audit is an Audit for Cause.

**CHAPTER 2**

**DISCIPLINARY PROCEEDINGS**

**4-201. State Disciplinary Board.**

The powers to investigate and discipline members of the State Bar of Georgia and those authorized to practice law in Georgia for violations of the Georgia Rules of Professional Conduct set forth in Bar Rule 4-102 are hereby vested in a State Disciplinary Board and a Consumer Assistance Program. The State Disciplinary Board shall consist of two panels. The first panel shall be the Investigative Panel of the State Disciplinary Board (Investigative Panel). The second panel shall be the Review Panel of the State Disciplinary Board (Review Panel). The Consumer Assistance Program shall operate as described in Part XII of these Rules.

(a) The Investigative Panel shall consist of the President-elect of the State Bar of Georgia and the President-elect of the Young Lawyers Division of the State Bar of Georgia, one member of the State Bar of Georgia from each judicial district of the State appointed by the President of the State Bar of Georgia with the approval of the Board of Governors of the State Bar of Georgia, one member of the State Bar of Georgia from each judicial district of the State appointed by the Supreme Court of Georgia, one at-large member of the State Bar of Georgia appointed by the Supreme Court of Georgia, one at-large member of the State Bar of Georgia appointed by the President with the approval of the Board of Governors, and six public members appointed by the Supreme Court of Georgia to serve as public members of the Panel.

(1) All members shall be appointed for three-year terms subject to the following exceptions:

(i) any person appointed to fill a vacancy caused by resignation, death, disqualification or disability shall serve only for the unexpired term of the member replaced unless reappointed;

(ii) ex-officio members shall serve during the term of their office and shall not increase the quorum requirement; and

(iii) certain initial members as set forth in paragraph (2) below.

(2) It shall be the goal of the initial appointments that one-third (1/3) of the terms of the members appointed will expire annually.

(3) A member may be removed from the Panel pursuant to procedures set by the Panel for failure to attend regular meetings of the Panel. The vacancy shall be filled by appointment of the current President of the State Bar of Georgia.

(4) The Investigative Panel shall annually elect a chairperson, a vice-chairperson, or a vice-chairperson for any subcommittee for which the chairperson is not a member to serve as chairperson for that subcommittee, and such other officers as it may deem proper. The Panel shall meet in its entirety in July of each year to elect a chairperson. At any time the Panel may decide to divide itself into subcommittees or to consolidate after having divided. A majority shall constitute a quorum and a majority of a quorum shall be authorized to act. However, in any matter in which one or more Investigative Panel members are disqualified, the number of members constituting a quorum shall be reduced by the number of members disqualified from voting on the matter.

(5) The Investigative Panel is authorized to organize itself into as many subcommittees as the Panel deems necessary to conduct the expeditious investigation of disciplinary matters referred to it by the Office of the General Counsel. However, no subcommittee shall consist of fewer than seven (7) members of the Panel and each such subcommittee shall include at least one (1) of the public members.

(b) The Review Panel shall consist of the Immediate Past President of the State Bar of Georgia, the Immediate Past President of the Young Lawyers Division or a member of the Young Lawyers Division designated by its Immediate Past President, nine (9) members of the State Bar of Georgia, three (3) from each of the three (3) federal judicial districts of the State appointed as described below, and four (4) public members appointed by the Supreme Court of Georgia.

(1) The nine (9) members of the Bar from the federal judicial districts shall be appointed for three (3) year terms so that the term of one Panel member from each district will expire each year. The three (3) vacant positions will be filled in odd years by appointment by the President, with the approval of the Board of Governors, and in even years by appointment by the Supreme Court of Georgia.

(2) The Panel members serving at the time this Rule goes into effect shall continue to serve until their respective terms expire. New Panel members shall be appointed as set forth above.

(3) Any person appointed to fill a vacancy caused by resignation, death, disqualification or disability shall serve only for the unexpired term of the member replaced unless reappointed.

(4) Ex-officio members shall serve during the term or terms of their offices and shall not increase their quorum requirement.

(5) The Review Panel shall elect a chairperson and such other officers as it may deem proper in July of each year. The presence of six (6) members of the Panel shall constitute a quorum. Four (4) members of the Panel shall be authorized to act except that a recommendation of the Review Panel to suspend or disbar shall require the affirmative vote of at least six (6) members of the Review Panel, with not more than four (4) negative votes. However, in any case in which one or more Review Panel members are disqualified, the number of members constituting a quorum and the number of members necessary to vote affirmatively for disbarment or suspension, shall be reduced by the number of members disqualified from voting on the case. No recommendation of disbarment or suspension may be made by fewer than four (4) affirmative votes. For the purposes of this Rule the recusal of a member shall have the same effect as disqualification.

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

(a) All grievances other than those initiated by the Supreme Court of Georgia, the Investigative Panel or inquiries which may be filed with the Consumer Assistance Program under Part XII of these Rules shall be first filed with the Office of the General Counsel of the State Bar of Georgia. The Office of the General Counsel shall require that oral grievances, and grievances illegibly or informally drawn, be reduced to a

memorandum of grievance in such form as may be prescribed by the Investigative Panel.

(b) Upon receipt of a grievance in proper form, the Office of the General Counsel shall screen it to determine whether the grievance is unjustified, frivolous, patently unfounded or fails to state facts sufficient to invoke the disciplinary jurisdiction of the State Bar of Georgia. The Office of the General Counsel shall be empowered to collect evidence and information concerning any grievance and to add the findings and results of its investigation to the file containing such grievance. The screening process may include forwarding a copy of the grievance to the Respondent in order that the Respondent may respond to the grievance.

(c) Upon completion of its screening of a grievance, the Office of the General Counsel shall be empowered to dismiss those grievances which are unjustified, frivolous, patently unfounded or which fail to state facts sufficient to invoke the disciplinary jurisdiction of the State Bar of Georgia; provided, however, that a rejection of such grievances by the Office of the General Counsel shall not deprive the complaining party of any right of action he or she might otherwise have at law or in equity against the Respondent. Those grievances which appear to allege any violation of Part IV, Chapter 1 of the State Bar Rules shall be forwarded to the Investigative Panel or a subcommittee of the Investigative Panel according to Rule 4-204.1.

#### **Rule 4-203. Powers and Duties.**

(a) In accordance with these rules, the Investigative Panel shall have the following powers and duties:

(1) To receive and evaluate any and all written grievances against members of the State Bar of Georgia and to frame such charges and grievances as shall conform to the requirements of these rules. A copy of any grievance serving as the basis for investigation or proceedings before the Panel shall be furnished to the Respondent by the procedures set forth in Rule 4-204.2;

(2) To initiate grievances on its own motion, to require additional information from a complainant, where appropriate, and to dismiss and reject such grievances as to it may seem unjustified, frivolous, or patently unfounded. However, the rejection of a grievance by the Investigative Panel shall not deprive the complaining party of any right of action he or she might otherwise have at law or in equity against the Respondent;

(3) To issue letters of instruction when dismissing a grievance;

(4) To delegate the duties of the Panel enumerated in subparagraphs (1), (2), (11) and (12) hereof to the chairperson of the Panel or chairperson of any subcommittee of the Panel or such other members as the Panel or its chairperson may designate subject to review and approval by the Investigative Panel or subcommittee of the Panel;

(5) To conduct probable cause investigations, to collect evidence and information concerning grievances, to hold hearings where provided for in these rules, and to certify grievances to the Supreme Court of Georgia for hearings by Special Masters as hereinafter provided;

(6) To pass upon petitions for protection of the clients of deceased, disappearing or incapacitated members of the State Bar of Georgia;

(7) To adopt forms for formal complaints, subpoenas, notices, and any other written instruments necessary or desirable under these rules;

(8) To prescribe its own rules of conduct and procedure;

(9) To receive, investigate, and collect evidence and information; and to review and accept or reject such Petitions for Voluntary Discipline which request the imposition of confidential discipline and are filed with the Investigative Panel prior to the time of issuance of a formal complaint by Bar counsel. Each such petition shall contain admissions of fact and admissions of conduct in violation of Part IV, Chapter 1 of these rules sufficient to authorize the imposition of discipline. Bar counsel shall, upon filing of such petition, file with the Panel its recommendations as to acceptance or rejection of the petition by the Panel, giving the reasons therefor, and shall serve a copy of its recommendation upon the Respondent presenting such petition;

(10) To sign and enforce, as hereinafter described, subpoenas for the appearance of persons and for the production of things and records at investigations and hearings;

(11) To extend the time within which a formal complaint may be filed;

(12) To issue letters of formal admonition and Investigative Panel Reprimands as hereinafter provided;

(13) To enter a Notice of Discipline providing that unless the Respondent affirmatively rejects the notice, the Respondent shall be sanctioned as ordered by the Investigative Panel;

(14) To use the investigators, auditors, and/or staff of the Office of the General Counsel in performing its duties.

(b) In accordance with these rules, the Review Panel or any subcommittee of the Panel shall have the following powers and duties:

(1) To receive reports from Special Masters, and to recommend to the Supreme Court of Georgia the imposition of punishment and discipline;



- (2) To adopt forms for subpoenas, notices, and any other written instruments necessary or desirable under these rules;
- (3) To prescribe its own rules of conduct and procedure;
- (4) (Reserved).
- (5) Through the action of its chairperson or his or her designee and upon good cause shown, to allow a late filing of the Respondent's answer where there has been no final selection of a Special Master within thirty days of service of the formal complaint upon the Respondent;
- (6) Through the action of its chairperson or his or her designee, to receive and pass upon challenges and objections to Special Masters.
- (7) to receive Notice of Reciprocal Discipline and to recommend to the Supreme Court of Georgia the imposition of punishment and discipline pursuant to Bar Rule 9.4 (b) (3).

**Rule 4-203.1. Uniform Service Rule.**

(a) Attorneys authorized to practice law in Georgia shall inform the Membership Department of the State Bar of Georgia, in writing, of their current name, official address and telephone number. The Supreme Court of Georgia and the State Bar of Georgia may rely on the official address on file with the Membership Department in all efforts to contact, communicate with, and perfect service upon an attorney. The choice of an attorney to provide only a post office box or equivalent commercial box address to the Membership Department of the State Bar of Georgia shall constitute an election to waive personal service. Notification of a change of address given to any department of the State Bar of Georgia other than the Membership Department shall not satisfy the requirement herein.

(b) In all matters requiring personal service under Part IV of the Bar Rules, service may be perfected in the following manner:

- (1) **Acknowledgment of Service:** An acknowledgment of service from the Respondent shall constitute conclusive proof of service and shall eliminate the need to utilize any other form of service.
- (2) **Written Response from Respondent:** A written response from the Respondent or Respondent's counsel shall constitute conclusive proof of service and shall eliminate the need to utilize any other form of service.
- (3) In the absence of an acknowledgment of service, or a written response from the Respondent or Respondent's counsel, and subject to the provisions of paragraph (4) below, the Respondent shall be served in the following manner:

(i) Personal service: Service may be accomplished by the Sheriff, or a Court approved agent for service of process, or any person approved by the Chairperson of the Investigative Panel or the Chair's designee. Receipt of a Return of Service Non Est Inventus from the Sheriff or any other person approved for service of the service documents, shall constitute conclusive proof that service cannot be perfected by personal service.

