

MANAGING ETHICAL ISSUES IN YOUR DAY-TO-DAY PRACTICE

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III. SOLVE COMMON ETHICAL CHALLENGES

A. Where Conflicts of Interest Can Easily Occur

The Rules of Professional Conduct are, for the most part, easy to understand. It is basic common sense that an attorney must be honest with the client and cannot steal from the client. However, it is difficult for attorneys to understand that certain situations and/or possible situations will or may compromise an attorney's duty of loyalty. Conflicts of interest present a two-fold problem for attorneys, first, inability to recognize them, and, second, failure to properly react to an existing conflict.

Conflicts are difficult to identify for several reasons. First of all, conflicts are difficult to understand. They are subtle. Their analysis requires more than just a passing thought. Second, although attorneys study conflicts and are tested on them in law school and in Bar examinations, thereafter attorneys do not receive sufficient training and analytical process reinforcement to become astute at spotting them. Third, at the outset of a new matter, attorneys focus on "how should I do this job" rather than "is it appropriate for me to do the job." Fourth, the pressure of competition forces attorneys to accept new business or keep existing business and turn their heads away from conflicts. On the other hand, an attorney can successfully identify conflicts, and thereby stay out of trouble, if the attorney understands the basic principle of a conflict and keeps a vigilant lookout for them.

The first solution to identifying a conflict is to understand the conflict's basic principle. Conflicts involve the attorney's duty of undivided loyalty. ("one cannot serve two masters.") Without undivided loyalty to the client, an attorney has a conflict. With this in mind, before and during a representation, an attorney should ask the following question:

In this particular situation, is my client receiving, or, will my client receive,
my undivided loyalty?

The second solution to identifying conflicts of interest is to know the situations in which absolute conflicts exist and cannot be waived. They are as follows:

1. **Gifts.** An attorney cannot prepare an instrument giving the attorney a substantial gift from a client, unless the donee (client) is related to the attorney. Rule 1.8(c).

2. **Literary Rights.** 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. Rule 1.8(d).

3. **Loaning Money.** An attorney shall not loan or give money to a personal injury plaintiff (or any other client) in connection with pending or contemplated litigation. Rule 1.8(e),

4. **Representing Opposing Parties.** An attorney, ordinarily, may not act as an advocate against a person the lawyer represents in some other matter, even if wholly unrelated. Rule 1.7,

5. **Two Criminal Defendants.** An attorney cannot represent more than one defendant in a criminal case. Rule 1.7(b),

These situations are absolute danger zones and the attorney must avoid them. However, if a client wants an attorney to devise an instrument giving the attorney a gift, the attorney can refer that client to other reputable attorneys. If a client needs and wants a loan, the attorney can refer the client to a company who will loan litigants money as long as the attorney thoroughly explains how the loan process works.

The third solution to identifying conflicts is to know the areas where conflicts commonly develop. They are as follows:

1. **Representing more than one party in litigation.** For example, when the party's testimony is substantially different, there is a conflict of interest in representing both. Rule

1.7(b), Comment. Another example is representing a passenger and host driver against an adverse driver when there is testimony that the host driver was at fault. When attorneys represent one or more plaintiffs whose claims are larger than the available insurance and/or assets, there is a conflict. Rule 1.7(b), Comment.

2. **Equity for a fee.** Taking an equity position in an entity as payment for services rendered to the entity. Rule 1.8(a),

3. **Undisclosed interest.** Referring clients to a business the attorney has an undisclosed interest in is a conflict without disclosure and consent. Rule 1.7(b),

4. **Insurance defense counsel.** An attorney may be paid from a source other than the client, if the client is informed and consents and the arrangement will not compromise the attorney's loyalty. Rule 1.8(f), 1.7(b),

5. **Sexual relations with the client.** This is a conflict because it clouds the attorney's ability to give objective advice.

6. **Questionable conduct.** If the probity or conduct of the attorney in the matter is questioned, then there may be a conflict because the attorney may not be able to give objective advice. Rule 1.7(b), Comment.

7. **Wills.** Preparing Wills for several family members may pit interests against interests. Rule 1.7(a), Comment.

8. **General counsel and board member.** Acting as general counsel for a corporation while also being a board member, may be a conflict because the attorney may be called upon to advise the corporation in matters involving the Board of Directors. Rule 1.7(b),

9. **Representation against former clients.** Whether a conflict exists depends on whether the representation is on the same matter or a substantially related matter. Representation

on the same matter is prohibited. When the matter is substantially related, the test is whether the attorney was so involved in matters of that type that such representation can be regarded as changing of sides. Rule 1.9.

Finally, another way to identify a conflict is to review the rules, comments and available authorities. The main conflict rules are:

Rule 1.7--The General Rule

Rule 1.8-- The Prohibited Transaction/Matter Rule

Rule 1.9 -- The Former Client Rule

The rules can be frustrating because they are deliberately open-ended. On the other hand, the comments to the rules lend specific guidelines. For further guidance, at least as to the OGC's interpretation of the rules, consult the State Bar website. At this website, the OGC's informal opinions can be reviewed. The opinions are brief and specific. In addition, the OGC is happy to answer discreet hypothetical questions over the telephone. They will confirm their answers in writing. If, after consulting the rules, comments and/or informal opinions, there is still some doubt in a practitioner's mind, the attorney should contact the OGC by telephone and discuss this matter with a staff member.

It is also important to recognize the impact that a "big case" or "big representation" has on a lawyer's inability to identify a conflict of interest. Human nature being what it is, an attorney will almost always convince himself or herself that there is not conflict of interest so as to avoid having to give the case up. This cautionary advice should be heeded by all attorneys trying to identify conflicts of interest.

B. Unravel Sticky Issues in the Lawyer/Client Relationship

The main ethical challenge in the attorney-client relationship is communication with the

client. Seventy-five percent of the complaints filed concern the attorney's failure to communicate with the client.

