ETHICAL ISSUES:

SOMETHING OLD, SOMETHING NEW,

SOMETHING TWITTERED, SOMEONE'S BLUE

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INTRODUCTION:

The Georgia Rules of Professional Conduct have for years formed the basis of our ethical and professional rules, goals and standards that get us through the many challenges to fulfilling our responsibilities as lawyers. The Preamble to the Rules is worth re-reading as a reminder to who we are as individual lawyers and who we are together as a profession. The Rules don't give a hard and fast answer to every question, but they give a road map through the danger zones.

> "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms of "shall" or "shall not." . . . Others, generally cast in the terms of "may" or "should," are permissive or aspirational and define areas under the Rules in which the lawyer has professional discretion. . . . The Rules are thus partly obligatory and disciplinary and partly aspirational and descriptive. Together they define a lawyer's professional role. Comments do not add obligations to or expand Rules but provide guidance for practicing in compliance with the Rules. (Preamble, Scope, Section [13])"

We live in a new world with new issues and challenges that didn't exist even five years ago: a world order that is changing by the hour; a new (and hopefully improving) economy; changes in the business model of the legal profession; and rapidly changing technology. Applying our ethical standards to a changing world raises new issues daily.

I. Communication:

> "Rule 1.4: A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, shall keep the client reasonably informed about the status of matters and shall promptly comply with reasonable requests for information."

Many ethical issues and client complaints arise because "what we have here is a failure to communicate."

Issues with communication with a client through correspondence and telephone is nothing new, but the methods of communication have changed dramatically. Instead of "the letter didn't arrive" the issue now is "what e-mail, what text, what voice mail, what fax." To avoid having a "he said she said" controversy over whether the lawyer returned phone calls or responded to letters or e-mails, protect yourself by having and following written office procedures to record and preserve incoming and outgoing communication of all types with clients and other parties. These should include procedures for receiving calls from potential clients from who you do not undertake representation.

II. Competence:

> "Rule 1.1: 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."

Any lawyer who believes "anybody can try a condemnation case" has given an open invitation for a malpractice claim. Condemnation is different from other types of

civil litigation, with its own statutes, rules and procedures to which the Civil Practice Act may not apply, and which easily could trip up an inexperienced lawyer. The need to understand condemnation substance and procedure is not a new requirement for a competent condemnation lawyer, but depending on the jurisdiction or the circumstances, there may be new issues of technology that must be considered in meeting the standard of competence, including:

- E-Discovery
- Electronic Filing
- Use of Technology in the Court Room (what about the PowerPoint that crashes)
- Failure to use Technology
- Using or Misusing Social Networking Sites
- Technology in the Jury Box

III. Confidentiality Of Information:

> "Rule 1.6(a): A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these rules or other law, or by order of the Court."

A lawyer rarely discloses client information intentionally, but the sources for unintentional disclosure are expanding constantly:

- Casual Conversation and Gossip – You Never Know Who's Listening
- Marketing Letters
- Snail Mail Mis-Sent

- E-Mails Mis-Sent – Is a Confidentiality Notice Enough
- Trash Not Protected
- Information Stored in or Transmitted by:
    - Computer
    - Scanner
    - Mobile Devices (cell phones, Blackberry, iphone, droid, ipad, etc.)
- Information on or in Copy Machines
- Social Media Use and Abuse
    - Blogs
    - Facebook
    - LinkedIn
    - Twitter
- Metadata
- Cloud Computing (see American Bar Association "Ethics 20/20 Commission;" www.abanet.org/ethics20/20/)

IV. Conflict Of Interest:

> "Rule 1.7(a): A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client . . . ."

There are potential conflict issues in representing multiple clients in the same condemnation action:

- Landlord and Tenant – Look at the Lease
- Owner and Lender – Look at the Loan Documents
- Multiple Tenants on the Same Property
- Multiple Owners Impacted by the Same Project

V. **Attorney Fees:**

> "'Rule 1.5(a): A lawyer's fee shall be reasonable. [The factors to be considered in determining the reasonableness of a fee are listed in this rule.]"
>
> "(c) (1) A fee may be contingent on the outcome of the matter for which the service is rendered . . . . A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated."

A periodic review of Rule 1.5 in its entirety is helpful, particularly with the current challenges to traditional fee structures. Is the hourly rate really dead? And for contingent fees there are variables that must be addressed:

- Define all Operative terms in the Written Fee Agreement
- What is the "Amount Recovered"
    - Does it Include Court Awarded Interest
    - Does it Include Court Awarded Attorney Fees
    - Does it Include Non-Monetary Compensation

VI. **Communication With Persons Represented By Counsel:**

> "Rule 4.2(a): 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 constitutional law or statute."

Lawyers for Condemnors and Condemnees routinely have contact with individuals who are or may be represented by counsel in a condemnation case. These range from discussions at public hearings about plans for a future public project to discussions with right of way personnel, surveyors, engineers and others involved in the acquisition process before and after the filing of a condemnation case. The "no contact

rule" clearly does not prohibited a party to a controversy with a government entity from speaking with government officials about the matter, even though the government entity probably has a general counsel. The basic questions are: When is the rule triggered? Who does it cover? What types of communications are covered?

- When is a No Contact Rule Triggered?
    - Definitely when the matter is in litigation
    - Prior to litigation where there is reason to believe the individual is actually represented by a lawyer or normally would be advised by a lawyer on the particular matter in question. If in doubt, you should inquire as to representation.
- Who in a government agency is covered by the no contact rule?
    - Just because the rule is triggered does not mean that it covers every communication with every official or employee of a represented government agency.
    - The "control group" approach is stated in the comment to ABA Model Rule 4.2: "In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with a matter may be imputed to the organization for purposes of civil or criminal liability."

- What types of communications are covered?
    - Contacts concerning "policy matters" as opposed to specific issues in a particular case probably are permitted. See ABA Formal Ethics OP.97-408.
    - Open records act requests are specifically authorized by statute and probably are authorized in accordance with the notice provisions in the statute.
    - After a condemnation matter has been referred to a lawyer for filing, all communications should go through that lawyer, even before the litigation has been filed.

VII. Assistance in Resolving Questions Under the Rules:

- Select an Ethics Partner within the firm whose role is to be familiar with the Rules and to act as counselor to the firm regarding specific questions.
- Rule 4-401. Informed Advisory Opinions

  The office of the General Counsel of the State Bar of Georgia is authorized to give informal advisory opinions interpreting the Rules of Professional Conduct. The opinions may be issued in oral or written form.
- Rule 4-402. The Formal Advisory Opinion Board

  The Board is authorized to consider requests for a formal advisory opinion and to draft proposed opinions concerning the proper interpretation of the Rules. The proposed opinion is published for comments and subsequently filed with the Superior Court for discretionary review.