The North Carolina State Bar

2002 Lawyer's Handbook

Rules and Regulations
page 7

Revised Rules of Professional Conduct
page 71

Ethics Opinions
page 136

Index to Ethics Opinions
page 268

Trust Account Guidelines
page 279

IOLTA Questions and Answers
page 289

The North Carolina State Bar Lawyer's Handbook 2002 (Abridged)
An official publication of the North Carolina State Bar containing the most frequently referenced rules and regulations of the North Carolina State Bar, annotated Revised Rules of Professional Conduct, all Ethics Opinions adopted under Revised Rules and Superseded (1985) Rules, and Trust Account guidelines.

Stand Out In Your Field... Specialize!

- **Enhance Your Professionalism**
- **Increase Your Knowledge in Your Practice Area**
- **Demonstrate Your Skill and Experience**
- **Increase Business and Referrals**

The North Carolina State Bar certifies attorneys as specialists in the following areas:

- Bankruptcy Law
- Criminal Law
- Estate Planning and Probate Law
- Family Law
- Immigration Law
- Real Property Law
- Workers' Compensation Law

Applications are accepted annually in May – June.

Examinations given in November of each year.

CONTACT

ALICE NEECE MINE

(919) 828-4620

OR E-MAIL DENISE MULLEN

dmullen@ncbar.com

www.nclawspecialists.org

North Carolina State Bar Board of Legal Specialization

Selected Provisions from the Rules of the North Carolina State Bar
Table of Contents

27 NCAC Chapter 1 7

Subchapter A: Organization of the North Carolina State Bar 7

Section .0200 Membership - Annual Membership Fees 7

.0201 Classes of Membership 7
.0202 Register of Members 7
.0203 Annual Membership Fees; When Due 7

Section .0900 Organization of the Judicial District Bars 8

.0901 Bylaws 8

Section .1000 Model Bylaws For Use by Judicial District Bars 9

.1001 Name 8
.1002 Authority and Purpose 8
.1003 Membership 8
.1004 Officers 8
.1005 Councilor 9
.1006 Annual Membership Fee 9
.1007 Meetings 9
.1008 District Bar Finances 9
.1009 Prohibited Activities 9
.1010 Committees 10
.1011 Board of Directors or Executive Committee 10
.1012 Amendment of the Bylaws 10

Section .1200 Filing Papers with and Serving the North Carolina State Bar 11

.1201 When Papers Are Filed Under These Rules and Regulations 11

Subchapter B: Discipline and Disability Rules 11

Section .0100 Discipline and Disability of Attorneys 11

.0101 General Provisions 11
.0102 Procedure for Discipline 11
.0103 Definitions 11
.0104 State Bar Council: Powers and Duties in Discipline and Disability Matters 12
.0105 Chairperson of the Grievance Committee: Powers and Duties 12
.0106 Grievance Committee: Powers and Duties 13
.0107 Counsel: Powers and Duties 13
.0108 Chairperson of the Hearing Commission: Powers and Duties 14
.0109 Hearing Committee: Powers and Duties 14
.0110 Secretary: Powers and Duties in Discipline and Disability Matters 14
.0111 Grievances: Form and Filing 14
.0112 Investigations: Initial Determination 15
.0113 Proceedings before the Grievance Committee 15
.0114 Formal Hearing 16
.0115 Effect of a Finding of Guilt in Any Criminal Case 18
.0116 Reciprocal Discipline & Disability Proceedings 19
.0117 Surrender of License While Under Investigation 20
.0118 Disability Hearings 20
.0119 Enforcement of Powers 21
.0120 Notice to Member of Action and Dismissal 21
.0121 Notice to Complainant 21
.0122 Appointment of Counsel to Protect Client's Interests When Attorney Disappears, Dies, or is Transferred to Disability Inactive Status 21
.0123 Imposition of Discipline; Findings of Incapacity or Disability; Notice to Courts 21
.0124 Obligations of Disbarred or Suspended Attorneys 22
.0125 Reinstatement 22
.0126 Address of Record 24
.0127 Disqualification Due to Interest 24
.0128 Trust Accounts; Audit 24
.0129 Confidentiality 25
.0130 Disciplinary Amnesty in Illicit Drug Use Cases 25

Section .0200 Rules Governing Judicial District Grievance Committees 25

.0201 Organization of Judicial District Grievance Committees . .25
.0202 Jurisdiction and Authority of District Grievance Committee 26
.0203 Meetings of the District Grievance Committees 27
.0204 Procedure Upon Institution of a Grievance 27
.0205 Record Keeping 28
.0206 Miscellaneous 28
.0207 Conflicts of Interest 28
.0208 Letter to Complainant Where Local Grievance Alleges Fee Dispute Only 28
.0209 Letter to Complainant Where Local Grievance Alleges Fee Dispute and Other Violations 28
.0210 Letter to Complainant/Respondent Where District Committee Recommends Finding of No Probable Cause . .29
.0211 Letter to Respondent Where District Committee Recommends Finding of Probable Cause 29
.0212 Letter to Complainant Where District Committee Recommends Finding of Probable Cause 29
.0213 Letter to Complainant Acknowledging Grievance 29
.0214 Letter to Investigating Attorney Assigning Grievance 30
.0215 Letter to Complainant from Investigating Attorney 30
.0216 Letter of Notice to Respondent Attorney 30
.0217 Letter Transmitting Completed File to North Carolina State Bar 30

Subchapter C: Rules Governing the Board of Law Examiners and the Training of Law Students 30

Section .0200 Rules Governing Practical Training of Law Students 30

.0201 Purpose 30
.0202 Definitions 30
.0203 Eligibility 31
.0204 Certification as Legal Intern 31
.0205 Supervision 31
.0206 Activities 31
.0207 Use of Student's Name 31

For a complete listing of all Rules of the State Bar, see page 289

Subchapter D: Rules of the Standing Committees of the North Carolina State Bar 32

Section .0100 Procedures for Ruling on Questions of Legal Ethics 32
.0101 Definitions 32
.0102 General Provisions 32
.0103 Informal Ethics Advisories and Ethics Advisories 32
.0104 Formal Ethics Opinions and Ethics Decisions 33

Section .0200 Procedures for the Authorized Practice Committee 33
.0201 General Provisions 33
.0202 Procedure 33
.0203 Definitions 33
.0204 State Bar Council - Powers and Duties 34
.0205 Chairperson of the Authorized Practice 34
Committee - Powers and Duties 34
.0206 Authorized Practice Committee - Powers and Duties 34
.0207 Counsel - Powers and Duties 34
.0208 Suing for Injunctive Relief 34

Section .0600 Rules Governing the Lawyer Assistance Program 34
.0601 Purpose 34
.0602 Authority 35
.0603 Operational Responsibility 35
.0604 Size of Board 35
.0605 Appointment of Members; When; Removal 35
.0606 Term of Office and Succession 35
.0607 Appointment of Chairperson 35
.0608 Appointment of Vice-Chairperson 35
.0609 Source of Funds 35
.0610 Meetings 35
.0611 Annual Report 35
.0612 Powers and Duties of the Board 35
.0613 Confidentiality 36
.0614 Referral to the Grievance Committee 36
.0615 Regional Chapters 36
.0616 Suspension for Impairment, Reinstatement 36
.0617 Consensual Suspension 36
.0618 Agents of the State Bar 36
.0619 Judicial Committee 36
.0620 Rehabilitation Contracts for Lawyers Impaired by
Substance Abuse 37
.0621 Evaluations for Substance Abuse, Alcoholism,
and/or other Chemical Addictions 37
.0622 Grounds for Compelling an Evaluation 37
.0623 Failure to Comply with an Order Compelling
an Evaluation 37

Section .0700 Procedures for Fee Dispute Resolution 37
.0701 Purpose and Implementation 37
.0702 Jurisdiction 37
.0703 Coordinator of Fee Dispute Resolution 37
.0704 Reserved 37
.0705 Selection of Mediators 37
.0706 Processing Requests for Fee Dispute Resolution 37
.0707 Mediation Proceedings 38
.0708 Finalizing the Agreement 38
.0709 Record Keeping 38
.0710 District Bar Fee Dispute Resolution 38

