State Bar of Georgia

ETHICS UPDATE 2015

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The rules governing lawyer conduct are subject to constant revision. This paper describes recent changes to the Georgia Rules of Professional Conduct and other Bar Rules, trends in lawyer disciplinary investigations and prosecutions, and new advisory opinions interpreting the Rules.

Disciplinary Statistics

Statistics gathered during the last few Bar years disproved assumptions long held by those who study the lawyer disciplinary process. In the past, the number of people requesting forms to file a complaint against a Georgia lawyer increased when the economy fell into recession. For the years since 2007, however, the number of Grievance requests has fallen. The decline had the expected effect at the other end of the process. The number of cases in which discipline was imposed has also decreased.

The Bar received 3192 requests for Grievance forms in the 2013-'14 Bar year. The number of Grievances the Office of the General Counsel actually received was 1857, a decrease from the previous year. The number of cases sent to the Investigative Panel also decreased; the previous year the number was 264 and this year the number fell to 188.

At the end of the process the Supreme Court of Georgia and the State Disciplinary Board imposed discipline in 142 cases between June 1, 2013 and May 31, 2014.

Formal Advisory Opinions

Formal Advisory Opinion 13-1

The Supreme Court approved Formal Advisory Opinion 13-1 on September 22, 2014. The opinion deals with witness-only closings in real estate transactions and it answers the following questions:

> 1. Does a lawyer violate the Georgia Rules of Professional Conduct when he/she conducts a "witness only" real estate closing?
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> 2. Can a lawyer who is closing a real estate transaction meet his/her obligations under the Georgia Rules of Professional Conduct by reviewing, revising as necessary, and adopting documents sent from a lender or from other sources?
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> 3. Must all funds received by a lawyer in a real estate closing be deposited into and disbursed from the lawyer's trust account?

This is the summary answer in the opinion:

> 1. A lawyer may not ethically conduct a "witness only" closing. Unless parties to a transaction are handling it pursuant to Georgia's *pro se* exemption, Georgia law requires that a Lawyer handle a real estate closing (see O.C.G.A. § 15-19-50, UPL Advisory Opinion No. 2003-2 and Formal Advisory Opinion No. 86-5). When handling a real estate closing in Georgia a lawyer does not absolve himself/herself from violations of the Georgia Rules of Professional Conduct by claiming that he/she has acted only as a witness and not as an attorney. (See UPL Advisory Opinion No. 2003-2 and Formal Advisory Opinion No. 04-1).
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> 2. The closing lawyer must review all documents to be used in the transaction, resolve any errors in the paperwork, detect and resolve ambiguities in title or title defects, and otherwise act with competence. A lawyer conducting a real estate closing may use documents prepared by others after ensuring their accuracy, making necessary revisions, and adopting the work.
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> 3. A lawyer who receives funds in connection with a real estate closing must deposit them into and disburse them from his/her trust account or the trust account of another lawyer. (See Georgia Rule of Professional Conduct 1.15(II) and Formal Advisory Opinion No. 04-1).

Formal Advisory Opinion 10-1

On July 11, 2013, the Supreme Court of Georgia approved a final version of Formal Advisory Opinion 10-1. The opinion provides that lawyers employed in a circuit public defender office in the same judicial circuit may not represent co-defendants when a single lawyer would have an impermissible conflict of interest in doing so. The basis of the opinion is Rule 1.10, which imputes the conflicts of one lawyer to other lawyers in the same firm. The opinion contains two footnotes explaining that it is limited to the question of whether Bar Rule 1.10 applies to a circuit public defender office as it would to a private law firm. It does. The revised opinion should not be read to endorse or prohibit methods by which law firms attempt to avoid imputed disqualification, as that was not the question before the Court.

