
Professional and Ethical Dilemmas in Litigation

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Session One

1. You are defense counsel in a medical malpractice case, and you are attending a mediation. Your highly qualified and prestigious expert witness, who you previously identified to opposing counsel, has recently informed you that he is no longer willing to testify that your client did not breach the standard of care.

-Can you tell plaintiff's counsel, at mediation, that the expert is still on board?

-What if the expert has informed you that he will not testify, but it's because of a conflict, rather than a change of opinion?

-May you still inform Plaintiff's counsel that the expert will testify at trial?

-What if the mediation is being handled by the judge before whom the case will be tried; can you tell the judge that the expert is going to testify?

Rule 3.3 (Candor Toward the Tribunal)

Rule 4.1 (Truthfulness in Statements to Others)

American Bar Association Formal Opinion 06-439

Session One

1. You are defense counsel in a medical malpractice case, and you are attending a mediation. Your highly qualified and prestigious expert witness, who you previously identified to opposing counsel, has recently informed you that he is no longer willing to testify that your client did not breach the standard of care.

-Can you tell plaintiff's counsel, at mediation, that the expert is still on board?

-What if the expert has informed you that he will not testify, but it's because of a conflict, rather than a change of opinion?

-May you still inform Plaintiff's counsel that the expert will testify at trial?

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-Can you tell plaintiff's counsel, at mediation, that the expert is still on board?

-What if the expert has informed you that he will not testify, but it's because of a conflict, rather than a change of opinion?

-May you still inform Plaintiff's counsel that the expert will testify at trial?

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2. 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)

Session One

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

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)

Session One

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

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GEORGIA FORMAL ADVISORY OPINION NO. 97-3

Session One

4. As a bitterly fought case approaches trial, the defense counsel offers a settlement which includes a substantial and seemingly fair cash payment to the plaintiff. The defendant insists, however, that plaintiff's counsel agree not to represent any more clients in suits against said defendant. Recognizing that the plaintiff's lawyer will thus be required to decline other cases, the corporation agrees to retain the lawyer for future work for a \$75,000.00 per year retainer for a minimum of 5 years. **May the attorney recommend such a settlement to his client?**

Rule 1.7 (Conflict of Interest: General Rule)

Rule 1.8 (Conflict of Interest: Prohibited Transactions)

Rule 5.6 (b) (Restrictions on Right to Practice)

Session One

5. Your firm opens a new bank account, and your managing partner notices a provision stating that any complaints regarding the monthly statement must be raised within 60-days, or the complaint is waived. The managing partner decides that is a policy your firm should implement. **May your firm place the following language on its invoices or other communications with clients:**

Important Message

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.

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

GEORGIA FORMAL ADVISORY OPINION NO. 05-8

Session One

6. You have just been retained by a legal malpractice insurer to defend an attorney in a legal malpractice action. The errors and omissions policy provides coverage in the amount of \$100,000, and it is a self-liquidating policy (ie: the costs of defense diminish the coverage dollar-for-dollar). The plaintiff has a relatively weak case, but should he prevail, the damages are likely to be in excess of \$1,000,000.00. Generally, if the limits of liability were considerably higher, you would wait until the close of discovery and perhaps after a motion for summary judgment before making any serious effort to settle the case, but such a course in this case might exhaust the liability limits available for settlement. **How should you proceed?**

Rule 1.2 (Scope of Representation)

Rule 1.3 (Diligence)

Rule 1.4 (Communication)

Rule 1.7 (a) (Conflict of Interest: General Rule)

Rule 1.16 (Declining or Terminating Representation)

Rule 2.1 (Advisor)

Rule 5.4 (Professional Independence of a Lawyer)

Session One

7. You are a partner in a mid-size law firm. While attending a cocktail party at your golf club, you overhear a conversation and learn that a local corporation has fired its litigation counsel and is looking to retain a new law firm. **What efforts may you make to obtain the litigation business of this corporation?** Is the answer different if the corporation has in-house counsel and that is the only individual you desire to contact?