Section .0900 Procedures for Administrative Committee 38
.0901 Transfer to Inactive Status 38
.0902 Reinstatement from Inactive Status 39
.0903 Suspension for Nonpayment of Membership Fee,
Late Fee, Client Security Fund Assessment, or
Assessed Costs 39
.0904 Reinstatement After Suspension for Failure to
Pay Fees or Assessed Costs 40

Section .1400 Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar 40
.1401 Purpose; Definitions 40
.1402 Jurisdiction: Authority 41
.1403 Operational Responsibility 41
.1404 Size of Board 41
.1405 Lay Participation 41
.1406 Appointment of Members; When; Removal 41
.1407 Term of Office 41
.1408 Staggered Terms 41
.1409 Succession 41
.1410 Appointment of Chairperson 41
.1411 Appointment of Vice-Chairperson 42
.1412 Source of Funds 42
.1413 Fiscal Responsibility 42
.1414 Meetings 42
.1415 Annual Report 42
.1416 Appropriate Uses of the Client Security Fund 42
.1417 Applications for Reimbursement 42
.1418 Processing Applications 42
.1419 Subrogation for Reimbursement 43
.1420 Authority Reserved by the Supreme Court 43

Section .1500 Rules Governing the Administration of the Continuing Legal Education Program 43
.1501 Purpose and Definitions 43
.1502 Jurisdiction: Authority 44
.1503 Operational Responsibility 44
.1504 Size of Board 44
.1505 Lay Participation 44
.1506 Appointment of Members; When; Removal 44
.1507 Term of Office 44
.1508 Staggered Terms 44
.1509 Succession 44
.1510 Appointment of Chairperson 44
.1511 Appointment of Vice-Chairperson 45
.1512 Source of Funds 45
.1513 Fiscal Responsibility 45
.1514 Meetings 45
.1515 Annual Report 45
.1516 Powers and Duties of the Board 45
.1517 Scope and Exemptions 45
.1518 Continuing Legal Education Program 46
.1519 Accreditation Standards 46
.1520 Accreditation of Sponsors and Programs 46
.1521 Credit Hours 46
.1522 Annual Report 47
.1523 Noncompliance 47
.1524 Reinstatement 47
.1525 Reserved 48
.1526 Effective Date 48
.1527 Regulations 48

Section .1600 Regulations Governing the Administration of the Continuing Legal Education Program 48
.1601 Organization 48

.1602 General Course Approval 48
.1603 Accredited Sponsors 49
.1604 Accreditation of Prerecorded Programs and Live Programs Broadcast to Remote Locations by Telephone, Satellite or Video Conferencing Equipment 49
.1605 Computation of Credit 50
.1606 Fees 50
.1607 Special Cases and Exemptions 50
.1608 General Compliance Procedures 50
.1609 Noncompliance Procedures 50
.1610 Authority for Appeals 51
.1611 Accreditation of Computer-Based CLE 51

Section .1700 The Plan of Legal Specialization 51
.1701 Purpose 51
.1702 Jurisdiction: Authority 51
.1703 Operational Responsibility 51
.1704 Size of Board 51
.1705 Lay Participation 51
.1706 Appointment of Members; When; Removal 51
.1707 Term of Office 51
.1708 Staggered Terms 51
.1709 Succession 51
.1710 Appointment of Chairperson 51
.1711 Appointment of Vice-Chairperson 51
.1712 Source of Funds 52
.1713 Fiscal Responsibility 52
.1714 Meetings 52
.1715 Annual Report 52
.1716 Powers and Duties of the Board 52
.1717 Retained Jurisdiction of the Council 52
.1718 Privileges Conferred and Limitations imposed 52
.1719 Specialty Committees 53
.1720 Minimum Standards for Certification of Specialists 53
.1721 Minimum Standards for Continued Certification4 of Specialists 54
.1722 Establishment of Additional Standards 54
.1723 Suspension or Revocation of Certification as a Specialist ..54
.1724 Right to Hearing and Appeal to Council 54
.1725 Areas of Specialty 54
.1726 Certification Standards of the Specialties of Bankruptcy Law, Estate Planning and Probate Law, Real Property Law, Family Law, and Criminal Law 54

Section .2100 Certification Standards for the Real Property Law Specialty 54
.2101 Establishment of Specialty Field 54
.2102 Definition of Specialty 55
.2103 Recognition as a Specialist in Real Property Law 55
.2104 Applicability of Provisions of the North Carolina Plan of Legal Specialization 55
.2105 Standards for Certification as a Specialist in Real Property Law 55
.2106 Standards for Continued Certification as a Specialist 55
.2107 Applicability of Other Requirements 55

Section .2200 Certification Standards for the Bankruptcy Law Specialty 56
.2201 Establishment of the Specialty Field 56
.2202 Definition of Specialty 56
.2203 Recognition as a Specialist in Bankruptcy Law 56
.2204 Applicability of Provisions of the North Carolina Plan of Legal Specialization 56
.2205 Standards for Certification as a Specialist in Bankruptcy Law 56
.2206 Standards for Continued Certification as a Specialist 56
.2207 Applicability of Other Requirements 53

Section .2300 Certification Standards for the Estate Planning and Probate Law Specialty 57
.2301 Establishment of Specialty Field 57
.2302 Definition of Specialty 57
.2303 Recognition as a Specialist in Estate Planning and Probate Law 57
.2304 Applicability of Provisions of the North Carolina Plan of Legal Specialization 57
.2305 Standards for Certification as a Specialist in Estate Planning and Probate Law 57
.2306 Standards for Continued Certification as a Specialist 58
.2307 Applicability of Other Requirements 58

Section .2400 Certification Standards for the Family Law Specialty ..58
.2401 Establishment of Specialty Field 58
.2402 Definition of Specialty 58
.2403 Recognition as a Specialist in Family Law 58
.2404 Applicability of Provisions of the North Carolina Plan of Legal Specialization 58
.2405 Standards for Certification as a Specialist in Family Law ..58
.2406 Standards for Continued Certification as a Specialist 59
.2407 Applicability of Other Requirements 59

Section .2500 Certification Standards for the Criminal Law Specialty .59
.2501 Establishment of Specialty Field 59
.2502 Definition of Specialty 59
.2503 Recognition as a Specialist in Criminal Law 59
.2504 Applicability of Provisions of the North Carolina Plan of Legal Specialization 60
.2505 Standards for Certification as a Specialist 60
.2506 Standards for Continued Certification as a Specialist 61
.2507 Applicability of Other Requirements 61

Section .2600 Certification Standards for the Immigration Law Specialty 61
.2601 Establishment of Specialty Field 61
.2602 Definition of Specialty 61
.2603 Recognition as a Specialist in Immigration Law 62
.2604 Applicability of Provisions of the North Carolina Plan of Legal Specialization 62
.2605 Standards for Certification as a Specialist in Immigration Law 62
.2606 Standards for Continued Certification as a Specialist 62
.2607 Applicability of Other Requirements 63

Section .2700 Certification Standards for the Workers' Compensation Law Specialty 63
.2701 Establishment of Specialty Field 63
.2702 Definition of Specialty 63
.2703 Recognition as a Specialist in Workers' Compensation Law .63
.2704 Applicability of Provisions of the North Carolina Plan of Legal Specialization 63
.2705 Standards for Certification as a Specialist in Workers' Compensation Law 63
.2706 Standards for Continued Certification as a Specialist 63
.2707 Applicability of Other Requirements 64

Subchapter E: Regulations for Organizations Practicing Law 64

Section .0100 Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law 64
.0101 Authority, Scope, and Definitions 64
.0102 Name of Professional Corporation or Professional Limited Liability Company 64
.0103 Registration with the North Carolina State Bar 65
.0104 Management and Financial Matters 66
.0105 General and Administrative Provisions 67
.0106 Forms 67

