

Ethical Issues Arising in Externships: Supervisor Awareness and Student Judgment

I. Issue Awareness for Supervisors

A. The Three C's: Confidentiality, Conflicts and Competence

Students are typically advised to mind the “Three Cs” of Confidentiality, Conflicts and Competence when in their externships. We also hope that supervisors will be alert to and will help us reinforce these principles as they apply in the context of their particular office setting.

For ethical purposes, law school faculty are not “associated” with externship attorneys and do not have an attorney-client relationship with the externship’s clients – a situation that makes an externship program different from an in-house clinic. However, students in externship are associated with your practices, and should observe the same rules applicable to attorneys employed by your office. It does not matter that students are not your employees; nor does it matter whether they are certified under relevant Third-Year Practice rules.

As faculty supervisors, we face a distinct challenge. On the one hand, we encourage students to get *within* the role as a member of your practice, with all of the ethical responsibilities that entails. On the other, we also seek to offer them educational support, which fosters connections between students, ourselves and often students in other placements. Stated simply, students have a foot in two worlds.

Our programs require students to occupy the role of a practicing lawyer, within the parameters set by your office.¹ Thus, they have a duty under Rule 5.2 to ensure they do not knowingly violate Georgia’s Rules of Professional Conduct, regardless of what a supervising attorney directs them to do. However, the key word is “knowingly”: students may not yet have the experience to recognize the areas in which they must tread (if at all) with caution, whereas field supervisors should.² Moreover, as field supervisors, you have an independent duty under Rules 5.1 and 5.3 to ensure that there are measures in place to prevent subordinates from violating the Rule. You are responsible for violations that students direct or ratify, as well as for the mitigation or prevention of any potential or actual violation of which they are aware.

Below are some ideas about how field supervisors can provide adequate support and guidance to students in these areas.

Confidentiality

Observing ethical obligations of confidentiality is a central principle of the lawyer-client relationship. Students should not disclose any confidential information to the faculty

¹ They may have an obligation to follow the Georgia Rules as if they were an attorney under their school’s conduct code.

² See Comment 1 to Rule 5.2.

director, support staff, or other students. Students should observe ethical rules (including Rule 1.6) regarding disclosure and consent in successive externships, summer internships or career positions, just as if the student were a paid attorney employee in each setting.

Many of the Georgia law school programs have some form of a classroom component in which students discuss experiences in their externships with a faculty member and other students. Many programs ask students to discuss experiences among themselves on a class discussion board, small group meeting, or similar format. Most Georgia programs require that students have meetings with their faculty supervisors, in which the discuss their placements. Finally, most of our programs require students to write journals for our review.

In all of these contexts, a student may find it hard to avoid disclosure of confidential information in the course of achieving the educational goals in the program. You should know that we remind the students about their confidentiality obligations. Many of us have specific exercises for the students focusing them on confidentiality. We will do everything we can to educate students about confidentiality obligations as a general matter, and we will alert supervisors to potential problems to the extent they arise during the externship.

You can help students to understand the obligations about confidentiality by

(1) talking with the extern during orientation about confidentiality, including any particular sensitivity you and your office has with regard to certain kinds of information it commonly handles.

(2) discussing with the student how confidentiality may affect the topics they can address in their reflective writing and discussions in class, in meetings and in written journals. Many programs commit to keeping the content of written journals private, so as to allow the student freedom to think freely (and sometimes critically) about their experience. That said, you can help students to be clear about what topics they cannot ethically address in their reflective writing.

(3) exposing students to situations in which attorneys communicate with people outside the attorney-client relationship, so that students can observe how attorneys “edit” the conversation so as not to disclose confidential information. These may include CLEs, conversations with nonparty witnesses or victims, or informal conversations with other attorneys outside the organization.

(4) making sure that students understand that confidentiality applies not only to intentional disclosure, but also to inadvertent disclosure.

We ask that supervisors **do not** simply advise students to never discuss any part of their work with anyone. While that may be the easy way to guarantee there is no inadvertent disclosure, it teaches the student nothing about this important aspect of a lawyer’s professional life. There will always be *some* aspect of an attorney’s work that can be discussed at *some* level of generality (or in the form of a hypothetical with changed facts) that does not violate an attorney’s confidentiality obligations. While the faculty can advise and remind students of the obligation in principle, you can help students learn how

to apply it in specific settings, and reinforce the need to constantly be vigilant about the content of conversations outside the attorney-client relationship.

