ETHICS IN FAMILY LAW IN GEORGIA: SELECTED ISSUES

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I. INTRODUCTION

All the Georgia Rules of Professional Conduct apply to lawyers who practice family law. But domestic relations matters present some special and recurring issues. For this article, I have selected several to discuss. My criteria for selection of the issues were: (1) relationship of the issue to recent changes or proposed changes to the Georgia Rules of Professional Conduct; (2) reports from family law practitioners or superior court judges that the issue is a common or emerging one; (3) differences between the law in Georgia and either a Model Rule of Professional Conduct or a formal opinion of the American Bar Association Standing Committee on Ethics and Professional Responsibility; and (4) the existence of a Georgia formal advisory opinion on point.[1] The issues relate mostly to a lawyer's responsibilities to clients. A few deal with duties to third parties, while one relates to the duty of candor to the court.

II. ISSUES RELATED TO CLIENTS

A. Prospective Clients

Before a lawyer has a client, there is someone who seeks to confer with the lawyer about entering into an attorney-client relationship. Such a person is a "prospective client," and Georgia Rule of Professional Conduct 1.18 sets forth the lawyer's duties to prospective clients.[2]

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[1] I am a member of the Georgia Formal Advisory Opinion Board. Any opinions expressed in this article are mine and not necessarily the opinions of the Board or any of its members.

[2] GA. RULES OF PROF'L CONDUCT r. 1.18 (2025).

It was not always so. The Georgia Supreme Court adopted Rule 1.18 in 2021.[3] Before then, there was no specific rule governing a lawyer's duties to a prospective client, and the lack of such a rule created problems for the State Bar. For example, attorney Marsha Williams Mignott was accused of using information gained from a prospective client to the detriment of that prospective client.[4] That conduct would be improper as to a current or a former client under Rule 1.8(b)[5] and 1.9(c)(1)[6] respectively, and the Bar tried to use those rules to discipline Mignott.[7] The Georgia Supreme Court rejected that attempt and dismissed the case because Mignott never formed an attorney-client relationship with the alleged victim, and Georgia's Rule 1.18 was not yet in effect.[8]

Now, Rule 1.18 sets forth the lawyer's obligations to a prospective client, defined as a "person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter…."[9] Let's look at a common scenario in the family law context.

Suppose you meet with Mary about the possibility of becoming her lawyer in her divorce from her husband John. In those preliminary discussions, you learn information from Mary that could be significantly harmful to her in the divorce. Perhaps she has been hiding marital assets or conducting an affair. Mary chooses not to hire you. What are your responsibilities to Mary?

As a preliminary matter, you need to determine whether Mary meets the definition of a "prospective client." Not everyone who contacts you about possibly representing them will. For example, if Mary had communicated all her secrets "in response to advertising that merely describes the lawyer's

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[3] Order on 2020-1 Motion to Amend the Rules and Regulations for the Organization and Government of the State Bar of Georgia (May 14, 2021), https://www.gasupreme.us/wp-content/uploads/2021/05/Order-2020-1_issued.pdf.

[4] In Re Mignott, 317 Ga. 764, 893 S.E.2d 891 (2023).

[5] GA. RULES OF PROF'L CONDUCT r. 1.8(B) (2025) ("A lawyer shall not use information gained in the professional relationship with a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules").

[6] GA. RULES OF PROF'L CONDUCT r. 1.9(C)(1) (2025) ("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: (a) 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 ….).

[7] Mignott, 317 Ga. at 764 – 765, 893 S.E.2d at 891 – 892.

[8] *Id.* at 767, 893.

[9] GA. RULES OF PROF'L CONDUCT r. 1.18(a) (2025).

education, experience, areas of practice, and contact information, or provides legal information of general interest," she would not be entitled to the protections afforded to prospective clients.[10] "Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a 'prospective client.'"[11] On the other hand, if your website or other advertising "specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response," that person is a prospective client.[12]

In our hypothetical, you had an old-fashioned face-to-face talk with Mary about her divorce. Mary nevertheless may not be entitled to the protections afforded to prospective clients. It is not unheard of for parties who are about to file for divorce to try to make sure that all the "good" lawyers in the community are disqualified from representing the other side. These schemers make the rounds of the lawyers they fear and disclose confidential information for the purpose of making sure those lawyers will not show up on the other side. Maybe Mary, in our hypothetical, was secretly executing such a plan. If so, she would not be entitled to status as a prospective client. Comment 2 to Rule 1.18 provides: "a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a 'prospective client.'"[13]

Suppose, however, that Mary meets the definition of a prospective client. What duties do you owe her, even though she never became a client? One is confidentiality, although on first reading the scope of your confidentiality duty may seem mysterious. Rule 1.18(b) provides: "Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information,

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[10] *Id.* at Comment 2.

[11] *Id.*

[12] *Id.* The risk of inadvertently undertaking duties to someone as a prospective client is something to consider in the design of law firm websites, especially "chat" features that invite web surfers to submit information to the firm. The ABA Standing Committee on Ethics and Professional Responsibility has warned: "Imprecision in a website message and failure to include a clarifying disclaimer may result in a website visitor reasonably viewing the website communication itself as the first step in a discussion. Lawyers are therefore well-advised to consider that a website-generated inquiry may have come from a prospective client …." ABA Formal Op. 10-457 (2010).

[13] *Id.* at Comment 2.

except as Rule 1.9 would permit with respect to information of a former client."[14] So, you consult Rule 1.9 to determine what confidentiality duties you owe to former clients. There, you discover that you may not use information you learned from Mary to her disadvantage "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."[15] You also may not reveal Mary's information "except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client."[16] In other words, you must treat what you learned from your prospective client Mary just the same as if Mary were a current client, with the exception that you may use her confidential information against her if it has become "generally known."[17]

You also owe Mary some limited duties of loyalty. Suppose that, after Mary tells you that she is not going to retain you, you are contacted by John, who may want you to represent him in his divorce from Mary. If you had previously actually represented Mary in her divorce, Rule 1.9(a) would prevent you from "switching sides" and representing John, unless Mary consented (an unlikely prospect).[18] But Mary was never your client. Under what circumstances must you decline to represent John?