Section .0200 Registration of Interstate and International Law Firms 69
.0201 Registration Requirement 69
.0202 Conditions of Registration 69
.0203 Registration Fee 70
.0204 Certificate of Registration 70
.0205 Effect of Registration 70

Section .0300 Rules Concerning Prepaid Legal Services Plans 70
.0301 Registration Requirement 70
.0302 Registration Site 70
.0303 Requirement to File Amendments 70
.0304 Advertising of State Bar Approval Prohibited 70
.0305 Annual Registration 70
.0306 Registration Fee 70
.0307 Index of Registered Plans 70
.0308 State Bar May Not Approve or Disapprove Plans 70
.0309 State Bar Jurisdiction 70
.0310 Definition of Prepaid Plan 70

Title 27 of the North Carolina Administrative Code: The North Carolina State Bar Chapter 2: Revised Rules of Professional Conduct 71

0.1 Preamble: A Lawyer's Responsibilities 72
0.2 Scope 73
0.3 Terminology 74

Client-Lawyer Relationship
Rule 1.1 Competence 74
Rule 1.2 Scope Of Representation 75
Rule 1.3 Diligence 76
Rule 1.4 Communication 77
Rule 1.5 Fees 78
Rule 1.6 Confidentiality of Information 81
Rule 1.7 Conflict of Interest: General Rule 83
Rule 1.8 Conflict of Interest: Prohibited Transactions and Other Specific Applications 88
Rule 1.9 Conflict of Interest: Former Client 90
Rule 1.10 Imputed Disqualification: General Rule 92
Rule 1.11 Successive Government and Private Employment 93
Rule 1.12 Former Judge or Arbitrator 94
Rule 1.13 Organization As Client 94
Rule 1.14 Client Under a Disability 95
Rule 1.15 Preserving the Property of Others 96
Rule 1.15-1 Definitions 96
Rule 1.15-2 General Rules 96
Rule 1.15-3 Records and Accountings 97
Rule 1.15-4 Interest on Lawyers' Trust Accounts 100
Rule 1.16 Declining or Terminating Representation 100
Rule 1.17 Sale of a Law Practice 102
Rule 1.18 Sexual Relations with Clients Prohibited 103

Counselor
Rule 2.1 Advisor 104
Rule 2.2 Intermediary 104
Rule 2.3 Evaluation for Use by Third Persons 105

Advocate
Rule 3.1 Meritorious Claims and Contentions 106
Rule 3.2 Expediting Litigation 106
Rule 3.3 Candor Toward the Tribunal 106
Rule 3.4 Fairness to Opposing Party and Counsel 108
Rule 3.5 Impartiality and Decorum of the Tribunal 110
Rule 3.6 Trial Publicity 111
Rule 3.7 Lawyer as Witness 112
Rule 3.8 Special Responsibilities of a Prosecutor 113
Rule 3.9 Reserved 114

Transactions with Persons Other Than Clients
Rule 4.1 Truthfulness in Statements to Others 114
Rule 4.2 Communication with Person Represented by Counsel 114
Rule 4.3 Dealing with Unrepresented Person 115
Rule 4.4 Respect for Rights of Third Persons 115

Law Firms and Associations
Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer 116
Rule 5.2 Responsibilities of a Subordinate Lawyer 116
Rule 5.3 Responsibilities Regarding Nonlawyer Assistants 116
Rule 5.4 Professional Independence of a Lawyer 117
Rule 5.5 Unauthorized Practice of Law 118
Rule 5.6 Restrictions on Right to Practice 119

Public Service
Rule 6.1 Reserved 119
Rule 6.2 Reserved 119
Rule 6.3 Membership in Legal Services Organization 119
Rule 6.4 Law Reform Activities Affecting Client Interests 120
Rule 6.5 Action as a Public Official 120

Information About Legal Services
Rule 7.1 Communications Concerning a Lawyer's Services 120
Rule 7.2 Advertising 121
Rule 7.3 Direct Contact with Prospective Clients 122
Rule 7.4 Communication of Fields of Practice 124
Rule 7.5 Firm Names and Letterheads 124

Maintaining the Integrity of the Profession
Rule 8.1 Bar Admission and Disciplinary Matters 125
Rule 8.2 Judges and Other Adjudicatory Officers 126
Rule 8.3 Reporting Professional Misconduct 126
Rule 8.4 Misconduct 127
Rule 8.5 Disciplinary Authority; Choice of Law 129

Correlation Tables
Correlation Table 1: Revised Rules of Professional Conduct and Superseded N.C. Rules of Professional Conduct (1985) 131
Correlation Table 2: Superseded N.C. Rules of Professional Conduct, Revised Rules of Professional Conduct and Superseded Code of Professional Responsibility 122

Ethics Opinions 136
Ethics Opinion Index 268
Trust Account Guidelines 279
IOLTA Questions and Answers 289

Title 27 of the North Carolina Administrative Code
The North Carolina State Bar

Chapter 1
Rules and Regulations of the North Carolina State Bar

Editor's Note: The Rules and Regulations of the North Carolina State Bar are published officially in the North Carolina Reports and the North Carolina Administrative Code - Title 27. They may be cited properly with reference to the Administrative Code. For example, Rule 7.4 of the Revised Rules of Professional Conduct would be cited as 27 NCAC 2 7.4.

SUBCHAPTER A

Organization of the North Carolina State Bar

Section .0200 Membership - Annual Membership Fees

.0201 Classes of Membership

(a) Two Classes of Membership

Members of the North Carolina State Bar shall be divided into two classes: active members and inactive members.

(b) Active Members

The active members shall be all persons who have obtained licenses entitling them to practice law in North Carolina, including persons serving as justices or judges of any state or federal court in this state, unless classified as inactive members by the council. All active members must pay the annual membership fee.

(c) Inactive Members

The inactive members shall include all persons who have been admitted to the practice of law in North Carolina but who the council has found are not engaged in the practice of law or holding themselves out as practicing attorneys and who do not occupy any public or private position in which they may be called upon to give legal advice or counsel or to examine the law or to pass upon the legal effect of any act, document or law. Inactive members of the North Carolina State Bar may not practice law and are exempt from payment of membership dues during the period in which they are inactive members. For purposes of the State Bar's membership records, the category of inactive members shall be further divided into the following subcategories:

(1) Retired/nonpracticing

This subcategory includes those members who are not engaged in the practice of law or holding themselves out as practicing attorneys and who are retired, hold positions unrelated to the practice of law, or practice law in other jurisdictions.

(2) Disability inactive status

This subcategory includes members who suffer from a mental or physical condition which significantly impairs the professional judgment, performance or competence of an attorney, as determined by the courts, the council or the Disciplinary Hearing Commission.

(3) Disciplinary suspensions/disbarments

This subcategory includes those members who have been suspended from the practice of law or who have been disbarred by the courts, the council or the Disciplinary Hearing Commission for one or more violations of the Rules of Professional Conduct.

(4) Administrative suspensions

This subcategory includes those members who have been suspended from the practice of law for failure to comply with the regulations regarding mandatory continuing legal education, payment of membership fees, or payment of late fees pursuant to these rules.

History Note: Statutory Authority G.S. 84-16; G.S. 84-23
Readopted Effective December 8, 1994

.0202 Register of Members

(a) Initial Registration with State Bar

Every member shall register by completing and returning to the North Carolina State Bar a signed registration card containing the following information:

(1) name and address;
(2) date;
(3) date passed examination to practice in North Carolina;
(4) date and place sworn in as an attorney in North Carolina;
(5) date and place of birth;
(6) list of all other jurisdictions where the member has been admitted to the practice of law and date of admission;
(7) whether suspended or disbarred from the practice of law in any jurisdiction or court, and if so, when and where, and when readmitted.

(b) Membership Records of State Bar

The secretary shall keep a permanent register for the enrollment of members of the North Carolina State Bar. In appropriate places therein entries shall be made showing the address of each member, date of registration and class of membership, date of transfer from one class to another, if any, date and period of suspension, if any, and such other useful data which the council may from time to time require.

