

ETHICAL CONSIDERATIONS IN PERSONAL INJURY CASES

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GENERAL OVERVIEW

When one considers ethics, the attorney-client relationship first springs to mind. The sanctity of the attorney-client privilege hinges on open discussion between the client and his/her attorney. Without open discussion, a client will be guarded in his/her disclosures, and the attorney cannot effectively represent the client's interests without full disclosure. However, if another person is present during the communications between the client and attorney, then the client's privilege may be waived. (Attorney-Client Relationship, n.d.)¹

The ethical rules outline the basic tenet that all attorneys know- confidence is a hallmark of the attorney-client relationship- and outline the expectations of attorneys in their relationship with the client. So important is the privilege that it survives the client even after death. (Michmerhuizen, 2007). The attorney must balance client confidentiality with his/her own protection. Of course, a lawyer cannot support a client's criminal conduct or advise the client in furtherance of the criminal conduct.²

Though some states require mandatory disclosure in certain situations, discretionary rules allow the attorney-client privilege to remain intact while giving an alternative option for the attorney to protect the public and himself/herself. However, sometimes, it may benefit the lawyer to withdraw from representation instead of continuously placing himself/herself in a precarious situation.³

However, attorneys also must ensure that their supervisory relationships with non-attorneys do not impact their duties to their clients nor unduly prejudice the other parties. We will discuss some scenarios in personal injury cases, but first let's review some ethical rules.

¹ From Waters, J. Maria. (2017). *Ethical Considerations When Representing Gun Owners or Dealers*. Presented at NBI Seminar Gun Law in Georgia, Savannah, Georgia, 2017 (pp. 161-170). Eau Claire, WI: NBI, Inc. Reprinted/adapted with permission.

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RELEVANT GEORGIA RULES OF PROFESSIONAL CONDUCT FOR SCENARIOS

Georgia Rule of Professional Conduct 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.

Georgia Rule of Professional Conduct 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.

Georgia Rule of Professional Conduct 5.3 (Responsibilities Regarding Non-Lawyer 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.

Georgia Rule of Professional Conduct 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.

Georgia Rule of Professional Conduct 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

SCENARIOS

SCENARIO #1

Don and Nick are enjoying a joy ride in Nick's father's 1960 Porsche. They stop at the red light in the right lane. Tom, in his brand-new Ford F-150, approaches the left lane next to the Porsche. After the light turns green, the driver of the Porsche enters Tom's lane. The Ford F-150 rear ends the Porsche. Tom loses consciousness after the impact. The investigating officer charges Tom for following too closely based upon the area of impact. Tom is taken to the hospital for neck and back injuries.

Tom sues Nick for his injuries stemming from the accident. Nick tells his father that he was driving the Porsche. Burls Insurance Company, which insures the Porsche, assigns Nick's case to your private firm. You will represent Nick.

During your interview with Nick, you notice that he is fidgety and sweating. You inquire into the reason for his behavior. As he lowers his head, he admits that he was not the driver of the vehicle. In fact, Don was the driver but was not permitted to drive the vehicle by Nick's father. The police officer assumed that he was the driver, and neither he nor Don dispelled the notion. Nick also admits that Don was speeding and did not have on his turn signal which did not allow Tom sufficient time to stop when Don entered his lane.

What would you do?

What if Nick asked you not to reveal the information?

SCENARIO #2

Rory travels home for the Christmas holidays. Hilary and Shannon are traveling in Shannon's car to the mall for shopping. As they leave the mall, Hilary (driver) slams into the side of Rory's vehicle. The police smell alcohol on Hilary's breath and conduct a DUI investigation. Hilary refuses the state breath test. So, the police charge her with driving under the influence of alcohol to the extent that it is less safe to drive. Rory sues Hilary and Shannon.

Burls Insurance Company assigns your firm to represent Hilary and Shannon. Though Shannon admits that she gave Hilary permission to drive her vehicle, she denies having knowledge that Hilary was under the influence. Shannon tells you that Hilary met her at another friend's house before departing for the mall and that she has nasal congestion which prevents her from smelling anything. She wants to be dismissed from the lawsuit.

Hilary tells you that she and Shannon each had 3 glasses of wine at their friend's house. Hilary also had a glass of bourbon. The consumption was over a three-hour period. Hilary does not want Shannon dismissed from the lawsuit.

What would you do?

Can you tell Hilary and Shannon what the other stated? What is informed consent?

