

**CLE materials to accompany Professionalism and ethics presentation by M. Scott Boone, Associate Professor of Law, Atlanta's John Marshall Law School**

The most relevant Georgia rules and comments are reproduced herein. In places, only those subsections and comments applicable to language and communication difficulties have been included. For complete versions, please consult the State Bar of Georgia's website.

Perhaps the most basic of ethical rules is Rule 1.1 on Competence. Importantly, the competence requirements set forth in Rule 1.1 are not a relative sliding scale without a bottom end. There is a minimum level of competence, regardless of any difficulties standing in the way of competent representation. More specifically, communication difficulties cannot excuse less than competent representation. This is the case even where the alternative might be no representation (except under the very narrow emergency exception).

**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.

While the phrasing of most of the comments to Rule 1.1 appears to be aimed at competence and knowledge of a legal nature, Comment 5 addresses the adequacy of how a lawyer approaches a particular matter. This would appear to encompass how a lawyer handles any communication difficulties arising from language differences or hearing impairment.

*Thoroughness and Preparation*

*[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.*

## **RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER**

Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the scope and objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

### *Allocation of Authority between Client and Lawyer*

*[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.*

*[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).*

*[4] In a case in which the client appears to be suffering from diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.*

## **RULE 1.4 COMMUNICATION**

- a A lawyer shall:
  - 1 promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(h), is required by these Rules;
  - 2 reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  - 3 keep the client reasonably informed about the status of the matter;
  - 4 promptly comply with reasonable requests for information; and
  - 5 consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- b A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

### *Comment*

*[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.*

### *Communicating with Client*

*[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's informed consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).*

*[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.*

*[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged. The timeliness of a lawyer's communication must be judged by all the controlling factors. "Prompt" communication with the client does not equate to "instant" communication with the client and is sufficient if reasonable under the relevant circumstances.*

### *Explaining Matters*

*[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, where there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(h).*

*[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.*

### *Withholding Information*

*[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client.*

## **RULE 1.5 FEES**

b. The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

## **RULE 1.14 CLIENT WITH DIMINISHED CAPACITY**

a. When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

b. When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

c. Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to 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.

### *Comment*

*[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished mental capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, 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. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.*

*[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.*

*[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the lawyer should consider such participation in terms of its effect on the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.*

*[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).*

#### *Taking Protective Action*

*[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking 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. In taking any protective action, the lawyer 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 decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.*

*[6] 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.*

*[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.*

### *Disclosure of the Client's Condition*

*[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine 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 lawyer's position in such cases is an unavoidably difficult one.*

### *Emergency Legal Assistance*

*[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.*

*[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.*

*[11] This Rule is not violated if a lawyer acts in good faith to comply with the Rule.*

## Ethical Considerations for a Bilingual Attorney

### RULE 3.7 LAWYER AS WITNESS

a. A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

1. the testimony relates to an uncontested issue;
2. the testimony relates to the nature and value of legal services rendered in the case; or
3. disqualification of the lawyer would work substantial hardship on the client.

b. A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

#### *Comment*

*[1] Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.*

*[2] The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.*

*[3] Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.*

*[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10: Imputed Disqualification has no application to this aspect of the problem.*

*[5] Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7: Conflict of Interest: General Rule or Rule 1.9: Conflict of Interest: Former Client. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7:*



*Conflict of Interest. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10: Imputed Disqualification disqualifies the firm also.*

## **Ethical Considerations for an Attorney as a Supervisor/Employer of an Interpreter**

### **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

#### *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.*

A number of rules may require an attorney to make certain disclosures or take certain actions given a specific state of knowledge. For example, an attorney is required to remediate the effects of false statements of material fact offered as evidence by the attorney before a tribunal. As another example, an attorney is required to clarify the attorney's role is in the course of representing a client, the attorney comes to understand that the unrepresented person they are speaking with misunderstands the attorney's role with respect to that person. In each of these situations, meeting this duty is predicated upon the attorney's knowledge – something that can be complicated by communication difficulties.

### **RULE 1.13 ORGANIZATION AS CLIENT**

f. In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

### **RULE 3.3 CANDOR TOWARD THE TRIBUNAL**

- a. 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;
  3. fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  4. offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- b. The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- c. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- d. In an ex parte proceeding, other than grand jury proceedings, a lawyer shall inform the tribunal of all material facts known to the lawyer that the lawyer reasonably believes are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.

## *Comment*

*[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(r) for the definition of tribunal. It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(4) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.*

*[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.*

## *Representations by a Lawyer*

*[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).*

## *Legal Argument*

*[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.*

## *Offering Evidence*

*[5] Paragraph (c) allows that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.*

*[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer may refuse to offer the false evidence. If only a portion of a witness's testimony will be*

*false, the lawyer may call the witness to testify but may not elicit from the witness the testimony that the lawyer knows is false.*

*[7] The duties stated in paragraphs (a), (b) and (c) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].*

*[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(i). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.*

*[9] Although paragraph (a)(4) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].*

#### *Remedial Measures*

*[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done - making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing.*

*[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.*

#### **RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS**

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; or
- b. fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

#### **RULE 4.3 DEALING WITH UNREPRESENTED PERSON**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

- a. state or imply that the lawyer is disinterested; when the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding; and
- b. 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.