The standard is more relaxed than it would have been if Mary had become a client. As Comment 1 to Rule 1.18 states, "A lawyer's consultations with a prospective client usually are limited in time and depth and … prospective clients should receive some but not all of the protection afforded clients."[19] You will be disqualified from representing John only if John's interests are materially adverse to Mary's (they are), the matters are the same or substantially related (they are), you received information from Mary that could be significantly harmful to her in the matter (maybe, maybe not), and

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[14] GA. RULES OF PROF'L CONDUCT r. 1.18(b) (2025).

[15] GA. RULES OF PROF'L CONDUCT r. 1.9(c)(1) (2025).

[16] GA. RULES OF PROF'L CONDUCT r. 1.9(c)(2) (2025).

[17] Lawyers often believe the "generally known" exception is broader than it is. The ABA Standing Committee on Ethics and Professional Responsibility has opined that the "generally known" exception applies only to information "widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade." ABA Formal Op. 479 at 1 (2017). It also found that "[i]nformation is not 'generally known' simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information." *Id.*

[18] GA. RULES OF PROF'L CONDUCT r. 1.9(a) (2025) ("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.").

[19] GA. RULES OF PROF'L CONDUCT r. 1.18 Comment 1 (2025).

Mary will not consent to the conflict (she won't).[20] The only "maybe" in that sequence is whether you received significantly harmful information. If you did, you're disqualified. If you did not, there is no conflict.

One lesson is to try to limit what you learn in the early stages of dealing with a prospective client.[21] An alternative is to obtain informed consent at the outset of your communications with the prospective client that you will not be precluded from representing another party in the matter because of any information you learn from the prospective client.[22]

If you learned significantly harmful information from Mary about Mary's impending divorce from John, and you neither obtained her advance consent to you representing John nor can you obtain that consent now, you may not represent John. Suppose, however, that John asks one of your partners to represent him in the divorce. Your conflicts system flags that John's opposing party Mary consulted you about the divorce. You are disqualified, but is your conflict imputed to your partner? If so, could the partnership cure that conflict by screening you from your partner's representation of John?

Rule 1.18(c) imputes your conflict to your partner: "If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except [with the informed consent of both John and Mary]."[23] Screening would not help. This is a significant change that Georgia made to Model Rule of Professional Conduct 1.18, which allows for screening in certain circumstances when the conflict is with a prospective client.[24]

Georgia Rule 1.18 now provides detailed guidance about your responsibilities to a prospective client. It is important to recognize when you

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[20] GA. RULES OF PROF'L CONDUCT r. 1.18(c) (2025).

[21] Comment 4 to Rule 1.18 provides this guidance: "In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose."

[22] Comment 5 to Rule 1.18 provides: "A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter."

[23] GA. RULES OF PROF'L CONDUCT r. 1.18(c) (2025).

[24] MODEL RULES OF PROF'L CONDUCT r. 1.18(d) (2025).

are communicating with a prospective client and to be aware of your duties of confidentiality and loyalty even if you are not hired.

B. Issues Related to Fees

Domestic relations cases frequently raise issues related to fees. The most common one in disciplinary cases is the failure to return unearned fees, in violation of Rule 1.16(d), at the end of the representation. Many of these cases involve abandonment of the client after payment of a fee deposit and the refusal of the lawyer to return the money after being fired.[25] These are straightforward issues under the rules of conduct.[26] There are, however, several special fee issues that warrant discussion.

1. Advance Payment of Fees and "Nonrefundable Retainers"

It is commonplace, and understandable, for family law attorneys to require clients to pay fees in advance. These arrangements go by various names (e.g., "advance payment," "prepayment," and "deposit"). In Georgia, the precise term is "special retainer." As the Formal Advisory Opinion Board explained in 2003:

> A special retainer is a contract for representation obligating a client to pay fees in advance for specified services to be provided by an attorney. This definition applies regardless of the manner of determining the amount of the fee or the terminology used to designate the fee, e.g., hourly fee, percentage fee, flat fee, fixed fees, or minimum fees. Generally, fees paid in advance under a special retainer are earned as the specified services are provided.[27]

Under the Model Rules of Professional Conduct, a lawyer must place prepaid fees into the lawyer's trust account until they are earned.[28] Not so in Georgia,

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[25] See, e.g., In Re Perry, 318 Ga. 155, 158 (2024).

[26] See GA. RULES OF PROF'L CONDUCT r. 1.3 (2025) ("A lawyer shall act with reasonable diligence and promptness in representing a client. Reasonable diligence as used in this rule means that a lawyer shall not without just cause to the detriment of the client in effect willfully abandon or willfully disregard a legal matter entrusted to the lawyer.") and 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as … refunding any advance payment of fee that has not been earned.").

[27] Georgia Formal Advisory Opinion 03-1 (2003).

[28] ABA Formal Op. 505 at 6 (2023).

where placing the advance fees in the trust account is permitted but not required, "absent special circumstances necessary to protect the interest of the client."[29] The Model Rules and the Georgia Rules align, however, over the requirement that any unearned fees must be returned to the client at the end of the representation.[30]

Sometimes lawyers designate part of the special retainer fee as "nonrefundable" and decline to refund that portion no matter when the attorney-client relationship ends.[31] That practice is permissible in Georgia only in specific circumstances:

> Some services, for example, the services of the attorney's commitment to the client's case and acceptance of potential disqualification from other representations, are provided as soon as the contract is signed. The portion of the fee reasonably allocated to these services is, therefore, earned immediately. These fees, and any other fees that have been earned by providing specified services to the client, need not be refunded to the client. In this sense, a special retainer can be made non-refundable.[32]

The permissibility of this practice arises from the fact that one factor in determining the reasonableness of an attorney's fee is "the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer."[33] It is prudent to be cautious, however, about how much of the advance payment you designate as "nonrefundable." The Formal Advisory Opinion Board has reminded Georgia lawyers not to make fee

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[29] Georgia Formal Advisory Opinion 03-1 (2003) (citing Georgia Formal Advisory Opinion 91-2 (1991). I thank John Shiptenko, Senior Assistant General Counsel of the State Bar of Georgia, for his assistance with this point.