Conflicts

As in any legal setting, two kinds of conflicts may arise in the context of an externship: concurrent and successive. However, the manner in which these conflicts arise is somewhat different than in a typical law practice.

The concurrent conflict in a law practice typically arises because the organization or firm is representing (or proposing to represent) adverse parties in a matter. At some Georgia law schools, students may be permitted to take multiple experiential learning courses at one time. Given the current job market, many students are also working (or volunteering) in a legal organization outside the educational setting while also taking an externship. Thus, unlike full-time attorneys, students may be involved in multiple different legal work settings. An organization's typical conflict-checking procedure, which may focus on internal conflicts, may overlook this possibility.

With regard to successive conflicts, attorneys are more familiar with assessing whether the same organization can represent one party and another that is now adverse to the first client. But the kinds of successive conflicts students usually encounter relate to their prior employment (or prospective future employment) at another organization. While the organization may have a conflict-checking procedure as part of their onboarding process for attorneys, students may not be asked to participate in a similar process, and thus these conflicts may not be included in the organization's conflict-checking procedure.

Not all students in Georgia law schools will have had a legal ethics course before embarking on an externship, but they will be given the essential information on how to identify current and successive conflicts, and the rules applicable to each (including the necessary elements of any disclosure and waiver). (These Rules include Rules 1.7-1.11.) Of course, the faculty supervisors will assist students who reveal a potential conflict and seek prospective assistance. At the end of the externship, the faculty supervisors will also remind students to observe conflicts rules when seeking out subsequent clinical opportunities or employment.

Field supervisors can involve students in providing the necessary information for a conflicts check regarding the student's prior and current activities at the beginning of the placement. To the extent the office conducts regular conflicts checks for incoming clients, attorneys or staff, you can give the student a chance to observe the process and the manner in which you analyze and resolve potential conflicts. The field supervisor should also encourage the student to maintain a list of all matters on which the student has worked (which the office may want to retain a copy of), in order to help the student identify potential conflicts in successive positions.

Competence

The Rule regarding competence (Rule 1.1) may be most difficult to apply in an externship because it is understood that the student does not have experience – and that

the point of the externship is to acquire experience. Moreover, many attorneys remember being new attorneys and not feeling particularly “competent” when performing a skill the first time, so it may be hard for a supervisor to determine where the line between “going outside the comfort zone” and “incompetence” lies when giving assignments.

Typically, in an externship, the faculty supervisor does not have a role in supervising the legal work of the students. As a result, field supervisors and students must take primary responsibility for determinations of student competence in the course of the externship relationship. However, we do provide some guidance to students about how they might work with you, which you might find useful to know.

We advise students that they should be proactive about seeking out more guidance or background information if they don’t feel sufficiently prepared to perform the task asked of them. Ultimately, the student must alert a supervisor if they realize they have gone so far out of their comfort zone as to not be competent.

In turn, you should understand that students are often afraid of “looking stupid,” and don’t know enough to realize that they don’t have the information they need to perform a task competently. Thus, it is also incumbent upon supervisors to take care when they give assignments, and to be available to students for questions. We are happy to provide assistance and tools to help you improve that process. Doing so will help ensure that the student has the information s/he needs to determine whether they feel competent, as well as the opportunity to ask more questions or seek more guidance if they do not.

B. Student Practice and Unauthorized Practice of Law

The above discussion of competence leads naturally into questions of student practice and unauthorized practice of law. Not only do supervisors have an ethical obligation to ensure that the student is able to competently perform the tasks requested, the law has established that those who are not admitted to the Bar are simply not permitted to perform certain kinds of legal work, except in limited circumstances when specially certified.

