Ethics for Law Students & Law School Graduates Interning in a District Attorney's or Solicitor-General's Office or at the Prosecuting Attorneys' Council

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Ethics for Law Students Working in a Ga. Prosecuting Attorney's Office

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Georgia law and court rules permit third year law students[1] and recent law school graduates[2] to perform most of the functions of a prosecutor.[3] Some of you already have had this experience through a clinical program offered by your law school.[4] For others this will be the first opportunity to put into practice what you have been learning in law school. Whether you are referred to as being an intern, extern, third-year law student or law school graduate,[5] you are going to be confronted with the same ethical issues and situations that confront prosecutors on a day to day basis. While in your law school classes, legal ethics may be viewed from third party perspective, as an intern working in a prosecutor's office, violations of the Rules of Professional Conduct can have real world consequences.

A growing body of ethics opinions,[6] legal research[7] and court decisions[8] recognize that law student interns are subject to the Rules of Professional Conduct. As a result, law student interns face "the possibility of

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1 O.C.G.A. § 15-18-22("Law School Public Prosecutor Act of 1970"); Ga. S.Ct . R. 91 - 96 ("Third-Year Law Students"). Collectively, these two provisions dealing with law students are referred to as the "Third-Year Practice Act." See generally Donald M. Zupanec, Annot., *Propriety and Effect of Law Students Acting as Counsel in Court Suit*, 3 A.L.R.4th 358 (1981).

2 Ga. S.Ct. R. 97 - 103 ("Law School Graduates").

3 See O.C.G.A. § 15-18-22(d); Ga. S.Ct. R. 94; Ga. S.Ct. R. 101.

4 See Peter A. Joy and Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 Clinical L. Rev. 493 (2002) (hereafter "Joy & Kuehn").

5 PAC collectively refers to third year law students and law school graduates as "interns," while most law schools consider you to be "externs." For the purposes of this paper, the two terms are interchangeable.

6 See e.g. Conn. Informal Op. 97-10 (1997); Maine Ethics Op. Opinion # 102 (1990); N.Y. St. Bar Assoc. Comm. on Prof. Ethics, 794 (2002); Ibid, 688 (1997).

7 See Joy & Kuehn; Alexis Anderson, Arlene Kanter & Cindy Slane, *Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom*,10 Clinical L. Rev. 473 (2004); Adrienne Thomas McCoy, *Law Student Advocates and Conflicts of Interest*, 73 Wash. L. Rev. 731 (1998); Peter A. Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 S. Tex. L. Rev. 815 (2004).

8 *In re Hatcher*, 150 F.3d 631, 636 (7th Cir. 1998); *Bechtold v. Gomez*, 576 N.W.2d 185, 190-91 (Neb. 1998); *Pisa v. Streeter*, 491 F. Supp. 530, 532 (D. Mass. 1980); *Actel Corp. v. Quicklogic Corp.*, 1996 U.S. Dist. LEXIS 11816 (D. Cal. 1996); *People v. Williams*, 454 N.E.2d 220, 240 (Ill. 1983); see also *State v. Cook*, 84 Wash.2d 342 (1974).

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professional discipline in some states, (and) that ethical misconduct as clinic students may have (an effect) on their application to the bar."[9] Additionally, allegations of "prosecutorial misconduct" based on violations of ethical rules by a law student intern can be raised by criminal defendants in appeals.[10] They can also form the basis for habeas corpus actions brought years after your internship is over.[11]

The role of the prosecutor is unique among lawyers, even among government attorneys. The most obvious fact that makes the prosecutor unique is that a prosecutor does not usually have an identifiable client[12] but instead is said to represent all the people of the State.[13] Because of this, the prosecuting attorney is often referred to as a "minister of justice" in almost reverential tones.[14] The uniqueness of the prosecutor is

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9 Joy & Kuehn, 9 Clinical L. Rev. at 503; *In re Craig*, 526 N.W.2d 261, 261-62 (Wisc. 1995); *In re Beasley*, 243 Ga. 134, 137 (1979) (failure to pay child support while in law school); see also *Schware v. Board of Bar Examiners*, 353 U.S. 232, 249 (1957) (Frankfurter, J., concurring). In Georgia, see S. Ct. of Ga., Office of Bar Admission, Policy Statement of the Board to Determine Fitness of Bar Applicants Regarding Character and Fitness Reviews, available at http://www.gabaradmissions.org/pdf/policystatement.pdf (Site visited Jun. 7, 2012).