[30] ABA Formal Op. 505 at 5 (2023); Georgia Formal Opinion 03-1 (2003). See also MODEL RULES OF PROF'L CONDUCT r. 1.16(d) (2025) and GA. RULES OF PROF'L CONDUCT r. 1.6(d) (2025) (both requiring return of unearned fees at the end of a representation).

[31] This is to be distinguished from a "general retainer," which is a fee that is "paid – and deemed earned – upon the promise of availability to represent a client, whether or not services are actually needed or requested by the client." ABA Formal Op. 505 at 2 (2023). General retainers are "quite rare." *Id.* at 3. It would be particularly surprising to see a divorce lawyer on general retainer. Perhaps only Henry VIII would foresee needing to divorce so often that it would be beneficial to pay a lawyer to be on call.

[32] Georgia Formal Advisory Opinion 03-1 (2003).

[33] GA. RULES OF PROF'L CONDUCT r. 1.5(a)(2) (2025).

arrangements that are intended to penalize clients for terminating the attorney-client relationship.[34]

2. Fees Paid in Marital Property

A sitting superior court judge with long experience in family law recently alerted me that he has seen fee arrangements wherein a lawyer is to be paid by receiving a specific piece of property (such as a work of art) if the client obtains that property when the marital estate is divided. Almost forty years ago, the Supreme Court of Georgia approved the practice of lawyers in domestic cases obtaining interests in marital property as security for payment of their fees unless the specific circumstances would compromise the lawyer's independent judgment.[35] That opinion was based on Standard 31 but is consistent with current Rule 1.8(j):

> A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that a lawyer may: (a) acquire a lien granted by law to secure the lawyer's fees or expenses as long as the exercise of the lien is not prejudicial to the client with respect to the subject of the representation.[36]

The 1986 Formal Advisory Opinion stressed that the interest in the marital property could only be to secure the payment of fees.[37]

Being paid with marital property, as opposed to just taking a security interest in the property, is different. It is also problematic. Marital property is a "subject matter" of a divorce case, and a lawyer who is to be paid by acquiring specific property has acquired a "proprietary interest" in one of the subjects of the litigation the lawyer is conducting for the client. The arrangement that the judge describes likely violates rule 1.8(j) because of the risk that it would skew the lawyer's advice regarding property division.[38] The lawyer's interest would be to ensure that the specific property that is to be the lawyer's fee ends up in the client's hands, regardless of advantages the client might obtain by bargaining that property away to the spouse in exchange for other preferred property.

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[34] Georgia Formal Advisory Opinion 91-2 (1991).
[35] Georgia Formal Advisory Opinion 86-1 (1986).
[36] GA. RULES OF PROF'L CONDUCT r. 1.8(j) (2025).
[37] Georgia Formal Advisory Opinion 86-1 (1986).
[38] GA. RULES OF PROF'L CONDUCT r. 1.8 Comment 19 (2025).

This arrangement also may run afoul of Rule 1.5(d)(1), which provides: "A lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof…."[39] If the arrangement is that the lawyer will be paid only if the client obtains the specific property in the divorce, then the fee is contingent upon securing the divorce (and contingent on the terms of the property division). One reason why contingent fees are prohibited in divorce cases is that the lawyer has a disincentive to advise or support reconciliation – the lawyer would not be paid at all because the contingency never occurs. That same risk is present when the lawyer only gets paid if the divorce happens and the client receives the specific property the lawyer contracted to receive as the fee.

3. "Churning" Fees

Another fee issue came to my attention from a friend who practices family law. He reports that his adversaries frequently channel the emotions of their clients and continue the marital arguments in the divorce proceedings. Such posturing is a way of showing the client that the lawyer is "on their side" and shares their disregard for the opposing party and counsel. My friend wrote, "there are many attorneys who believe that litigating family law cases means writing long multi-page letters to opposing counsel essentially, again, continuing the marital arguments. These letters in no way advance the case, but just provide those attorneys . . . [an] opportunity for billing …."[40] They "stir the pot."[41]

There are problems with such conduct, first as a matter of professionalism. Georgia's Aspirational Statement on Professionalism recites that all lawyers should aspire "[t]o model for others, and particularly for . . . clients, the respect due to those we call upon to resolve our disputes and the regard due to all participants in our dispute resolution processes."[42] Another aspiration is "the expeditious and economical achievement of all client objectives."[43] Treating opposing parties and counsel disrespectfully and

[39] GA. RULES OF PROF'L CONDUCT r. 1.5(d)(1) (2025).
[40] Email from Franklin T. Gaddy to the Author November 7, 2024 (on file with the Author).
[41] *Id.*
[42] Georgia Lawyer's Creed and Aspirational Statement on Professionalism at 3 (https://cjcpga.org/wp-content/uploads/2019/07/1-Lawyers-Creed-and-Aspirational-Statement-Clean-Copy-v-2013-new-logo-seal.pdf).
[43] *Id.* at 4.

drawing out the divorce proceedings to please an embittered client are inconsistent with these aspirations.

But professionalism and ethics are different things.[44] As a matter of ethics, the issue with "stirring the pot" is 1.5(a)'s prohibition on charging unreasonable fees. One factor in determining reasonableness is the "time and labor required" for the representation.[45] A lawyer who is channeling the client's anger to generate more billable hours is not billing for time and labor that is required by the circumstances. Such fees would be unreasonable under Rule 1.5(a).[46]

C. Agreements to Limit the Scope of Representation

My friend also informed me that courts are seeing abuses of agreements to provide representation with a limited scope in family law cases. The Georgia rules allow for limited scope representation under certain conditions: "A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[47] Limited scope representation has the potential to alleviate some of the problems caused by the number of pro se divorce litigants. For example, having a lawyer just to help complete the child support worksheets would streamline many cases. In fact, the Georgia Supreme Court has created a study committee to explore (among other issues) whether trained non-lawyers should be licensed to provide such limited-scope services to help those who otherwise would clumsily proceed pro se. The State Bar of Georgia surveyed its members about the idea in March 2025.[48]

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[44] See Harold G. Clarke, *Professionalism: Repaying the Debt,* 25 GEORGIA BAR J. 170, 173 (1989) ("ethics is a minimum standard which is required of all lawyers while professionalism is a higher standard expected of all lawyers.").