History Note: Statutory Authority G.S. 84-23; G.S. 84-34
Readopted Effective December 8, 1994
Amended December 7, 1995

.0203 Annual Membership Fees; When Due

(a) Amount and Due Date

The annual membership fee shall be in the amount as provided by law and shall be due and payable to the secretary of the North Carolina State Bar on January 1 of each year and the same shall become delinquent if not paid before July 1 of each year.

(b) Late Fee

Any attorney who fails to pay the entire annual membership fee in the amount provided by law and the annual Client Security Fund assessment approved by the North Carolina Supreme Court before July 1 of each year shall also pay a late fee of $30.

(c) Waiver of All or Part of Dues

No part of the annual membership fee or Client Security Fund assessment shall be prorated or apportioned to fractional parts of the year, and no part of the membership fee or Client Security Fund assessment shall be waived or rebated for any reason with the following exceptions:

(1) A person licensed to practice law in North Carolina for the first time by examination shall not be liable for dues or the Client Security Fund assessment during the year in which the person is admitted;

(2) A person licensed to practice law in North Carolina serving in the armed forces, whether in a legal or nonlegal capacity, will be exempt from payment of dues and Client Security Fund assessment for any year in which the member is on active duty in the military service;

(3) A person licensed to practice law in North Carolina who files a peti-

tion for inactive status on or before December 31 of a given year shall not be liable for the membership fee or the Client Security Fund assessment for the following year if the petition is granted. A petition shall be deemed timely if it is postmarked on or before December 31.

History Note: Statutory Authority G.S. 84-23; G.S. 84-34
Readopted Effective December 8, 1994
Amended September 7, 1995
Amended December 7, 1995
Amended March 7, 1996

Section .0900 Organization of the Judicial District Bars

.0901 Bylaws

(a) Each judicial district bar shall adopt bylaws for its governance subject to the approval of the council;

(b) Each judicial district bar shall submit its current bylaws to the secretary of the North Carolina State Bar for review by the council on or before June 1, 1996;

(c) Pending review by the council, any bylaws submitted to the secretary on behalf of a judicial district bar or which already exist in the files of the secretary shall be deemed official and authoritative.

(d) All amendments to the bylaws of any judicial district bar must be filed with the secretary within 30 days of adoption and shall have no force and effect until approved by the council.

(e) The secretary shall maintain an official record for each judicial district bar containing bylaws which have been approved by the council or for which approval is pending.

History Note: Statutory Authority G.S. 84-18.1; 84-23
Adopted March 7, 1996

.0902 Annual Membership Fee

If a judicial district bar elects to assess an annual membership fee from its active members pursuant to N.C.G.S. §84-18.1(b), the following procedures shall apply:

(a) Notice to State Bar. The judicial district bar shall notify the North Carolina State Bar of its election to assess an annual membership fee each year at least thirty days prior to mailing to its members the first invoice therefore, specifying the amount of the annual membership fee, the date after which payment will be delinquent, and the amount of any late fee for delinquent payment.

(b) Accounting to State Bar. No later than thirty days after the end of the judicial district bar's fiscal year, the judicial district bar shall provide the North Carolina State Bar with an accounting of the annual membership fees it collected during such judicial district bar's fiscal year.

(c) Delinquency Date. The date upon which the annual membership fee shall be delinquent if not paid shall be not later than ninety days after, and not sooner than thirty days after, the date of the first invoice for the annual membership fee. The delinquency date shall be stated on the invoice and the invoice shall advise each member that failure to pay the annual membership fee must be reported to the North Carolina State Bar and may result in suspension of the member's license to practice law.

(d) Late Fee. Each judicial district bar may impose, but shall not be required, to impose a late fee of any amount not to exceed thirty dollars ($30.00) for nonpayment of the annual membership fee on or before the stated delinquency date.

(e) Members Subject to Assessment. Only those lawyers who are active members of a judicial district bar may be assessed an annual membership fee. A lawyer who joins a judicial district bar after the beginning of its fiscal year shall be exempt from the obligation to pay the annual membership fee for that fiscal year only if the lawyer can demonstrate that he or she previously paid an annual membership fee to another judicial district bar with a fiscal year that runs conterminously, for a period of three (3) months or more, with the fiscal year of the lawyer's new judicial district bar.

(f) Hardship Waivers. A judicial district bar may not grant any waiver from the obligation to pay the judicial district bar's annual membership fee or any late fee unless the lawyer requesting the waiver is granted a waiver of the lawyer's annual membership fee to the North Carolina State Bar for the comparable period.

(g) Reporting Delinquent Members to State Bar. Twelve months after the date of the first invoice for the annual membership fee, the judicial district bar shall report to the North Carolina State Bar all of its members who have not paid the annual membership fee or any late fee.

History Note: Statutory Authority G.S. 84-18.1; 84-23
Adopted December 20, 2000

.0903 Fiscal Period

To avoid conflict with the assessment of the membership fees for the North Carolina State Bar, each judicial district bar that assesses a membership fee shall adopt a fiscal year that is not a calendar year.

History Note: Statutory Authority G.S. 84-18.1; 84-23
Adopted December 20, 2000

Section .1000 Model Bylaws For Use by Judicial District Bars

.1001 Name

The name of this district bar shall be THE DISTRICT BAR OF THE _____JUDICIAL DISTRICT, and shall be hereinafter referred to as the "district bar".

History Note: Statutory Authority G.S. 84-18.1; 84-23
Adopted March 7, 1996

.1002 Authority and Purpose

The district bar is formed pursuant to the provisions of Chapter 84 of the North Carolina General Statutes to promote the purposes therein set forth and to comply with the duties and obligations therein or thereunder imposed upon the Bar of this judicial district.

History Note: Statutory Authority G.S. 84-18.1; 84-23
Adopted March 7, 1996

.1003 Membership

The members of the district bar shall consist of two classes: active and inactive.

(a) Active members: The active members shall be all persons who, at the time of the adoption of these bylaws or any time thereafter

(1) are active members in good standing with the North Carolina State Bar; and
(2) reside in the judicial district; or
(3) practice in the judicial district and elect to belong to the district bar as provided in G.S. 84-16.

(b) Inactive members: The inactive members shall be all persons, who, at the time of the adoption of these bylaws or at any time thereafter

(1) have been granted voluntary inactive status by the North Carolina State Bar; and
(2) reside in the judicial district; and
(3) elect to participate, but not vote or hold office, in the district bar by giving written notice to the secretary of the district bar.

History Note: Statutory Authority G.S. 84-18.1; 84-23
Adopted March 7, 1996

.1004 Officers

The officers of the district bar shall be a president, a vice-president, and secretary and/or treasurer who shall be selected and shall serve for the terms set out herein.

(a) President: The president serving at the time these bylaws are effective shall continue to serve for a term ending at the next annual meeting following the adoption or effective date of these bylaws. The president for the following term shall be the then current vice-president. Thereafter, the duly elected vice-president shall automatically succeed to the office of the president for a term of one, two, or three years.

(b) Vice-president: The vice-president serving at the time these bylaws are effective shall continue to serve for a term ending at the next annual meeting following the adoption or effective date of these bylaws, at which time said vice-president shall succeed to the office of the president. Thereafter, the vice-president shall be elected at the annual meeting as hereinafter provided for a term of one, two, or three years.

(c) Secretary and/or treasurer: The secretary and/or the treasurer serving at the time these bylaws are effective shall each continue to serve in their respective offices until the expiration of the term of that office or until successors are appointed by the president (or be elected by the active members of the district bar), whichever occurs later. In all other years, the secretary and/or treasurer shall be appointed by the president (or be elected by the active members of the district bar) to serve for a term of one, two, or three years.

(d) Election: Before (or at) the annual meeting at which officers are to be elected, the Nominating Committee shall submit the names of its nominees for the office of vice-president to the secretary. Nominations from the floor shall be permitted. If no candidate receives a majority of the votes cast, the candidate with the lowest number of votes shall be eliminated and a run-off election shall immediately be held among the remaining candidates. This procedure shall be repeated until a candidate receives a majority of the votes.[1]

(e) Duties: The duties of the officers shall be those usual and customary for such officers, including such duties as may be from time to time designated by resolution of the district bar, the North Carolina State Bar Council or the laws of the State of North Carolina.