The standard for an attorney's ethical duty to communicate is "reasonableness." Rule 1.4. No doubt, many complainants have unreasonable expectations of the level of communication. On the other hand, an attorney's business, laziness, or unwillingness to contact the client simply because there is nothing new to report, is the cause of many situations wherein the client has a legitimate complaint.

There is no better way to solve the communication problem than diligently keeping the client advised and promptly returning phone calls, letters or emails. If lawyers would communicate better, they would be amazed at how happy their clients are, even if the result is disappointing. To better communicate with clients, attorneys should follow a few simple rules:

1. Answer telephone calls from the client. Do not screen calls. Do not have your secretary take the call.
2. Return the telephone calls within twenty-four hours. Document unsuccessful attempts. Document the discussion in the telephone call.
3. Communicate in writing about most, if not all, events that take place during the representation.
4. Always explain the event or matter. The attorney has an obligation to do so. Rule 1.4(b). Your obligation extends to that which is reasonably necessary. Document your explanation.
5. If the client is "unreasonably high maintenance" in that the client desires unreasonably high levels of communication, then either:
 - (a) Withdraw, if permissible, or

- (b) Provide written guidelines that you propose for communication levels and withdraw if the client will not agree in writing to the guidelines.

Clients who complain about lack of communication are the kinds of clients who are predisposed to file legal malpractice actions on the theory that they lacked sufficient information to make an informed choice. If you reasonably communicate and if you document the file well your defense to such an action will be considerably stronger.

The worst ethical violation an attorney can commit during the attorney-client relationship is stealing the client's money. The next worst violation is commingling the client's funds with the attorney's funds. Innocent commingling, through sloppiness or needless haste, is enough to get an attorney disbarred. Rule 1.15(a). The lawyer must separately maintain a firm account and a client trust account. Rule 1.15(b). The client trust account must be kept in the state where the attorney's office is situated. Rule 1.15(b). Complete records of such account's funds are required and shall be preserved by the attorney for five years after termination of the representation. Rule 1.15(b). An attorney must provide the client with a full accounting if requested. Rule 1.15(b). Securities shall be held by an attorney in a safe deposit box. Rule 1.15(b), Comment. If there is a dispute over fees, and, an attorney is holding client funds which could pay the disputed fees, then the attorney should safe keep the funds until the dispute is resolved. Rule 1.15(b), Comment. If creditors of the client demand the attorney release client funds to the creditor, an attorney may be forced to refuse to surrender the funds to the client. In such a case, a proper remedy maybe to interplead. Rule 1.15, Comment. In such a situation, the attorney is well advised to contact the OGC for guidance.

Besides communication and handling the client's funds, termination of the representation presents a unique challenge to the relationship. Rule 1.16 governs termination. An attorney must

withdraw (mandatory withdrawal) if:

1. Representation will result in a violation of the Rules of Professional Conduct or other law. Rule 1.16(a)(1).
2. The attorney's physical or mental condition materially impairs the attorney's ability to represent. Rule 1.16(a)(2).
3. The attorney is discharged. Rule 1.16(a)(3).

An attorney does not improperly abandon the client by moving to withdraw where the client, by pro se motion, sought the attorney's removal.

With regard to the first reason for mandatory withdrawal, the attorney may be required to explain to the court. The lawyer's statement that professional considerations require termination of the representation is ordinarily accepted. Rule 1.16, Comment. With regard to discharge, an attorney must realize that a client has a right to discharge an attorney with or without cause.

To some degree, the attorney has a choice in deciding whether to terminate the relationship. An attorney can withdraw (optional withdrawal) if withdrawal can be accomplished without material adverse affect on the client's interests. Circumstances for optional withdrawal are stated in Rule 1.16(b)(1) through 1.16(b)(6).

The attorney must optionally withdraw as soon as possible, especially when facing a trial setting. The attorney must follow proper local procedures for withdrawing. A court does not have to grant a Motion to Withdraw and typically will not do so on the eve of trial setting, especially in Federal Court. An attorney who seeks an optional withdrawal on the eve of trial is well advised to also file a Motion for Continuance.

C. How to Address Client Misconduct

An attorney's first duty is that of counselor. In all instances where a client's misconduct becomes known to the attorney, the attorney must fully advise the client of the nature of the misconduct and the possible consequences. Rule 1.2(d) and Comment. In those cases where the attorney has a duty to disclose the misconduct, he must fully advise the client of that duty and encourage the client to make the disclosure first. Rule 1.2(e) and Comment. If the client refuses, the attorney must then take the disclosures described in Section D. Rule 3.3(a)(2) and (d). In all instances where the representation will result in assisting or perpetrating client misconduct, the attorney must decline or withdraw from the representation. Rules 1.16(a)(1) and 1.2.

Rule 1.16 governs termination of the attorney-client relationship. Rule 1.16(a)(1) requires an attorney to decline or withdraw from the representation if the representation will result in a violation of the rules of conduct. For example, if an attorney is hired to prepare documents to enable a client to obtain financing and, during the course of representation, learns that financial statements prepared by the client are falsified, he must encourage the client to "come clean." If the client will not, the attorney must withdraw, because, under Rule 1.2, such would constitute assisting a crime or fraud. An attorney does have some leverage in that the withdrawal can be "noisy". Rule 1.16(d) does not prevent the lawyer from giving notice of the withdrawal to other parties, and the lawyer is not prohibited from taking steps to disaffirm his prior work. (Attorney should return check misappropriated by conservator to Court).

Under Rule 1.6(b) an attorney may withdraw in several situations involving client misconduct: (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; or (3) the client insists upon pursuing an objective that the lawyer

considers repugnant or imprudent. The client should be fully counseled that, with regard to commission of a future crime or fraud, the attorney could be compelled to testify to communications with the client under law.