[45] GA. RULES OF PROF'L CONDUCT r. 1.5(a)(1) (2025).

[46] See also comment 5 to Rule 1.5: "A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures." For an extreme example of a lawyer who decided to "stir the pot" and ended up disbarred, see In Re Farmer, 307 Ga. 307 (2019).

[47] GA. RULES OF PROF'L CONDUCT r. 1.2(c) (2025).

[48] Email from Ivy Cadle, President of the State Bar of Georgia, March 19, 2025 (Subject: Supreme Court of Georgia Study Committee on Legal Regulatory Reform Seeks Input) (linking to survey) (on file with the Author). The Study Committee issued its report in June 2025 and recommended a pilot project that would license "Limited License Legal Professionals" to help with housing and consumer debt matters, but not family law. The Committee's report is available on the website of the Supreme Court at

Rule 1.2(c), however, is subject to abuse. Suppose a lawyer undertakes representation of a low-income person in a family law case after obtaining a substantial upfront deposit (perhaps all the money the client can pay). Then the lawyer provides full-service representation at an hourly rate until the deposit is exhausted (long before the case is complete), at which point the lawyer seeks to withdraw for nonpayment of fees under Rule 1.16(b)(4) or (5).[49] The client is left without a lawyer and without funds to hire another. This inevitable eventuality is not explained to the client at the outset of the "limited scope" representation.

That arrangement violates both Rule 1.2(c) and Rule 1.5. A limited scope representation must be reasonable.[50] An arrangement such as that just described is unreasonable for the same reasons the comments to Rule 1.5 disapprove of it:

> An agreement may not be made, the terms of which might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction.[51]

Limited scope representation is a way of helping clients help themselves. Taking all of their money up front, and then withdrawing when the money runs out, does not accomplish that goal.

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https://www.gasupreme.us/08-26-2025-study-committee-on-legal-regulatory-reform-seeks-public-comment-on-report/.

[49] GA. RULES OF PROF'L CONDUCT r. 1.16(b) (2025) ("except as stated in paragraph (c), a lawyer may withdraw from representing a client … if: … (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; [or] (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client ….").

[50] GA. RULES OF PROF'L CONDUCT r. 1.2(c) (2025).

[51] GA. RULES OF PROF'L CONDUCT r. 1.5, Comment 5 (2025). Comment 5 does provide that "it is proper to define the extent of services in light of the client's ability to pay." *Id.* But the scenario I am describing is one in which the likely outcome – abandonment in the midst of the case – is not explained to the client before the "limited service" agreement is made.

D. Sex with Clients

The propriety of sexual relationships between lawyers and clients has been long debated.[52] Anecdotally, the problem arises most frequently in divorce cases. Over twenty years ago, the American Bar Association approved an amendment to the Model Rules to deal with this issue: "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."[53] A comment to the Model Rule explains the rule and its effect:

> Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.[54]

Model Rule 1.8(j) is thus a prohibition with no exceptions.

Georgia has considered adopting a version of Model Rule 1.8(j) but so far has not done so. That does not mean, however, that sex with clients is unregulated in Georgia. Suppose that you and your divorce client find yourselves sexually attracted to each other. You would like to commence a sexual relationship and continue the attorney-client relationship. But commencing a sexual relationship with a client is fraught with risks of conflicts of interest under Georgia Rule of Professional Conduct 1.7, which provides in relevant part: "A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests … will materially and adversely affect the representation of the client, except [with informed consent]."[55] The chance that the sexual relationship will pose risks of material and adverse effects on the representation are high, especially in a divorce case. For example, once you begin a sexual relationship with your client, your personal interest in continuing that relationship likely would affect your advice to the client if the client's spouse attempts to reconcile.

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[52] See, e.g., Mary Wood, *Sexual Ethics Affect Lawyer's Professionalism,* October 30, 2002 (reporting on panel presentation about the ethics of lawyer-client sexual relationships) (https://www.law.virginia.edu/news/200210/sexual-ethics-affect-lawyers-professionalism-panel-says).

[53] MODEL RULES OF PROF'L CONDUCT r. 1.8(j) (2025).

[54] *Id.* at Comment 20.

[55] GA. RULES OF PROF'L CONDUCT r. 1.7(a) (2025).

Although in Georgia lawyers are not strictly prohibited from commencing sexual relationships with their clients, the lawyer must be alert to the possibility that the lawyer's personal interests might materially and adversely affect the representation of the client.

But Rule 1.7 is not a prohibition, unlike Model Rule 1.8(j). You may be able to obtain informed consent from your client to the conflicts raised by commencing a sexual relationship. Before doing so, you must consider whether the conflict is consentable: "Client informed consent is not permissible if the representation: …involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients."[56] You must try to be objectively self-aware and ask whether the sexual relationship makes it reasonably unlikely that you can resist the temptation to serve your personal interests rather than the client's. If it is reasonably unlikely that you can do so, then you must choose between the sexual relationship and the client-lawyer relationship. Informed consent to the conflict is not possible.