10 *People v. Williams*, supra; *Baker v. Cox*, 974 F. Supp. 73, 76 (D. Mass. 1997); *Love v. Superior Court*, 111 Cal. App. 3d 367, 374 (Cal. Ct. App. 1980) (prosecutors office recused; assistant district attorney worked on defendant's case while legal intern with public defender); *State v. Givens*, 776 So. 2d 443, 454 (La. 2001) (prosecutor's office not removed from case because defendant failed to show that four assistant prosecutors who had worked on defendant's case while they were law students in the Loyola Law Clinic "actually participated in or otherwise aided the prosecution.")

11 *Pisa v. Streeter*, 491 F. Supp. at 532 (habeas corpus alleged conflict of interest by assistant district attorney who worked as research assistant for Pisa's attorney while in law school).

12 However, when the District Attorney is statutorily authorized to represent a specific government agency, such as is the case under O.C.G.A. §§ 19-11-23, a traditional attorney client relationship is created.

13 In 2010 Georgia's total population was 9,687,653. Ga. Office of Planning and Budget, GEORGIA STATISTICS - SOCIO-ECONOMIC CHARACTERISTICS, POPULATION AND DEMOGRAPHICS, available at http://opb.georgia.gov/2010-census (site visited Oct. 8, 2012).

14 GRPC R. 3.8 Comment [1]. The earliest reference to a prosecuting attorney in Georgia as a minister of justice occurs in the case of *Boyd v. State*, 17 Ga. 194 (1855), but the concept dates back to English Common Law. In 1794, Attorney General Sir John Scott (later Lord Chancellor Eldon) argued "[f]or in the situation which I hold in the country, to a certain degree, at least, I ought to be counsel for those I prosecute as well as counsel against them." *John Horne Took Case*, 25 Howell St. Tr. 1, 555 (K.B. 1794); see also *John Hornes Case*, 20 Howell St. Tr. 651 at 758 ("If there were any improper practices with regard to the prosecution, it might be a reason of objection to those who prosecute."); *R. v. Puddick*, [1865] Eng.R. 61, 4 F. & F. 497, 499, 176 E.R. 662; *R. v Greenberg*, [1942] 2 All ER 344. The concept that public prosecutors are ministers of justice is now recognized internationally. See Int'l Assoc. of Prosecutors, STANDARDS OF PROFESSIONAL RESPONSIBILITY AND STATEMENT OF THE ESSENTIAL DUTIES AND RIGHTS OF PROSECUTORS (1999), http://www.iap.nl.com/ (site last visited Dec. 9, 2008); *Boucher v The Queen* (1954) 110 Can CC 263, 270, per Rand J.; *The People (at the suit of the Director of Public Prosecutions) v D. O'S.*, [2006] IESC 12, [S.C. No. 528 of 2004], [2006] 3 IR 57

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emphasized in the Georgia Rules of Professional Conduct (hereafter "GRPC") by the fact that prosecutors are the only class of lawyers that have a Rule specifically devoted to them.[15] Moreover, even though the Rules state that "[t]he purpose of these Rules is not to give rise to a cause of action nor to create a presumption that a legal duty has been breached. . . . . Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons"[16] the reality is that any alleged breach of the Rules becomes "prosecutorial misconduct" in motions and briefs filed by the criminal defense bar.[17]

Following are excerpts from the Georgia Rules of Professional Conduct (GRPC) are provided for your information. As law students working as an intern in a District Attorney's, Solicitor-General's office or PACOG, you are covered by all of the provisions of the GRPC.[18] We have selected these portions of the GRPC to emphasize their importance as they apply to law student interns. Each of these rules represent an ethical issue that has confronted one or more of our interns in prior years. They are only intended as a guide and a starting point for your research, not as a comprehensive treatise on the ethical rules that apply to law student interns.

When your internship is completed and you return to school, your obligations under the GRPC do not diminish. The conflict of interest provisions, especially under GRPC R. 1.11, will apply to your future endeavors both in law school and in your legal career.

(Irish S. Ct).