What happens when the attorney discovers a crime or fraud and the client denies it? First, the client must be fully advised that no false evidence can be used by the attorney, be it documentary or testimonial. Rule 1.2, 3.3 and Comments. If the false facts are already before the court, the client must again be advised that the attorney has a duty to report the same. Rule 3.3. If the attorney believes that he is assisting in the perpetuation of a crime/fraud, he must withdraw. Rule 1.16. If an attorney is unsure whether his continued representation constitutes a violation of the Rules, he should call Chief Disciplinary Counsel immediately for an informal opinion.

In summary, an attorney must always provide a client with clear and complete advice concerning current or contemplated conduct. The attorney must also advise the client that he must withdraw when the representation will cause him to violate the Rules. He must advise the client of the requirement to disclose this evidence and that no false evidence can be used in the proceedings. Hopefully, the advice will encourage the client to take the necessary corrective measures. If not, the attorney is bound by the rules to withdraw.

If the client's misconduct does not cause the attorney to violate the rules, but does involve criminal, fraudulent or repugnant conduct, the attorney may withdraw. The client must be given notice and reasonable opportunity to acquire other counsel.

D. Control Client Expectations and Your Exposure to Risk

Client expectations are governed by Rule 7.1 The rule prohibits an attorney from making any false or misleading communication about the lawyer's services, in relevant part, it defines "false" or "misleading" as: (a) containing a material misrepresentation of fact or law; (b) omitting

a fact resulting in a misleading statement; (c) one which is likely to create an unjustified expectation about the results the lawyer can achieve. Hence, the way to control client expectations is not to create them in the first place. For a plaintiff's counsel, many potential clients come in angry and some greedy. The lawyer's duty to counsel the client is foremost. All attorneys have a duty to keep their clients reasonably informed about the status of the case so that the client can make informed decisions. Rule 1.4. A lawyer may not promise the moon to get the business or to keep the client. Common sense dictates that when presented with a client who has \$2,000 in medical expenses and \$500 in past lost wages, an attorney cannot promise that the client will get \$500,000 from the adverse party.

There is also a difference between puffing about capabilities and bald misrepresentations concerning jury verdicts, damage awards or client endorsements that would affect a potential client's decision to choose an attorney. The latter is prohibited by the rule. In addition, any statements that constitutes misrepresentation, fraud, deceit or dishonesty also violate Rule 8.4(c). This would also include stating or implying that the attorney can improperly influence a judge, government official, or agency. *See also*, Rule 8.4(c).

There still arise situations where the attorney has acted in accordance with the Rules from the beginning, without making grand promises to the client, the client has been kept fully informed of the strengths and weaknesses of the case, and the client is still dissatisfied with the "offer on the table". If the attorney realistically believes this is the best that can be obtained, and the client will not accept it, the attorney may withdraw if the client's interests will not be adversely affected. Rule 1.16(b).

The ordinary lay person does not understand the legal system and is, therefore, very vulnerable to impressions, opinions and representations by lawyers. Moreover, most people do not understand our arcane language. Hence, careful communication at each state of a representation is

required, from before the retention agreement through the end of the relationship. Rule 7.1 shields the client and potential client from being misled either intentionally or unintentionally. Moreover, attorneys must always bear in mind that any statement or conduct which is dishonest, deceitful, or fraudulent is prohibited under Rule 8.4.

E. When Confidentiality Conflicts with Personal Responsibility - What to Do

Confidentiality involves two separate concepts. One is contained in Rule 1.6, Confidentiality of Information; and the other the attorney-client privilege. The attorney-client privilege applies only to confidential communications, whereas Rule 1.6 applies to all information acquired relating to the representation. Hence, Rule 1.6 is much broader. The Rule protects all information relating to the representation. It protects information acquired from any source relating to the representation, be it the client, documents acquired during the representation or information from third-party interviews. Generally, an attorney may not use information acquired during the representation to the disadvantage of a former client. Rule 1.9(b).

Confidentiality and personal responsibility most often clash when an attorney is faced with knowledge of a client's past, present and/or future crimes or frauds. The questions for the attorney become what, if anything, may the attorney disclose, and at what point may he/she disclose it. The answers to these dilemmas may be found in exceptions to Rule 1.6, Rules 1.2(d), and 3.3 and case authorities.

1. The Scope of the Attorney-Client Relationship

Before reaching the issue of whether an exception to confidentiality applies, courts first look at the scope and timing of the attorney-client relationship. Courts look closely to determine whether the information acquired or communication occurred during the representation, and whether it related to the subject matter of the representation.

Information acquired prior to an attorney-client relationship is not protected.

Similarly, an attorney cannot make information acquired prior to the representation privileged by entering into an attorney-client relationship with a person.

Matters outside the scope of the subject matter of the representation are not confidential. Communications contained in letters between an attorney and his client were found not privileged where they related to a personal relationship between the attorney and the client and not the subject of the representation in a divorce. A note about a business matter sent to an attorney by a client was held not confidential, where it was found that the attorney and client were also lifelong friends and the attorney considered the note friendly but not confidential.

Rule 1.6(b)(1) gives an attorney the discretion to reveal information in order to “prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.”

Attorneys are encouraged to counsel the client against taking such action, but if unsuccessful, may disclose the information to the intended victim or appropriate authorities. Rule 1.6, Comment. An attorney may also take into account such factors as the nature and length of the representation and the client’s state of mind, taking into account that the client may “cool off” and change her mind. Rule 1.6, Comment. The rule is discretionary and defers to the attorney’s judgment in the matter. Rule 1.6, Comment. The attorney must always carefully weigh the principles of full disclosure and trust underlying the general rule of confidentiality with the need to protect society. Rule 1.6, Comment.