When dealing with interpreters, attorneys should be conscious that interpreters have their own code of professional responsibility with which they need to comply. Further, attorneys should understand that interpreters have a specific role within the judicial system, one that serves the tribunal and the judicial system, and not the client foremost.

What follows is the professional responsibility code for interpreters in the state of Georgia. A model code was promulgated a number of decades ago, but this Georgia version goes beyond the model code in a number of ways.

## **CODE OF PROFESSIONAL RESPONSIBILITY FOR INTERPRETERS**

### **Preamble**

The Georgia Supreme Court adopted the Rules on the Use of Interpreters for Non-English Speaking and Hearing Impaired Persons and created the Georgia Supreme Court Commission on Interpreters at the recommendation of the Supreme Court Commission on Equality. The Commission on Interpreters was charged to recruit, register, certify, license, and govern the work and conduct of language interpreters in the courts of Georgia in order to assure that persons of limited English proficiency as well as hearing impaired persons be provided due process, equal access and meaningful participation in all court proceedings and court support services; that the constitutional rights of criminal defendants to assistance of language interpreters be safeguarded; and, that the efficiency, quality and uniformity of court proceedings as assisted by interpreters be encouraged and preserved. This Code of Professional Responsibility is to be interpreted in accordance with these purposes. The following enumerated standards of ethical conduct to be observed by language interpreters in the courts of Georgia contain authoritative principles and directives to assist the judiciary, officers of the court, language interpreters, agencies and organizations administering, delivering, or supervising interpreting services to the courts and the public. These rules are applicable to all persons interpreting in the courts except for standards XV through XVIII which do not apply to uncompensated interpreters. Commentaries are intended to provide contextual guidance. Proceedings concerning violations of the enumerated standards shall be brought as provided for by general law, the regulations of the Commission on Interpreters, and the within standards.

## Standards

Interpreters shall:

- I. Act strictly in the interest of the court during proceedings before the court and with fidelity to the non-English or hearing impaired speaker for whom they are interpreting.
- II. Reflect proper court decorum and act with dignity and respect to the officials and staff of the court.
- III. Avoid professional or personal conduct which could discredit the court.
- IV. Work unobtrusively so that attention is focused on the parties rather than the interpreter.
- V. Accurately state their qualifications as a court interpreter.
- VI. Interpret accurately and faithfully without indicating any personal bias. In doing so, interpreters shall:
  1. Preserve the level of language used and the ambiguities and nuances of the speaker without editing.
  2. Request clarification of ambiguous statements or unfamiliar vocabulary from the judge or counsel.
  3. Refrain from expressing personal opinion in a matter before the court.
  4. Promptly notify the court of any error in their interpretation.

*Commentary: Parties to litigation have a constitutional right to test the testimony of non-English speaking or hearing impaired witnesses, just as they test the testimony of an English speaking witness. In the courtroom, the judge or jury must evaluate the fairness of the questioning and the understanding of the witness, not the interpreter. Outside of the testimonial setting, for instance in witness interviews, probation interviews, or mediation, the interpreter may play a more active role in clarifying misunderstandings between the participants. Further, in such settings, requests for clarifications should be directed at the participants, rather than being referred to the judge.*

*The obligation to preserve accuracy includes the interpreter's duty to correct any error of interpretation discovered by the interpreter during the proceeding. Interpreters should demonstrate their professionalism by objectively analyzing any challenge to their performance.*

*In civil cases, the courts must sometimes rely on community service groups, friends, acquaintances, and relatives of the non-English or hearing impaired speaker to interpret or translate during court proceedings. Even interpreters whose participation is uncompensated must understand they take an oath to faithfully interpret impartially in the courtroom setting without interference as a participant, and that the evaluation of the questions and answers must be left to the finder of fact (the judge or jury).*

*Example: If a questioner in courtroom testimony asks a question that assumes incorrect facts (such as where certain streets intersect), it would be highly improper for the interpreter to interject his or her own knowledge of the correct information. In contrast, if a probation officer in an intake interview, for instance, makes a mistake in giving directions as to how to get to a court-related office, it would be helpful, rather than improper, for the interpreter to point out the supposed error to the parties to the conversation.*

- VII. Maintain impartiality by avoiding undue contact with witnesses, attorneys, interested parties, and jurors before, during and until the case is concluded.



- VIII. Disclose to the court and parties any prior involvement with a case, private involvement with the parties or with others significantly involved in the case.