15 GRPC R. 3.8.; see also GRPC R. 9.5.

Adopted in 2000 and substantially amended in November, 2011, the GRPC is principally based on the A.B.A. MODEL RULES OF PROFESSIONAL CONDUCT (MRPC), but there are numerous, often subtle differences. Patrick Emery Longan, *Legal Ethics*, 53 Mercer L. Rev. 379 (2001). For example, the GRPC does not include R. 3.8 (c) of the MPRC ("[t]he prosecutor in a criminal case shall . . . (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing."). Compare also GRPC R. 3.8(b) & (g) to MPRC R. 3.8(b) & (g). "Since at least 45 states and the District of Columbia use some version of the ABA Model Rules, there will now be a body of relevant case law to use when you research ethics issues. There are also ethics opinions from the ABA and from other states which Georgia lawyers may find helpful in situations where there is no other guidance." Office of General Counsel, *A Brief Introduction to The Georgia Rules of Professional Conduct*, unpublished 2006.

16 GRPC Preamble [18]; see also [20] ("nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty,").

17 As one speaker at the National Prosecution Ethics Symposium noted, "we are hurt by the nomenclature." Mistakes by a judge are labeled "reversible error;" errors by a defense attorney are called "ineffective assistance of counsel;" mistakes made by prosecutors, whether deliberate or inadvertent, are referred to as "prosecutorial misconduct." David L. Landefeld, *The Ethical Prosecutor*, lecture to the NCDA-NCPE National Prosecution Ethics Symposium, April 14, 2005.

18 See GRPC R. 5.3 (page 10). The Georgia Supreme Court requires that law students and law school graduates be "covered by an adequate amount of malpractice insurance." Ga. S.Ct. R. 96 and 103. Law students working in a district attorney's office are automatically covered by the State's liability insurance program.

If any situation should arise in which you have questions whether something is covered by the GRPC, you should discuss the situation with your immediate supervisor, an experienced prosecutor in your office. If they are unable to resolve the situation, you and your supervisor can contact me at PACOC.

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Georgia Rules of Professional Conduct

PREAMBLE

[16] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government entity may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized by law to represent several government entities in intergovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

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Rule 1.0 TERMINOLOGY

(a) "Belief " or "believes" denotes that the person involved actually thought the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing" when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person, or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (h) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

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(e) "Firm" or "law firm" denotes a lawyer or lawyers in a private firm, law partnership, professional corporation, sole proprietorship or other association authorized to practice law pursuant to Bar Rule1-203(4); or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

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(h) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

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(p) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.[19]

(q) "Substantial'" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(s) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

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Rule 1.6 Confidentiality of Information.

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

(b) (1) A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:
(i) to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law;
(ii) to prevent serious injury or death not otherwise covered by subparagraph (i) above;
(iii) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
(iv) to secure legal advice about the lawyer's compliance with these Rules.
(2) In a situation described in paragraph (b)(1), if the client has acted at the time the lawyer learns of the threat of harm or loss to a victim, use or disclosure is permissible only if the harm or loss has not yet occurred.
(3) Before using or disclosing information pursuant to paragraph (b)(1), if feasible, the lawyer must make a good faith effort to persuade the client either not to act or, if the client has already acted, to warn the victim.

(c) The lawyer may, where the law does not otherwise require, reveal information to which the duty of confidentiality does not apply under paragraph (b) without being subjected to disciplinary proceedings.

(d) The lawyer shall reveal information under paragraph (b) as the applicable law requires.

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(e) The duty of confidentiality shall continue after the client-lawyer relationship has terminated.

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

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Rule 1.7 Conflict of Interest: General Rule.

(a) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).

(b) If client informed consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected client or former client gives informed consent confirmed in writing to the representation after:

(1) consultation with the lawyer pursuant to Rule 1.0(c);

(2) having received in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation; and

(3) having been given the opportunity to consult with independent counsel.

(c) Client informed consent is not permissible if the representation:

(1) is prohibited by law or these Rules;

(2) includes the assertion of a claim by one client against another client represented by the lawyer in the same or a substantially related proceeding; or

(3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.

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

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Rule 1.11 Successive Government and Private Employment.