The lawyer may not reveal the information relating to past crimes or fraud. A classic example is the case where the attorney learns from the client that she has murdered two children and hidden the bodies. The lawyer wants to reveal the location of the bodies to the anxious parents. A heart-wrenching situation for the lawyer? You bet. Should he provide the information to the parents or authorities? Absolutely not! To do so would violate Rule 1.6 and subject him to

discipline.(May not reveal information concerning misappropriation of funds).

2. Crimes Other Than Death or Serious Harm and Fraud

What should an attorney do when he learns that a client has committed a less serious criminal or fraudulent act in the past, is doing so currently, or intends to do so? Several rules govern the lawyer's conduct in this regard. Rule 1.2(d) prohibits a lawyer from counseling a client to commit a crime or from assisting in such conduct. Certainly, the lawyer may and should counsel the client not to engage in the conduct. Furthermore, the lawyer is not prevented from conducting a thorough analysis of the law, including the parameters permitted and prohibited by the courts. Rule 1.2(d), (e) and Comment. This is not to say that an attorney may demonstrate to the client how to commit the crime or fraud without getting caught. Rule 1.2, Comment. For example, the difference between a legal and illegal representation is that of establishing a legitimate trust for tax avoidance proposes mid setting up a money-laundering scheme for a crime family. If it becomes apparent that the client intends to commit the crime or fraud despite the attorney's advice, the attorney must either decline or withdraw from the representation in accordance with Rule 1.16.

Under Rule 1.6, a lawyer may not voluntarily disclose the client's intent to commit a crime or fraud however, Rule 3.3(a)(2), prohibits a lawyer from failing to disclose a material fact to avoid assisting a criminal or fraudulent act by the client. Rule 3.3(b) creates a waiver of confidentiality found in Rule 1.6. Rule 3.3(a)(2) applies to the lawyer who discovers that evidence supplied by his client is untrue or fraudulent. The rule protects the integrity of the judicial system is requiring full disclosure, despite probable enormously adverse consequences to the client. For this reason, the lawyer should fully counsel the client to make the disclosure herself and advise her that he will be required to do so should she disregard the advice. Note that this rule requires mandatory disclosure, as opposed to the discretionary disclosure exception found in Rule

1.6(b)(1). Rule 3.3(a)(3) also requires an attorney to disclose controlling legal authority. Subsection (d) requires disclosure of all known material facts, adverse or not, in *ex parte* proceeding. Rule 3.3 also controls what is prohibited conduct. An attorney shall not make a false statement of material fact or offer false evidence. For example, an attorney may not use perjured testimony.

What constitutes a material fact? In a case where an attorney was charged with misconduct for events arising from a Social Security proceeding for disabled widow and 551 benefits. The attorney advised the client she need not volunteer that she had remarried, but that if questioned directly on the subject, she should answer truthfully. The client made several misrepresentations concerning her marital status during the hearing. In addition, the attorney asked questions designed to mislead the judge and referred to the client under her former married name.

The Supreme Court held that because the client's remarriage would not have affected the outcome of the proceedings and that no finding of fact was made concerning her marital status, the attorney did not violate Rule 3.3. (It should be noted, however, that the attorney's conduct was found to violate Rule 8.4(c) and (d), which respectively define misconduct as engaging in conduct "involving dishonesty, fraud, deceit or misrepresentation" and conduct that is prejudicial to the administration of justice.")

3. Personal Responsibilities in Dealings With Third Parties

An attorney must also show candor in his dealings with third persons. Rule 4.1 prohibits an attorney from making a false statement of material fact to a third person; and, as in Rule 3.3, requires disclosure of material facts to avoid assisting crime or fraud. However, this disclosure requirement does not contain an exception to the confidentiality requirement of Rule 1.6 as in Rule 3.3 which addresses situations involving tribunals.

4. The Attorney-Client Privilege

The attorney-client privilege protects a lawyer from revealing client confidences when called to testify under the compulsion of order of subpoena. Because the privilege belongs to the client, the attorney must raise the privilege unless the client has given consent to its waiver. An attorney is protected from charges of misconduct when ordered by a court to testify.

There are several situations where the courts have recognized a waiver of the privilege. The privilege is waived in cases where the client alleges ineffective assistance of counsel. The privilege is also waived where the proof of a party's claim will require proof of the contents of attorney-client communications, as in a case alleging reliance on advice of counsel. In addition, the privilege is waived when the client places in issue the subject of communications. The attorney-client privilege may not be used to enable a person to carry out a future crime or fraud. An attorney is competent to testify concerning a client's acknowledgment of a deed. The privilege is also waived to testify regarding the circumstances surrounding a testator at the time of execution of a will.

It has been pointed out that the privilege applies to "communications" only, a more narrow focus than Rule 1.6's reference to all "information" acquired during the attorney-client relationship. Under the privilege, an attorney may testify to matters outside of communications. For example, an attorney can testify to his observations of a client with regard to an insanity plea. In addition, the privilege does not apply to communications concerning non-legal matters.

5. Summary

In analyzing the attorney's responsibilities in light of the confidentiality requirements of Rule 1.6 and the attorney client privilege, an attorney must first look at the scope of the relationship with the client, Questions to ask are: Was the information acquired or did the communication occur during the relationship? Did the information or communication pertain to

the legal matters for which the attorney was retained? If the answers are yes, the next step is to determine what information or communication must be disclosed, what may be disclosed, and what can be compelled by subpoena or order.

If the client will not do so, an attorney must disclose that a false material fact has been presented to a tribunal when it comes to the attorney's attention during the representation. An attorney also is required to disclose all material facts, whether adverse or favorable, during an *ex parte* proceeding. If the attorney discovers that the client has committed a crime or fraud, he may not disclose it and cannot be forced to disclose it by compulsion of law. On the other hand, he must either decline the representation or withdraw if he knows that the fraud or crime will continue during his representation. To continue with the representation constitutes assisting the commission of the crime/fraud, clearly a violation of Rule 1.2(d). If an attorney learns that evidence is false, he may not offer it during legal proceedings or he is subject to discipline under Rule 3.3(1) and (2). In a similar vein, an attorney may not make a material misrepresentation to a third party.