(f) Vacancies: If a vacancy in the office of the vice-president, secretary-treasurer occurs, the vacancy will be filled by the board of directors, if any, and if there is no board of directors, then by the vote of the active members at a special meeting of such members. The successor shall serve until the next annual meeting of the district bar. If the office of the president becomes vacant, the vice-president shall succeed to the office of the president and the board of directors, if any, and if there is no board of directors, then by the vote of the active members at a special meeting of such members, will select a new vice-president, who shall serve until the next annual meeting.

(g) Notification: Within 10 days following the annual meeting, or the filling of a vacancy in any office, the president shall notify the executive director of the North Carolina State Bar of the names, addresses and telephone numbers of all officers of the district bar.

(h) Record of bylaws: The president shall ensure that a current copy of these bylaws is filed with the office of the senior resident superior court judge with the _____ Judicial District and with the executive director of the North Carolina State Bar.

(i) Removal from office: The district bar, by a two-thirds vote of its active members present at a duly called meeting, may, after due notice and an opportunity to be heard, remove from office any officer who has engaged in conduct which renders the officer unfit to serve, or who has become disabled, or for other good cause. The office of any officer who, during his or her term of office ceases to be an active member of the North Carolina State Bar shall immediately be deemed vacant and shall be filled as provided in Rule .1004(f) above.

History Note: Statutory Authority G.S. 84-18.1; 84-23
Adopted March 7, 1996

.1005 Councilor

The district bar shall be represented in the State Bar council by one or more duly elected councilors, the number of councilors being determined pursuant to G.S. 84-17. Any councilor serving at the time of the adoption of these bylaws shall complete the term of office to which he or she was previously elected. Thereafter, elections shall be held as necessary. Nominations shall be made and the election held as provided in G.S. 84-18 and in Section .0800 et seq. of Subchapter 1A of the Rules of the North Carolina State Bar (27 N.C.A.C. 1A .0800 et seq.). If more than one council seat is to be filled, separate elections shall be held for each vacant seat. A vacancy in the office of councilor shall be filled as provided by Rule .0804 of this subchapter (27 N.C.A.C. 1A .0804).

History Note: Statutory Authority G.S. 84-18.1; 84-23
Adopted March 7, 1996
Amended November 5, 1999

.1006 Annual Membership Fee

(a) Each active member of the district bar shall:

(1) Pay such annual membership fee, if any, as is prescribed by a majority vote of the active members of the district bar present and voting at a duly called meeting of the district bar, provided, however, that such fee may never exceed the amount of the annual membership fee currently imposed by the North Carolina State Bar. Each member shall pay the annual district bar membership fee at the time and place set forth in the notice thereof mailed to the member by the secretary-treasurer; and

(2) Keep the secretary-treasurer notified of the member's current mailing address and telephone number.

(b) The annual membership fee shall be used to promote and maintain the administration, activities and programs of the district bar.

History Note: Statutory Authority G.S. 84-18.1; 84-23
Adopted March 7, 1996

.1007 Meetings

(a) Annual meetings: The district bar shall meet each _____ at a time and place designated by the president. The president, secretary or other officer shall mail or deliver written notice of the annual meeting to each active member of the district bar at the member's last known mailing address on file with the district bar at least ten days before the date of the annual meeting and shall so certify in the official minutes of the meeting. Notice of the meeting mailed by the executive director of the North Carolina State Bar shall also satisfy the notice requirement. Failure to mail or deliver the notice as herein provided shall invalidate any action at the annual meeting.

(b) Special meetings: Special meetings, if any, may be called at any time by the president or the vice-president. The president, secretary or other officer shall mail or deliver written notice of the special meeting to each active member of the district bar at the member's last known mailing address on file with the district bar at least ten days before the date of any special meeting. Such notice shall set forth the time and place for the special meeting and the purpose(s) thereof. Failure to mail or deliver the notice shall invalidate any action taken at a special meeting.

(c) Quorum: Twenty percent of the active members of the district bar shall constitute a quorum, and a quorum shall be required to take official action on behalf of the district bar.[2]

History Note: Statutory Authority G.S. 84-18.1; 84-23
Adopted March 7, 1996

.1008 District Bar Finances

(a) Fiscal Year: The district bar's fiscal year shall begin on_____ and shall end on _____.

(b) Duties of treasurer: The treasurer shall maintain the funds of the district bar on deposit, initiate any necessary disbursements and keep appropriate financial records.

(c) Annual financial report: Each _____ before the annual meeting, the treasurer shall prepare the district bar's annual financial report for review by the board of directors, if any, and submission to the district bar's annual meeting and the North Carolina State Bar.

(d) District bar checks: All checks written on district bar accounts (arising from the collection of mandatory dues) that exceed $500 must be signed by two of the following: (1) the treasurer, (2) any other officer, (3) another member of the board of directors, or (4) the executive secretary/director, if any.

(e) Fidelity bond: If it is anticipated that receipts from membership fees will exceed $20,000 for any fiscal year, the district bar shall purchase a fidelity bond at least equal in amount to the anticipated annual receipts to indemnify the district bar for losses attributable to the malfeasance of the treasurer or any other member having access to district bar funds.

(f) Taxpayer identification number: The treasurer shall be responsible for obtaining a federal taxpayer identification number for the district bar.

History Note: Statutory Authority G.S. 84-18.1; 84-23
Adopted March 7, 1996
Amended July 22, 1999

.1009 Prohibited Activities

(a) Prohibited expenditures: Mandatory district bar dues, if any, shall not be used for the purchase of alcoholic beverages, gifts to public officials, including judges, charitable contributions, recreational activities or expenses of spouses of district bar members or officers. However, such expenditures may be made from funds derived entirely from the voluntary contributions of district bar members.

(b) Political expenditures: The district bar shall not make any expenditures to fund political and ideological activities.

(c) Political activities: The district bar shall not engage in any political or ideological conduct or activity, including the endorsement of candidates and the taking or advocation of positions on political issues, referendums, bond elections, and the like, however, the district bar, and persons speaking on its behalf, may

take positions on, or comment upon, issues relating to the regulation of the legal profession and issues or matters relating to the improvement of the quality and availability of legal services to the general public.

History Note: Statutory Authority G.S. 84-18.1; 84-23

Adopted March 7, 1996

.1010 Committees

(a) Standing committee(s): The standing committees shall be the Nominating Committee, Pro Bono Committee, Fee Dispute Arbitration Committee and Grievance Committee, provided that, with respect to the Fee Dispute Arbitration Committee and the Grievance Committee, the district meets the State Bar guidelines relating thereto.

(b) Fee Arbitration Committee:

(1) The Fee Arbitration Committee shall consist of at least six but not more than eighteen persons appointed by the president to staggered three-year terms as provided in the district bar's Fee Arbitration Plan.

(2) The Fee Arbitration Committee shall be responsible for implementing a Fee Arbitration Plan approved by the Council of the North Carolina State Bar to resolve fee disputes efficiently, economically, and expeditiously without litigation.

(c) Grievance Committee:

(1) The Grievance Committee shall consist of at least five but not more than thirteen persons appointed by the president to staggered three year terms as provided by the Rules and Regulations of the North Carolina State Bar governing Judicial District Grievance Committees.

(2) The Grievance Committee shall assist the Grievance Committee of the North Carolina State Bar by receiving grievances, investigating grievances, evaluating grievances, informally mediating disputes, facilitating communication between lawyers and clients and referring members of the public to other appropriate committees or agencies for assistance.

(3) The Grievance Committee shall operate in strict accordance with the rules and policies of the North Carolina State Bar with respect to district bar grievance committees.

(d) Special Committees: Special committees may be created and appointed by the president.