Opinion of the Formal Advisory Opinion Board

The Formal Advisory Opinion Board issued Opinion 13-2, which addresses the propriety of a lawyer, as a condition of settlement, agreeing to indemnify the opposing party for claims by third persons to the settlement funds. The opinion concludes that a lawyer may not ethically agree to indemnify the opposing party for such claims because they violate Rule 1.8(e) of the Georgia Rules of Professional Conduct, which prohibits a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation. The opinion also concludes that a lawyer may not seek to require, as a condition of settlement, that a plaintiff's lawyer make a personal agreement to indemnify the opposing party from claims by third persons to the settlement funds. Such conduct violates Rule 8.4(a)(1) of the Georgia Rules of Professional Conduct, which prohibits a lawyer from knowingly inducing another lawyer to violate the Georgia Rules of Professional Conduct. Formal Advisory Opinion 13-2 is binding

only on the State Bar of Georgia and the person who requested the opinion, but the Supreme Court will treat the opinion as persuasive authority.

Rules Changes

At the 2015 Midyear Meeting of the State Bar of Georgia the Bar's Board of Governors approved several amendments to the Bar rules. The proposals will be published in the April issue of the *Georgia Bar Journal*, and every Bar member will have the opportunity to comment or file objections with the Court. After publication the Office of the General Counsel will file the proposals with the Supreme Court. The changes are not final unless and until the Court approves them. Most of the proposed changes are simple housekeeping amendments. The substantive proposals include:

- Changes to Rule 4-403 that will allow proposed formal advisory opinions to be published on the Bar's website as an alternative to the *Georgia Bar Journal*.
- An amendment to Rule 7.3 that will do away with the requirement that the Bar "certify" lawyer referral services and instead will require lawyers to use only services that meet certain requirements.
- Proposed changes to Rule 4-213 provide that a special master may require the Bar to pay for a copy of the hearing transcript for a respondent who has demonstrated an inability to pay.
- Rule 5.4 will add a subpart (e), which addresses working with lawyers organized under alternative business structures and the sharing of fees with such lawyers.

- The proposed change to Rule 3.5 will add subpart (c) and comment 7, which prohibit communication with a juror or prospective juror after discharge of the jury under certain circumstances.

There is a motion pending with the Supreme Court which would amend Rules 1.15(I), (II) and (III) to require rate parity between IOLTA accounts and similarly constituted non-IOLTA accounts. The rule would require lawyers to have their trust account at banks that offer rate parity.

On November 3, 2011, the Supreme Court of Georgia approved amendments to the Georgia Rules of Professional Conduct to bring them more in line with the American Bar Association Model Rules. The Court approved additional changes on December 1, 2012. Those amendments included the creation of the position of Coordinating Special Master (Rule 4-209.1) and an amendment allowing foreign lawyers to serve as in-house counsel (Rule 5.5). On June 12, 2013 the Supreme Court approved a new rule, Rule 6.5, which relaxes the conflicts requirements for nonprofit and court-annexed legal services programs. By order issued March 21, 2014, the Court approved amendments to Rule 7.2 of the Georgia Rules of Professional Conduct. Rule 7.2 now requires additional written or oral disclosures for lawyer advertisements, including the full address of the lawyer's office and prominent disclosures if actors appear in an advertisement as either a lawyer or client. The Court also amended the rules regarding receiverships. The court added a provision for reimbursement of expenses for a lawyer serving as the receiver for the files of a lawyer who has died, disappeared, or become incapacitated.

Please remember that the current version of the Georgia Rules of Professional Conduct and archived issues of the Georgia Bar Journal are always available on the State Bar website, www.gabar.org.

Trust Account Overdraft Notification Program

The Office of the General Counsel has operated a Trust Account Overdraft Notification Program since January 1996. The program requires banks to notify the State Bar of Georgia when a lawyer's escrow account check is presented against insufficient funds. The purpose of the program is to stop the theft of client funds by providing a mechanism for early detection of problems in the escrow account.