Under Rule 1.6, an attorney may disclose that a client intends to commit a crime likely to result in death or serious bodily harm. This disclosure is discretionary and carries with it the duty to carefully advise the client. The attorney may use his judgment in the matter and will not be held liable for failure to alert the appropriate person or authority. For example, the attorney may reasonably believe the client has or will "cool off" and abandon the threat. On the other hand, the attorney will not be subject to discipline for disclosing the client's intent if he reasonably believes the client intends to carry out the threat.

The attorney-client privilege protects communications and only applies where the attorney is under compulsion to testify. In general, the privilege is waived in disputes between attorney and client; in cases where it is alleged the attorney breached some duty owed to the

client; where the client has placed the matter in issue; to prevent the client from committing a contemplated crime or fraud; and where the circumstances surrounding the client's execution of a will or documents transferring property are in issue. The attorney will be protected in all situations where a court orders an attorney to testify concerning a communication.

F. The Ethics of Negotiation, Mediation and Alternative Dispute Resolution

The Comment to Rule 3.9 (Advocate in Non Adjudicative Proceedings) states that Rule 4.1 through 4.4 govern negotiations and bilateral transactions. As previously discussed, Rule 4.1 applies to false statements of material fact or law to third persons. As with a tribunal, an attorney may not make a false statement of material fact to a third person. Rule 4.2 prohibits communications with persons known to be represented by counsel. Rule 4.3 prohibits an attorney, in dealing with a non-represented person, from implying the attorney is disinterested; and should correct any misunderstandings concerning the attorney's role. Rule 4.4 prohibits an attorney from using any means to "embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person" In addition to these rules, an attorney should bear in mind that when involved in Federal court-ordered mediation, a party who acts in bad faith can be reported to the referring judge by the mediator and is subject to sanctions. E.D.Loc.R. 6.05(A).

The current controversy in negotiations arises under Rule 4.1, from the distinction between representation of a material fact and puffing. For example, an attorney's estimates of value or price are generally considered puffing. At the other extreme, an untrue statement that one already had in hand a bid of "X" dollars, made to drive up the other party's bid, is clearly a misrepresentation of a material fact, subjecting the attorney to discipline. Rule 4.1 and Comment; and see, James C. Freund, *Smart Negotiations* (1992). At some point in between these two extremes is a grey area to be avoided by cautious attorneys. For example, in some negotiations, an

attorney may want to emphasize one point seeking to make it larger than it is to obtain a concession on another point. The point is to maneuver the opponent into making an assessment that appears favorable to the other attorney's position, but which will enhance the bargaining position of the client's attorney. So long as no "lying" is taking place, the attorney is probably safe. It is also proper to bold back material information, so long as doing so does not constitute assisting in a crime or fraud. Rule 1.2(d) and 4.1(b).

The Comment to Rule 4.1 also points out that misrepresentation can occur by affirming the statement of another when known to be false, and failing to act. However, an attorney's duty of disclosure is conditioned upon his duty of confidentiality under Rule 1.6. If the attorney is bound by confidentiality not to disclose a false material fact, the client should be fully counseled on the matter, and the previous rules of termination apply.

In sum, attorneys should look to Rules 4.1 through 4.4 to understand the parameters of acceptable conduct in conducting negotiations.

G. Where Do Attorneys' Fees Fit In?

The fact that an entire section of the Rules concern arbitration of fee disputes is a comment on the scope of the problem. (PART VI.. ARBITRATION OF FEE DISPUTES). Documentation of the fee schedule and communication of developments in representation can go a long way to avoiding fee arbitration. LAWYER HELPLINE - 404-527-8741 or 800-682-9806.

Rule 1.5 declares that a lawyer's fee shall be reasonable (listing factors to be considered); requires notice of the fee unless representation has been ongoing; approves contingent fees (except in divorce and criminal matters) and sets disclosure requirements regarding contingent fees.(A lawyer may charge for standard time units so long as this does not result in a fee that is unreasonable, and so long as the lawyer communicates to the client the method of billing the lawyer is using so that the client can understand the basis for the fee. FAO No. 01-1)

Rule 5.4 addresses the attorneys professional independence and prohibits fee splitting and partnerships with nonlawyers. (I'd like to offer my paralegal a bonus based on the legal fees I've taken in each month. **Is that ethical?** Rule 5.4 and Formal Advisory Opinion 91-3 prohibit a lawyer from splitting a legal fee with a nonlawyer.)

H. Boggled by Challenges Among Partners, Associates and Office Personnel?

Here's the Solution

A law firm's partners and shareholders must put into place measures to give reasonable assurances that all attorneys in the firm comply with the rules of professional conduct. Rule 5.1(a).

A lawyer supervising another lawyer has the same duty as to the subordinate lawyer. Typically, this duty is fulfilled by the firm's provision of continuing legal education in professional ethics, either by an approved in-house program or approved CLE programs. Rule 5.1, Comment. Some larger firms have designated senior partners or committees for ethical questions. Junior attorneys may make confidential referrals of ethical problems to the designated partner or committee. Rule 5.1, Comment. In smaller firms, ethical direction is usually a matter of informal discussion and/or admonition.

Both partners and associates are responsible for another lawyer's violation of the Rules of Professional Conduct if the lawyer orders or with knowledge of the specific conduct ratifies it. Rule 5.1(c)(1), Rule 8.4(a).