Rule 7.1 (Communications Concerning a Lawyer's Service)

Rule 7.2 (Advertising)

Rule 7.3 (Direct Contact with Prospective Clients)

Rule 7.4 (Communication of Fields of Practice)

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Rule 7.1 (Communications Concerning a Lawyer's Service)

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Rule 7.3 (Direct Contact with Prospective Clients)

Rule 7.4 (Communication of Fields of Practice)

Session One

8. While investigating a potential claim against a manufacturer, you desire to contact a former employee to discuss facts pertaining to the claim. When you call the former employee, she states that she does not mind talking to you, but she wants to call the Human Resources department at her former company to find out if they object. You then receive a phone call from local counsel for the corporation, and he tells you that he represents the former employee and you are not allowed to speak with her. **What should you do?**

Rule 4.2 (Communication with Person Represented by Counsel)

Rule 4.3 (Dealing with Unrepresented Person)

Rule 4.4 (Respect for Rights of Third Persons)

GEORGIA FORMAL ADVISORY OPINION NO. 94-3

Session One

9. Your firm has lost an important trial for a large client. The client asks you to appeal. A colleague suggests that you retain a former appellate court judge, who has good personal relationships with the current judges, to work on the appeal. **Is it appropriate to hire the former judge?** What considerations should guide the former judge's decision about whether to accept this representation?

Rule 1.12 (Former Judge or Arbitrator)

Rule 1.12, Comment

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9. Your firm has lost an important trial for a large client. The client asks you to appeal. A colleague suggests that you retain a former appellate court judge, who has good personal relationships with the current judges, to work on the appeal. Is it appropriate to hire the former judge? **What considerations should guide the former judge's decision about whether to accept this representation?**

Rule 1.12 (Former Judge or Arbitrator)

Rule 1.12, Comment

Session One

10. You represent a plaintiff who has agreed to settle his case. When the settlement proceeds are delivered to you, you ask the client to come to your office to execute the settlement documents. When you sit down to explain the documents, your client insists that the contingency fee agreement was for 20%, not 40%. You show him the original fee contract, and he claims you must have changed it after he signed it. **What must you do with regard to the proceeds?**

Rule 1.15(I) Safekeeping Property – General Rule

Rule 1.7 (Conflict of Interest: General Rule)

Session Two

11. 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?

- 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)

Rule 1.6 (b) (iii) (Fees)

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Session Two

12. You are asked to represent the head of a local chapter of the KKK (or other controversial, potentially undesirable client) who is charged with a crime. While this is a prospective client who you ordinarily would decline to represent, you agree to meet with him and listen to his request for representation. The representation will be complex and occupy a large amount of your time.

Your first inclination is to decline the representation, but the skinhead tells you that he will pay you 3x your normal hourly rate and pay you a large non-refundable retainer.

You are still hesitant, and he points out that his story, and the trial, will create national headlines, and he tells you that he will give you exclusive publication rights.

When he sees that you still are wavering, he offers to buy you a nice car as a gift.

He then tells you that all the bills will be paid by an anonymous individual who supports “the cause” but does not want his name known.

Are there any problems with this proposal?

Rule 1.2 (Scope of Representation)

Rule 1.8 (Conflict of Interest: Prohibited Transactions)

Rule 1.16 (Declining or Terminating Representation)

GEORGIA FORMAL ADVISORY OPINION NO. 03-1

Session Two

13. Your corporate client has been served with Requests to Produce. The in-house counsel instructs you that certain “sensitive” documents should not be produced in discovery unless absolutely necessary. The Requests to Produce arguably, but not clearly, request these “sensitive” documents. The in-house counsel proposes a response that objects to the request, but that goes on to imply in vague terms that such documents do not exist.

-What considerations should guide your response?

-Should you alert opposing counsel that your interpretation of the request is that it does not call for certain documents that may exist?

Rule 1.2 (d) (Scope of Representation)

Rule 1.6 (Confidentiality of Information)

Rule 5.1 (c) (Responsibilities of Partner or Supervisory Lawyer)

Rule 3.3 (a) (1) and (4) (Candor Towards the Tribunal)

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Rule 3.4(a), (b) and (f) (Fairness to Opposing Party and Counsel)

Rule 4.1(a) (Truthfulness in Statements to Others)

Rule 5.4(c) (Professional Independence of a Lawyer)

Rule 8.4(a) (1) and (4) (Misconduct)

GEORGIA FORMAL ADVISORY OPINION NO. 05-10

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Rule 8.4(a) (1) and (4) (Misconduct)