(ii) Service by publication: In the event that personal service cannot be perfected, or when the Respondent has only provided a post office box to the Membership Department and Respondent has not acknowledged service within twenty (20) days of a mailing to Respondent's post office box, service may be accomplished by publication once a week for two weeks in the legal organ of the county of Respondent's address, as shown on the records of the Membership Department of the State Bar of Georgia, and, contemporaneously with the publication, mailing a copy of the service documents by first class mail to Respondent's address as shown on the records of the Membership Department of the State Bar of Georgia.

(4) When it appears from an affidavit made by the Office of the General Counsel that the Respondent has departed from the state, or cannot, after due diligence, be found within the state, or seeks to avoid the service, the Chairperson of the Investigative Panel, or the chair's designee, may authorize service by publication without the necessity of first attempting personal service. The affidavit made by the Office of the General Counsel must demonstrate recent unsuccessful attempts at personal service upon the Respondent regarding other or related disciplinary matters and that such personal service was attempted at Respondent's address as shown on the records of the Membership Department of the State Bar of Georgia.

(c) Whenever service of pleadings or other documents subsequent to the original complaint is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is otherwise required by these Rules. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his or her last known address. As used in this Rule, the term "delivery of a copy" means handing it to the attorney or to the party, or leaving it at his or her office with his or her clerk or other person in charge thereof or, if the office is closed or the person to be served has no office, leaving it at his or her dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing. Proof of service may be made by certificate of an attorney or of his or her employee, by written admission, by affidavit, or by other proof satisfactory to the court. Failure to make proof of service shall not affect the validity of service.

**Rule 4-204. Preliminary Investigation by Investigative Panel-Generally.**

(a) Each grievance alleging conduct which appears to invoke the disciplinary jurisdiction of the State Disciplinary Board of the State Bar of Georgia shall be referred in accordance with Rule 4-204.1 by the Office of the General Counsel to the Investigative Panel or a subcommittee of the Investigative Panel for investigation and disposition in accordance with its rules. The Investigative Panel shall appoint one of its members to be responsible for the investigation. The Office of the General Counsel shall simultaneously assign a staff investigator to assist in the investigation. If the investigation of the Panel establishes probable cause to believe that the respondent has violated one or more of the provisions of Part IV, Chapter 1 of these Rules, it shall:

- (1) issue a letter of admonition;
- (2) issue an Investigative Panel Reprimand;
- (3) issue a Notice of Discipline; or
- (4) refer the case to the Supreme Court of Georgia for hearing before a Special Master and file a formal complaint with the Supreme Court of Georgia, all as hereinafter provided.

All other cases may be either dismissed by the Investigative Panel or referred to the Fee Arbitration Committee or the Lawyer Assistance Program.

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

**Rule 4-204.1. Notice of Investigation.**

(a) Upon completion of its screening of a grievance under Rule 4-202, the Office of the General Counsel shall forward those grievances which appear to invoke the disciplinary jurisdiction of the State Bar of Georgia to the Investigative Panel, or subcommittee of the Investigative Panel by serving a Notice of Investigation upon the respondent.

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

- (1) a statement that the grievance is being transmitted to the Investigative Panel, or subcommittee of the Investigative Panel;
- (2) a copy of the grievance;
- (3) a list of the Rules which appear to have been violated;

(4) the name and address of the Panel member assigned to investigate the grievance and a list of the Panel, or subcommittee of the Panel, members;

(5) a statement of respondent's right to challenge the competency, qualifications or objectivity of any Panel member;

(c) The form for the Notice of Investigation shall be approved by the Investigative Panel.

**Rule 4-204.2. Service of the Notice of Investigation.**

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

**Rule 4-204.3. Answer to Notice of Investigation Required.**

(a) The Respondent shall file a written response under oath to the Notice of Investigation with the panel member assigned to investigate the grievance within thirty (30) days of service.

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

(c) The panel member assigned to investigate the grievance may in the panel member's discretion grant extensions of time for Respondent's answer. Any request for extension of time must be made in writing on or before the date on which the response was due and the grant of an extension of time must also be in writing. Extensions of time shall be reasonable in length and should not be routinely granted.

(d) In cases where the maximum sanction is disbarment or suspension, failure to respond by the Respondent may authorize the Investigative Panel or subcommittee of the Panel to suspend the Respondent until a response is filed.

(1) The determination that an adequate response has been filed is within the discretion of the Investigative Panel or subcommittee of the Panel.

(2) When the Investigative Panel or subcommittee of the Panel determines that a Respondent has failed to respond in accordance with the rules of the Panel and that the Respondent should be suspended, the Office of the General Counsel shall notify the Supreme Court of Georgia that the Panel has made such a recommendation. The Supreme Court of Georgia shall enter an appropriate Order.

(3) When the Investigative Panel or subcommittee of the Panel determines that a Respondent who has been suspended for failure to respond in accordance with the rules of the Panel has filed an appropriate response and

should be reinstated, the Office of the General Counsel shall notify the Supreme Court of Georgia that the Panel has made such a recommendation. The Supreme Court of Georgia shall enter an appropriate Order.

**Rule 4-204.4. Finding of Probable Cause; Referral to Special Master.**

(a) In the event the Investigative Panel, or a subcommittee of the Panel, finds Probable Cause of the Respondent's violation of one or more of the provisions of Part IV, Chapter 1 of these rules it may refer the matter to the Supreme Court of Georgia by directing the Office of the General Counsel to file with the Clerk of the Supreme Court of Georgia either:

- (1) A formal complaint, as herein provided;
- (2) A petition for the appointment of a Special Master; and
- (3) A notice of its finding of Probable Cause.

The documents specified above shall be filed in duplicate within thirty (30) days of the finding of Probable Cause unless the Investigative Panel, or a subcommittee of the Panel, or its Chairperson grants an extension of time for the filing.

(b) A Notice of Discipline and the matter shall thereafter proceed pursuant to Bar Rules 4-208.1, 4-208.2 and 4-208.3.

**Rule 4-204.5. Letters of Instruction.**

(a) In addition to dismissing a complaint, the Investigative Panel, or subcommittee of the Panel, may issue a letter of instruction in any disciplinary case upon the following conditions:

- (1) the case has been thoroughly investigated, the Respondent has been notified of and has had an opportunity to answer the charges brought against him, and the case has been reported to the entire Panel, or subcommittee of the Panel, assembled at a regularly scheduled meeting; and
- (2) the Investigative Panel, or subcommittee of the Panel, as evidenced through the majority vote of its members present and voting, is of the opinion that the Respondent either:
  - (i) has not engaged in conduct which is in violation of the provisions of Part IV, Chapter 1 of these rules; or
  - (ii) has engaged in conduct that although technically in violation of such rules is not reprehensible, and has resulted in no harm or injury to any third person, and is not in violation of the spirit of such rules; or

(iii) has engaged in conduct in violation of the Code of Professional Responsibility of Part III of these rules or any recognized voluntary creed of professionalism;

(b) Letters of instruction shall contain a statement of the conduct of the Respondent which may have violated Part III of these rules or the voluntary creed of professionalism.

(c) A letter of instruction shall not constitute a finding of any disciplinary infraction.

**Rule 4-205. Confidential Discipline; In General.**

In lieu of the imposition of any other discipline, the Investigative Panel or a subcommittee of the Investigative Panel may issue letters of formal admonition or an Investigative Panel Reprimand in any disciplinary case upon the following conditions:

(a) the case has been thoroughly investigated, the Respondent has been notified of and has had an opportunity to answer, the charges brought against him, and the case has been reported to the entire Panel or a subcommittee of the Panel assembled at a regularly scheduled meeting;

(b) the Panel or a subcommittee of the Panel, as evidenced through the majority vote of its members present and voting, is of the opinion that the Respondent has engaged in conduct which is in violation of the provisions of Part IV, Chapter 1 of these rules;

(c) the Panel or a subcommittee of the Panel, as evidenced through the majority vote of its members present and voting, is of the opinion that the conduct referred to in subpart (b) hereof was engaged in:

(1) inadvertently; or

(2) purposefully, but in ignorance of the applicable disciplinary rule or rules; or

(3) under such circumstances that it is the opinion of the Investigative Panel or a subcommittee of the Investigative Panel that the protection of the public and rehabilitation of the Respondent would be best achieved by the issuance of a letter of admonition or an Investigative Panel Reprimand rather than by any other form of discipline.

**Rule 4-206. Confidential Discipline; Contents.**

(a) Letters of formal admonition and Investigative Panel Reprimands shall contain a statement of the specific conduct of the Respondent which violates Part IV,

Chapter 1 of these rules, shall state the name of the complainant and shall state the reasons for issuance of such confidential discipline.

(b) A letter of formal admonition shall also contain the following information:

(1) the right of the Respondent to reject the letter of formal admonition under Rule 4-207;

(2) the procedure for rejecting the letter of formal admonition under Rule 4-207; and

(3) the effect of an accepted letter of formal admonition in the event of a third or subsequent imposition of discipline.

(c) An Investigative Panel Reprimand shall also contain information concerning the effect of the acceptance of such reprimand in the event of a third or subsequent imposition of discipline.

**Rule 4-207. Letters of Formal Admonition and Investigative Panel Reprimands; Notification and Right of Rejection.**

In any case where the Investigative Panel, or a subcommittee of the Panel, votes to impose discipline in the form of a letter of formal admonition or an Investigative Panel Reprimand, such vote shall constitute the Panel's finding of probable cause. The Respondent shall have the right to reject, in writing, the imposition of such discipline. A written rejection shall be deemed an election by the Respondent to continue disciplinary proceedings under these rules and shall cause the Investigative Panel to proceed under Rule 4-204.4

(a) Notification to Respondent shall be as follows:

(1) in the case of letters of formal admonition, the letter of admonition;

(2) in the case of an Investigative Panel Reprimand, the letter notifying the Respondent to appear for the administration of the reprimand;

(3) sent to the Respondent at his or her address as reflected in State Bar records, via certified mail, return receipt requested.

(b) Rejection by Respondent shall be as follows:

(1) in writing, within thirty days of notification;

(2) sent to the Investigative Panel via certified mail, return receipt requested, directed to the Office of the General Counsel of the State Bar of Georgia at the current headquarters address of the State Bar.

(c) If the Respondent rejects the imposition of a formal admonition or Investigative Panel Reprimand, the Office of the General Counsel shall file a formal complaint with the Clerk of the Supreme Court of Georgia within thirty days of receipt of the rejection unless the Investigative Panel or its Chairperson grants an extension of time for the filing of the formal complaint.

(d) Investigative Panel Reprimands shall be administered before the Panel by the Chairperson or his or her designee.

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

An accepted letter of formal admonition or an Investigative Panel Reprimand shall be considered as a disciplinary infraction for the purpose of invoking the provisions of Bar Rule 4-103. In the event of a subsequent disciplinary proceeding, the confidentiality of the imposition of confidential discipline shall be waived and the Office of the General Counsel may use such information as aggravation of discipline.

**Rule 4-208.1. Notice of Discipline.**

(a) In any case where the Investigative Panel or a subcommittee of the Panel finds Probable Cause, the Panel may issue a Notice of Discipline imposing any level of public discipline authorized by these rules.

(b) Unless the Notice of Discipline is rejected by the Respondent as provided in Rule 4-208.3, (1) the Respondent shall be in default; (2) the Respondent shall have no right to any evidentiary hearing; and (3) the Respondent shall be subject to such discipline and further proceedings as may be determined by the Supreme Court of Georgia.