*Commentary: It is not improper for an interpreter retained by one side in litigation for witness or client interviews to also interpret testimony in the courtroom. Whether such a dual role is to be permitted in a particular case is for the presiding judge to determine. It would be highly improper, however, for the interpreter to fulfill such multiple roles without disclosure to all parties and the court.*

- IX. Never take advantage of knowledge obtained in the performance of official duties, for the interpreter's own or another's personal gain.
- X. Protect the confidentiality of all privileged and other confidential information pertaining to court cases.
1. Interpreters shall not voluntarily disclose any admission or communication that is declared to be confidential or privileged under state law. Out-of-court disclosures made by a non-English or hearing impaired speaker communicating through an interpreter shall be treated by the interpreter as confidential and/or privileged unless the court orders the interpreter to disclose such communications, or the non-English or hearing impaired speaker waives such confidentiality or privilege.
  2. Interpreters shall not publicly discuss, report, or offer an opinion concerning a matter in which they are engaged, even when that information is not privileged or required by law to be confidential.
  3. Prior to service, every interpreter serving in the courts of the State of Georgia shall agree in writing to comply with the Code of Professional Responsibility for Interpreters.
  4. The presence of an interpreter shall not affect the privileged nature of any discussion.

*Commentary: Confidentiality does not extend to a situation in which there are threats of imminent violence, the interpreter is a witness to criminal acts, or to information relating to a crime committed during the course of the proceedings or the interpreter's employment where the information concerning such crime does not derive from attorney-client conversations. Such information should be disclosed to a judge who is not involved in the proceeding for advice in regard to the potential conflict in professional responsibility; however, if the information was acquired during attorney-client conversations, the information should be discussed with the attorney participant. Confidentiality does not extend to disclosures to a client's attorney, so that an interpreter may freely discuss issues of client misconduct with the client's attorney. Confidentiality does not extend to the fact or dates of employment as an interpreter. Also, if a disciplinary complaint or lawsuit arising out of interpretation services is filed against an interpreter, the interpreter may testify about relevant communications.*

*When an interpreter is called upon to testify in court, the interpreter should request a ruling by the court upon the propriety of testimony on confidential matter. Furthermore, if the testimony concerns a conversation between attorney and client, the interpreter should request a ruling as to whether the conversation is covered by attorney-client privilege.*

- XI. Inform the presiding judge should the interpreter feel harassed or intimidated by an officer of the court.

- XII. Immediately report to the court any solicitations or efforts by another to induce or encourage the interpreter to violate any law, standard, or any part of this Code of Professional Responsibility.
- XIII. Accept no money, gift or other benefit in excess of the compensation for the performance of interpretation duties.
- XIV. Not give any kind of legal advice whether solicited or not. In all instances, the non-English or hearing impaired speaker shall be referred to the judge or counsel.

*Commentary: The interpreter is subject to the same constraints against giving legal advice as other non-lawyer court personnel. In addition, interpreters need to be mindful of the dependence of the non-English speaking or hearing impaired person on their services; therefore, any erroneous information provided by an interpreter is unlikely to be questioned or corrected. Accordingly, interpreters need to be particularly cautious even in the non-legal information they provide. Interpreters regularly appearing in a given courtroom may seek and rely upon guidance from the presiding judge on how informational inquiries should be handled. If an attorney is called upon to interpret, his or her conduct is governed by the "Georgia Rules of Professional Conduct" for attorneys, but an attorney acting as an interpreter shall at all times act in conformity with section II. (F) of Appendix A of the "Supreme Court Rules on the Use of Interpreters for Non-English Speaking and Hearing Impaired Persons."*

- XV. Never act as an individual referral service for any attorney. If asked by a non-English or hearing impaired speaker to refer the speaker to an attorney, an interpreter shall direct such individual to the local bar association or to the indigent defense office. Further, no interpreter may receive any compensation or benefit, direct or indirect, for referral to an attorney.
- XVI. Continually improve their skills and knowledge through such activities as professional training and education.
- XVII. Refuse any assignment for which they are not qualified or under conditions which substantially impair their effectiveness.
- XVIII. Be permitted to advertise, but interpreters and interpreting services shall not engage in untruthful or misleading representations. In particular, interpreters and services shall never claim that they will guarantee a specific result; interpreters and services shall not claim an ability to provide legal advice, services, or referrals; all statements as to qualifications must be accurate.

*Commentary: Rules XV-XVIII are directed to interpreters for compensation, rather than unpaid, volunteer interpreters, such as acquaintances, family, and community service volunteers.*

- XIX. Be required to be of good moral character, and if seeking certification, registration, or listing with the Commission on Interpreters, must comply with any regulations of the Commission adopted to ensure good character; and, must cooperate with background investigation, including criminal background checks.
- XX. Agree to be bound by this Code. Violations of this Code may result in the interpreter's removal from the interpreter registry maintained by the Commission on Interpreters, and willful violation may also result in other appropriate sanctions.