GEORGIA FORMAL ADVISORY OPINION NO. 05-10

Session Two

14. You are a partner at a law firm where client development is an important criteria in your compensation. You were a college roommate of the CEO of a company that just had an IPO. You own some stock in the company. The CEO asks you to be the Trustee of Trust he is creating for his children. The sole asset in the Trust is the stock of the company. You would like to handle the legal work of the CEO and his company, and you feel that agreeing to be the Trustee would assist in that endeavor. **What should you consider before agreeing to be Trustee of the Children's Trust?**

Rule 1.7 (Conflict of Interest: General Rule)

Rule 1.16 (Declining or Terminating Representation)

Rule 8.4 (Misconduct)

Session Two

15. You represent a pesticide manufacturer in litigation in several states. The claims all involve damage to crops on farms. During the course of the representation the chief engineer of the corporation tells you, in confidence, that his in-house chemists have recently concluded that the chemicals can cause harm to humans, but the data required to prove that damage is not in the public domain and further, the executives at the company believe that it will take 15 years for anyone to figure out what is making the people sick. The chief engineer tells you that they are going to continue using the chemicals until they are “forced to stop.” **Can you reveal the confidences and secrets of the client in order to prevent injury to humans?**

Rule 1.2 (d) (Scope of Representation)

Rule 1.2, Comment 7

Rule 1.6 (Confidentiality of Information)

Rule 1.6 (Comment 8)

Session Two

16. You are approached by in-house counsel for an out-of-state corporation doing business in Georgia. The in-house counsel asks if you would be willing to represent it in defending a personal injury suit involving disputed liability and damages. Based on the telephone call, you feel that the case may involve complex medical/damages issues. The in-house counsel asks if you will agree to represent the corporation for a flat-fee (including attorney's fees and expenses), regardless of whether the case settles or goes to trial.

-What should you consider before agreeing to accept the representation?

-What if the phone call you receive is from an insurance carrier who wants you to represent its insured?

Rule 1.2 (Scope of Representation)

Rule 1.7 (Conflict of Interest)

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

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Rule 1.7 (Conflict of Interest)

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

Rule 5.4 (Restrictions on Right to Practice)

Session Two

17. You represent the owner of several bars in the Atlanta area. Over the years, you have represented his various corporations, and you have represented him personally (for instance, you drafted his Will). You also represent a small contractor in the Atlanta area who has done some renovation work at a few of your client's bars. In addition, you and the contractor own a small business in which you buy homes, renovate them and sell them. The bar owner and the contractor get into a dispute involving alleged shoddy construction and over-billing. **Can you represent either party in the dispute? If so, what must you do as a condition precedent?**

Rule 2.2 Intermediary

Rule 1.2 (Scope of Representation)

Rule 1.6 (Confidentiality of Information)

Rule 1.7 (Conflict of Interest: General Rule)

Rule 1.8 (Conflict of Interest: Prohibited Transactions)

Rule 1.16 (Declining or Terminating Representation)

Session Two

18. You represent the defendant in a hotly disputed car crash case. The only fact in dispute is whether your client had the green light or the plaintiff had the green light. You have a telephone call with the only eye-witness to the crash, and he tells you that your client had the green light. You take extensive notes during the phone call. At deposition, the eye-witness gives a different rendition of the facts and says that your client had the red light.

-At the deposition, can you cross examine the witness with the notes from your phone call?

-Can you do so at trial?

-Can you testify at trial regarding the phone call while remaining as counsel for the defendant?

-If not, must you withdraw as counsel?

Rule 3.7 (Lawyer as Witness)

Rule 4.3 (Dealing with Unrepresented Person)

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Session Two

19. You represent 15 families who were injured while riding a MARTA bus. Defense counsel offers a lump sum amount and tells you that the defendant does not care how the proceeds of the settlement are distributed. **What considerations should guide how you respond and under what circumstances, if any, may you pursue such a settlement?**

Rule 1.4 (Communication)

Rule 1.7 (Conflict of Interest: General Rule)

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

American Bar Association Formal Opinion 06-438

Session Two

20. Your spouse had a small growth removed from her skin and was told it might be malignant. As instructed, she calls the doctor's office the next day to obtain the results of the pathology lab.

-The receptionist takes a message and says the doctor will call back promptly. How soon should the doctor (or someone at the office) call back?

-Your client has called you requesting an update on the status of his claim. You were in a meeting and receive the voicemail message upon returning to your desk. How soon should you return the client's call?

Rule 1.4 (Communication)

Rule 1.4, Comment 1B



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