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

(a) The Notice of Discipline shall state the following:

(1) The Rules which the Investigative Panel found that the Respondent violated;

(2) The facts, which if unrefuted, support the finding that such Rules have been violated;

(3) The level of public discipline recommended to be imposed;

(4) The reasons why such level of discipline is recommended, including matters considered in mitigation and matters considered in aggravation, and such other considerations deemed by the Investigative Panel to be relevant to such recommendation;



(5) The entire provisions of Rule 4-208.3 relating to rejection of Notice of Discipline. This may be satisfied by attaching a copy of the Rule to the Notice of Discipline and referencing same in the Notice;

(6) A copy of the Memorandum of Grievance; and

(7) A statement of any prior discipline imposed upon the Respondent, including confidential discipline under Rules 4-205 to 4-208.

(b) The original Notice of Discipline shall be filed with the Clerk of the Supreme Court of Georgia, and a copy of the Notice of Discipline shall be served upon the respondent pursuant to Bar Rule 4-203.1.

(c) This subparagraph is reserved.

(d) This subparagraph is reserved.

(e) This subparagraph is reserved.

(f) This subparagraph is reserved.

(g) The Office of the General Counsel shall file the documents by which service was accomplished with the Clerk of the Supreme Court of Georgia.

(h) The level of disciplinary sanction in any Notice of Discipline rejected by the respondent or the Office of the General Counsel shall not be binding on the Special Master, the Review Panel or the Supreme Court of Georgia.

**Rule 4-208.3. Rejection of Notice of Discipline.**

(a) In order to reject the Notice of Discipline the respondent or the Office of the General Counsel must file a Notice of Rejection of the Notice of Discipline with the Clerk of the Supreme Court of Georgia within 30 days following service of the Notice of Discipline.

(b) Any Notice of Rejection by the respondent shall be served by the respondent upon the Office of the General Counsel of the State Bar of Georgia. Any Notice of Rejection by the Office of the General Counsel of the State Bar of Georgia shall be served by the General Counsel upon the respondent. No rejection by the respondent shall be considered valid unless the respondent files a written response as required by Rule 4-204.3 at or before the filing of rejection. The respondent must also file a copy of such written response with the Clerk of the Supreme Court of Georgia at the time of filing the Notice of Rejection.

(c) The timely filing of a Notice of Rejection shall constitute an election for the Coordinating Special Master to appoint a Special Master and the matter shall thereafter proceed pursuant to Rules 4-209 through 4-225.

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

(a) The Office of the General Counsel shall file with the Clerk of the Supreme Court of Georgia a formal complaint or a Petition for Appointment of Special Master within thirty (30) days following the filing of a Notice of Rejection. The Notice of Discipline shall operate as the notice of finding of Probable Cause by the Investigative Panel.

(b) The Office of the General Counsel may obtain extensions of time for the filing of the formal complaint from the Chairperson of the Investigative Panel or his or her designee.

(c) After the rejection of a Notice of Discipline and prior to the time of the filing of the formal complaint, the Investigative Panel may consider any new evidence regarding the grievance and take appropriate action.

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

(a) Upon receipt of a finding of Probable Cause, a petition for appointment of a Special Master and a formal complaint from the Investigative Panel, the Clerk of the Supreme Court of Georgia shall file the matter in the records of the Court, give the matter a Supreme Court docket number and notify the Coordinating Special Master that appointment of a Special Master is appropriate. In those proceedings where a Notice of Discipline has been filed, the finding of Probable Cause need not be filed.

(b) Within a reasonable time after receipt of a petition/motion for appointment of a Special Master or notification that a Special Master previously appointed has been disqualified, the Coordinating Special Master will appoint a Special Master to conduct formal disciplinary proceedings in such complaint. The Coordinating Special Master shall select as Special Masters experienced members of the State Bar of Georgia who possess a reputation in the Bar for ethical practice; provided, that a Special Master may not be appointed to hear a complaint against a Respondent who resides in the same circuit as that in which the Special Master resides.

(c) Upon being advised of appointment of a Special Master by the Coordinating Special Master, the Clerk of the Supreme Court of Georgia shall return the original Notice of Discipline, rejection of Notice of Discipline, if applicable, formal complaint, Probable Cause finding, petition for appointment of Special Master and the signed order thereon to the Office of the General Counsel of the State Bar of Georgia. Upon notification of the appointment of a Special Master, the Office of the General Counsel shall immediately serve the Respondent with the order of appointment of a Special Master and with its formal complaint as hereinafter provided.

(d) Within ten days of service of the notice of appointment of a Special Master, the Respondent and the State Bar of Georgia shall lodge any and all objections or challenges they may have to the competency, qualifications or impartiality of the Special Master with the chairperson of the Review Panel. The party filing such objections or challenges must also serve a copy of the objections or challenges upon the opposing counsel, the Coordinating Special Master and the Special Master, who may respond to such objections or challenges. Within a reasonable time, the chairperson of the Review Panel shall consider the challenges, the responses of Respondent, the State Bar of Georgia, the Coordinating Special Master and the Special Master, if any, determine whether the Special Master is disqualified and notify the parties, the Coordinating Special Master and the Special Master of the chairperson's decision. Exceptions to the chairperson's denial of disqualification are subject to review by the entire Review Panel and, thereafter, by the Supreme Court of Georgia when exceptions arising during the evidentiary hearing and exceptions to the report of the Special Master and the Review Panel are properly before the Court. In the event of disqualification of a Special Master by the chairperson of the Review Panel, said chairperson shall notify the Clerk of the Supreme Court of Georgia, the Coordinating Special Master, the Special Master, the State Bar of Georgia and the Respondent of the disqualification and appointment of a successor Special Master shall proceed as provided in this rule.

#### **Rule 4-209.1. Coordinating Special Master.**

(a) The appointment of and the determination of the compensation of the Coordinating Special Master shall be the duty of the Coordinating Special Master Selection and Compensation Commission. The Commission shall be comprised of the second, third and fourth immediate past presidents of the State Bar of Georgia. If any of the above named ex officio individuals should be unable to serve, the vacancy shall be filled by appointment by the Supreme Court of Georgia.

(b) The Coordinating Special Master shall be selected by the Coordinating Special Master Selection and Compensation Commission, with the approval of the Supreme Court of Georgia. The Coordinating Special Master shall serve as an independent contractor at the pleasure of the Coordinating Special Master Selection and Compensation Commission.

(c) The Coordinating Special Master shall be compensated by the State Bar of Georgia from the general operating funds of the State Bar of Georgia in an amount specified by the Coordinating Special Master Selection and Compensation Commission. The Coordinating Special Master's compensation shall be approved by the Supreme Court of Georgia. On or before the first day of each calendar year, the Coordinating Special Master Selection and Compensation Commission shall submit to the Supreme Court of Georgia for approval the hourly rate to be paid to the Coordinating Special Master during the fiscal year beginning the first day of July of that year, which rate shall continue until the conclusion of the fiscal year of the State Bar of Georgia.

and may incur such operating expenses in such amounts as may be specified by the Supreme Court of Georgia. Such amounts shall be paid by the State Bar of Georgia

from the general operating funds. On or before the first day of each calendar year, the Supreme Court of Georgia will set the amount to be paid for the above items during the fiscal year beginning the first day of July of that year.

(e) If the Coordinating Special Master position is vacant or the Coordinating Special Master has recused or been disqualified from a particular matter, the Supreme Court of Georgia may appoint a temporary Acting Coordinating Special Master to act until the position can be filled or to act in any particular matter.

#### **Rule 4-209.2. Special Masters.**

(a) The Coordinating Special Master, subject to the approval of the Supreme Court of Georgia, shall select and maintain a limited pool of qualified lawyers to serve as Special Masters for the State Disciplinary Board and Hearing Officers for the Board to Determine Fitness of Bar Applicants pursuant to Part A, Section 8 of the Rules Governing Admission to the Practice of Law in Georgia. The names of those so selected shall be placed on a list maintained by the Coordinating Special Master. Said list shall be published annually in a regular State Bar of Georgia publication. Although not mandatory, it is preferable that a lawyer so selected shall only remain on such list for five years, so that the term may generally be considered to be five years. Any lawyer whose name is removed from such list shall be eligible to be selected and placed on the list at any subsequent time.

(b) Training for Special Masters and Hearing Officers is expected, subject to the terms of this Rule, and shall consist of one training session within twelve months after selection. The Special Master and Hearing Officer training shall be planned and conducted by the Coordinating Special Master. Special Masters and Hearing Officers who fail to attend such a minimum training session shall periodically be removed from consideration for appointment in future cases. Failure to attend such a training session shall not be the basis for a disqualification of any Special Master or Hearing Officer; as such qualifications shall remain in the sole discretion of the Supreme Court of Georgia.

(c) The Special Masters may be paid by the State Bar of Georgia from the general operating funds on a per case rate to be set by the Supreme Court of Georgia. Hearing Officers may be paid pursuant to Part A, Section 14 of the Rules Governing Admission to the Practice of Law in Georgia.

(d) On or before the first day of March of each calendar year, the Supreme Court of Georgia may set the amount to be paid to the Special Masters during the fiscal year beginning the first day of July of that year, which rate shall continue until the conclusion of the fiscal year of the State Bar of Georgia.

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

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

- (1) to establish requirements for and supervise Special Master and Hearing Officer training;
- (2) to assign cases to Special Masters and Hearing Officers from the pool provided in Bar Rule 4-209(b);
- (3) to exercise all of the powers and duties provided in Bar Rule 4-210 when acting as a Special Master under subparagraph (8) below;
- (4) to monitor and evaluate the performance of Special Masters and Hearing Officers;
- (5) to remove Special Masters and Hearing Officers for such cause as may be deemed proper by the Coordinating Special Master;
- (6) to fill all vacancies occasioned by incapacity, disqualification, recusal or removal;
- (7) to administer Special Master and Hearing Officer compensation, if authorized as provided in Bar Rule 4-209.2 or Part A, Section 14 of the Rules Governing Admission to the Practice of Law in Georgia;
- (8) to hear pretrial motions when no Special Master has been assigned;  
and
- (9) to perform all other administrative duties necessary for an efficient and effective hearing system.

**Rule 4-210. Powers and Duties of Special Masters.**

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

- (1) to exercise general supervision over assigned disciplinary proceedings and to perform all duties specifically enumerated in these Rules;
- (2) to rule on all questions concerning the sufficiency of the formal complaint;
- (3) to conduct the negotiations between the State Bar of Georgia and the Respondent, whether at a pretrial meeting set by the Special Master or at any other time;
- (4) to receive and evaluate any Petition for Voluntary Discipline;
- (5) to grant continuances and to extend any time limit provided for herein as to any pending matter;

(6) to apply to the Coordinating Special Master for leave to withdraw and for the appointment of a successor in the event that he or she becomes incapacitated to perform his or her duties or in the event that he or she learns that he or she and the Respondent reside in the same circuit;

(7) to hear, determine and consolidate action on the complaints, where there are multiple complaints against a Respondent growing out of different transactions, whether they involve one or more complainants, and may proceed to make recommendations on each complaint as constituting a separate offense;

(8) to sign subpoenas and exercise the powers described in Bar Rule 4-221(b);

(9) to preside over evidentiary hearings and to decide questions of law and fact raised during such hearings;

(10) to make findings of fact and conclusions of law as hereinafter provided and to submit his or her findings for consideration by the Review Panel;

(11) to exercise general supervision over discovery by parties to disciplinary proceedings and to conduct such hearings and sign all appropriate pleadings and orders pertaining to such discovery as are provided for by the law of Georgia applicable to discovery in civil cases;

(12) in disciplinary cases, to make a recommendation of discipline, and in emergency suspension cases a recommendation as to whether the Respondent should be suspended pending further disciplinary proceedings; and

(13) to conduct and exercise general supervision over hearings for the Board to Determine Fitness of Bar Applicants and to make written findings of fact and recommendations pursuant to Part A, Section 8 of the Rules Governing Admission to the Practice of Law in Georgia.