During the 2013-2014 year the Program received 480 overdraft notices from financial institutions. Three hundred and ten of those matters were dismissed when the lawyer was able to provide a satisfactory explanation for the overdraft. Others were forwarded to the Investigative Panel for disciplinary investigation.

Pro Hac Vice Admission

The Supreme Court of Georgia amended Rule 4.4 of the Uniform Rules of Superior Court to require that out-of-state lawyers applying for *pro hac vice* admission in Georgia serve a copy of their application for admission on the State Bar of Georgia. In November 2007 the judges of the Georgia Board of Workers Compensation entered an order making the Rule applicable to lawyers practicing before the Board.

On September 4 2014 the Supreme Court amended the rule to revise the fees for admission *pro hac vice.* The applicant must pay a $75 fee to the Bar each time she applies for

admission. In addition, the applicant must pay an annual fee of $200, and must pay that amount every year by January 15th if she is still admitted *pro hac vice* before any court in Georgia. The annual fee is also paid to the Bar, and a portion is transferred to the Georgia Bar Foundation to support the delivery of legal services to the poor.

The Office of the General Counsel may object to the application or request that the court impose conditions to its being granted. Among other reasons, the Bar may object to an application if the lawyer has a history of discipline in his or her home jurisdiction, or if the lawyer has appeared in Georgia courts so frequently that he or she should become a member of the bar in this state. Lawyers admitted *pro hac* agree to submit to the authority of the State Bar of Georgia and the Georgia courts. During the last Bar year the Office of the General Counsel reviewed 754 *pro hac vice* applications.

Bank Failures and Lawyer Trust Accounts

The downturn in the economy caused concern about the stability of banks and other financial institutions where lawyers maintain their escrow accounts. The Bar Rules require that a lawyer maintain his or her trust account in a financial institution approved by the State Bar. The Bar has approved over 130 such institutions, but recent bank mergers and failures mean that the list changes constantly. "Approval" is based upon the institution's willingness to participate in the Interest on Lawyers Trust Account ("IOLTA") program, and not on any sophisticated analysis of the institution's viability in hard economic times. (Bar Rule 1.15(III) does require that IOLTA banks be authorized by federal or state law to do business in Georgia, and that they be federally insured.) As always, a lawyer should check the Bar's list of approved banks (which can be found on the Bar's website) and use common sense in deciding where to maintain an escrow account.

Beginning in November 2008 the Temporary Liquidity Guarantee Program fully insured deposits with any IOLTA-eligible institution, without regard to the amount on deposit and without regard to the number of clients whose money was pooled in the account. The program guaranteed funds in non-interest-bearing transaction accounts in unlimited amounts—beyond the $250,000 per depositor limit for other types of accounts. It went into effect October 14, 2008 and expired December 31, 2012. Thus far the Fund's expiration has not caused problems for Georgia lawyers but it is more important than ever that lawyers exercise good judgment in deciding where to maintain an escrow account.

ABA Opinions of Interest

Although Formal Advisory Opinions issued by the American Bar Association are not binding in Georgia, they provide useful advice about application of the Model Rules of Professional Conduct to a particular set of facts. The Office of the General Counsel will look to the ABA opinions for guidance where our rule is similar to the ABA Model and where there is no Georgia-specific advice. The American Bar Association has issued four Formal Opinions since this time last year. They are as follows:

- Formal Opinion 469: Prosecutors & Debt Collection Companies (November 12, 2014)
- Formal Opinion 468: Facilitating the Sale of a Law Practice (October 8, 2014)
- Formal Opinion 467: Managerial and Supervisory Obligations of Prosecutors Under Rules 5.1 and 5.3 (September 8, 2014)
- Formal Opinion 466: Lawyer Reviewing Jurors' Internet Presence (April 24, 2014)

Currently all four opinions are available on the ABA's website. The ABA's practice is to leave new opinions posted on the public portion of their site for about a year. After that, there is a charge if you wish to access an opinion.

Last updated January 2015