If, however, you conclude that despite the conflict you will be able to provide adequate representation to the client, you may seek informed consent in compliance with Rule 1.7(b). You must consult with the client, which means that you must communicate "information reasonably sufficient to permit the client to appreciate the significance of the matter in question."[57] You must also supply the client "in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation" and give the client the chance to consult with independent counsel.[58] If the client gives informed consent after the lawyer takes these steps, then the lawyer must confirm that consent in writing.[59]

Trying to represent a client with whom one is having a sexual relationship is perilous. Even if you follow all the steps under Rule 1.7 to conclude that a conflict is consentable and to obtain informed consent, you should realize that sometimes sexual relationships end badly, and the client might decide later to file a grievance against you. Then someone else – perhaps a special master appointed by the Supreme Court – will be the one to decide, at least initially, if the conflict was consentable and, if so, whether

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[56] GA. RULES OF PROF'L CONDUCT r. 1.7(c) (2025).
[57] GA. RULES OF PROF'L CONDUCT r. 1.0(d) (2025).
[58] GA. RULES OF PROF'L CONDUCT r. 1.7(b) (2025).
[59] *Id.*

you conveyed reasonable and adequate information to make consent to the conflict of interest informed. It will usually be the more prudent course to refer the client to another lawyer if you and your client wish to commence a sexual relationship.

E. Clients with Diminished Capacity[60]

A superior court judge has informed me that increasingly he is seeing parties in divorce proceedings display signs of diminished capacity. Usually, these parties are elderly. If you have a client in that category, you have special responsibilities under Georgia Rule of Professional Conduct 1.14.

Rule 1.14 identifies two types of clients with diminished capacity. You are empowered to take protective action if the client is "at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest."[61] If the client's diminished capacity is not so severe that those risks are present, you "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[62] You must assign your diminished-capacity client to one group or the other.

Your legal training did not prepare you to make this judgment, but you must make it nevertheless. A comment to Rule 1.14 provides guidance:

> In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.[63]

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[60] Much of this discussion of diminished capacity is reproduced by permission from a paper I wrote with Professor Suparna Malempati and Susan Goico for a CLE program presented in 2024 by the Georgia Chief Justice's Commission on Professionalism. I thank my co-authors for that permission.

[61] GA. RULES OF PROF'L CONDUCT r. 1.14(b) (2025).

[62] GA. RULES OF PROF'L CONDUCT r. 1.14(a) (2025).

[63] GA. RULES OF PROF'L CONDUCT r. 1.14 Comment 6 (2025).

Note that several of these factors depend upon getting to know your client well over time, in order to enable you to know whether the client has a "variable" state of mind and whether the client's instructions are consistent with the client's "long-term commitments and values." There is also a confidentiality issue at this stage (discussed below).

If you determine that the client does not meet the criteria in Rule 1.14(b) for protective action, your obligation is, as noted, to "as far as reasonably possible, maintain a normal client-lawyer relationship."[64] Effective communication is the key. Think specifically about time, place, and manner of communication. For example, if your client's diminished capacity is due to age-related cognitive decline, it may be that your client is more alert in the morning than in the evening. You may find that you need to repeat yourself to make sure that the client understands. The client may understand better if the conversation occurs in the client's home or other familiar space. Using plain language in both oral and written communication may be extremely helpful.

Another option is to obtain the assistance of a family member or friend. The comments to Rule 1.14 note: "The client may wish to have family members or other persons participate in discussions with the lawyer."[65] The usual formulation of the scope of the attorney-client privilege would include communications under these circumstances if the assistance of another is reasonably required.[66] Beware, however, of the family member whose "assistance" is self-interested or aggressive. "[T]he lawyer must keep the client's interests foremost and … must look to the client, and not family members, to make decisions on the client's behalf."[67]

If you determine that the client "is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest," then you have the option to take protective action.[68] That action can range from modest to drastic. Protective action includes "consulting with individuals or entities that have the ability to take action to

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[64] GA. RULES OF PROF'L CONDUCT r. 1.14(a) (2025).
[65] GA. RULES OF PROF'L CONDUCT r. 1.14 Comment 3 (2025).
[66] See, e.g., THE RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70, Cmt. F ("A person is a confidential agent for communication if the person's participation is reasonably necessary to facilitate the client's communication with a lawyer or another privileged person and if the client reasonably believes that the person will hold the communication in confidence.").
[67] GA. RULES OF PROF'L CONDUCT r. 1.14 Comment 3 (2025).
[68] GA. RULES OF PROF'L CONDUCT r. 1.14(b) (2025).

protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian."[69] The comments add more detail:

> Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.[70]

Comment 5 goes on to provide guidelines for deciding among these alternatives. You "should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections."[71]

Confidentiality issues arise at two stages. The first is in making the determination whether the client is at substantial risk and cannot act to protect his or her own interest. As noted, Comment 6 guides that judgment. It provides that in "appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician." Seeking that guidance would require revelation of confidential information such as the lawyer's experience in interacting with the client. Those revelations, however, are often necessary and are made for the purpose of representing the client. They are therefore "impliedly authorized" under Georgia Rule of Professional Conduct 1.6(a).[72]

Taking protective action also raises confidentiality issues. For example, protective action includes the possibility of "consulting with family members."[73] Those consultations will usually require the revelation of confidential information. Rule 1.14(c) explicitly permits these disclosures: "Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to

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[69] GA. RULES OF PROF'L CONDUCT r. 1.14 Comment 3 (2025).
[70] *Id.* at Comment 5.
[71] *Id.*
[72] GA. RULES OF PROF'L CONDUCT r. 1.6(a) Comment 5 (2025).
[73] GA. RULES OF PROF'L CONDUCT r. 1.14 Comment 5 (2025).

paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."[74] Comment 8 cautions the lawyer to limit such disclosures as much as possible and specifically to consider "whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client." The Comment concludes (unhelpfully), "The lawyer's position in such cases is an unavoidably difficult one."

With the aging of the pool of potential clients, family law attorneys must be sensitive to the special issues that arise when a client displays signs of diminished capacity. Rule 1.14 must be consulted for its guidance about the ethical issues that may arise and how lawyers should handle them.