The supervising partner is also responsible for another lawyer's violation of the Rules of Professional Conduct if the supervising partner knows of the conduct at the time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. Rule 5.1(c)(2). The supervising attorney must intervene if the supervising attorney knows that the misconduct occurred. For example, if the supervising attorney knows that a subordinate attorney

misrepresented a matter to an opposing party in negotiations, the supervising partner has a duty to correct the resulting misapprehension. Rule 5.1, Comment.

An associate is bound by the Rules of Professional Conduct despite the fact that the associate acted at the direction of another person. Rule 5.2(a). Whether the associate had sufficient knowledge to render conduct a violation of the Rules of Professional Conduct may well be controlled by the fact the associate acted at another's direction. For example, an associate will not be responsible for filing a frivolous pleading if the associate acted at the partner's direction and the associate did not know of the pleading's frivolous character. Rule 5.2, Comment.

The rules do not provide the associate some lenience in the case of arguable positions. In "gray areas" or an area of "professional judgment as to ethical duty" where the position is reasonably arguable, the associate is entitled to follow the partner's direction. The comment provides a simple example. If a question arises whether the interest of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged. Rule 5.2, Comment.

For the associate, it may be necessary to seek guidance from outside the firm. The best way to obtain this guidance is to telephone the OGC and speak with a staff member. Your conversation will be confidential.

IV. ADVERTISE YOUR SERVICES WITHOUT FEAR

A. What you can and Cannot Say in Advertising.

RULE 7.2 ADVERTISING . Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio, or television, or through direct mail advertising (See, Rule 7.3 Comments) distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter. **RULE 7.1** generally prohibits false,

deceptive or misleading communications about a lawyer or legal services, requires disclosure of value paid for public communication, and places ultimate responsibility for communications compliance with the Rules upon the attorney. Prohibited illustrative communications include: including false or omitting necessary facts; create an unjustified expectation about results the lawyer can achieve; states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; compares the quality of a lawyer's or a law firm's services with other lawyers' services unless the comparison can be factually substantiated; states that legal services are available on a contingent or no-recovery-no-fee basis without stating conspicuously that the client may be responsible for costs or expenses, if that is the case.

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.. The lawyer may also communicate specialization or certification in a particular field of law under the Georgia Rule. Any such communication must comport with Rule 7.1 and not be false or misleading.

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 lawyer's firm name shall include the name of the lawyer, the name of another lawyer in the firm or the name of a deceased or retired member of the firm in a continuing line of succession.

(c) A lawyer's firm name shall not include the name of any person other than a present member of the firm or a deceased or retired member of the firm in a continuing line of succession.

(d) Subject to paragraphs (a), (b) and (c) hereof, a law firm with offices in states other

than Georgia may use the same name in Georgia as used in other states, but identification of lawyers in an office in Georgia shall indicate the jurisdictional limitations of any lawyers so listed who are not licensed to practice in Georgia.

(e) 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;

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

RULE 10.1

LAWYER REFERRAL AND INFORMATION SERVICES

(a) The operation of this Rule 10.1 and compliance with its provisions shall be supervised by the chief disciplinary counsel. The chief disciplinary counsel shall develop and promulgate regulations, procedures and forms not inconsistent with this Rule 10.1, including the amount of the fee to register a qualified service, subject to approval by this Court.

(b) Lawyers eligible to practice in this state may participate in a service that refers them to prospective clients, but only if the service is a qualified service because it conforms to this Rule 10.1.

(c) A qualified 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 in light of their financial circumstances, spoken language, any disability, geographical convenience, and the nature and complexity of their problems.

(d) Only a qualified service may call itself a lawyer referral service or operate for a direct or indirect purpose of referring potential clients to particular lawyers, whether or not the

term “referral service” is used.

(e) A qualified service must be open to all lawyers licensed to practice in this state who: (1) maintain an office within the geographical area served, (2) pay reasonable fees established by the service, and (3) maintain in force a policy of errors and omissions insurance in an amount at least equal to the minimum established by the chief disciplinary counsel. A qualified service shall establish and publish a procedure for admitting, suspending, or removing lawyers from its roll of panelists.

(f) No fee generating referral may be made to any lawyer who has an ownership interest in, or who operates or is employed by, a qualified service or who is associated with a law firm that has an ownership interest in, or operates or is employed by, a qualified service.

(g) A qualified service shall periodically survey client satisfaction with its operations and shall investigate and take appropriate action with respect to client complaints against panelists, the service, and its employees.

(h) A qualified service may establish specific subject matter panels, including moderate and no fee panels, foreign language panels, alternative dispute resolution panels, and other special panels that respond to the referral needs of the consumer public, eligibility for which shall be determined on the basis of experience and other substantial objectively determinable criteria.

(i) A qualified service shall: (1) register with the chief disciplinary counsel and demonstrate its compliance with this Rule 10.1 before commencing to operate; (2) update the materials filed with the chief disciplinary counsel within thirty days of any material change; and (3) annually file with the chief disciplinary counsel on or before June 30 a report of its operations and finances during the previous twelve months demonstrating its continued compliance with this Rule 10.1.

(j) This Rule 10.1 does not apply to: (1) a group or prepaid legal plan, whether operated by a union, trust, mutual benefit or aid association, corporation, or other entity or person that provides unlimited or a specified amount of telephone advice or personal communication at no charge to the members or beneficiaries, other than a periodic membership or beneficiary fee and that furnishes or pays for legal services to its beneficiaries; (2) a plan of prepaid legal services insurance authorized to operate in this state; (3) individual lawyer-to-lawyer referrals; (4) lawyers jointly advertising their own services in a manner that discloses that such advertising is solely to solicit clients for themselves; (5) any pro bono legal assistance program that does not accept any fee from clients for referrals, or (6) any organization maintaining a 26 USC 501(c)(3) exemption that maintains a referral list only incident to its other activities.

(k) A disclosure of information to a lawyer referral service for the purpose of seeking legal assistance or for purposes of complying with the survey under Rule 10.1(g) shall be deemed a privileged lawyer-client communication.

