
Professional and Ethical Dilemmas

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HYPOS

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

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

Rule 3.4

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

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

Work Product

Attorney-Client Privilege

HYPOS

2. During the course of litigation, you feel that your opposing counsel has engaged in various ethical violations which have created an unfair advantage for the opposing side. The perceived ethical violations are: destroying documents, lying about witness whereabouts and coaching witnesses at depositions.
- **When you become entirely fed up, may you threaten a bar complaint to gain leverage in settlement negotiations?**
 - **Must you report any of the above conduct to the State Bar?**

Rule 8.3 (Reporting Professional Misconduct)

Rule 9.2 (Settlement of Claims)

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

DUTY TO REPORT

- RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT
- (a) A lawyer having knowledge that another lawyer has committed a violation of the Georgia Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should inform the appropriate professional authority.
- (b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office should inform the appropriate authority.

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

Comment

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

Challenges

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

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

Comment

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

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

HYPOS

3. A lawyer at a firm has decided to leave the firm and start his own practice. He wants to take his existing clients with him. Consider the following:
- **May the lawyer call his clients, tell them he is leaving and ask the clients to hire his new firm?**
 - **Must the lawyer let the law firm handle the communication with the client?**
 - **May the lawyer or the firm insist that the communication be made jointly?**
 - **What if there is a pressing deadline in one of the client's cases. Should that disclosure be handled differently than with a client in which there are no deadlines pending?**
 - **Are any of the answers different if the lawyer is a partner at the law firm?**

Rule 1.3 (Diligence)

Rule 1.16 (d) (Declining or Terminating Representation)

Rule 8.4 (a) (4) (Misconduct)

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

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

GEORGIA FORMAL ADVISORY OPINION NO. 97-3

Challenges

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

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

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

Rule 1.3 (Diligence)

Rule 1.4 (Communication)

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

Rule 1.1 (Competence)

Rule 1.3 (Diligence)

Rule 1.4 (Communication)

Rule 1.7 (Conflict of Interest)

HYPOS

- 5. May your firm place the following language on its invoices or other communications with clients:**
- *If you disagree with anything set forth in this communication or the way we have represented you to date, please notify us by certified mail at the address set forth herein immediately. If we do not hear from you, it shall be an acknowledgment by you per our agreement that you are satisfied with my representation of you to date and you agree with my statements in this communication.*

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

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

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

GEORGIA FORMAL ADVISORY OPINION NO. 05-8

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

Challenges

- Formal Advisory Opinion 05-8
- QUESTION PRESENTED:
 - The question presented is whether an attorney may stamp client correspondence with a notice stating that the client has a particular period of time to notify the lawyer if he /she is dissatisfied with the lawyer and that if the client did not notify the lawyer of his /her dissatisfaction within that period of time, the client would waive any claim for malpractice.
- SUMMARY ANSWER:
 - A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. Therefore, in the absence of independent representation of the client, the lawyer should not condition the representation of a client upon the waiver of any claim for malpractice and should not attempt to cause the waiver of any claim for malpractice by the inclusion of language amounting to such a waiver in correspondence with a client.

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

May you:

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

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

May you:

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

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

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

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

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

Rule 1.6 (b) (iii) (Fees)

Rule 1.7 (Conflict of Interest)

HYPOS

7. As a lawyer, you have earned a juris doctor degree.
- As a sole practitioner, can you name your firm "Ogier & Associates?"
 - What if you are a two-person firm (with one partner and one associate)?
 - Can a sole practitioner name his firm "The Ogier Law Group?"
 - How about "The Ogier Law Firm?"
 - Can Tamara have a firm named "Pitbull Lawyers, LLC?"
 - How about Ogier Pitbull Lawyers, LLC?"
 - How about Ogier Better Than The Rest, LLC?"
 - Can Tamara identify herself as a specialist in a particular practice area?
 - Can three friends who share office space and facilities call themselves **Smith, Jones & Johnson if they are not in any type of actual partnership relationship?**

Rule 7.1 (Communications Concerning a Lawyer's Services)

Rule 7.4 (Communication of Fields of Practice)

Rule 7.5 (Firm Names and Letterheads)

"SPECIALIST"

- **RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE**

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

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

Comment

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

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

HYPOS

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

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

Rule 1.9

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

Flashdance

HYPOS

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

Rule 3.7 (Lawyer as Witness)

Rule 4.3 (Dealing with Unrepresented Person)

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

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



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