SCENARIO #3

John, a Ritz Subs delivery driver, is on his way to deliver subs and pizza at Sharon's home in his personal vehicle. Sharon leaves her home to pick up sodas. John reaches to pick up his sunglasses on the floorboard and sideswipes Sharon's vehicle. John apologizes for the accident.

Sharon sues John. Burls Insurance Company insures John's personal vehicle and asks that you represent John. Sharon's attorney demands the policy limits in exchange for a LLR as Sharon wants to pursue other insurance. Burls Insurance Company agrees to pay the policy limits.

Sharon later adds Ritz Subs as a party. Ritz Subs has coverage Fortson Insurance Company. Ritz Pizza decides to tender its defense to Burls Insurance Company. You now also will represent Ritz Pizza. Ritz Subs is angry that you settled the case with the driver without incorporating it within the release and feels that you jeopardized its position.

What would you do?

SCENARIO #4

You have been assigned to represent truck driver Todd in a trucking accident which occurred on I-75. The Plaintiffs, a married couple, suffered serious bodily injuries but may have had some significant pre-existing injuries. One of the Plaintiffs has a significant felony history. You hire an investigator, John Q, to obtain the criminal records. The investigator tells you that he will jump right on it.

However, investigator John Q plans to fly to Europe, so he contracts with another investigator to conduct a full-blown investigation on both Plaintiffs. Identifying himself as an employee of the Plaintiffs' attorney, the contracted investigator interviewed both Plaintiffs and their spouses over the course of two days. He then plans to interview the Plaintiffs' two minor children about their parents' health once investigator John Q returns from vacation.

Once investigator John Q returns from his European vacation, he delivers a transcription of the Plaintiffs' interviews to your legal assistant and paralegal.

What would you do?

SCENARIO #5

You and Bradley are fellow associates in Jones, Burger & Burger. Bradley asks you to go to lunch to discuss some matters. Bradley recently hired a new assistant to help him with his caseload. However, he is concerned about the assistant's conduct. He requested that his assistant interview a personal injury client. For the next 3 months, the client phones Bradley's secretary and always requests to speak with the 'new attorney' since he never heard from Bradley.

Bradley initially thought that the client was mistaken when referring to the assistant as a 'new attorney.' However, Bradley later spoke with the client 5 months later and realized that the new assistant held himself out to be an attorney. Bradley was scared to notify the client that the assistant was a disbarred attorney.

In reviewing his file, he realized that there were several records missing from the file. The new assistant told the client that the records were not necessary.

What would you advise Bradley?

SCENARIO #6

Arnold is a fellow associate in your firm. He has a difficult personal injury defense client. The Plaintiff made a punitive damage claim resulting from the client's arrest for driving under the influence of drugs associated with the accident. The police do not conduct any blood or urine tests on the client.

One of the interrogatory responses requests information on the types and quantities of drugs which the client partook before the accident. The client denies taking any illegal substances on the day of the accident. He states that he took prescription medication. Arnold completes the interrogatories based upon the responses.

After Arnold prepares and mails his client's responses, he interviews a friend of the client who also serves as an eyewitness. The friend has just left rehab. Arnold requests that you join him for the interview. The friend states that the client lied about not using any illegal substances and that the client used small amounts of heroin, cocaine, and marijuana within an hour of the accident. The friend wants to clear his conscience and has the names of other persons who witnessed the client's drug use that day.

You and Arnold speak with the other witnesses who confirm the friend's story.

What would you advise Arnold?

RESOURCES

In reviewing different scenarios, sometimes the answer is not as straightforward. Deciphering the meaning of the applicable ethical rules can be a daunting task in some situations. Attorneys may turn to other persons in their office or seek the advice from an attorney about their ethical questions. (Michmerhuizen, 2007). In Georgia, the Office of General Counsel (404-527-8400) has an attorney of the day who will discuss your ethical question with you. Though this is a very useful resource, it is important to remember that they do not serve as your legal counsel and that their opinions are non-binding.⁴

For ethical considerations, the old saying ‘it’s best to ask for forgiveness later’ is not a good roadmap. Attorneys must act before the situation becomes unmanageable. It is important for attorneys to know that seeking advice should address potentially future conduct. If the conduct already has occurred, then it is too late for the advice- unless you want to know the consequences of further action which will stem from the already occurred conduct. An attorney also must remember to fully detail the circumstances of the ethical dilemma when discussing the situation.⁵

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