F. Conflicts When Acting as Counsel and Guardian ad Litem for a Minor

In Georgia, a minor is entitled to court-appointed counsel in a proceeding to terminate parental rights.[75] The lawyer for the minor has the same duties that the lawyer has to any other client.[76] Georgia law also requires the appointment of a guardian ad litem for the minor in this situation.[77] The role of the guardian ad litem is to advocate for the minor's best interest.[78] The guardian ad litem and the attorney for the child can be the same person "unless or until there is a conflict of interest between the attorney's duty to such child as such child's attorney and the attorney's considered opinion of such child's best interests as guardian ad litem."[79]

Suppose that you represent a minor child and serve as the guardian ad litem. As guardian, you believe the best interests of the minor would be served by termination of the parent's rights. Your job as guardian is to explain that to the court. On the other hand, as the attorney for the minor, your obligation would be to provide candid advice that the minor would be better off if the parent's rights were terminated. If the minor agrees, then all is well. There is no conflict. But what if, despite your advice, the minor instructs you as their lawyer to seek a result – denial of the termination of parental rights – that you believe to be against the minor's best interests?

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[74] GA. RULES OF PROF'L CONDUCT r. 1.14(c) (2025).
[75] O.C.G.A. 15 – 11 – 262(a) – (b).
[76] *Id.* at 262(c).
[77] *Id.* at 262(d).
[78] O.C.G.A. 15 – 11 – 105(a).
[79] O.C.G.A. 15 – 11 – 262(d).

In 2016, the State Bar of Georgia Formal Advisory Opinion Board posed this question: "May an attorney who has been appointed to serve both as legal counsel and as guardian ad litem for a child in a termination of parental rights case advocate termination over the child's objection?"[80] The obvious answer to this question is no. You cannot as the minor's attorney substitute your judgment for theirs. The minor is a client with diminished capacity, but recall that your duty under Rule 1.14(a) is to have as normal a lawyer-client relationship as possible with diminished capacity clients.[81] In a normal lawyer-client relationship, the client decides the objectives of the representation. And the comments to Rule 1.14 recognize that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody."[82] If your client has instructed you that the objective of the representation is to keep the parent's rights intact, then you cannot argue for the opposite result without violating Rule 1.2(a). You either follow the client's instructions or seek to withdraw as counsel because the client is insisting on pursuing an objective that you believe to be imprudent.[83]

But is there another solution that would enable you to try to do what's best for the minor? Suppose you withdrew as the attorney because the client's objective is imprudent. Could you continue to serve as guardian ad litem and advise the court that the child's interests would best be served by termination of parental rights? Again, the answer is no. Once you have withdrawn as the attorney, the minor becomes a former client. Inevitably, in trying to convince the court to terminate the parent's rights you would be using confidential information you learned in your representation of the minor to the detriment of the minor (at least as the minor perceives the situation). That would violate rule 1.9(c)(1).[84]

The Formal Advisory Opinion Board reached the same result when it concluded that the attorney must withdraw as guardian ad litem "when it becomes clear that there is an irreconcilable conflict between the child's

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[80] Georgia Formal Advisory Opinion 16-2 (2016).

[81] GA. RULES OF PROF'L CONDUCT r. 1.14(a) (2025).

[82] GA. RULES OF PROF'L CONDUCT r. 1.14 Comment 1 (2025).

[83] GA. RULES OF PROF'L CONDUCT r. 1.16(b)(3) (2025).

[84] GA. RULES OF PROF'L CONDUCT r. 1.9(c)(1) (2025). ("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….").

wishes and the attorney's considered opinion of the child's best interests…."[85] The attorney cannot continue as guardian but maybe can continue as counsel. Whether the lawyer continues to represent the minor, and seeks the result the minor wants, depends upon just how imprudent that lawyer believes that decision to be.

G. Confidentiality and Client Threats of Violence

Many divorce cases involve marriages marked by domestic violence.[86] The divorce proceedings themselves are not likely to calm things down. As one lawyer wrote on his website:

> Domestic violence can escalate during the divorce process due to increased stress and tension. The divorce process itself can be emotionally charged and stressful, and these factors can further escalate instances of domestic violence. The heightened emotions and conflicts that arise during divorce proceedings can intensify the abusive behavior, making it even more challenging for the parties involved to find a resolution.[87]

A divorce attorney must be prepared to navigate client threats of violence in accordance with the rules of conduct.

Take an example. Recently, a Houston County man who was in the midst of divorce proceedings found his wife in bed with her new boyfriend.[88] The man shot and killed the boyfriend and has now been sentenced to life with the possibility of parole. Suppose you represented this man before the homicide. He tells you that he knows his wife is sleeping with her new boyfriend while the man's children are in the house. He angrily tells you, I am "going to take care of this myself." You know your client always carries a gun because he is a tow truck driver and sometimes feels threatened while he is on the job. What do you do?

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[85] Georgia Formal Advisory Opinion 16 – 2 at 1.

[86] *Understanding the Link Between Domestic Violence and Divorce*, Law Offices of Peter Van Aulen, https://www.pvalaw.com/understanding-the-link-between-domestic-violence-and-divorce.html.

[87] *Id.*

[88] *Man Convicted of Killing Estranged Wife's Friend in Warner Robins Learns His Sentence*, Lars Lonnroth, 13 WMAZ, https://www.13wmaz.com/article/news/local/warner-robins/man-convicted-killing-estranged-wifes-friend-warner-robins-sentence-court-records-show/93-67f79fd9-6ed4-4483-a634-5fc7f6ae6057.

You are generally bound by Rule 1.6(a) to "maintain in confidence all information gained in the professional relationship with a client …." The client's rage at his wife, his stated intentions "to take care of" the situation, and his possession of a gun – all of that is confidential. There are, however, exceptions to the general rule of confidentiality. One may be applicable here. You may reveal what you have learned from your client if you reasonably believe it is necessary to do so "to avoid or prevent harm … to another as a result of client criminal conduct … clearly in violation of the law…."[89] If you do, you must first (if feasible) make a good faith effort to persuade your client not to act.[90] But if those efforts fail, you are left with the decision whether to reveal your client's confidential information to possibly save the life of the wife or, as it turned out, the life of the new boyfriend.