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government entity gives informed consent, confirmed in writing. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is duly given to the client and to the appropriate government entity to enable it to ascertain compliance with the provisions of this Rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that

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lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or
(2) negotiate for private employment with any person who is involved as a party or as a lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and
(2) any other matter covered by the conflict of interest rules of the appropriate government entity.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.[20]

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[20] State and Federal law provides that certain information that prosecuting attorneys come in contact with is confidential. This information includes, but is not limited to:

(1) Attorney work product, O.C.G.A. §§ 17-16-2(D); 24-6-612(b); 50-18-72(a)(42); which includes notes, memoranda, or other records made by such victim assistance personnel of communications with a crime victim, other than a peace officer, O.C.G.A. § 17-17-9.1, except where such disclosure is required by law.
(2) Autopsy photographs, O.C.G.A. § 45-16-27(d).
(3) Child abuse reports, O.C.G.A. § 49-5-40(b).
(4) Child pornography. O.C.G.A. § 50-18-72(d); 18 U.S.C. §§ 2251(d), 2252, 2252A, 2258C(e).
(5) Credit histories, 15 U.S.C. § 1681b(a)(4)(D).
(6) Criminal history record information. O.C.G.A. § 35-3-30(3)(A); 35-3-37; Ga. Op. Att'y Gen. U81-47; 28 U.S.C. § 534; 28 C.F.R. § 20.3; GCIC R. 140-1-.02(2)(c)(1); 140-2-.02. "Criminal history record information" is defined as:

> Information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, information, or other formal criminal charges, and any disposition arising there from including acquittal, sentencing, correctional supervision and release. Such term also includes the age and sex of each victim as provided by criminal justice agencies. The term does not include identification information, such as fingerprint

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

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RULE 1.12 FORMER JUDGE OR ARBITRATOR

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator **or law clerk to such a person**, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other

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records not related to an arrest, to the extent that such information does not indicate involvement of the individual in the criminal justice system.

(7) Crime victim information, including the victim's "legal name, address, phone number, social security number, date of birth, and, if the victim has an e-mail address, his or her e-mail address" which is obtained for purpose of obtaining restitution from the defendant. O.C.G.A. § 17-17-18(c).
(8) Driver histories from Ga. Dept. of Driver Services., O.C.G.A. § 40-5-2(b).
(9) Grand jury materials, Kessler v. State, 249 Ga. 462, 474 (1982); In re Gwinnett County Grand Jury, 284 Ga. 510 (2008).
(10) Informant information, O.C.G.A. § 24-9-21(4); 24-9-27(d); Turner v. State, 247 Ga. App. 775,777 (2001).
(11) Information contained in the files of pending cases which is not required by law to be disclosed. O.C.G.A. § 50-18-72(a)(4).
(12) Medical records of a patient, O.C.G.A. § 24-9-41; 24-9-42; 45 C.F.R. § 164.512(f).
(13) Personal identifying information on individuals, including public employees, such as an "individual's social security number, mother's birth name, credit card information, debit card information, bank account information, account number, including a utility account number, password used to access his or her account, financial data or information, and insurance or medical information in all records, unlisted telephone number if so designated in a public record, personal e-mail address or cellular telephone number and information regarding public utility, television, Internet, or telephone accounts held by private customers." O.C.G.A. § 50-18-72(a)(20) and (21).
(14) "Records, the disclosure of which would compromise security against sabotage or criminal or terrorist acts and the nondisclosure of which is necessary for the protection of life, safety, or public property." O.C.G.A. § 50-18-72(a)(25)(A).
(15) Tax information. O.C.G.A. § 48-7-60(a); Bowers v. Shelton, 265 Ga. 247 (1995).

[21] See fn. 14.

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adjudicative officer or arbitrator. In addition, the law clerk shall promptly provide written notice of acceptance of employment to all counsel of record in all such matters in which the prospective employer is involved.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

The maximum penalty for a violation of this Rule is a public reprimand.

(Emphasis added.)

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Rule 3.8 Special Responsibilities of a Prosecutor.

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) refrain from making any effort to prevent the accused from exercising a reasonable effort to obtain counsel;

(c) Reserved.

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense;

(e) exercise reasonable care to prevent persons who are under the direct supervision of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under subsection (g) of this Rule;

(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information; and

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(g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

The maximum penalty for a violation of this Rule is a public reprimand.

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Rule 4.2 Communication with Person Represented by Counsel.

(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.

