



September 8, 2014

ABA Formal Advisory Opinion 467

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Prosecuting Attorneys With Managerial Authority or Supervisory Responsibility Must Adopt “Reasonable Policies and Procedures” That Will Ensure That All Lawyers and Nonlawyers in Their Offices Conform to the Rules of Professional Conduct

On September 8, 2014, the Standing Committee on Ethics and Professional Responsibility of the American Bar Association (ABA) issued a Formal Advisory Opinion which says that Rules 5.1 (responsibilities of partners, managers and supervisory lawyers) and 5.3 (responsibilities regarding nonlawyer assistants) of the Model Rules of Professional Conduct (MRPC) require that

[p]rosecutors with managerial authority and supervisory lawyers must make “reasonable efforts to ensure” that all lawyers and nonlawyers in their offices conform to the Rules of Professional Conduct. Prosecutors with managerial authority must adopt reasonable policies and procedures to achieve these goals. Prosecutors with direct supervisory authority must make reasonable efforts to ensure that the lawyers and nonlawyers they supervise comply with the Rules. Where prosecutors have both managerial and direct supervisory authority, they may, depending on the circumstances, be required to fulfill both sets of obligations. The particular measures that managerial and supervisory prosecutors must implement to comply with these rules will depend on a variety of factors, including the size and structure of their offices, as set forth in this opinion.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) (hereafter “ABA Op.”).

Because Rules 5.1 and 5.3 of the Georgia Rules of Professional Responsibility (GRPC) as adopted by the Supreme Court of Georgia are virtually identical to Rules 5.1 and 5.3 of the MRPC, the ABA Opinion will be persuasive authority for interpreting those Rules in Georgia. See e.g. *Outdoor Advert. Ass'n of Ga. v. Garden Club of Ga.*, 272 Ga. 146, 147-149 (2000); *Henderson v. Hsi Fin. Servs.*, 266 Ga. 844, 845-846 (1996); *In re Tante*, 264 Ga. 692, 693 (1994); *Frazier v. State*, 257 Ga. 690 (1987); Ga. FAO 11-1 (2011); Ga. FAO 05-13 (2007).

The ABA Op. begins with the following:

We believe that most prosecutors know and follow the rules of professional conduct. Indeed, the laudable efforts of such prosecutors have provided good examples, cited throughout this opinion. But there are prosecutors who do violate the rules, and for all prosecutors there are special challenges and obligations.

However, it notes, because “[i]n recent years, reports, court opinions, and other authorities have drawn attention to prosecutorial misconduct[,]” more guidance is suggested.



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The ABA Op. then focuses on the managers and supervisors who have responsibilities under Rules 5.1 and 5.3. A prosecutor having managerial responsibility is defined as “the top prosecutors and all other prosecutors with managerial or executive functions in the office . . . includ[ing], for example, the District or County or U.S. Attorney him or herself, as well as executive staff, bureau or unit heads, and similarly positioned others who, among other duties, make policies and set procedures for the office as a whole or for individual units.” A “supervisor’ is a lawyer who--regardless of his or her position or title in the office hierarchy--directly supervises the work of another prosecutor [or nonlawyer] in a particular matter, proceeding, inquiry or other event or series of events involving a case.”

Prosecutors are encouraged to meet certain “basic requirements” including the establishment of office-wide policies addressing confidentiality obligations, how to detect and resolve conflicts of interest, dates by which actions must be taken in pending matters, and ways to ensure that inexperienced lawyers are properly supervised. Suggestions are also made as to topics to be covered in training sessions and the manner in which supervisors can most effectively keep themselves informed of the status of and developments in pending cases. Finally, the ABA Op. makes recommendations for creating a “culture of compliance” within a prosecutor’s office, enforcing “up-the-ladder” obligations regarding violations of the Rules of Professional Conduct, and disciplining those who violate such Rules.

The full text of the ABA Op. is available on the PAC website in the Members Resources Section under Ethics for Prosecutors and also can be found at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_467.pdf