**Rule 4-211. Formal Complaint; Service.**

(a) Within thirty days after a finding of Probable Cause, a formal complaint shall be prepared by the Office of the General Counsel, which shall specify with reasonable particularity the acts complained of and the grounds for disciplinary action. A formal complaint shall include the names and addresses of witnesses so far as then known. A copy of the formal complaint shall be served upon the Respondent after appointment of a Special Master by the Coordinating Special Master. In those cases where a Notice of Discipline has been filed and rejected, the filing of the formal complaint shall be governed by the time period set forth in Rule 4-208.4. The formal complaint shall be served pursuant to Bar Rule 4-203.1.

(b) This subparagraph is reserved.

(c) At all stages of the proceeding both the Respondent and the State Bar of Georgia may be represented by counsel. Counsel representing the State Bar of Georgia shall be authorized to prepare and sign notices, pleadings, motions, complaints, and certificates for and in behalf of the State Bar of Georgia and the State Disciplinary Board.

**Rule 4-211.1. Dismissal after Formal Complaint.**

At any time after the Investigative Panel finds Probable Cause, the Office of the General Counsel may dismiss the proceeding with the consent of the Chairperson or Vice Chairperson of the Investigative Panel or with the consent of any three members of the Investigative Panel.

**Rule 4-212. Answer of Respondent; Discovery.**

(a) The Respondent shall serve his or her answer to the formal complaint of the State Bar of Georgia within thirty days after service of the formal complaint. In the event that Respondent fails to answer or to obtain an extension of time for his or her answer, the facts alleged and violations charged in the formal complaint shall be deemed admitted. In the event the Respondent's answer fails to address specifically the issues raised in the formal complaint, the facts alleged and violations charged in the formal complaint and not specifically addressed in the answer shall be deemed admitted. A Respondent may obtain an extension of time not to exceed fifteen days to file the answer from the Special Master, or, when a challenge to the Special Master is pending, from the chairperson of the Review Panel. Extensions of time for the filing of an answer shall not be routinely granted.

(b) The pendency of objections or challenges to one or more Special Masters shall provide no justification for a Respondent's failure to file his or her answer or for failure of the State Bar of Georgia or the Respondent to engage in discovery.

(c) Both parties to the disciplinary proceeding may engage in discovery under the rules of practice and procedure then applicable to civil cases in the State of Georgia.

(d) In lieu of filing an answer to the formal complaint of the State Bar of Georgia, the Respondent may submit to the Special Master a Petition for Voluntary Discipline; provided, however, that each such petition shall contain admissions of fact and admissions of conduct in violation of Part IV, Chapter 1 of these rules sufficient to authorize the imposition of discipline. As provided in Rule 4-210(d), the Special Master may solicit a response to such petition from Bar counsel.

**Rule 4-213. Evidentiary Hearing.**

(a) Within 90 days after the filing of respondent's answer to the formal complaint or the time for filing of the answer, whichever is later, the Special Master shall proceed to hear the case. The evidentiary hearing shall be reported and

transcribed at the expense of the State Bar of Georgia. When the hearing is complete, the Special Master shall proceed to make findings of fact, conclusions of law and a recommendation of discipline and file a report with the Review Panel or the Supreme Court of Georgia as hereinafter provided. Alleged errors in the trial may be reviewed by the Supreme Court of Georgia when the findings and recommendations of discipline of the Review Panel are filed with the Court. There shall be no direct appeal from such proceedings of the Special Master.

(b) Upon respondent's showing of necessity and financial inability to pay for a copy of the transcript, the Special Master shall order the State Bar of Georgia to purchase a copy of the transcript for respondent.

**Rule 4-214.**

This rule is reserved.

**Rule 4-215.**

This rule is reserved.

**Rule 4-216.**

This rule is reserved.

**Rule 4-217. Report of the Special Master to the Review Panel.**

(a) Within 30 days from receipt of the transcript of the evidentiary hearing, the Special Master shall prepare a report which shall contain the following:

- (1) findings of fact on the issues raised by the formal complaint, and
- (2) conclusions of law on the issues raised by the pleadings of the parties; and
- (3) a recommendation of discipline.

(b) The Special Master shall file his or her original report and recommendation with the Clerk of the State Disciplinary Board and shall serve a copy on the respondent and counsel for the State Bar of Georgia pursuant to Rule 4-203.1.

(c) Thirty days after the Special Master's report and recommendation is filed, the Clerk of the State Disciplinary Board shall file the original record in the case directly with the Supreme Court of Georgia unless either party requests review by the Review Panel as provided in paragraph (d) of this Rule. In the event neither party requests review by the Review Panel and the matter goes directly to the Supreme Court of



Georgia, both parties shall be deemed to have waived any right they may have under the Rules to file exceptions with or make request for oral argument to the Supreme Court of Georgia. Any review undertaken by the Supreme Court of Georgia shall be solely on the original record.

(d) Upon receipt of the Special Master's report and recommendation, either party may request review by the Review Panel as provided in Rule 4-218. Such party shall file the request and exceptions with the Clerk of the State Disciplinary Board in accordance with Rule 4-221 (f) and serve them on the opposing party within 30 days after the Special Master's report is filed with the Clerk of the State Disciplinary Board. Upon receipt of a timely written request and exceptions, the Clerk of the State Disciplinary Board shall prepare and file the record and report with the Review Panel. The responding party shall have 30 days after service of the exceptions within which to respond.

**Rule 4-218. Findings by the Review Panel.**

(a) Upon receipt of the report from a Special Master pursuant to Rule 4-217 (d), the Review Panel shall consider the record, make findings of fact and conclusions of law and determine whether a recommendation of disciplinary action will be made to the Supreme Court of Georgia and the nature of such recommended discipline. The findings of fact and conclusions of law made by a Special Master shall not be binding on the Panel and may be reversed by it on the basis of the record submitted to the Panel by the Special Master.

(b) The Respondent shall have the right to challenge the competency, qualifications, or objectivity of any member of the Review Panel considering the case against him under a procedure as provided for in the rules of the Panel.

(c) There shall be no de novo hearing before the Review Panel except by unanimous consent of the Panel.

(d) The Review Panel may grant rehearings, or new trials, for such reasons, in such manner, on such issues and within such times as the ends of justice may require.

(e) The Review Panel may consider exceptions to the report of the Special Master and may in its discretion grant oral argument. Exceptions and briefs shall be filed with the Clerk of the State Disciplinary Board, in accordance with Bar Rules 4-217(d) and 4-221(f). The responding party shall have ten (10) days after service of the exceptions within which to respond.

(f) The Review Panel shall file its report and the complete record in the disciplinary proceeding with the Clerk of the Supreme Court of Georgia. A copy of the Panel's report shall be served upon the respondent.

**Rule 4-219. Judgments and Protective Orders.**

(a) After either the Review Panel's report or the Special Master's report is filed with the Supreme Court of Georgia, the respondent and the State Bar of Georgia may file with the Court any written exceptions, supported by written argument, each may have to the report subject to the provisions of Rule 4-217 (c). All such exceptions shall be filed with the Court within 30 days of the date that the report is filed with the Court and a copy served upon the opposing party. The responding party shall have an additional 30 days to file its response with the Court. The Court may grant oral argument on any exception filed with it upon application for such argument by a party to the disciplinary proceedings. The Court will promptly consider the report of the Review Panel or the Special Master, any exceptions, and any responses filed by any party to such exceptions, and enter judgment upon the formal complaint. A copy of the Court's judgment shall be transmitted to the State Bar of Georgia and the respondent by the Court.

(b) In cases in which the Supreme Court of Georgia orders disbarment, voluntary surrender of license or suspension, or the respondent is disbarred or suspended on a Notice of Discipline, the Review Panel shall publish in a local newspaper or newspapers and on the official State Bar of Georgia website, notice of the discipline, including the respondent's full name and business address, the nature of the discipline imposed and the effective dates.

(c)

(1) After a final judgment of disbarment or suspension, including a disbarment or suspension on a Notice of Discipline, the respondent shall immediately cease the practice of law in Georgia and shall, within 30 days, notify all clients of his inability to represent them and of the necessity for promptly retaining new counsel, and shall take all actions necessary to protect the interests of his clients. Within 45 days after a final judgment of disbarment or suspension, the respondent shall certify to the Court that he has satisfied the requirements of this Rule. Should the respondent fail to comply with the requirements of this Rule, the Supreme Court of Georgia, upon its own motion or upon motion of the Office of the General Counsel, and after ten days notice to the respondent and proof of his failure to notify or protect his clients, may hold the respondent in contempt and, pursuant to Rule 4-228, order that a member or members of the State Bar of Georgia take charge of the files and records of the respondent and proceed to notify all clients and to take such steps as seem indicated to protect their interest. Motions for reconsideration may be taken from the issuance or denial of such protective order by either the respondent or by the State Bar of Georgia.

(2) After a final judgment of disbarment or suspension under Part IV of these Rules, including a disbarment or suspension on a Notice of Discipline, the respondent shall take such action necessary to cause the removal of any indicia of the respondent as a lawyer, legal assistant, legal clerk or person with similar status. In the event the respondent should maintain a presence in an office where the practice of law is conducted, the respondent shall not:

(i) have any contact with the clients of the office either in person, by telephone, or in writing; or

(ii) have any contact with persons who have legal dealings with the office either in person, by telephone, or in writing.

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

(a) Upon a final judgment of disbarment or suspension, notice of the action taken shall be given by the Office of the General Counsel of the State Bar of Georgia to the clerks of all courts of record in this State and to the Secretary of the State Bar of Georgia, and the name of the Respondent in question shall be stricken from the rolls of said courts and from the rolls of the State Bar of Georgia either permanently, in case of disbarment, or for the prescribed period in case of suspension.

(b) Review Panel Reprimands shall be administered before the Panel by the chairperson or his or her designee.

(c) Public Reprimands shall be prepared by the Review Panel, the Chairperson of the Review Panel or his or her designee, and shall be read in open court, in the presence of the Respondent, by the judge of the superior court in the county in which the Respondent resides or in the county in which the disciplinary infraction occurred, with the location to be specified by the Review Panel, subject to the approval of the Supreme Court of Georgia.

(d) After a Public or Review Panel Reprimand has been administered, a certificate reciting the fact of the administration of the reprimand and the date of its administration shall be filed with the Supreme Court of Georgia. There shall be attached to such certificate a copy of the reprimand. Both the certificate and the copy of the reprimand shall become a part of the record in the disciplinary proceeding.