(e) Nominating Committee:

(1) The Nominating Committee shall be appointed by the officers (or the board of directors) of the district bar and shall consist of at least three active members of the district bar who are not officers or directors of the district bar.[3]

(2) The Nominating Committee shall meet as necessary for the purpose of nominating active members of the district bar as candidates for officers and councilor(s) and the board of directors, if any.

(3) The Nominating Committee members shall serve one-year terms beginning on _____ and ending on _____.

(4) Any active member whose name is submitted for consideration for nomination to any office or as a councilor must have indicated his or her willingness to serve if selected.

(f) Pro Bono Committee:

(1) The Pro Bono Committee shall consist of at least five active members of the district bar appointed by the president.

(2) The Pro Bono Committee shall meet at least once each quarter and shall have the duty of encouraging members of the district bar to provide pro bono legal services. The committee shall also develop programs whereby attorneys not involved in other volunteer legal service programs may provide pro bono legal service in their areas of concentration and practice.

(3) The members of the Pro Bono Committee shall serve one-year terms commencing on _____.

History Note: Statutory Authority G.S. 84-18.1; 84-23

Adopted March 7, 1996

.1011 Board of Directors or Executive Committee

(a) Membership of board: A board of directors consisting of at least _____ active members of the district bar shall be elected. At all times, the board of directors shall include at least one director from each county in the judicial district. The board of directors serving when these bylaws become effective shall continue to serve until the following annual meeting. Beginning on _____ immediately after the effective date of these bylaws, the president shall appoint an initial board of directors who shall serve three-year terms commencing on _____, except that the terms of the initial members of the board shall be staggered at one-year intervals to ensure continuity and experience. To effect the staggered initial terms, the president will determine which of the initial members shall serve terms of less than three years.

The State Bar councilor (or councilors) from the judicial district shall be an ex officio member (or members) of the district bar board of directors or Executive Committee.

(b) Terms of directors: After the initial staggered terms of the board of directors expire, successors shall be elected by the active members at the annual district bar meeting, as set out in Rule .1004(d) above, and Rule .1011(c) and (d) below. Following the completion of the initial staggered terms, the directors shall serve three-year terms beginning on _____ following their election.

(c) Designated and at-large seats in multi-county districts: In multi-county districts, one seat on the board of directors shall be set aside and designated for each county in the district. Only active members of the district bar who reside or work in the designated county may be elected to a designated county seat. All other seats on the board of directors shall be at-large seats which may be filled by any active member of the district bar.

(d) Elections: When one or more seats on the board of directors become vacant, an election shall be held at the annual meeting of the district bar. Except as otherwise provided herein, the election shall be conducted as provided for in Rule .1004(d) above. The candidates receiving the highest number of votes cast will be elected, regardless of whether any of the candidates received a majority of the votes cast, provided that designated seats will be filled by the candidates receiving the highest number of votes who live or work in the designated county, regardless of whether any of the candidates received a majority of the votes cast.

(e) Vacancies: If a vacancy occurs on the board of directors, the president (or the board of directors) shall appoint a successor who shall serve until the next annual meeting of the district bar. If the vacancy occurs in a designated seat for a particular county within the district, the successor will be selected from among the active members of the district bar who live or work in the designated county.

(f) Duties of board of directors: The board of directors shall have the responsibilities described Rules .1004(f) and .1007(c) above. The board of directors shall also consult with the officers regarding any matters of district bar business or policy arising between meetings and may act for the district bar on an emergency basis if necessary, provided that any such action shall be provisional pending its consideration by the district bar at its next duly called meeting. The board of directors may not impose on its own authority any sort of fee upon the membership.

History Note: Statutory Authority G.S. 84-18.1; 84-23

Adopted March 7, 1996

.1012 Amendment of the Bylaws

The membership of the district bar, by a (majority, two-thirds, etc.) vote of the active members present at any duly called meeting at which there is a quorum present and voting throughout, may amend these bylaws in ways not inconsistent with the constitution of the United States, the policies and rules of the North Carolina State Bar and the laws of the United States and North Carolina.

History Note: Statutory Authority G.S. 84-18.1; 84-23

Adopted March 7, 1996

Endnotes:

1. The procedure for voting for, and election of, councilors is set by statute and rules of the North Carolina State Bar. District bar voting procedure with regard to matters relating to district bar dues is now statutorily prescribed in North Carolina General Statutes Section 84-18.1. The procedure, but not the manner or method of conducting the vote, to submit nominations to the governor to fill vacancies on the district court bench is set forth in North Carolina General Statutes Section 7A-142. It is suggested that, for voting upon, and elections for, other district bar matters and issues, the district bars be permitted to adopt bylaws providing for procedures as may seem appropriate for each district bar. Such rules might address notice provisions, including how much notice is

given and permissible methods of giving notice, what shall constitute a quorum (see footnote 2), and how any such election shall be conducted (including whether or not members must be present to vote, whether proxies will be permitted, whether or not absentee or some other form of mail ballot will be allowed and whether or not cumulative voting should be permitted when elections for multiple candidates or positions are being conducted).

2. Consistent with the comment contained in footnote 1, each district bar should be permitted to adopt bylaws providing for what shall constitute a quorum based upon each district bar's particular situation and circumstances. The above provision regarding quorum should be considered only as a a suggestion, and individual district bars may wish to provide that a different percentage of the membership shall constitute a quorum. Other methods of defining a quorum should also be permitted. For example, in certain of the larger district bars, any quorum based on a percentage of the membership, except for a very nominal percentage, may be difficult to attain. One alternate quorum provision might read as follows: A quorum shall be those present at any membership meeting for which proper notice was given.

3. The composition of the Nominating Committee set forth above is a suggestion only. The district bars may choose to constitute their nominating committees in a different manner, as for example, letting the committee consist of the three most immediate past presidents of the district bar who are still active members of the district bar as defined herein. Smaller district bars may choose to have no Nominating Committee and nominate and elect officers from the floor at the annual meeting of the district bar.

Section .1200 Filing Papers with and Serving the North Carolina State Bar

.1201 When Papers Are Filed Under These Rules and Regulations

Whenever in these rules and regulation there is a requirement that petitions, notices or other documents be filed with or served on the North Carolina State Bar or the council, the same shall be filed with or served on the secretary of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

SUBCHAPTER B

Discipline and Disability Rules

Section .0100 Discipline and Disability of Attorneys

.0101 General Provisions

Discipline for misconduct is not intended as punishment for wrongdoing but is for the protection of the public, the courts, and the legal profession. The fact that certain misconduct has remained unchallenged when done by others, or when done at other times, or that it has not been made the subject of earlier disciplinary proceedings, will not be a defense to any charge of misconduct by a member.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.0102 Procedure for Discipline

(a) The procedure to discipline members of the bar of this state will be in accordance with the provisions hereinafter set forth.

(b) District bars will not conduct separate proceedings to discipline members of the bar but will assist and cooperate with the North Carolina State Bar in reporting and investigating matters of alleged misconduct on the part of its members.

(c) Concurrent Jurisdiction of State Bar and Courts

(1) The Council of the North Carolina State Bar is vested, as an agency of the state, with the control of the discipline, disbarment, and restoration of attorneys practicing law in this state.

(2) The courts of this state have inherent authority to take disciplinary action against attorneys practicing therein, even in relation to matters not pending in the court exercising disciplinary authority.

(3) The authority of the North Carolina State Bar and the courts to discipline attorneys is separate and distinct, the North Carolina State Bar having derived its jurisdiction by legislative act and the courts from the inherent power of the courts themselves.

(4) Neither the North Carolina State Bar nor the courts are authorized or empowered to act for or in the name of the other, and the disciplinary action taken by either entity should be clearly delineated as to the source or basis for the action being taken.

(5) It is the position of the North Carolina State Bar that no trial court has the authority to preempt a North Carolina State Bar disciplinary proceeding with a pending civil or criminal court proceeding involving attorney conduct, or to dismiss a disciplinary proceeding pending before the North Carolina State Bar.