(b) Attorneys for the State and Federal Government shall be subject to this Rule in the same manner as other attorneys in this State.

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

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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;

(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 the client.

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

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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 comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect

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measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;
(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Georgia Rules of Professional Conduct if engaged in by a lawyer if:
(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action;

and

(d) . . .

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

Comment

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

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Ga. Supreme Ct Rules

Rule 4.

(1) Law students authorized to practice under the third-year practice act, see Rules 91-96, or the law-school graduate rules, see Rules 97-103, may not make oral argument, but may co-author briefs, and shall indicate their status on the signature line.[22]

Rule 92. Third Year Law Students.

22 When signing documents, prosecution interns must use a signature line block that clearly indicates their status and not use a title that implies they are attorneys. See St. Disciplinary Bd. Advisory Op. No. 21 (1977).

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> All pleadings and other entries of record must also be signed by the district attorney, solicitor general, solicitor, public defender, or duly appointed assistant district attorney, assistant solicitor general, assistant solicitor, assistant public defender, or licensed practicing attorney as described in Rule 91. . . .

Rule 98. Law School Graduates.

> All pleadings and other entries of record must also be signed by the Attorney General, a district attorney, solicitor general, solicitor, public defender, or duly appointed assistant attorney general, assistant district attorney, assistant solicitor general, assistant solicitor, assistant public defender, or licensed practicing attorney as described in Rule 97. . .

Ga. Court of Appeals Rules.

Rule 1. Filing with clerk's office.

> (a) Requirement for Written and Signed Documents. **All filings**, documents, motions, briefs, requests and communications relating to appeals shall be in writing, shall be filed with the Clerk's office, **shall be signed by an attorney of record, an attorney granted courtesy appearance** or pro se parties, and shall include the mailing address and telephone number of the attorney or pro se party signing the document, and shall show that copies have been furnished to opposing counsel. Documents with conformed signatures by law firm staff or an attorney's employee will not be accepted. **All signed documents shall include the State Bar of Georgia membership number of all submitting attorneys**. (Emphasis added)

> ***NOTE:*** *Based on Rule 1(a), the Court of Appeals will not accept briefs, etc signed by law school graduates or third year law students.*

Screening

Under GRPC R. 1.11 and current case law, a conflict of interest involving an attorney (including the head of the office) or a member of the staff of a district attorney's or a solicitor-general's office does not automatically require disqualification of the entire office. *Arnold v. State*, 253 Ga. App. 387, 389 (2002); *Chafin v. State*, 246 Ga. 709, 712 (1980); *Lyons v. State*, 271 Ga. 639, 640 (1999); *Frazier v. State*, 257 Ga. 690, 694-695 (1987); *Billings v. State*, 212 Ga. App. 125, 129 (1994); *Price v. State*, 228 Ga. App. at 156; *Comment [9] to* GRPC R. 1.11; see also *United States v. Hasarafally*, 529 F.3d 125 (2d Cir. N.Y. 2008). Unlike private law firms, imputed disqualification does not apply to a public prosecutor's office. *Holiday v. State*, 258 Ga. 393, 397 (1988).

However adequate screening procedures must be promptly established within the office that insure that the disqualified attorney does not have contact with the case or cases in which he or she has a conflict of interest. GRPC R. 1.0(p); 1.7(b); *Sealey v. State*, 277 Ga. 617, 619 (2004); *McPherson v. State*, 274 Ga. 444, 447 (2001); *Billings v. State*, supra; *Frazier v. State*, supra; *Lemming v. State*, 292 Ga. App. 138, 142 (2008); *In re R.B.*, 583 N.W.2d 839 (S.D. 1998); *People v. Davenport*, 280 Mich. App. 464, 474-475 (Mich. Ct. App. 2008); *State v. Kinkennon*, 275 Neb. 570, 576, 747 N.W.2d 437, 443 (2008).

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These screening procedures are commonly referred to in case law as a "Chinese Wall." At a minimum, the GRPC requires that the screening procedures result in the "isolation of [the screened] lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law." GRPC R. 1.0(p). Case law goes further and holds that an effective Chinese Wall need to have the following characteristics:

(1) All other attorneys in the office are forbidden to discuss the case with or in the presence of the disqualified attorney or employee;

(2) The disqualified attorney or employee does not have access to any documents in the case, including computer files related to the case;

(3) The screening procedures are put into effect promptly (before a challenge has been filed);

(4) The procedures are documented and all of the staff of the prosecuting attorneys's office are prepared to testify concerning the procedures; and

(5) The defendant and the court are notified of the screening.