(e) In the event of a final judgment of acquittal, the State Bar of Georgia shall, if directed by the Respondent, give notice thereof to the clerk of the superior court of the county in which the Respondent resides. The Respondent may give reasonable public notice of the judgment or acquittal.

**Rule 4-221. Procedures.**

(a) Oaths. Before entering upon his or her duties as herein provided, each member of the State Disciplinary Board and each Special Master shall subscribe to an oath to be administered by any person authorized to administer oaths under the laws of this State, such oath to be in writing and filed with the Executive Director of the State Bar of Georgia. The form of such oath shall be:

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

(b) Witnesses and Evidence; Contempt.

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

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

(i) disregard, in any manner whatever, of a subpoena issued pursuant to Rule 4-221(b) (1);

(ii) refusal to answer any pertinent or proper question of a Special Master or Board member, or

(iii) wilful or flagrant violation of a lawful directive of a Special Master or Board member.

It shall be the duty of the chairperson of the affected Panel or Special Master to report the fact to the Chief Judge of the superior court in and for the county in which said investigation, trial or hearing is being held. The superior court shall have jurisdiction of the matter and shall follow the procedures for contempt as are applicable in the case of a witness subpoenaed to appear and give evidence on the trial of a civil case before the superior court under the laws in Georgia.

(3) Any member of the State Disciplinary Board and any Special Master shall have power to administer oaths and affirmations and to issue any subpoena herein provided for.

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

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

and said fees shall be assessed against the parties to the proceedings under the rule of law applicable to civil suits in the superior courts of this State.

(6) Whenever the deposition of any person is to be taken in this State pursuant to the laws of another state, territory, province or commonwealth, or of the United States or of another country for use in attorney discipline, fitness or disability proceedings there, the chairperson of the Investigative Panel, or his or her designee upon petition, may issue a summons or subpoena as provided in this Rule to compel the attendance of witnesses and production of documents at such deposition.

(c) Venue of Hearings.

(1) The hearings on all complaints and charges against resident respondents shall be held in the county of residence of the respondent unless he or she otherwise agrees.

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

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

(d) Confidentiality of Investigations and Proceedings.

(1) The State Bar of Georgia shall maintain as confidential all disciplinary investigations and proceedings pending at the screening or investigative stage, unless otherwise provided by these Rules.

(2) After a proceeding under these Rules is filed with the Supreme Court of Georgia, all evidentiary and motions hearings shall be open to the public and all reports rendered shall be public documents.

(3) Nothing in these Rules shall prohibit the complainant, respondent or third party from disclosing information regarding a disciplinary proceeding, unless otherwise ordered by the Supreme Court of Georgia or a Special Master in proceedings under these Rules.

(4) The Office of the General Counsel of the State Bar of Georgia or the Investigative Panel of the State Disciplinary Board may reveal or authorize disclosure of information which would otherwise be confidential under this Rule under the following circumstances:

(i) In the event of a charge of wrongful conduct against any member of the State Disciplinary Board or any person who is otherwise

connected with the disciplinary proceeding in any way, either Panel of the Board or its chairperson or his or her designee, may authorize the use of information concerning disciplinary investigations or proceedings to aid in the defense against such charge.

(ii) In the event the Office of the General Counsel receives information that suggests criminal activity, such information may be revealed to the appropriate criminal prosecutor.

(iii) In the event of subsequent disciplinary proceedings against a lawyer, the Office of the General Counsel may, in aggravation of discipline in the pending disciplinary case, reveal the imposition of confidential discipline under Rules 4-205 to 4-208 and facts underlying the imposition of discipline.

(iv) A complainant or lawyer representing the complainant may be notified of the status or disposition of the complaint.

(v) When public statements that are false or misleading are made about any otherwise confidential disciplinary case, the Office of the General Counsel may disclose all information necessary to correct such false or misleading statements.

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

(i) The Committee on the Arbitration of Attorney Fee Disputes or the comparable body in other jurisdictions;

(ii) The Trustees of the Clients' Security Fund or the comparable body in other jurisdictions;

(iii) The Judicial Nominating Commission or the comparable body in other jurisdictions;

(iv) The Lawyer Assistance Program or the comparable body in other jurisdictions;

(v) The Board to Determine Fitness of Bar Applicants or the comparable body in other jurisdictions;

(vi) The Judicial Qualifications Commission or the comparable body in other jurisdictions;

(vii) The Executive Committee with the specific approval of the following representatives of the Investigative Panel of the State

Disciplinary Board: the chairperson, the vice-chairperson and a third representative designated by the chairperson;

(viii) The Formal Advisory Opinion Board;

(ix) The Consumer Assistance Program;

(x) The General Counsel Overview Committee;

(xi) An office or committee charged with discipline appointed by the United States Circuit or District Court or the highest court of any state, District of Columbia, commonwealth or possession of the United States; and

(xii) The Unlicensed Practice of Law.

(6) Any information used by the Office of the General Counsel in a proceeding under Rule 4-108 or in a proceeding to obtain a Receiver to administer the files of a member of the State Bar of Georgia, shall not be confidential under this Rule.

(7) The Office of the General Counsel may reveal confidential information when required by law or court order.

(8) The authority or discretion to reveal confidential information under this Rule shall not constitute a waiver of any evidentiary, statutory or other privilege which may be asserted by the State Bar of Georgia or the State Disciplinary Board under Bar Rules or applicable law.

(9) Nothing in this Rule shall prohibit the Office of the General Counsel or the Investigative Panel from interviewing potential witnesses or placing the Notice of Investigation out for service by sheriff or other authorized person.

(10) Members of the Office of the General Counsel and State Disciplinary Board may respond to specific inquiries concerning matters that have been made public by the complainant, respondent or third parties but are otherwise confidential under these Rules by acknowledging the existence and status of the proceeding.

(11) The State Bar of Georgia shall not disclose information concerning discipline imposed on a lawyer under prior Supreme Court Rules that was confidential when imposed, unless authorized to do so by said prior Rules.

(e) Burden of Proof; Evidence.

(1) In all proceedings under this Chapter the burden of proof shall be on the State Bar of Georgia, except for proceedings under Rule 4-106.

(2) In all proceedings under this chapter occurring after a finding of probable cause as described in Rule 4-204.4, the procedures and rules of evidence applicable in civil cases under the laws of Georgia shall apply, except that the quantum of proof required of the State Bar of Georgia shall be clear and convincing evidence.

(f) Pleadings and Copies. Original pleadings shall be filed with the Clerk of the State Disciplinary Board at the headquarters of the State Bar of Georgia and copies served upon the Special Master and all parties to the disciplinary proceeding. Depositions and other original discovery shall be retained by counsel and shall not be filed except as permitted under the Uniform Superior Court Rules.

(g) Pleadings and Communications Privileged. Pleadings and oral and written statements of members of the State Disciplinary Board, members and designees of the Lawyer Assistance Program, Special Masters, Bar counsel and investigators, complainants, witnesses, and respondents and their counsel made to one another or filed in the record during any investigation, intervention, hearing or other disciplinary proceeding under Part IV, and pertinent to the disciplinary proceeding, are made in performance of a legal and public duty, are absolutely privileged, and under no circumstances form the basis for a right of action.

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

(a) No proceeding under Part IV, Chapter 2, shall be brought unless a Memorandum of Grievance has been received at State Bar of Georgia headquarters or instituted by the Investigative Panel within four years after the commission of the act. Provided, however, this limitation shall be tolled during any period of time, not to exceed two years, that the offender or the offense is unknown, the offender's whereabouts are unknown, or the offender's name is removed from the roll of those authorized to practice law in this State.

(b) Referral of a matter to the Investigative Panel by the Office of the General Counsel shall occur within twelve months of the receipt of the Memorandum of Grievance at State Bar of Georgia headquarters or institution of a Memorandum of Grievance by the Investigative Panel.

#### **Rule 4-223. Advisory Opinions.**

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

(b) It shall be considered as mitigation to any grievance under these rules that the respondent has acted in accordance with and in reasonable reliance upon a written



Informal Advisory Opinion requested by the Respondent pursuant to Rule 4-401 or a Formal Advisory Opinion issued pursuant to Rule 4-403, but not reviewed by the Supreme Court of Georgia.

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

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

(1) those grievances closed by the Office of the General Counsel after screening pursuant to Rule 4-202(c) shall be expunged after one year;

(2) those grievances dismissed by the Investigative Panel of the State Disciplinary Board after a probable cause investigation pursuant to Rule 4-204 (a) shall be expunged after two years; and

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

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

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

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

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

(f) A lawyer may respond in the negative when asked if he or she has ever been professionally disciplined or determined to have violated any professional

disciplinary rules if all grievances filed against the lawyer have either been dismissed or dismissed with a letter of instruction.

**Rule 4-225. Jurisdiction.**

The State Disciplinary Board and any person who is connected with disciplinary proceedings in any way shall not be subject to the jurisdiction of any court other than the Supreme Court of Georgia with respect thereto, except as provided in Rules 4-214, 4-215 and 4-216.

**Rule 4-226. Immunity.**

The regulatory proceedings of the State Bar of Georgia are judicial in nature. Therefore, members of the State Disciplinary Board, members and designees of the Committee on Lawyer Impairment, Special Masters, Bar counsel, special prosecutors, investigators and staff are entitled to judicial immunity when engaged in regulatory activities.

**Rule 4-227. Petitions for Voluntary Discipline.**

(a) A petition for voluntary discipline shall contain admissions of fact and admissions of conduct in violation of Part IV, Chapter 1 of these Rules sufficient to authorize the imposition of discipline.

(b) Prior to the issuance of a formal complaint, a respondent may submit a petition for voluntary discipline seeking any level of discipline authorized under these Rules.

(1) Those petitions seeking private discipline shall be filed with the Office of the General Counsel and assigned to a member of the Investigative Panel. The Investigative Panel of the State Disciplinary Board shall conduct an investigation and determine whether to accept or reject the petition as outlined at Rule 4-203 (a) (9).

(2) Those petitions seeking public discipline shall be filed directly with the Clerk of the Supreme Court of Georgia. The Office of the General Counsel shall have 30 days within which to file a response. The Court shall issue an appropriate order.

(c) After the issuance of a formal complaint a respondent may submit a petition for voluntary discipline seeking any level of discipline authorized under these Rules.

(1) The petition shall be filed with the Clerk of the State Disciplinary Board at the headquarters of the State Bar of Georgia and copies served upon the Special Master and all parties to the disciplinary proceeding. The Special Master shall allow Bar counsel 30 days within which to respond. The Office of the General Counsel may assent to the petition or may file a response, stating objections and giving the reasons therefor. The Office of the General Counsel shall serve a copy of its response upon the respondent.

(2) The Special Master shall consider the petition, the State Bar of Georgia's response, and the record as it then exists and may accept or reject the petition for voluntary discipline.

(3) The Special Master may reject a petition for such cause or causes as seem appropriate to the Special Master. Such causes may include but are not limited to a finding that:

(i) the petition fails to contain admissions of fact and admissions of conduct in violation of Part IV, Chapter 1 of these Rules sufficient to authorize the imposition of discipline;

(ii) the petition fails to request appropriate discipline;

(iii) the petition fails to contain sufficient information concerning the admissions of fact and the admissions of conduct;

(iv) the record in the proceeding does not contain sufficient information upon which to base a decision to accept or reject.