(6) Whenever the North Carolina State Bar learns that a court has initiated an inquiry or proceeding regarding alleged improper or unethical conduct of an attorney, the North Carolina State Bar may defer to the court and stay its own proceeding pending completion of the court's inquiry or proceeding. Upon request, the North Carolina State Bar will assist in the court's inquiry or proceeding.

(7) If the North Carolina State Bar finds probable cause and institutes disciplinary proceedings against an attorney for conduct which subsequently becomes an issue in a criminal or civil proceeding, the court may, in its discretion, defer its inquiry pending the completion of the North Carolina State Bar's proceedings.

(8) Upon the filing of a complaint by the North Carolina State Bar, the North Carolina State Bar will send a copy of the complaint to the chief resident superior court judge and to all superior court judges regularly assigned to the district in which the attorney maintains his or her law office. The North Carolina State Bar will send a copy of the complaint to the district attorney in the district in which the attorney maintains a law office if the complaint alleges criminal activity by the attorney.

(9) The North Carolina State Bar will encourage judges to contact the North Carolina State Bar to determine the status of any relevant complaints filed against an attorney before the court takes disciplinary action against the attorney.

History Note: Statutory Authority G.S. 84-23; G.S. 84-36
Readopted Effective December 8, 1994

.0103 Definitions

Subject to additional definitions contained in other provisions of this subchapter, the following words and phrases, when used in this subchapter, will have, unless the context clearly indicates otherwise, the meanings given to them in this rule.

(1) Admonition - a written form of discipline imposed in cases in which an attorney has committed a minor violation of the Rules of Professional Conduct.

(2) Appellate division - the appellate division of the general court of justice.

(3) Board - the Board of Continuing Legal Education.

(4) Board of Continuing Legal Education - a standing committee of the council responsible for the administration of a program of mandatory continuing legal education and law practice assistance.

(5) Censure - a written form of discipline more serious than a reprimand issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the attorney's license.

(6) Certificate of conviction - a certified copy of any judgment wherein a member of the North Carolina State Bar is convicted of a criminal offense.

(7) Chairperson of the Grievance Committee - councilor appointed to serve as chairperson of the Grievance Committee of the North Carolina State Bar.

(8) Commission - the Disciplinary Hearing Commission of the North Carolina State Bar.

(9) Commission chairperson - the chairperson of the Disciplinary Hearing Commission of the North Carolina State Bar.

(10) Complainant or complaining witness - any person who has complained

of the conduct of any member of the North Carolina State Bar to the North Carolina State Bar.

(11) Complaint - a formal pleading filed in the name of the North Carolina State Bar with the commission against a member of the North Carolina State Bar after a finding of probable cause.

(12) Consolidation of cases - a hearing by a hearing committee of multiple charges, whether related or unrelated in substance, brought against one defendant.

(13) Council - the Council of the North Carolina State Bar.

(14) Councilor - a member of the Council of the North Carolina State Bar.

(15) Counsel - the counsel of the North Carolina State Bar appointed by the council.

(16) Court or courts of this state - a court authorized and established by the constitution or laws of the state of North Carolina.

(17) Criminal offense showing professional unfitness - the commission of, attempt to commit, conspiracy to commit, solicitation or subornation of any felony or any crime that involves false swearing, misrepresentation, deceit, extortion, theft, bribery, embezzlement, false pretenses, fraud, interference with the judicial or political process, larceny, misappropriation of funds or property, overthrow of the government, perjury, willful failure to file a tax return, or any other offense involving moral turpitude or showing professional unfitness.

(18) Defendant - a member of the North Carolina State Bar against whom a finding of probable cause has been made.

(19) Disabled or disability - a mental or physical condition which significantly impairs the professional judgment, performance, or competence of an attorney.

(20) Grievance - alleged misconduct.

(21) Grievance Committee - the Grievance Committee of the North Carolina State Bar or any of its panels acting as the Grievance Committee respecting the grievances and other matters referred to it by the chairperson of the Grievance Committee.

(22) Hearing committee - a hearing committee designated under Rule .0108(a)(2), .0114(d), .0114(x), .0118(b)(2), .0125(a)(6), .0125(b)(7) or .0125(c)(2) of this subchapter.

(23) Illicit drug - any controlled substance as defined in the North Carolina Controlled Substances Act, section 5, chapter 90, of the North Carolina General Statutes, or its successor, which is used or possessed without a prescription or in violation of the laws of this state or the United States.

(24) Incapacity or incapacitated - condition determined in a judicial proceeding under the laws of this or any other jurisdiction that an attorney is mentally defective, an inebriate, mentally disordered, or incompetent from want of understanding to manage his or her own affairs by reason of the excessive use of intoxicants, drugs, or other cause.

(25) Investigation - the gathering of information with respect to alleged misconduct, alleged disability, or a petition for reinstatement.

(26) Investigator - any person designated to assist in the investigation of alleged misconduct or facts pertinent to a petition for reinstatement.

(27) Lawyer Assistance Program Board – the Lawyer Assistance Program Board of the North Carolina State Bar.

(28) Letter of caution - communication from the Grievance Committee to an attorney stating that the past conduct of the attorney, while not the basis for discipline, is unprofessional or not in accord with accepted professional practice.

(29) Letter of notice - a communication to a respondent setting forth the substance of a grievance.

(30) Letter of warning - written communication from the Grievance Committee or the commission to an attorney stating that past conduct of the attorney, while not the basis for discipline, is an unintentional, minor, or technical violation of the Rules of Professional Conduct and may be the basis for discipline if continued or repeated.

(31) Member - a member of the North Carolina State Bar.

(32) Office of the Counsel - the office and staff maintained by the counsel of the North Carolina State Bar.

(33) Office of the secretary - the office and staff maintained by the secretary-treasurer of the North Carolina State Bar.

(34) Party - after a complaint has been filed, the North Carolina State Bar as plaintiff or the member as defendant.

(35) Plaintiff - after a complaint has been filed, the North Carolina State Bar.

(36) Preliminary hearing - hearing by the Grievance Committee to determine whether probable cause exists.

(37) Probable cause - a finding by the Grievance Committee that there is reasonable cause to believe that a member of the North Carolina State Bar is guilty of misconduct justifying disciplinary action.

(38) Reprimand - a written form of discipline more serious than an admonition issued in cases in which a defendant has violated one or more provisions of the Rules of Professional Conduct and has caused harm or potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require a censure.

(39) Respondent - a member of the North Carolina State Bar who has been accused of misconduct or whose conduct is under investigation, but as to which conduct there has not yet been a determination of whether probable cause exists.

(40) Secretary - the secretary-treasurer of the North Carolina State Bar.

(41) Supreme Court - the Supreme Court of North Carolina.

(42) Will - when used in these rules, means a direction or order which is mandatory or obligatory.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended February 3, 2000

.0104 State Bar Council: Powers and Duties in Discipline and Disability Matters

The Council of the North Carolina State Bar will have the power and duty

(1) to supervise and conduct disciplinary proceedings in accordance with the provisions hereinafter set forth;

(2) to appoint members of the commission as provided by statute;

(3) to appoint a counsel. The counsel will serve at the pleasure of the council. The counsel will be a member of the North Carolina State Bar but will not be permitted to engage in the private practice of law;

(4) to order the transfer of a member to disability inactive status when such member has been judicially declared incompetent or has been involuntarily committed to institutional care because of incompetence or disability;

(5) to accept or reject the surrender of the license to practice law of any member of the North Carolina State Bar;

(6) to order the disbarment of any member whose resignation is accepted;

(7) to review the report of any hearing committee upon a petition for reinstatement of a disbarred attorney and to make final determination as to whether the license will be restored.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended September 7, 1995

.0105 Chairperson of the Grievance Committee: Powers and Duties

(a) The chairperson of the Grievance Committee will have the power and duty

(1) to supervise the activities of the counsel;

(2) to recommend to the Grievance Committee that an investigation be initiated;

(3) to recommend to the Grievance Committee that a grievance be dismissed;

(4) to direct a letter of notice to a respondent or direct the counsel to issue letters of notice in such cases or under such circumstances as the chairperson deems appropriate;