It is crucial to realize that this is a matter of discretion rather than duty. Rule 1.6(b)(1) provides that a lawyer "may" reveal confidential information if an exception applies. Comment 12 to Rule 1.6 leaves no doubt: "A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this rule." So, if you were representing the Houston County husband and heard him threaten his wife, you could warn her or not. If a tragedy occurs, and your client carries out a threat to kill someone, your failure to warn was a perfectly acceptable decision under the Georgia Rules of Professional Conduct.[91]

III. Issue Relating to Third Parties

The issues discussed so far all involve duties to clients. I want to raise two issues that concern duties to third parties.

A. Unrepresented Opposing Parties

In 2022, there were 45,413 pro se litigants in domestic civil cases in Georgia.[92] Family law practitioners cannot avoid having to deal from time to

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[89] GA. RULES OF PROF'L CONDUCT r. 1.6(b)(1)(i) (2025).

[90] GA. RULES OF PROF'L CONDUCT r. 1.6(b)(3) (2025).

[91] Not every state agrees. See, e.g., ILL. RULES OF PROF'L CONDUCT r. 1.6(c) (2025). ("A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.").

[92] CIVIL ACCESS TO JUSTICE INNOVATIVE IDEAS TO SUPPORT SELF-REPRESENTED LITIGANTS AND INCREASE COURT EFFICIENCY IN CIVIL CASES at 7 (2023), https://georgiacourts.gov/wp-content/uploads/2024/03/Civil-Access-to-Justice-Report-12_22_2023.pdf.

time with unrepresented adversaries. In doing so, they must be careful to comply with Rule 4.3.

Suppose you represent Jane in her divorce from Bill, who is unrepresented. Eventually, you will need to negotiate with Bill to try to reach an agreement. Because Bill does not have a lawyer, the “no-contact rule” (4.2) does not apply, and you are free to communicate with him directly. But you still must be careful as you do so.

Rule 4.3(a) provides that, in dealing on behalf of a client with an unrepresented party, you may not state or imply that you are disinterested.[93] Simple enough– don’t lie to an unrepresented party. But Rule 4.3(a) imposes an additional duty that requires more alertness. You have an obligation if you know or reasonably should know that the unrepresented party misunderstands your role - you must make reasonable efforts to correct the misunderstanding, even if you did not contribute to it.[94] Notice especially the “know or reasonably should know” standard. It will do you no good in a disciplinary proceeding to plead ignorance of the unrepresented party’s misunderstanding if the special master or, ultimately the Supreme Court, decides that under the circumstances you *should have* known about it.

Let me give you an example I often use in my class. Suppose you are representing a husband in a divorce from his wife, who is unrepresented. You meet with the wife to present a proposed settlement agreement. She reads it and says to you, “thank you so much for helping us out. This has been a tough time for both of us.” The wife seems to think that you are helping her, yet your sole allegiance is to her adversary. In that circumstance, you know or should know that the wife misunderstands your role in the matter. You have an obligation to make reasonable efforts to correct that misunderstanding. You might, for example, explain to the wife: “Please understand that I represent your husband, and I do not represent you. It is not therefore my role to help you resolve the issues – my sole allegiance is to your husband. Do you understand?”

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[93] GA. RULES OF PROF’L CONDUCT r. 4.3(a) (2025). An intentional misrepresentation such as that would also violate Rule 4.1(a) (“In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person ….”) and Rule 8.4(a)(4) (“It shall be a violation of the Georgia Rules of Professional Conduct for a lawyer to: … engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation ….”).

[94] GA. RULES OF PROF’L CONDUCT r. 4.3(a) (2025).

Rule 4.3(b) imposes another restriction on your communications with an unrepresented party. It provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not … give advice other than the advice to secure counsel, if a lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of a client.[95]

Suppose you want to settle a divorce case with an unrepresented party. You can present a proposed agreement to them, but they may not understand it. What if the unrepresented party asks you, for example, what "joint legal custody" means. If the unrepresented party does not understand what the proposal means, it may not be possible to resolve the case. Can you explain, or would that constitute legal advice that you are prohibited from giving?

Fortunately, Comment 2 to 4.3 gives you a way out of this dilemma. Remember, the purpose of Rule 4.3 is to protect the unrepresented party from making the mistake of trusting you, in the naive belief that you are looking out for them. You can eliminate that risk if you explain that you represent an adverse party and do not represent the unrepresented party. Once you do that, Comment 2 to Rule 4.3 tells you that you "may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations." You cannot of course make materially false statements of fact or law,[96] but you are free to seek the best deal for your client consistent with the truth, without fear of running afoul of Rule 4.3.

B. The No-Contact Rule and Represented Opposing Parties

Suppose you represent the wife in a divorce case and send a settlement proposal to the husband's counsel. Despite following up by phone, email, and text, you cannot get a response. You suspect (maybe based upon prior dealings with this lawyer) that opposing counsel has not conveyed the settlement offer to his client. What can you do?

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[95] GA. RULES OF PROF'L CONDUCT r. 4.3(b) (2025).
[96] GA. RULES OF PROF'L CONDUCT r. 4.1(a) (2025).

One thing is clear: you may not communicate directly with the husband to convey the settlement offer. Georgia Rule 4.2 provides: "A lawyer who is representing a client in a matter shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order."[97] You know the husband is represented in the matter, and the presentation of a settlement offer certainly would be about the subject of the representation.

One option you may consider is to ask your client to contact her husband and convey the settlement offer. The comments to Georgia Rule 4.2 recognize that parties have a right to communicate with each other.[98] You might also be tempted to follow the suggestions of American Bar Association Formal Opinion 11-461, which advised:

> Parties to a legal matter have the right to communicate directly with each other. A lawyer may advise a client of that right and may assist the client regarding the substance of any proposed communication. The lawyer's assistance need not be prompted by a request from the client. Such assistance may not, however, result in overreaching by the lawyer.[99]

Following this guidance would mean that you could equip your client with the documents and "talking points" needed to get the settlement talks going. As long as you do not overreach – such as by having your client try to get her husband's signature on the settlement before speaking with his lawyer – you would be in bounds, at least under the ABA's interpretation of the Model Rules.