As a general matter, the unauthorized practice of law certainly includes representing clients in court. Most placements are well aware that they must obtain third-year practice certification for students appearing in court in order to avoid unauthorized practice of law. The student practice rules,³ and the related statutory authorizations, are limited to public defenders, prosecutors, and nonprofit organizations serving the indigent or children. When a student is so certified, they are permitted to do everything that an attorney may do – with an important caveat: a supervising attorney must be physically present whenever the student is appearing in any court or administrative proceeding.

³ There is currently a proposal within the Bar to modify the third-year practice rules to allow fourth-semester students to take advantage of them – rendering them “student” practice rules; however, public defenders and prosecutors would still be limited by the statutes which still only authorize third-year students to act for them.

However, unauthorized practice of law also includes the *giving of legal advice* (see O.C.G.A. § 15-19-51) – and here is where an externship must tread carefully. We certainly want our students to have the opportunity to participate in client counseling experiences as part of their education. However, the students should not be put in a situation where they are giving off-the-cuff legal advice without being supervised by an attorney. If a supervising attorney cannot be present in a client meeting, the student may need to collect the relevant information, discuss proposed advice with the supervising attorney, who reviews and evaluates the advice before it is conveyed to the client. Alternatively, students (e.g., in a legal aid setting) can be trained to provide certain kinds of attorney-vetted information to callers that they are screening.

To the extent the student qualifies, an organization can obtain a student practice certification, which would allow the student to practice as an attorney would (including giving legal advice), without having to have a supervisor present outside of a courtroom setting. But, even when the student is certified, the competence and supervision rules still apply.

C. Malpractice

For malpractice purposes, law school externship faculty are also not associated with the law practices of each of the field placements that accept students as interns. As a result, to the extent that your practice faces malpractice liability (and some governmental practices may not), you will need to have consulted with your malpractice insurance provider to make sure that they cover the work of student interns in your office. Moreover, the supervisory structure of your office, and the protocols for supervising interns, matter as much here as they did in discussing competence, UPL and student practice. Indeed, they matter more, to the extent that your office faces exposure to liability as a result of unsupervised student work.

D. Duty to Report

On rare occasion, students will observe lawyer behavior at their placements that, rightly or wrongly, they believe to have violated the rules of ethics or to have breached some other norm of professional conduct. As field placement supervisors, we do not always hear about these incidents. But we often do, either in journals, in individual conversations or in classroom discussions. The conversations which follow invariably turn not only on an assessment of the particular ethical rules implicated by the observed behavior, but also on the more pointed question of the lawyer's ethical obligation to report misconduct.

In Georgia, Rule 8.33 states that a "a lawyer having knowledge that another lawyer has committed a violation . . . that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should report" to the appropriate authority. Similar language applies to lawyers who have knowledge of violations of the code of judicial conduct "that raises a substantial question as to the judge's fitness for office." The Comment to this rule describes these principles as requirements or obligations. At the same time, the language of the rule itself states that "[t]here is no disciplinary penalty for a violation of this Rule."

Note that the language of the rule applies to “a lawyer” with knowledge. Our students are not yet lawyers, and we could reasonably take the position that any misconduct they observe does not create in them any duty or even any ethical pressure to report. However, our programs uniformly encourage students to adopt the role of a lawyer. Moreover, especially where the behavior involves a member of your office, we see powerful reasons for discussing the behavior in detail, for assessing whether the conduct does involve a violation of a rule or does reflect on the lawyer’s capacities, and for appraising how reporting might occur.

Where the behavior does involve a member of your office, the most difficult questions concern whether and with whom in your office the student should raise the concern. You should understand that we do not start with the assumption that a student’s initial assessment of the situation is correct. Instead, we would approach the situation more patiently, and seek to determine whether a basis exists to go past the conversation between us and the student.

If we do reach such a conclusion, you can be of assistance in managing the next step, by making clear both to us and to our students how you might handle concerns of this sort. It takes very little to recognize the disincentives for a student to bring an ethical violation to your attention. The risks of being wrong, of giving offense and of guaranteeing a soured worksite and bad recommendation, all conspire to suppress whatever desire the student might have to initiate what would in any case be a hard conversation. If you have an internal process for handling complaints about conduct within the office, it helps us to be clear with students. If you do not, we may call you to ask about that process in the appropriate case.

