

Insights and Commentary from Dentons

The combination of Dentons US and McKenna Long & Aldridge offers our clients access to 1,100 lawyers and professionals in 21 US locations. Clients inside the US benefit from unrivaled access to markets around the world, and international clients benefit from increased strength and reach across the US.

This document was authored by representatives of McKenna Long & Aldridge prior to our combination's launch and continues to be offered to provide our clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

ON TOPIC

MONDAY
TECHNOLOGY

IN PRACTICE

WEDNESDAY
IN HOUSE

THURSDAY
LAW INC.

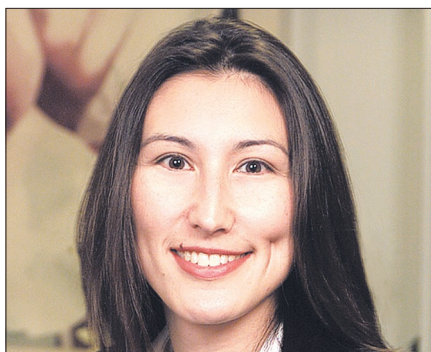
FRIDAY
IN RECESS

BE A CONTRIBUTOR

Send ideas for columns or letters to the editor to *Daily Report* Editor in Chief Ed Bean at ebean@alm.com or (404) 419-2830.



J. RANDOLPH EVANS is a partner in McKenna Long & Aldridge's Atlanta office, where he is the chairman of the financial institutions practice.



SHARI L. KLEVENS is a partner in McKenna Long & Aldridge's Washington office and is the managing chairwoman of the firm's law firm defense practice.

What's important in new bar rules

CHANGES AREN'T DRAMATIC, but they clarify obligations that Georgia attorneys need to know

J. RANDOLPH EVANS AND
SHARI L. KLEVENS

THE GEORGIA SUPREME COURT approved amendments to the Georgia Rules of Professional Conduct effective November 2011. Although these amendments do not dramatically alter the obligations of Georgia lawyers, there are certain changes worthy of note. The Bar Rules can be found in the Bar Directory or on the Georgia Bar's website at <http://www.gabar.org/>. Since the standard of care in Georgia contemplates compliance with the Bar Rules, it's always a good idea to brush up on them even if they do not change that much in any given year. Some of the changes from late last year are notable and merit the attention of Georgia attorneys.

Here are some of the more significant changes.

The meaning and mechanics of 'informed consent'

The amended rules include definitions for the terms "confirmed in writing" and "informed consent," which clarify a lawyer's obligations when required to obtain the client's consent. "Informed consent" is defined as "an agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of reasonable alternatives to the proposed course of conduct." "Confirmed in writing," then, simply refers to informed consent granted or confirmed in writing.

As set forth in the comments, informed consent requires a lawyer to "make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision." This ordinarily requires the attorney to disclose all relevant facts and circumstances, an explanation of the advantages and disadvantages of a particular course of conduct, a discussion of any alternatives, and generally, advice that the client seek independent counsel. Additionally, to be completely effective, informed consent requires the client's affirmative response in writing.

These definitions add clarity to the obligations arising under various rules requiring the attorney to obtain a client's informed consent.

Clarifying the definition of 'firm' or 'law firm'

The definition of "firm" or "law firm" has been expanded to include lawyers in a "law partnership, professional corporation, sole proprietorship or other association authorized to practice law pursuant to Bar Rule 1-203(4)." The newly inserted comment explains this definition further, noting that whether two or more lawyers meet the definition of a "firm" depends on

the specific facts. For example, if the lawyers "present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules."

Of course, determining whether two or more lawyers constitute a "firm" is vitally important in defining an array of rules that apply to law firms. For example, solo practitioners need check conflicts only for themselves. But, law firms must identify potential and actual conflicts of interest for all of the attorneys in the law firm.

There are other law firm rules that might otherwise apply to a solo practitioner. These can range from the standard of care to the obligation to make sure that all attorneys in the firm are complying with the Bar Rules.

Allocating authority over a matter

There have also been subtle amendments to Rule 1.2 regarding the allocation of authority between the client and lawyer. The most significant changes are found in the comments. The former version of Comment 1 stated that "[b]oth the lawyer and the client have authority and responsibility in the objectives and means of representation." The revised Comment 1, however, explains that Rule 1.2(a) confers only upon the client the "ultimate authority to determine the purposes to be served by legal representation."

In addition, the comment now requires the lawyer to consult with the client about the means by which the client's objectives will be pursued. The comment previously stated that the client had the right to consult with the lawyer. Now, the comment states that "[w]ith 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) as may take such action as is impliedly authorized to carry out the representation." (emphasis added).

These changes increase the attorney's responsibility to actively engage the client in the representation. The comments clarify that the client has the sole authority for determining the purpose(s) of the lawyer's representation, and the lawyer is required to consult with the client on how those purposes are being pursued.

Balancing diligence and professionalism

Rule 1.3 deals with an attorney's obligation to diligently represent his or her client. The only substantive change to this rule is an explicit plea for professionalism in carrying out this obligation: "The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy

and respect." This addition parallels the calls for professionalism made by several Georgia Supreme Court justices in *Evanoff v. Evanoff*, 262 Ga. 303 (1992), *Green v. Green*, 263 Ga. 551 (1993), and *Lucas v. Lucas*, 273 Ga. 240 (2000).

The lawyer's duty to communicate with clients


The amendments to Rule 1.4 clarify the lawyer's obligations regarding communication with clients. In addition to the previous requirements of keeping the client reasonably informed about the status of the matter and promptly complying with reasonable requests for information, the amended rule requires the attorney to (1) promptly notify the client of any decision or issue requiring the client's informed consent, (2) consult with client regarding the means for achieving the client's objectives, and (3) "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."

These additions, coupled with the amendments to Rule 1.2 discussed above, emphasize the importance of frequent, timely and candid communication with clients.

Lawyers serving as third-party neutrals

The amended rules now include a rule addressing the obligations of lawyers who serve as mediators or arbitrators. Rule 2.4 now requires a lawyer serving as a neutral to inform any unrepresented parties that the lawyer does not represent them and to further explain his or her role if the party does not understand.

Rule 2.4 also now requires the lawyer to consider conflicts of interest when agreeing to serve as a neutral. Specifically, if one of the parties to a matter is a current or former client of the neutral/lawyer or his or her law firm, the lawyer may only serve as the neutral if the matter is not the same as the one for which he represented the party, or if all the parties give informed consent, confirmed in writing. Of course, as a matter of best practice, lawyers serving as neutrals should always run a conflict check and disclose to all parties when any conflict or potential conflict arises.

As the discussion above shows, the recent amendments to the rules are not dramatic. Rather, in most instances, they simply clarify and reinforce pre-existing obligations. Nonetheless, Georgia lawyers should be aware of these changes as part of their regular review of the Rules of Professional Conduct. 

J. Randolph Evans and Shari L. Klevens are the authors of Georgia Legal Malpractice Law, published by Daily Report Books.