(4) The Special Master's decision to reject a petition for voluntary discipline does not preclude the filing of a subsequent petition and is not subject to review by either the Review Panel or the Supreme Court of Georgia. If the Special Master rejects a petition for voluntary discipline, the disciplinary case shall proceed as provided by these Rules.

(5) If the Special Master accepts the petition for voluntary discipline, he or she shall enter a report making findings of fact and conclusions of law and deliver same to the Clerk of the State Disciplinary Board. The Clerk of the State Disciplinary Board shall file the report and the complete record in the disciplinary proceeding with the Clerk of the Supreme Court of Georgia. A copy of the Special Master's report shall be served upon the respondent. The Supreme Court of Georgia shall issue an appropriate order.

(6) Pursuant to Rule 4-210 (5), the Special Master may in his or her discretion extend any of the time limits in these Rules in order to adequately consider a petition for voluntary discipline.

#### **Rule 4-228. Receiverships.**

(a) Definitions

Absent Attorney - A member of the State Bar of Georgia (or a foreign or domestic lawyer authorized to practice law in Georgia) who shall have disappeared, died, become disbarred, disciplined or incarcerated, or become so impaired as to be unable to properly represent his or her clients or as to pose a substantial threat of harm to his or her clients or the public as to justify appointment of a Receiver hereunder by the Supreme Court of Georgia.

(b) Appointment of a Receiver

(1) Upon a final determination by the Supreme Court of Georgia, on a petition filed by the State Bar of Georgia, that an attorney has become an Absent Attorney, and that no partner, associate or other appropriate representative is available to notify his or her clients of this fact, the Supreme Court of Georgia may order that a member or members of the State Bar of Georgia be appointed as Receiver to take charge of the Absent Attorney's files and records. Such Receiver shall review the files, notify the Absent Attorney's clients and take such steps as seem indicated to protect the interests of the clients and the public. A motion for reconsideration may be taken from the issuance or denial of such protective order by the respondent, his or her partners, associates or legal representatives or by the State Bar of Georgia.

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

(3) The Receiver shall be entitled to release to each client the papers, money or other property to which the client is entitled. Before releasing the property, the Receiver may require a receipt from the client for the property.

(c) Applicability of Attorney-Client Rules

(1) Confidentiality—The Receiver shall not be permitted to disclose any information contained in the files and records in his or her care without the consent of the client to whom such file or record relates, except as clearly necessary to carry out the order of the Supreme Court of Georgia or, upon application, by order of the Supreme Court of Georgia.

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

(d) Trust Account

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

the trust account or accounts, the Receiver shall file quarterly with the Supreme Court of Georgia or its designee a report showing the activity in and status of said accounts.

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

(3) In determining ownership of funds in the trust accounts, including by subrogation or indemnification, the Receiver should act as a reasonably prudent lawyer maintaining a client trust account. The Receiver may (1) rely on a certification of ownership issued by an auditor employed by the Receiver; or (2) interplead any funds of questionable ownership into the appropriate Superior Court; or (3) proceed under the terms of the Disposition of Unclaimed Property Act (O.C.G.A. §44-12-190 et seq.). If the Absent Attorney's trust account does not contain sufficient funds to meet known client balances, the Receiver may disburse funds on a pro rata basis.

(e) Payment of Expenses of Receiver

(1) The Receiver shall be entitled to reimbursement for actual and reasonable costs incurred by the Receiver for expenses, including, but not limited to, (i) the actual and reasonable costs associated with the employment of accountants, auditors and bookkeepers as necessary to determine the source and ownership of funds held in the Absent Attorney's trust account, and (ii) reasonable costs of secretarial, postage, bond premiums, and moving and storage expenses associated with carrying out the Receiver's duties. Application for allowance of costs and expenses shall be made by affidavit to the Supreme Court of Georgia, or its designee, who may determine the amount of the reimbursement. The application shall be accompanied by an accounting in a form and substance acceptable to the Supreme Court of Georgia or its designee. The amount of reimbursement as determined by the Supreme Court of Georgia or its designee shall be paid to the Receiver by the State Bar of Georgia. The State Bar of Georgia may seek from a court of competent jurisdiction a judgment against the Absent Attorney or his or her estate in an amount equal to the amount paid by the State Bar of Georgia to the Receiver. The amount of reimbursement as determined by the Supreme Court of Georgia or its designee shall be considered as prima facie evidence of the fairness of the amount, and the burden of proof shall shift to the Absent Attorney or his or her estate to prove otherwise.

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

(f) Receiver-Client Relationship

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

(g) Unclaimed Files

(1) If upon completion of the Receivership there are files belonging to the clients of the Absent Attorney that have not been claimed, the Receiver shall deliver them to the State Bar of Georgia. The State Bar of Georgia shall store the files for six years, after which time the State Bar of Georgia may exercise its discretion in maintaining or destroying the files.

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

(h) Professional Liability Insurance

Only attorneys who maintain errors and omissions insurance that includes coverage for conduct as a Receiver may be appointed to the position of Receiver.

(i) Requirement of Bond

The Supreme Court of Georgia or its designee may require the Receiver to post bond conditioned upon the faithful performance of his or her duties.

(j) Immunity

(1) The Supreme Court of Georgia recognizes the actions of the State Bar of Georgia and the appointed Receiver to be within the Court's judicial and regulatory functions, and being regulatory and judicial in nature the State Bar of Georgia and Receiver are entitled to judicial immunity.

(2) The immunity recognized in paragraph (1) above shall not apply if the Receiver is employed by a client of the Absent Attorney to continue the representation.

(k) Service

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

**RULES OF CONDUCT AND PROCEDURE  
OF THE INVESTIGATIVE PANEL  
STATE DISCIPLINARY BOARD**

Pursuant to the powers and duties accorded it in Rule 4-203 (a)(8) in Part IV of the Rules and Regulations of the State Bar of Georgia, the Investigative Panel of the State Disciplinary Board of the State Bar of Georgia establishes the following rules of conduct and procedure.

**Rule 1. Oaths of Office.**

Members of the Investigative Panel of the State Disciplinary Board shall, upon their selection, be furnished by the Executive Director with the oath of office required of them, shall immediately sign the oath furnished to them, and shall return the signed oath of office to the Executive Director who will preserve the oaths in the records of the State Bar of Georgia at State Bar Headquarters.

**Rule 2. Powers and Duties.**

The Investigative Panel shall have such powers and perform such duties as are set forth in Part IV of the Rules and Regulations for the Organization and Government of the State Bar of Georgia, referred to as the "Bar Rules."

**Rule 3. Meetings.**

The Investigative Panel or a subcommittee thereof shall meet as outlined at Bar Rule 4-201(a)(4) and at such dates, times and places as may be set by the Panel or a subcommittee thereof. The Investigative Panel shall also meet at other times on the call of the chairperson of the Investigative Panel.

**Rule 4. Election of Officers; Powers and Duties.**

Pursuant to Bar Rule 4-201(a)(4), the Investigative Panel shall elect officers.

The chairperson or vice-chairperson acting as chairperson of a subcommittee shall also exercise such powers and assume such duties as are hereinafter provided. In case of the absence, disqualification or incapacity of the chairperson, the vice-chairperson shall assume the duties and powers of the chairperson. In case of a disqualification of both the chairperson and vice-chairperson while a Panel meeting is in session, the Panel shall vote upon a member to preside over the Panel's consideration of the matter at issue. In case of a disqualification of both the chairperson and vice-chairperson when the Panel is not in session, the president-elect of the State Bar of Georgia shall designate another member of the Panel to preside over the Panel's consideration of the matter at issue.

**Rule 5. Initiation of Grievances; Duties and Powers of the Office of the General Counsel.**

(a) All grievances against members of the State Bar of Georgia, other than those initiated by the Supreme Court of the State of Georgia or the Investigative Panel,

shall be in written memorandum form signed by the complainant. The grievance form which shall be used in all grievances considered by the Office of the General Counsel shall be approved by the Investigative Panel.

(b) All grievances properly submitted on grievance forms shall be referred to the Office of the General Counsel for initial screening and review. The Office of the General Counsel shall determine whether each grievance recites facts and assertions sufficient to allege the violation of one or more Georgia Rules of Professional Conduct listed in Part IV, Chapter 1 of the State Bar Rules.

(c) All grievances not otherwise found to be unjustified, frivolous, or patently unfounded and alleging the violation of one or more of the Georgia Rules of Professional Conduct contained in Part IV, Chapter 1, of the State Bar Rules shall be forwarded by the Office of the General Counsel to a member of the Investigative Panel for investigation as hereinafter provided. All other grievances shall be dismissed by the Office of the General Counsel.

(d) At every meeting of the Investigative Panel, the Office of the General Counsel shall report on the number of grievances it has dismissed since the previous meeting for failure to invoke the disciplinary jurisdiction of the State Bar. The Office of the General Counsel shall cause all grievances which it has received and which have been dismissed either by it or by the State Disciplinary Board to be kept on file at the headquarters of the State Bar of Georgia until expunged pursuant to Bar Rules 4-224(a)(1) and (2).

(e) When the Office of the General Counsel receives information that appears to invoke the disciplinary jurisdiction of the State Bar of Georgia, but no grievance form is filed, the information should be brought to the attention of the Panel for the Panel to consider instituting a grievance on its own motion pursuant to Bar Rule 4-203. The Office of the General Counsel shall use the guidelines set forth in the Bar Rules and these rules regarding the screening of grievance forms to determine when a matter should be brought to the attention of the Panel.

#### **Rule 6. Evaluation of Grievances; Selection of Investigative Members.**

Pursuant to Bar Rules 4-203(a)(14) and 4-204, the Investigative Panel hereby delegates to the Office of the General Counsel assignment of cases for investigation by individual members of the Investigative Panel. Such assignment shall be in the sound discretion of the Office of the General Counsel. In assigning cases, the Office of the General Counsel shall take into consideration the geographical proximity of the member to the Respondent lawyer and the number of active investigations for which the member has responsibility at the time of the assignment. No assignment shall be made to the president-elect of the State Bar of Georgia, the president-elect of the Young Lawyers Division of the State Bar of Georgia, the chairperson of the Investigative Panel or any lay member of the State Disciplinary Board without that member's prior approval.

#### **Rule 7. Investigation by the Investigative Panel.**



(a) All grievances assigned for investigation to a member of the Investigative Panel shall be served upon the Respondent lawyer with a Notice of Investigation and the enclosures outlined at Bar Rule 4-204.1

(b) The investigating member is authorized to furnish supplemental information to more fully apprise the Respondent lawyer of the charges against that Respondent. Service of the Notice of Investigation and grievance shall be as outlined at Bar Rule 4-204.2.

(c) The Respondent lawyer shall file a written, verified response to the grievance with the investigating member as outlined at Bar Rule 4-204.3.

(d) The investigation of a grievance assigned to a member of the Investigative Panel shall be within that member's exclusive jurisdiction. No other member of the Panel shall enter the investigation of the case or engage in ex parte communication concerning the merits of the case without the express prior authorization of the investigating member.

#### **Rule 8. Report of the Investigating Member.**

At each meeting of the Investigative Panel, each member who has been assigned a grievance for investigation shall report. If the member's investigation has been completed, the investigating member shall give an accounting of the form and substance of the investigation after which the member may recommend and the Panel shall determine either that probable cause does or does not exist.

The investigating member or the Office of the General Counsel shall make available to any member of the Panel so desiring a photocopy of the entire investigative file or any portion thereof.