II. Building Students’ Ethical Judgment

So far, we have discussed ethical concerns arising out of the three-way relationships between placements, students and externship program. However, we also have a broader goal on ethics and ethical awareness: that you will help the students who work with you understand the process by which lawyers in practice deal with ethical issues as they arise.

We do not expect ethical issue to arise every day in your practices, or even very often. However, we find that students often have more questions about ethics in what they observe than an experienced attorney might expect. For students, their placement may be the very first opportunity they have to see attorneys engaged in conduct that they have studied in school. While their observations may be inaccurate, they usually have an intense curiosity and an equally strong desire to refine and strengthen their insight into how to think, act and relate to others in accordance with the rules.

Teaching about ethics in practice can unsettle the teacher, partly because there is no clear-cut way of assessing ethical issues, and often no clear-cut answer to ethical questions. However, for convenience we might suggest the following process as a simple sequence of questions or prompts for helping to guide students through the thicket of ethical assessment:

Seeing the Issue:

Often the most difficult task in resolving an ethical issues comes at the start: in knowing that you have an ethical issue at all. As with the law, so with ethics, these issues rarely stand up and say: "Look at me, I'm an ethical issue!" Apprehending an ethical issue can occur in several ways: by encountering conduct outside the normal patterns of professional practice in your sphere; by suffering breaks in the routine patterns or habits of your practice; or by experiencing unusually harsh treatment at the hands of another attorney.

These prompts for recognition provide relatively easy markers. More subtle tells often ask for more self-awareness. You often hear attorneys say that particular behavior must be unethical because it just doesn't feel right: the "hair-on-the-back-of-the-neck" test; or the "slimy-hands" test. Remember that these are not measures of whether an ethical violation has definitively occurred. Instead, they serve to divert your mind towards thinking about an ethical violation, and towards the next steps in the process.

With a student, you may encounter a moment where they ask whether particular conduct is the right way of doing things. A more reserved student may simply look unsettled or askance, while the more forthright student will state "that's just wrong." Whatever the initial prompt, your task will be to help them focus specifically on what conduct troubled them, before turning to assessing its rule-based dimensions.

Naming the Issue:

This task focuses on assessing which part or parts of the rules of ethics are implicated by the conduct. Questions here often go along the lines of "is this a problem of confidentiality? Of conflict of interest?" or "which rule might cover this particular problem?"

Remember that many things may feel wrong or inappropriate that don't have a covering rule in the Rules of Professional Conduct. Behavior may violate professional norms, or rules of comity, or simply be counterproductive lawyering, without necessarily being ethical violations. Perhaps more interesting, behavior that does have a specifically rule-based dimension may also breach professional norms or be counterproductive practice.

As a practical matter, this means that the naming process involves keeping your mind open to all of the ways that the behavior might be 'off' or wrong, without trying too quickly to narrow in on one particular dimension or name for the problem.

Assessing the Issue:

As you develop more clarity about how to name the behavior, you and the student develop an increased ability to analyze it. In Georgia, this starts with the Rules of Professional Conduct, and the task of construing the language of the rule, and the related commentary. Georgia offers some limited guidance in the form of advisory opinions and decisions of courts in this and other states offer further guidance.

Assessment of formal legal authority should parallel your assessment of the factual context within which the ethical issue arises. If the ethical problem involves a lawyer outside your own practice, you will be limited in what you can discover. If the problem involves your own practice, you will of course need to consider the in-house procedures for reporting and assessing ethical violations. We encourage you to engage the student as much as is feasible in these procedures.

Resolving the Ethical Issue

If the issue involves a lawyer (or judge) outside your practice, your discussion of resolving the ethical issue will turn on the language of Rule 8.3. (Duty to Report), discussed above. In this kind of situation, you can provide students with invaluable perspective on whether you would report in the particular situation. You may find that explaining your reasons for reporting and not reporting may require you to think carefully about your own assumptions about how much you know about the relevant conduct, how clear you are in your assessment of it as a violation, and what you are prepared to accept by way of practice.