(l) The chief disciplinary counsel may deny, suspend, or cancel any registration upon making a finding of a material violation of any provisions of this Rule 10.1. Any person who is substantially and individually aggrieved by the action of the chief disciplinary counsel may, within thirty days of receiving notice of the action, petition this Court for review of the action of the chief disciplinary counsel. This Court may direct that the issues raised in the petition be briefed and argued as through a petition for an original remedial writ has been sustained. This Court may sustain, modify or vacate the action of the chief disciplinary counsel or dismiss the petition.

(m) Any person violating the provisions of this Rule 10.1 shall be deemed to be engaged in the unauthorized practice of law.

B. When and Where Solicitation is Appropriate and Acceptable

Rule 7.3 applies to in-person and written solicitations by a lawyer with persons known to need legal services of the kind provided by the lawyer in a particular matter for the purpose of obtaining professional employment.

(a) **In-person solicitation.** A lawyer may not initiate the direct personal or live telephone contact for solicitation of legal business under any circumstances other than with an existing or former client, lawyer, close friend or relative. Query? What about real time internet communications under the existing Georgia Rules.

(b) **Written solicitation.** A lawyer may initiate written solicitations to an existing or former client, lawyer, friend or relative without complying with the requirements of this Rule 7.3(b). Written solicitations to others are subject to the following requirements:

(1) any written solicitation by mail shall be plainly marked “ADVERTISEMENT” on the face of the marked “ADVERTISEMENT” at the top of the first page in type at least as large as the largest written type used in the written solicitation;

(2) A lawyer shall not send, nor knowingly permit to be sent, on behalf of the lawyer, the lawyers firm, the lawyers partner, an associate or any other lawyer affiliated with the lawyer or the lawyers firm, a written solicitation to any prospective client for the purpose of obtaining professional employment if: (1) it has been made known to the lawyer that the person does not want to receive such solicitations from the lawyer; (2) the written solicitation involves coercion, duress, fraud, overreaching,

harassment, intimidation, or undue influence; (3) in a personal injury or wrongful death matter unless an accident or disaster occurred more than 30 days before the mailing.

C. Examples of Advertising - You be the Judge - Are they Ethical?

AD CONTENT

The chief disciplinary counsel considers that including settlement figures and verdict amounts in an advertisement are likely to create an unjustified expectation about results which would violate Rule 7.1(c). (The speaker believes this would be remedied by including a statement to the effect that not all cases would support such a verdict or something to that effect.

An attorney is allowed to include membership in professional and fraternal organizations and advertising but needs to be careful about Rule 7.4 and possibly implying specialization.

ANNOUNCEMENTS

If attorney changes firms and wants to notify former clients an attorney can send a letter or announcement without enclosing the Rule 7.3 advertising disclaimer unless the material discusses a particular matter where attorney knows the former client is involved. If the announcement is kept general it is not advertising.

DIRECT MAIL

There is no distinction in Rule 7.3(b) between prospective individual clients and prospective corporate/entity clients, so the same rules about solicitation and advertising apply to contact with a prospective business/entity client.

A letter to prospective members of a class requires the advertising disclaimer in Rule 7.3. In addition, if attorney has filed the class action suit, but it has not.

Attorney representing a charitable organization who sends an announcement to the members regarding the importance of having a will and estate planning, and includes informational brochure regarding estate planning is still considered advertising by the chief disciplinary counsel, and therefore requires the advertising disclaimer in Rule 7.3(a).

Information sent at the request of a prospective client is not advertising and does not fall within the advertising rules.

General advertising such as radio and television does not require assessing the prospective client's mental state. Direct mail advertising does.

GENERAL MAILINGS

A firm can write a letter to the board of an organization that it represents informing the board members that it represents the board. If any other statements are made or promotional materials are enclosed, the Rule 7.3 advertising disclaimer is required.

A general brochure merely giving general information about a firm sent to prospective clients does not require the advertising disclaimer of Rule 7.3(a). However, if the brochure includes any other communication referencing a particular type of matter in which the prospective client is believed to need legal assistance, the Rule 7.3(a) disclaimer must be included. (Message: this is referencing a very generic brochure.)

Attorney who writes a book for the public regarding a legal subject and

then sends a letter to individuals offering the book for free is advertising. The disclaimer is not required unless some of the recipients are persons known to need legal representation.

A newsletter being sent to current and prospective clients requires the 7.3 advertising disclaimer unless an attorney knows that no recipient will currently be in the position similar to one covered by the text and in need of representation - which in that instance would then be solicitation. The chief disciplinary council appears to have put the onus on the attorney to make sure that the letters do not go to someone in need of legal services under Rule 7.3(c).

An informational brochure which goes to current clients and friends and acquaintances only is considered general advertising under Rule 7.2, not solicitation, so the 7.3(c) disclaimer is not required. However, if it is being directed to an individual or prospective client who is in a situation similar to the one covered by the text, it is also solicitation for purposes of Rule 7.3, and therefore subject to the risk of violating the timing provisions of that rule.

SEMINARS

If an attorney speaks at a seminar for non-lawyers, but the attorney is not giving the program for the purpose of obtaining professional employment from the attendees, it would not be advertising and therefore would not require the advertising disclaimer.

An attorney giving a seminar for non-lawyers in a particular industry will give out course materials and promotional literature at the seminar, The

materials are considered advertising and must comply with Rule 7.1 through 7.5.

Life insurance agent who hires attorney to give seminar where attorney speaks about estate planning and agent speaks about life insurance is within ethical parameters. Attorneys may hire the insurance agent for assisting the client and funding a living trust as long as the client is fully informed of the relationship and consents. The agent can not engage in any activity that an attorney would be prohibited from engaging in under the Rules of Professional Conduct.