#### **Rule 9. Investigation of Petitions for Voluntary Discipline.**

(a) If during the course of the investigation of a grievance by a member of the Investigative Panel, the Respondent lawyer submits a petition for voluntary discipline under State Bar Rule 4-203(a)(9), a copy shall be furnished to the investigating member and the Office of the General Counsel. The member may continue the investigation. The Office of the General Counsel shall file its recommendation on the petition with the investigating member.

(b) The investigating member shall report to the Investigative Panel on the petition for voluntary discipline and the Office of the General Counsel's recommendation at such time as the member makes a report under Rule 8.

(c) If the Investigative Panel votes to accept the petition for voluntary discipline, it shall impose confidential discipline under Rule 4-205.

### **Rule 10. Investigative Powers.**

In investigating grievances against members of the State Bar, the Investigative Panel shall have all of those powers enumerated in Part IV of the State Bar Rules. Each member of the Investigative Panel shall be authorized to issue oaths and affirmations and to issue subpoenas for the appearance of persons and for the production of things and records during the course of the investigation of a grievance against a member of the State Bar.

### **Rule 11. Report of the Findings of Probable Cause to the State Supreme Court.**

After a finding of probable cause, the chairperson may delegate authority for the preparation, execution and filing of the documents required by Bar Rule 4-204.4 to the Office of the General Counsel.

### **Rule 12. Original Pleadings.**

Each investigating member shall keep a file for each assigned case with the original documents gathered during the course of the investigation. When the investigating member completes an investigation and reports on the grievance as outlined at Rule 8, the file containing original documents shall be returned to the Office of the General Counsel.

### **Rule 13. Expedited Treatment for Certain Cases.**

(a) Upon receipt of sufficient evidence demonstrating that an attorney poses a substantial threat of harm to clients or the public, the Office of the General Counsel, with the approval of the immediate past president of the State Bar of Georgia and the chairperson of the Review Panel, or at the direction of the chairperson of the Investigative Panel, may petition the Supreme Court of Georgia for the suspension of the attorney pending disciplinary proceedings predicated upon the conduct causing such petition pursuant to the procedures outlined in Rule 4-108 of the State Bar Rules.

(b) After the Investigative Panel has found probable cause for the lodging of a formal complaint under Investigative Panel Internal Rule 11, any member may move that the case be given expedited treatment as outlined at Rule 4-108. If the majority of those members present vote to expedite the case, the Office of the General Counsel shall proceed as outlined in Rule 4-108.

### **Rule 14. Contempt Procedure.**

Contempt proceedings against any person who fails to appear and give testimony or to produce books, papers, or documents, or who refuses to appear to testify before the Investigative Panel, its subcommittees, or any member thereof after being subpoenaed to do so, shall be as outlined at Rule 4-221(b).

**Rule 15. Challenges to the Competency, Qualifications or Objectivity of Investigative Panel Members.**

(a) A Respondent lawyer shall have the right to challenge the competency, qualifications or objectivity of any member of the Investigative Panel considering the grievance. Within ten (10) days after receipt of the Notice of Investigation pursuant to Rule 4-204.1, the Respondent lawyer shall deliver to the Clerk of the State Disciplinary Board written objection to the competency, qualifications or objectivity of any member of the Investigative Panel. The objection shall set forth the factual basis for the challenge. The challenged member may answer the Respondent lawyer's objection in writing and shall mail the answer to the Respondent lawyer and the Clerk of the State Disciplinary Board. At its next meeting, the Investigative Panel shall excuse the challenged member from the meeting room and consider the objection. The affirmative vote of three (3) members shall be sufficient to sustain the objection.

(b) Any member of the Investigative Panel shall have the right to decline to participate when the Panel considers a grievance.

**Rule 16. Letters of Admonition and Reprimands.**

The Investigative Panel shall have the power to issue formal letters of admonition and Investigative Panel reprimands in lieu of the recommendation of other discipline upon the conditions set forth at Rule 4-205.

**Rule 17. Nonresident Members; Venue of Hearing for Special Master.**

Venue of hearings shall be as set forth at Bar Rule 4-221(c).

**Rule 18. Extension of Time Within Which a Formal Complaint May Be Filed.**

The chairperson or chair-designee may extend the time within which the Office of the General Counsel may file a formal complaint with the Supreme Court of Georgia for good cause shown.

**Rule 19. Notification to Complainants.**

The Investigative Panel shall notify the complainant or complainants of the disposition of the grievance.

**Rule 20. Files.**

A file shall be opened for all matters which may come before the Investigative Panel for consideration. When such matters are closed, such files shall be expunged in accordance with Rule 4-224.

**Rule 21. Violation of Criminal Statute.**

In the event the charge against a Respondent lawyer amounts to a violation of a criminal statute, the Investigative Panel may direct the Office of the General Counsel to refer the matter to the appropriate district attorney for criminal prosecution and the Investigative Panel may defer any further action to await the disposition of the criminal charge.

**Rule 22. Appearances Before the Investigative Panel.**

It shall be the policy of the Investigative Panel not to permit personal appearances before the Panel or its subcommittees at meetings, except as otherwise specifically provided in these Rules. Any presentations to the Panel or any subcommittee thereof should be by brief, memorandum or in other written form, unless otherwise decided by a majority vote of the Investigative Panel members present at a meeting at which a personal appearance is requested.

**Rule 23. Chairperson's Review of Screening Decisions.**

When requested to do so by the complainant, the Chairperson of the Investigative Panel shall have discretionary authority to review a decision of the Office of the General Counsel to dismiss a grievance under Bar Rule 4-202(c). If the Chairperson agrees with the decision to dismiss the grievance, the complainant shall be notified of that decision in writing. If the Chairperson disagrees with the decision to dismiss the grievance, the grievance shall be forwarded to the Investigative Panel or subcommittee under Bar Rule 4-202(c) and 4-204.

**Rule 24. Review of Newly Discovered Evidence.**

After the grievance has been considered by the Panel, the Office of the General Counsel may refer a grievance back to the Investigating member of the Panel upon the request of either the complainant or the Respondent when that person has presented newly discovered evidence. The investigating member, in the member's sound discretion may review the newly discovered evidence and decide if the matter should be presented to the entire Panel. If the investigating member is no longer on the Panel, the Chairperson may review the newly discovered evidence.

**Rule 25. Removal of Panel Members.**

(a) Any Investigative Panel member who is absent from either three (3) consecutive meetings of the sub-committee to which that member is assigned or any four (4) meetings of that member's sub-committee in a calendar year, shall be considered for removal by the Panel, in Executive Session, at the next meeting of the Panel following said absences. Any such Panel member shall be removed from the Investigative Panel, unless the Panel determines, by majority vote, that bona fide, unavoidable reasons exist for some or all of the absences, and that such Panel member is not in violation of the case handling time limits set forth in sub-paragraph (b). Panel members may receive credit for attending a meeting of the sub-committee to which they are not assigned.

(b) Any Panel member who has, after any two meetings of the Panel in a calendar year, more than three (3) cases in excess of 180 days old, measured from the date of service of the Respondent, shall be considered for removal in Executive Session, at the next meeting of the Panel following said occurrence. Any such Panel member shall be removed from the Investigative Panel, unless the Panel determines, by majority vote, that bona fide, unavoidable reasons exist for the lack of resolution of some or all of the unresolved cases in question, and that such Panel member has met the attendance requirements set forth in sub-paragraph (a). The Panel may grant extensions of time, for good and sufficient reasons, to complete the investigation of any case.

(c) The Panel member being considered for removal shall not vote on the issue of removal, and shall not be present during the Panel's deliberation and vote. The Panel member under consideration may address the Panel in writing, or personally, prior to the Panel's deliberation and vote.

(d) The failure of a Panel member to comply with any of the provisions of this Rule shall not have any effect whatsoever upon the resolution of any case by the Panel and shall not operate as a defense to the Panel's ruling on the part of any Respondent.

(e) The vacancy created by any Panel member who is removed from the Investigative Panel under the provisions of this Rule shall be filled by appointment of the current President of the State Bar of Georgia.

#### **Rule 26. Pending Civil Litigation.**

In those grievances where there is related civil litigation pending, the Panel may, in its discretion, defer action on the matter until the civil litigation is completed.

#### **Rule 27. Disqualification.**

No member of the Investigative Panel or the Review Panel of the State Disciplinary Board shall represent a Respondent in any phase of an attorney disciplinary proceeding. If a Panel member's partners or associates represent a Respondent in any phase of an attorney disciplinary proceeding, then the Panel member is automatically recused from determination, investigation, or review regarding Respondent's case during all phases of the disciplinary proceeding.

### **RULES OF CONDUCT AND PROCEDURE OF THE REVIEW PANEL STATE DISCIPLINARY BOARD**

Pursuant to the powers and duties accorded it in Rule 4-203 (b) (3) in Part IV of the Rules and Regulations of the State Bar of Georgia, the Review Panel of the State Disciplinary Board of the State Bar of Georgia establishes the following Rules of Conduct and Procedure. (Amended June 17, 2016.)

### **Rule 1. Oaths of Office.**

Members of the Review Panel of the State Disciplinary Board shall, upon their selection, be furnished by the Office of General Counsel with the oath of office required of them, shall immediately sign the oath furnished to them, and shall return the signed oath of office to the Clerk of the State Disciplinary Board who will preserve the oaths in the records of the State Bar of Georgia at State Bar Headquarters.

### **Rule 2. Powers and Duties.**

The Review Panel shall have such powers and perform such duties as are set forth in Part IV of the Rules and Regulations for the Organization and Government of the State Bar of Georgia as approved by the Supreme Court of the State of Georgia on November 30, 1976, and subsequently amended. The said rules are hereinafter referred to as the "Bar Rules."

### **Rule 3. Meetings.**

The Review Panel shall meet at such times and places as may be set by the Panel. The Review Panel shall also meet at other times on the call of the chairperson of the Review Panel or of the president-elect of the State Bar of Georgia.

### **Rule 4. Election of Offices; Powers and Duties.**

At its first meeting subsequent to the Annual Meeting of the State Bar of Georgia, the membership of the Review Panel shall elect a chairperson and a vice-chairperson. The chairperson shall preside at all meetings of the Review Panel and shall serve until a successor is elected or the chairperson's term on the Review Panel expires.

The chairperson shall also exercise such powers and assume such duties as are hereinafter provided. In case of the absence, disqualification or incapacity of the chairperson, the vice-chairperson shall assume the duties and powers of the chairperson. In case of a disqualification of both the chairperson and vice-chairperson, the president-elect of the State Bar of Georgia shall designate another member of the Board to preside over the Panel's consideration of the matter at issue.

### **Rule 5.**

This rule is reserved.

### **Rule 6. Original Pleadings.**

Original pleadings shall be filed with the Clerk of the State Disciplinary Board at the headquarters of the State Bar of Georgia. Bar Counsel and the respondent lawyer shall be responsible for serving copies of all pleadings on the special master and all parties to the disciplinary proceeding. The original pleadings shall be maintained at the headquarters of the State Bar of Georgia by the Clerk of the State Disciplinary Board

until the Clerk files the record in the case with the Supreme Court pursuant to Bar Rule 4-217 (c) or 4-218 (f).