If the issue involves a lawyer within your own practice, the resolution will of course involve different considerations. Often, questions will arise before the fact, and the issue will focus on how to address the issue and adjust your conduct to comply with the applicable rules while achieving your client's goals. On occasion, questions will arise after the fact, and the problem-solving will involve the difficult mechanics of self-reporting. Either way, you can provide students with equally invaluable perspective on how you and your practice integrate ethical awareness into your practice.

Confidentiality

RULE 1.6 CONFIDENTIALITY OF INFORMATION

a. A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these Rules or other law, or by order of the Court.

...

b. The duty of confidentiality shall continue after the client-lawyer relationship has terminated.

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

Comment

...

[5] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. Rule 1.6 applies not merely to matters communicated in confidence by the client but also to all information gained in the professional relationship, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope. The requirement of maintaining confidentiality of information gained in the professional relationship applies to government lawyers who may disagree with the client's policy goals.

Authorized Disclosure

[6] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[7] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[7A] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized paragraph (b)(1)(iv) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

Disclosures Otherwise Required or Authorized

[18] The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

[19] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Conflicts

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

- a. A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).
- b. If client informed consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected client or former client gives informed consent, confirmed in writing, to the representation after:
 1. consultation with the lawyer, pursuant to Rule 1.0(c);
 2. having received in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation, and
 3. having been given the opportunity to consult with independent counsel.
- c. Client informed consent is not permissible if the representation:
 1. is prohibited by law or these Rules;
 2. includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or
 3. involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.

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

Comment

Loyalty to a Client

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. If an impermissible conflict of interest exists before representation is undertaken the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[2] Loyalty to a client is impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other competing responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (a) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose

courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

[3] If an impermissible conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment 4 to Rule 1.3 and Scope.

[4] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's informed consent. Paragraphs (b) and (c) express that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require informed consent of the respective clients.

Consultation and Informed Consent

[5] A client may give informed consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's informed consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain informed consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to give informed consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to give informed consent. If informed consent is withdrawn, the lawyer should consult Rule 1.9 and Rule 1.16.

[5A] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(s) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Lawyer's Interests

[6] The lawyer's personal or economic interests should not be permitted to have an adverse effect on representation of a client. See Rules 1.1 and 1.5. If the propriety of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client objective advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

[7] Paragraph (c)(2) prohibits representation of opposing parties in the same or a similar proceeding including simultaneous representation of parties whose interests may conflict, such as co-plaintiffs or co-defendants. An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal, the requirements of paragraph (b) are met, and consent is not prohibited by paragraph (c).

[8] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients give informed consent as required by paragraph (b). By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government entity is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

[9] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases while they are pending in different trial courts, but it may be improper to do so should one or more of the cases reach the appellate court.

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Non-litigation Conflicts

[11] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for material and adverse

effect include the duration and extent of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise.

[12] In a negotiation common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

[13] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

[14] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

- a. A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- b. A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
 1. whose interests are materially adverse to that person; and
 2. about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c), that is material to the matter; unless the former client gives informed consent, confirmed in writing.
- c. A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 1. use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
 2. reveal information relating to the representation except as Rule 1.6 or Rule

3.3 would permit or require with respect to a client.

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

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a matter for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are substantially related for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a

circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(b) and (h). With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

- a. While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7: Conflict of Interest: General Rule, 1.8(c): Conflict of Interest: Prohibited Transactions, 1.9: Former Client or 2.2: Intermediary.
- b. When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:
 1. the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 2. any lawyer remaining in the firm has information protected by Rules 1.6: Confidentiality of Information and 1.9(c): Conflict of Interest: Former Client that is material to the matter.
- c. A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7: Conflict of Interest: General Rule.

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

Comment

Definition of "Firm"

[1] For purposes of these Rules, the term "firm" includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant

in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to the other.

[2] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[3] Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

[4] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b): Successive Government and Private Employment; where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1): Successive Government and Private Employment. The individual lawyer involved is bound by the Rules generally, including Rules 1.6: Confidentiality of Information, 1.7: Conflict of Interest: General Rule and 1.9: Conflict of Interest: Former Client.