However, there is reason for caution in Georgia. Comment 8 to Georgia Rule 4.2 may forbid the type of party-to-party communication you want to have: namely, one instigated and directed by you. The entire Comment states, "Parties to a matter may communicate directly with each other because this Rule is not intended to affect communications between parties to an action entered into *independent of and not at the request or direction of counsel*."[100] The italicized language suggests that the ABA's

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[97] GA. RULES OF PROF'L CONDUCT r. 4.2(a) (2025).
[98] GA. RULES OF PROF'L CONDUCT r. 4.2 Comment 8 (2025). ("Parties to a matter generally may communicate directly with each other because this Rule is not intended to affect communications between parties to an action ….").
[99] ABA Formal Op. 11-461 at 1 (2011).
[100] GA. RULES OF PROF'L CONDUCT r. 4.2 Comment 8 (2025).

advice about the lawyer's role in suggesting and guiding party-to-party contact may not square with Georgia's rule. And the Georgia Supreme Court has expressed some skepticism about using ABA ethics opinions in interpreting Georgia rules.[101] You may be better advised to find another way to get a response from opposing counsel. Court involvement ultimately may be the best recourse.

One additional twist on domestic relations cases and Rule 4.2 bears mentioning. Suppose the husband in a divorce is a lawyer, while the wife is not a lawyer but is represented by one. May the lawyer-husband contact the represented wife without permission of the wife's lawyer? On the one hand, this is a party-to-party communication, which is normally permitted. On the other hand, the husband is a trained advocate, and allowing him to contact the wife directly without the permission of the wife's lawyer poses the exact risk that Rule 4.2 is designed to protect against, the "misuse of the imbalance of legal skill between a lawyer and a layperson."[102]

The Supreme Court of Georgia recently amended Rule 4.2 to provide more guidance about party-to-party communications when one of the parties is a lawyer. Rule 4.2(a) now reads (the new language is italicized):

> A lawyer who is representing a client *or proceeding pro se* in a matter shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.[103]

This amendment errs on the side of protecting the represented party from the dangers of communicating with a lawyer on the other side, at the cost of limiting otherwise permissible party-to-party communication. A lawyer who

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[101] See In re Formal Advisory Opinion No. 20-1, 313 Ga. 803, 807, 872 S.E.2d 745, 747 n.1 (2022) ("[W]e have modified the proposed FAO 20-1 to omit all of footnote 1 and a portion of footnote 3 in the proposed FAO, which contained references to ABA Model Rule 4.2, Comment 7 to that rule, and ABA Formal Opinion 91-359 (March 22, 1991)."

[102] GA. RULES OF PROF'L CONDUCT r. 4.2 Comment 7 (2025).

[103] In Re Motion to Amend 2023-2 (December 20, 2024) (https://www.gasupreme.us/wp-content/uploads/2024/12/Motion-to-Amend-2023-2_Order_FINAL_entered.pdf.). The American Bar Association Standing Committee on Ethics and Professional Responsibility reached the same conclusion in 2022 by interpreting the Model Rule 4.2 (which does not contain language explicitly about a pro se lawyer) to cover pro se lawyers because, according to the ABA, the pro se lawyer is representing a client – himself or herself. ABA Formal Op. 502 at 1 (2022).

is representing themselves and is also represented by counsel is proceeding pro se within the meaning of the amended rule.[104] Notice, however, that a represented lawyer who is not also representing themself may have contact with a represented opposing party, without the permission of the other side's lawyer. Such a lawyer would neither be representing a client nor proceeding pro se and so would be outside even the broader reach of new Rule 4.2.

IV. One Issue Relating to Candor to the Court: Secret Settlements

A superior court judge alerted me to an issue he has been seeing with respect to candor to the court. The scenario is this: A husband and wife agree to divorce and agree on child support. They want to avoid the hassle of completing the required detailed calculations of presumptive child support.[105] The husband and wife ask the lawyer to file for divorce on behalf of one spouse and to represent to the court that the couple have no children. The other spouse appears pro se and goes along with the ruse. The parties receive a quick and inexpensive divorce, relying on their secret "side deal" about the details.

Rule 3.3(a) provides that a lawyer "shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client…."[106] To misrepresent the existence of minor children of a divorcing couple violates Rule 3.3(a). That fact is material, even when the parties have reached an agreement, because the court is required by law to review the agreement with the best interests of the child in mind. As O.C.G.A. § 19-6-15 states, after reciting at great length the required process for determining presumptive child support:

> Nothing contained within this Code section shall prevent the parties from entering into an enforceable agreement contrary to the presumptive amount of child support which may be made the order of the court pursuant to review by the court of the adequacy of the child support amounts negotiated by the parties, including the provision for medical expenses and health insurance; provided, however, that if the agreement negotiated by the parties does not comply with the provisions contained in this Code section and does not contain findings

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[104] GA. RULES OF PROF'L CONDUCT r. 4.2 Comment 8 (2025).
[105] See O.C.G.A. § 19-6-15.
[106] GA. RULES OF PROF'L CONDUCT r. 3.3(a) (2025).

> of fact as required to support a deviation, the court shall reject such agreement.[107]

The child support guidelines are complicated, and following them and obtaining court approval can be time-consuming and expensive. But lying to the court about the existence of minor children to save time and money is not an option.

V. Conclusion

This article is not intended as a comprehensive examination of ethics issues in family law cases. It discusses only selected issues according to the criteria described in the introduction. For broader discussions of ethics in family law, a good place to start is Ethics, Malpractice, and Professional Liability in Matrimonial Cases, a journal of the American Academy of Matrimonial Lawyers.[108]

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[107] O.C.G.A. § 19-6-15(c)(6).

[108] The most recent issues are available at https://www.aaml.org/category/ethics-malpractice-and-professional-liability-in-family-law-cases/.