### **Rule 7. Review of the Report of the Special Master.**

(a) If a party requests review by the Review Panel pursuant to Rule 4-217 (d), the Clerk of the State Disciplinary Board or a designee of the Clerk shall cause copies of the report of special master and the complete record in the case to be delivered to the members of the Review Panel. Pursuant to Rule 4-218 (a), the Review Panel shall consider the record and the findings of fact and conclusions of law of the special master.

(b) At the time the report of the Special Master and the record in the case are transmitted to the Panel members, the Office of General Counsel shall notify the Respondent in writing of his or her rights under Bar Rule 4-218. Specifically, the Respondent shall be advised of his or her right to challenge the competency, qualifications, or objectivity of any Panel member and shall be provided the names and addresses of all Panel members.

(c) The Review Panel may grant rehearings or new trials either before itself or before a special master on such issues and within such times as appear to it appropriate to serve the ends of justice. A majority vote of those members present shall be sufficient to order a rehearing or new trial except that there may be no de novo hearing before the Review Panel without its unanimous vote with the consent of the respondent lawyer.

(d) The Review Panel may consider exceptions to the report of the special master. Exceptions and briefs shall be filed with the Clerk of the State Disciplinary Board within 30 days of the filing of the Special Master's report in accordance with Bar Rule 4-217(d). The responding party shall have 30 days after service of the exceptions within which to respond.

(e) The Review Panel may in its discretion grant oral argument. Either party may request oral argument by filing such request with the Clerk of the State Disciplinary Board at the time exceptions and responses to exceptions are filed. The Clerk of the State Disciplinary Board shall notify the Chair of the Review Panel upon the filing of a request for oral argument. A subcommittee consisting of the chairperson, vice-chairperson and the reviewing Panel member shall review the request and shall decide the issue at least ten days prior to the meeting of the Panel at which the case will be considered, and shall notify the parties of the subcommittee's decision. Any decision denying oral argument shall be subject to review by the entire Review Panel.

### **Rule 8. Report to the Supreme Court and Recommendation of Discipline.**

After completion of its review of the final report of the special master or review of a disciplinary proceeding, the Review Panel shall prepare a report and recommendation to the Supreme Court. The Review Panel may delegate responsibility for the preparation of its report to any member of the Panel or to either party.

The Review Panel shall file the report of the Review Panel with the Clerk of the State Disciplinary Board within 30 days after the Review Panel has completed its review and serve a copy of the report on the parties to the disciplinary proceeding. The Clerk shall promptly file the report of the Review Panel and the complete record with the Clerk of the Supreme Court and issue a certificate of filing to the parties and the Chair of the Review Panel.

In the event the report of the Review Panel is not filed with the Clerk of the State Disciplinary Board within 30 days after the Panel has completed its review and made a recommendation, the Chair of the Review Panel shall advise the Supreme Court and the parties stating the reason for the delay and the anticipated date the report will be filed.

### **Rule 9. Notice of Punishment.**

Upon a final judgment by the Supreme Court of Georgia of disbarment, suspension or acceptance of a petition for voluntary surrender of license for disciplinary reasons, the Office of the General Counsel shall cause notice of the action to be given to the clerks of all courts of record in the State of Georgia. The said notice shall direct that the name of the respondent lawyer be stricken from the rolls of the court and from the State Bar of Georgia either permanently in the case of disbarment or voluntary surrender of license or for a prescribed period in the case of suspension.

### **Rule 10. Preparation of Reprimands.**

(a) Upon final judgment of reprimand, either public or Review Panel, by the State Supreme Court, the chairperson shall cause to be prepared a written reprimand. The chairperson may delegate responsibility for preparing written reprimands to the Office of the General Counsel or any Panel member, but such written reprimand shall be reviewed and approved by the chairperson prior to administration to the respondent lawyer.

(b) In the case of public reprimands, the chairperson shall forward the written reprimand through the Office of the General Counsel to the chief judge of the superior court in the county where the reprimand is to be administered in accordance with State Bar Rule 4-220 (c).

(c) In the case of Review Panel reprimands, the chairperson or his/her designee shall administer the reprimand at a subsequent meeting of the Review Panel. The chairperson shall be authorized to compel the attendance of the respondent lawyer by subpoena.

### **Rule 11.**

This rule is reserved.

### **Rule 12.**



This rule is reserved.

**Rule 13. Contempt Procedure.**

Whenever any person subpoenaed to appear and give testimony or to produce books, papers, or documents required by such subpoena shall refuse to appear before the Review Panel, or any member thereof, or to answer any pertinent or proper question, or whenever any person shall wilfully and flagrantly violate a lawful directive of any member of the Review Panel, then such person shall be deemed in contempt of the Review Panel and it shall be the duty of the chairperson to report the fact to the superior court in and for the county in which the said investigation is being held; and thereupon, the said court shall issue an attachment in a usable form in said superior court directed to the sheriff of said county commanding him or her to attach such person and forthwith bring him or her before such court. On the return of said attachment and the production of the person attached, the superior court shall have jurisdiction of the matter and the person may purge him or herself of the contempt in the same way and the same proceedings shall be had and penalties may be imposed and the same punishment inflicted as in the case of a witness subpoenaed to appear and give evidence on the trial of a civil cause before any superior court under the existing laws of the State of Georgia.

**Rule 14. Challenges to the Competency, Qualifications or Objectivity of Review Panel.**

(a) A respondent lawyer shall have the right to challenge the competency, qualifications or objectivity of any member of the Review Panel considering the complaint against him or her. Within ten (10) days after the Special Master's report or a Notice of Reciprocal Discipline is transmitted to the Review Panel, the respondent lawyer may file written objection to the competency, qualifications or objectivity of any member or members of the Review Panel setting forth the factual basis for the challenge. The respondent lawyer shall serve a copy of the challenge on each member of the Review Panel and on the Office of the General Counsel.

The challenged member shall have the right to answer the respondent lawyer's challenge in writing at his or her option. Any such answer shall be served on the remaining members of the Review Panel, the respondent lawyer and the Office of the General Counsel.

At its next meeting, the Review Panel shall excuse the challenged member from the meeting room and consider the challenge. The affirmative vote of three members that the challenged member should be excluded shall be sufficient to sustain the challenge.

(b) Any member of the Review Panel shall have the right to withdraw voluntarily from consideration of any complaint in which his or her competency, qualifications or objectivity are challenged by the respondent lawyer.

**Rule 15. Publication.**

The Office of the General Counsel shall publish in one issue of an official publication of the State Bar of Georgia the names of persons against whom orders of disbarment, suspension or public reprimand have become final.

**Rule 16.**

This rule is reserved.

**Rule 17. Removal of Panel Members.**

Any Review Panel member who is absent from either three consecutive Review Panel meetings or any four meetings in a calendar year, shall be removed from the Review Panel. The vacancy shall be filled by appointment of the current President of the State Bar of Georgia.

**Rule 18. Disqualification.**

No member of the Review Panel of the State Disciplinary Board shall represent a respondent in any phase of an attorney disciplinary proceeding. If a Panel member's partners or associates represent a respondent in any phase of an attorney disciplinary proceeding, then the Panel member is automatically recused from determination, investigation, or review regarding the case during all phases of the disciplinary proceeding.

**Rule 19. Petitions for Reinstatement.**

A Petition for Reinstatement shall be filed with the Clerk of the State Disciplinary Board in accordance with Bar Rule 4-221 (f). The Office of General Counsel shall have 20 days after service of the Petition to respond. When all responses and reports have been filed, the record shall be delivered to the Review Panel by the Clerk of the State Disciplinary Board.

**RULES OF THE CLERK  
OF THE STATE DISCIPLINARY BOARD**

**Rule 1. Office of the Clerk.**

In accordance with Bar Rule 4-221(f), pleadings or documents in disciplinary cases pending before a Special Master shall be filed with the Clerk of the State Disciplinary Board at the headquarters of the State Bar of Georgia at its offices in Atlanta, Georgia.

**Rule 2. Hours.**

The Clerk's Office is open from 8:30 a.m. until 4:30 p.m. Monday through Friday, except legal holidays, to accept documents or pleadings for filing. There is no drop box or filing after hours.

### **Rule 3. Filing.**

Pleadings or documents may be mailed or delivered to the Clerk's Office for filing. A document or pleading will be filed when actually received by or delivered to the Clerk's Office during the days and times the Clerk's Office is open, except that documents are deemed filed on the day when deposited with the United States Postal Service for delivery by certified mail or when delivered to a commercial delivery service for overnight delivery, as provided in Supreme Court Rule 1.5.

### **Rule 4. Originals.**

Only original documents or pleadings will be accepted for filing. Letters, or copies of letters, unless attached as exhibits to pleadings or hearing transcripts, will not be accepted for filing. Copies of documents, pleadings, or letters not attached to pleadings or transcripts will be returned and not filed. Pleadings are not accepted for filing by facsimile or electronic mail.

### **Rule 5. Docket Numbers.**

Original pleadings or other documents shall bear the appropriate State Disciplinary Board docket number. In cases not consolidated by prior order of the Investigative Panel, the Special Master, or the Supreme Court, an original pleading or other document shall be filed in each separate docket number, as appropriate. If an original document or pleading lists more than one docket number, the original will be filed with the disciplinary case file of the first listed docket number.

### **Rule 6. Discovery Documents.**

As provided in Bar Rule 4-221(f), depositions and other original discovery shall not be filed, except in accordance with the Uniform Rules of the Superior Court.

### **Rule 7. Number of Copies.**

Along with the original of a document or pleading for filing, attorneys shall furnish the Clerk with two copies. Attorneys desiring file-marked copies of documents or pleadings filed in a disciplinary case shall furnish to the Clerk a self-addressed and stamped envelope.

### **Rule 8. Certificate of Service.**

In formal complaint proceedings, copies of all pleadings shall be served on the Special Master or the members of the Investigative Panel or the Review Panel, as appropriate, as well as on all parties to the disciplinary proceeding. Pleadings presented

to the Clerk for filing shall bear a certificate of service, signed by counsel for the party, or the Respondent if proceeding *pro se*, showing service on all parties and on the Special Master or the members of the Investigative Panel or the Review Panel, as appropriate. Pleadings not bearing a certificate of service will be returned and not filed.

**Rule 9. Removal of Files.**

The file of original documents and pleadings may not be removed from the office of the Clerk of the State Disciplinary Board, except by order of the Supreme Court, the Special Master, a panel of the State Disciplinary Board, or when the original is filed with the Clerk of the Supreme Court for its review pursuant to Bar Rule 4-219.

**Rule 10. Filing of Record in the Supreme Court.**

Once the record of a disciplinary proceeding is filed with the Supreme Court in accordance with Bar Rule 4-219, all pleadings shall be filed with the Clerk of the Supreme Court and directed to the Court. Any document or pleading submitted after the record has been transmitted to the Supreme Court shall be returned and not filed, except on order of the Supreme Court.

**Rule 11. Inspection and Copies of Files.**

The files of disciplinary cases maintained by the Clerk of the State Disciplinary Board and docketed by the Supreme Court may be inspected by prior arrangement with the Clerk's Office. Copies of pleadings or other documents filed with the Clerk may be obtained by first paying \$1 for the first, and 25 cents for each subsequent, page of the disciplinary case record requested. The Clerk may certify copies of pleadings or other documents filed with the Clerk as true copies. Copies of a disciplinary case record already filed with the Supreme Court must be sought from the Clerk of the Supreme Court.