[5] Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences and, therefore, to the protections provided in Rules 1.6: Confidentiality of Information, 1.9: Conflict of Interest: Former Client, and 1.11: Successive Government and Private Employment. However, if the more extensive disqualification in Rule 1.10: Imputed Disqualification were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations and, thus, has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10: Imputed Disqualification were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11: Successive Government and Private Employment.

Principles of Imputed Disqualification

[6] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle

of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b): Conflict of Interest: Former Client, and 1.10(b): Imputed Disqualification: General Rule.

[7] Rule 1.10(b): Imputed Disqualification operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7: Conflict of Interest. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6: Confidentiality of Information and 1.9(c): Conflict of Interest: Former Client.

RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

- a. Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government entity gives informed consent, confirmed in writing. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
 1. the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 2. written notice is duly given to the client and to the appropriate government entity to enable it to ascertain compliance with the provisions of this Rule.
- b. Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.
- c. Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:
 1. participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment,

- unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or
2. negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).
- d. As used in this Rule, the term "matter" includes:
1. any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and
 2. any other matter covered by the conflict of interest rules of the appropriate government entity.
- e. As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

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

Comment

[1] This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

[2] A lawyer representing a government entity, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government entity may give consent under this Rule.

[3] Where the successive clients are a public entity and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government entity should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified

lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

[4] When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

[5] Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[6] Paragraph (a)(2) does not require that a lawyer give notice to the government entity at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government entity will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

[7] Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[8] Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government entity when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[9] Paragraph (c) does not disqualify other lawyers in the entity with which the lawyer in question has become associated.

Competence

RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation as used in this Rule means that a lawyer shall not handle a matter which the lawyer knows or should know to be beyond the lawyer's level of competence without associating another lawyer who the original lawyer reasonably believes to be competent to handle the matter in question. Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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

Comment

Legal Knowledge and Skill

[1A] The purpose of these rules is not to give rise to a cause of action nor to create a presumption that a legal duty has been breached. These Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

[1B] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS AND SUPERVISORY LAWYERS

- a. A law firm partner as defined in Rule 1.0 (l), and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Georgia Rules of Professional Conduct.
- b. A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Georgia Rules of Professional Conduct.
- c. A lawyer shall be responsible for another lawyer's violation of the Georgia Rules of Professional Conduct if:
 1. the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 2. the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
 - 3.

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

Comment

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. *See Rule 1.0(e)*. This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Georgia Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of

experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. *See Rule 5.2.* Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members, and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. *See also Rule 8.4(a).*

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Georgia Rules of Professional Conduct. *See Rule 5.2(a).*

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

- a. A lawyer is bound by the Georgia Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- b. A subordinate lawyer does not violate the Georgia Rules of Professional Conduct if

that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

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

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7: Conflict of Interest, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- a. a partner, and a lawyer who individually or together with other lawyers possesses managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- b. a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;
- c. a lawyer shall be responsible for conduct of such a person that would be a violation of the Georgia Rules of Professional Conduct if engaged in by a lawyer if:
 1. the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 2. the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; and
- d. a lawyer shall not allow any person who has been suspended or disbarred and who

maintains a presence in an office where the practice of law is conducted by the lawyer, to:

1. represent himself or herself as a lawyer or person with similar status;
2. have any contact with the clients of the lawyer either in person, by telephone or in writing; or
3. have any contact with persons who have legal dealings with the office either in person, by telephone or in writing.
- 4.

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

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Georgia Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Georgia Rules of Professional Conduct if engaged in by a lawyer.

[3] The prohibitions of paragraph (d) apply to professional conduct and not to social conversation unrelated to the representation of clients or legal dealings of the law office, or the gathering of general information in the course of working in a law office. The thrust of the restriction is to prevent the unauthorized practice of law in a law office by a person who has been suspended or disbarred.

Unauthorized Practice of Law and Student Practice

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

- a. A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

...

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

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3; Responsibilities Regarding Nonlawyer Assistants.

...

OCGA 15-19-50. Practice of Law Defined.

The practice of law in this state is defined as:

- (1) Representing litigants in court and preparing pleadings and other papers incident to any action or special proceedings in any court or other judicial body;
- (2) Conveyancing;
- (3) The preparation of legal instruments of all kinds whereby a legal right is secured;
- (4) The rendering of opinions as to the validity or invalidity of titles to real or personal property;
- (5) The giving of any legal advice; and

(6) Any action taken for others in any matter connected with the law.