See *La Salle Nat'l Bank v. County of Lake*, 703 F.2d 252, 257-259 (7th Cir. 1983); *Smart Indus. Corp., Mfg. v. Superior Court ex rel. County of Yuma*, 179 Ariz. 141, 149-150, 876 P.2d 1176, 1184-1185 (1994); *People v. Davenport*, 760 N.W.2d 743, 748-750 (Mich. Ct. App. 2008); see also Restatement 3d of the Law Governing Lawyers, § 124.

In some circumstances, a Chinese Wall will not be effective, see e.g., *State v. Ross*, 829 S.W.2d 948, 950 (Mo. 1992), especially if it not promptly put in place. See *People v. Courtney*, 288 Ill. App. 3d 1025, 1033 - 1034, 687 N.E.2d 521, 526 - 527 (1997). Failure to promptly and effectively screen a disqualified member of the staff can result in the disqualification of the entire office. *Davenport v. State*, 157 Ga. App. at 705-706; *Reaves v. State*, 574 So. 2d 105, 107 (Fla. 1991), cert. denied 513 U.S. 990, 115 S. Ct. 488, 130 L. Ed. 2d 400 (1994); *Pisa v. Commonwealth*, 378 Mass. 724, 393 N.E.2d 386 (1979) (disqualified prosecutor who, as a law student, worked on defendant's case, proofed state's appellate brief).

Ethics for Law Students Working in a Ga. Prosecuting Attorney's Office

Georgia Rules of Professional Conduct (Selected Excerpts)

Ethics Situation

X.M. is a rising third year law student who attends State University which is located in Next County which is adjacent to Dry Creek County. Between the summer between her second and third year of law school she was hired as a summer intern in the Dry Creek County District Attorney's office. The rules governing the practice of law in the state include a provision, known as the Third Year Practice Rule, which allows rising third year law students to be specially admitted to practice by the trial courts so they can assist with the prosecution or defense of criminal cases provided they do so under the supervision of an attorney who is admitted to practice in the state. Case law interpreting those rules allows these law students to serve as lead counsel in cases as long as an assistant district attorney is present in the court room with the student.

X.M. was admitted to practice under the Third Year Practice Act and works on a number of cases, including trying several bench trials in misdemeanor and felony cases. Because X.M. does a very good job, the District Attorney offers to keep X.M. on as a part time-paid intern during the Fall semester and intends to continue to allow her to try cases.

When X.M. registers for Fall Courses, one of the courses she is enrolled in is an externship. The externship involves placing students in various legal and judicial offices. All assignments are controlled by a professor at the law school who supervises the intern program. Students may request a particular placement but the professor seldom consults students when placing them but rather makes the assignments based strictly on the student's academic performance.

X.M. learns that she has been assigned to work for one of the judges of the trial court in the county. When X.M. reports to the judge, she learns that her judge will be hearing a high profile multi-defendant conspiracy case. The judge tells X.M. that she will be doing research for the judge on the case.

X.M. is very excited about this and tells the assistant district attorney who supervises her under the Third Year Practice Rule about the wonderful opportunity that she will have working with the judge. While listening to X.M., the assistant DA realizes that the case X.M. will be working on for the judge was originally investigated by his office. Some of the witnesses in the conspiracy case were prosecuted on other charges by his office and that X.M. may have handled the probation revocation of one of the witnesses in the conspiracy case.

a. *What, if any, are the legal and/or ethical problems that may arise if X.M. continues to work part-time in the district attorney's office during the period of the externship?*

b. *Would the situation be different if X.M. worked for the district attorney's office that is prosecuting the case or another prosecutor's office that had no involvement in the case?*

c. *Does the prosecutor's office have any responsibility to screen interns who work in their office for potential conflicts on interest?*

d. *What ethical responsibility does a law school professor have to screen law students when making externship placement decisions?*

e. *What are the ethical obligations of the law student and the judge under these facts?*

f. *Would the situation be different if the law student worked for the judge before joining the prosecutor's office?*

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