A raffle station ad for free seminars on legal topics does not violate the rules. Direct telephone requests from a marketing company to attend the seminars falls under solicitation Rule 7.3(b) requiring assessment of mental state.

V. MANAGE ETHICAL COMPLAINTS AND DISCIPLINARY ACTIONS

A. The Procedure for Notification of a Complaint

The Office of General Counsel screens initial grievances. The OGC **may** give notice of the grievance at this stage. **R. 4-202(b)** [“The screening process **may** include forwarding a copy of the grievance to the respondent in order that the respondent **may** respond to the grievance”].

Matters within the disciplinary jurisdiction of the Bar will be referred by the OGC to the **Investigative Panel**. At this stage, there **will** be a **Notice of Investigation (R. 4-204.1)** served upon the respondent pursuant to **R. 4-203.1 [Uniform Service Rule]**.

Notification of a **Formal Complaint** is accomplished by service **R. 4-203.1**

[**Uniform Service Rule**] on the respondent within 30 days of a probable cause finding **R. 4-211**.

B. How You're Required to Respond to an Ethics Complaint.

First, there is a duty on the respondent attorney to respond to disciplinary authorities in accordance with the State Bar rules. **R. 9.3 Cooperation With Disciplinary Authorities**. As the comment to R. 9.3 makes clear this does not require the waiver of 5th Amendment privileges.

Response to initial notification of the grievance by the OGC may be discretionary **R. 4-202(b)** [“The screening process **may** include forwarding a copy of the grievance to the respondent in order that the respondent **may** respond to the grievance”].

However, service of a **Notice of Investigation** of a grievance by the **Investigative Panel** requires a response. **R. 4-204.3** requires that an Answer that is written and made under oath must be filed within 30 days of service. Inadequate responses or the failure to respond may result in suspension from the Bar.

The service of a **Formal Complaint** requires the filing of an Answer within 30 days under **R. 4-212**. Failure to specifically address facts, issues or violations alleged in the formal complaint means that they “shall be admitted”. An alternative to filing an Answer is the filing of a Petition for Voluntary Discipline authorized by **R. 4-212(d)**.

C. Walk Through Steps and Pitfalls in the Disciplinary Process.

The disciplinary process generally starts with **screening** of a grievance in the Office of General Counsel of the State Bar [OGC], to the **Investigative Panel** for investigation and a range of possible disciplinary actions, on to the filing of a **Formal Complaint** in the Supreme Court of Georgia, appointment of a **special master** and **discovery** and an **evidentiary hearing**, review by the **Review Panel** and, finally,

disciplinary action by the **Supreme Court** . At each step through the process there are alternative diversions available such as Committee on Fee Arbitration, Committee on Lawyer Impairment, Consumer Assistance Panel or a Petition for Voluntary Discipline. There are also potential pitfalls for the respondent and their counsel.

Screening. A grievance is first screened by the OGC for rule violations. The OGC may collect evidence, add to the grievance file and may notify the respondent. The grievance can be dismissed or passed on to the **Investigative Panel. PITFALL:**

Failure to cooperate and provide evidence of an unjustified grievance may result in unnecessary trouble and expense by referral of the matter to the Investigative Panel.

Investigative Panel. Once the grievance is sent to the Investigative Panel there must be a Notice of Investigation served on the respondent. A response must be filed within 30 days of service of the Notice. **R. 4-204.3. PITFALL:** The Answer must be written and made under oath. Inadequate responses or the failure to respond may result in suspension from the Bar. **R. 4-204.3.** The IP can

- 1) dismiss the grievance for lack of cause [and may issue a Letter of Instruction under **R. 4-204.5**],
- 2) refer the matter to the Committee on Lawyer Impairment or Fee Arbitration, or
- 3) find probable cause. When probable cause is found by the Panel it may:

- 1) issue a Letter of Admonition **R. 4-205**;
- 2) issue an Investigative Panel Reprimand **R. 4-206**;
- 3) issue a Notice of Discipline **R 4-208.1**;
- 4) refer to Supreme Court for filing of Formal Complaint and hearing

before a Special Master. **R. 4-204.4.**

Admonition and Reprimand are confidential disciplines. The Respondent has a right to reject or accept the IP admonition or reprimand **R. 4-207. PITFALL:**

Rejection of admonition or reprimand must be sent by certified mail return receipt requested to the IP via the OGC. R. 4-207(b)(2). A Notice of Discipline by the IP must be rejected by the Respondent or the OGC within 30 days. **R. 4-208.3. PITFALL: Rejection by the Respondent is not effective unless a written response has been made to the grievance at or before the filing of the rejection . R. 4-208.3(b).**

The filing of a **Formal Complaint** and appointment of a **special master** can follow a probable cause finding by the IP [R. 4-204.4] or a rejection of a Notice of Discipline by the Respondent or the OGC. [R. 4-208.4]. Objections to the Special Master must be filed within 10 days of service of notice of appointment. **R. 4-209(d). PITFALL: Pending objections to special master is no justification for delay in filing Answer or discovery R. 4-212(b).** The Respondent must file an Answer to a Formal Complaint or a Petition for Voluntary Discipline within 30 days. The special master conducts an evidentiary hearing within 90 days R. 4-213 and issues a report within 30 days of the receipt of the transcript R. 4-217.

The parties have a right to have the special master's report forwarded to the **Review Panel R. 4-217(d). PITFALL: failure to request a review panel waives filing any exceptions to the report with the Supreme Court or oral argument.**

R. 4-217(c).

Exceptions to the Review Panel report must be filed within 20 days and the

other party may reply within an additional 20 days **R. 4-219. PITFALL:**
Exceptions must be supported by written argument R. 4-219(a) .

There are other possible alternative processes for the resolution of the disciplinary grievance or complaint including; **Fee Arbitration Part VI, Lawyer Assistance Program Part VII, and the Consumer Assistance Program Part XII.**