OCGA 15-19-51. Unlawful Practice.

(a) It shall be unlawful for any person other than a duly licensed attorney at law:

(1) To practice or appear as an attorney at law for any person other than himself in any court of this state or before any judicial body;

(2) To make it a business to practice as an attorney at law for any person other than himself in any of such courts;

(3) To hold himself out to the public or otherwise to any person as being entitled to practice law;

(4) To render or furnish legal services or advice;

(5) To furnish attorneys or counsel;

(6) To render legal services of any kind in actions or proceedings of any nature;

(7) To assume or use or advertise the title of "lawyer," "attorney," "attorney at law," or equivalent terms in any language in such manner as to convey the impression that he is entitled to practice law or is entitled to furnish legal advice, services, or counsel; or

(8) To advertise that either alone or together with, by, or through any person, whether a duly and regularly admitted attorney at law or not, he has, owns, conducts, or maintains an office for the practice of law or for furnishing legal advice, services, or counsel.

(b) Unless otherwise provided by law or by rules promulgated by the Supreme Court, it shall be unlawful for any corporation, voluntary association, or company to do or perform any of the acts recited in subsection (a) of this Code section.

§ 15-18-22. Third-year law students and staff instructors as legal assistants to district attorneys

(d) An authorized third-year law student or staff instructor, when under the supervision of a district attorney, may assist in criminal proceedings within this state as if admitted and licensed to practice law in this state except that all indictments, presentments, pleadings, and other entries of record must be signed by a district attorney or by his duly appointed assistant and that, in the conduct of a grand jury investigation, trial, or other criminal proceeding, a district attorney or his duly appointed assistant must be physically present.

(e) A third-year law student or staff instructor may be authorized to assist a district attorney in such form and manner as the judge of the superior court may prescribe, taking care that the requirements of this Code section and the good moral character of the third-year student or staff instructor are properly certified by the dean of the law school. Before entering an order authorizing him to assist the district attorney, the judge shall further require of the student or instructor an oath similar to the oath required by a district attorney.

(f) As to each third-year law student or staff instructor authorized to assist a district attorney, there shall be kept on file in the office of the clerk of the superior court in the county where such authority is to be exercised the dean's certificate, the student's and instructor's oaths, and the judge's order as contemplated under subsection (e) of this Code section. The authority to assist a district attorney as allowed under this Code section shall extend for no longer than 18 months. If during this period any change occurs in the status of the student or instructor at the law school in which he or she was enrolled or employed, that is, if the student ceases his or her enrollment, is suspended, or is expelled or if the instructor ceases his or her employment or is released by the school, any such authority shall terminate and be revoked.

§ 17-12-42. Authorization to assist circuit public defender; certification

A third-year law student or staff instructor may be authorized to assist a circuit public defender in such form and manner as the judge of the court may prescribe, taking care that the requirements of this article and the good moral character of the third-year law student or staff instructor are properly certified by the dean of the law school.

§ 17-12-41. Assistance in criminal proceedings

An authorized third-year law student or staff instructor, when under the supervision of a circuit public defender, may assist in criminal proceedings within this state as if admitted and licensed to practice law in this state except that all pleadings and other entries of record must be signed by a circuit public defender or by his or her duly appointed assistant and that, in the conduct of a trial or other criminal proceeding, a circuit public defender or his or her duly appointed assistant must be physically present.

§ 17-12-43. File of certificates, oaths, orders; time of authorization

As to each third-year law student or staff instructor authorized to assist a circuit public defender, there shall be kept on file in the office of the clerk of the court in the county where such authority is to be exercised the dean's certificate, the student's and instructor's oaths, and the judge's order as contemplated under Code Section 17-12-42. The authority to assist a circuit public defender as allowed under this Code section shall extend for no longer than 18 months. If during this period any change occurs in the status of the student or instructor at the law school in which he or she was enrolled or employed, that is, if the student ceases his or her enrollment, is suspended, or is expelled or if the instructor ceases his or her employment or is released by the school, any such authority shall terminate and be revoked.

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.