(5) to issue, at the direction and in the name of the Grievance Committee, a letter of caution, letter of warning, an admonition, a reprimand, or a censure to a member;

(6) to notify a respondent that a grievance has been dismissed, and to notify the complainant in accordance with Rule .0121 of this subchapter;

(7) to call meetings of the Grievance Committee;

(8) to issue subpoenas in the name of the North Carolina State Bar or direct the secretary to issue such subpoenas;

(9) to administer or direct the administration of oaths or affirmations to witnesses;

(10) to sign complaints and petitions in the name of the North Carolina State Bar;

(11) to determine whether proceedings should be instituted to activate a suspension which has been stayed;

(12) to enter orders of reciprocal discipline in the name of the Grievance Committee;

(13) to direct the counsel to institute proceedings in the appropriate forum to determine if an attorney is in violation of an order of the Grievance Committee, the commission, or the council;

(14) to rule on requests for reconsideration of decisions of the Grievance Committee regarding grievances;

(15) to tax costs of the disciplinary procedures against any defendant against whom the Grievance Committee imposes discipline, including a minimum administrative cost of $50;

(16) in his or her discretion, to refer grievances primarily attributable to unsound law office management to a program of law office management training approved by the State Bar and to so notify the complainant;

(17) to dismiss a grievance upon request of the complainant, where it appears that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct and where counsel consents to the dismissal;

(18) to dismiss a grievance where it appears that the grievance has not been filed within the time period set out in Rule .0111(e);

(19) to dismiss a grievance where it appears that the complaint, even if true, fails to state a violation of the Revised Rules of Professional Conduct and where counsel consents to the dismissal;

(20) to dismiss a grievance where it appears that there is no probable cause to believe that the respondent has violated the Revised Rules of Professional Conduct and where counsel and a member of the Grievance Committee designated by the committee consent to the dismissal.

(21) to appoint a subcommittee to make recommendations to the council for such amendments to the Discipline and Disability Rules as the subcommittee deems necessary or appropriate.

(b) The president, vice-chairperson, or a member of the Grievance Committee designated by the president or the chairperson or vice-chairperson of the committee may perform the functions, exercise the power, and discharge the duties of the chairperson or any vice-chairperson when the chairperson or a vice-chairperson is absent or disqualified.

(c) The chairperson may delegate his or her authority to the president, the vice chairperson of the committee, or a member of the Grievance Committee.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended February 20, 1995
Amended March 6, 1997
Amended October 2, 1997
Amended March 3, 1999
Amended February 3, 2000

.0106 Grievance Committee: Powers and Duties

The Grievance Committee will have the power and duty

(1) to direct the counsel to investigate any alleged misconduct or disability of a member of the North Carolina State Bar coming to its attention;

(2) to hold preliminary hearings, find probable cause and direct that complaints be filed;

(3) to dismiss grievances upon a finding of no probable cause;

(4) to issue a letter of caution to a respondent in cases wherein misconduct is not established but the activities of the respondent are unprofessional or not in accord with accepted professional practice. The letter of caution will recommend that the respondent be more professional in his or her practice in one or more ways which are to be specifically identified;

(5) to issue a letter of warning to a respondent in cases wherein no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is an unintentional, minor, or technical violation of the Rules of Professional Conduct. The letter of warning will advise the attorney that he or she may be subject to discipline if such conduct is continued or repeated. The warning will specify in one or more ways the conduct or practice for which the respondent is being warned. A copy of the letter of warning will be maintained in the office of the counsel for three years subject to the confidentiality provisions of Rule .0129 of this subchapter;

(6) to issue an admonition in cases wherein the defendant has committed a minor violation of the Rules of Professional Conduct;

(7) to issue a reprimand wherein the defendant has violated one or more provisions of the Rules of Professional Conduct, and has caused harm or potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require a censure;

(8) to issue a censure in cases wherein the defendant has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the defendant's license;

(9) to direct that a petition be filed seeking a determination whether a member of the North Carolina State Bar is disabled;

(10) to include in any order of admonition, reprimand, or censure a provision requiring the defendant to complete a reasonable amount of continuing legal education in addition to the minimum amount required by the North Carolina Supreme Court;

(11) in its discretion, to refer grievances primarily attributable to unsound law office management to a program of law office management training approved by the State Bar in accordance with Rule .0112(i) of this subchapter.

(12) in its discretion, to refer grievances primarily attributable to the respondent's substance abuse or mental health problem to the Lawyer Assistance Program in accordance with Rule .0112(j) of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended March 3, 1999
Amended December 20, 2000

.0107 Counsel: Powers and Duties

The counsel will have the power and duty

(1) to initiate an investigation concerning alleged misconduct of a member;

(2) to direct a letter of notice to a respondent when authorized by the chairperson of the Grievance Committee;

(3) to investigate all matters involving alleged misconduct whether initiated by the filing of a grievance or otherwise;

(4) to recommend to the chairperson of the Grievance Committee that a matter be dismissed, that a letter of caution, or a letter of warning be issued, or that the Grievance Committee hold a preliminary hearing;

(5) to prosecute all disciplinary proceedings before the Grievance Committee, hearing committees, and the courts;

(6) to represent the North Carolina State Bar in any trial, hearing, or other proceeding concerning the alleged disability of a member;

(7) to appear on behalf of the North Carolina State Bar at hearings conducted by the Grievance Committee, hearing committees, or any other agency or court concerning any motion or other matter arising out of a disciplinary or disability proceeding;

(8) to appear at hearings conducted with respect to petitions for reinstatement of license by suspended or disbarred attorneys or by attorneys transferred to disability inactive status, to cross-examine witnesses testifying in support of such petitions, and to present evidence, if any, in opposition to such petitions;

(9) to employ such deputy counsel, investigators, and other administrative personnel in such numbers as the council may authorize;

(10) to maintain permanent records of all matters processed and of the disposition of such matters;

(11) to perform such other duties as the council may direct;

(12) after a finding of probable cause by the Grievance Committee, to designate the particular violations of the Rules of Professional Conduct to be alleged in a formal complaint filed with the commission;

(13) to file amendments to complaints and petitions arising out of the same transactions or occurrences as the allegations in the original complaints or petitions, in the name of the North Carolina State Bar, with the prior approval of the chairperson of the Grievance Committee;

(14) after a complaint is filed with the commission, to dismiss any or all claims in the complaint or to negotiate and recommend consent orders of discipline to the hearing committee.

History Note: Statutory Authority G.S. 84-23; G.S. 84-31
Readopted Effective December 8, 1994
Amended March 3, 1999

.0108 Chairperson of the Hearing Commission: Powers and Duties

(a) The chairperson of the Disciplinary Hearing Commission of the North Carolina State Bar will have the power and duty

(1) to receive complaints alleging misconduct and petitions alleging the disability of a member filed by the counsel; petitions requesting reinstatement of license by members who have been involuntarily transferred to disability inactive status, suspended, or disbarred; motions seeking the activation of suspensions which have been stayed; and proposed consent orders of disbarment;

(2) to assign three members of the commission, consisting of two members of the North Carolina State Bar and one nonlawyer to hear complaints, petitions, motions, and posthearing motions pursuant to Rule .0114(z)(2) of this subchapter. The chairperson will designate one of the attorney members as chairperson of the hearing committee. No committee member who hears a disciplinary matter may serve on the committee which hears the attorney's reinstatement petition. The chairperson of the commission may designate himself or herself to serve as one of the attorney members of any hearing committee and will be chairperson of any hearing committee on which he or she serves. Posthearing motions filed pursuant to Rule .0114(z)(2) of this subchapter will be considered by the same hearing committee assigned to the original trial proceeding. Hearing committee members who are ineligible or unable to serve for any reason will be replaced with members selected by the commission chairperson;

(3) to set the time and place for the hearing on each complaint or petition;

(4) to subpoena witnesses and compel their attendance and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. The chairperson may designate the secretary to issue such subpoenas;

(5) to consolidate, in his or her discretion for hearing, two or more cases in which a subsequent complaint or complaints have been served upon a defendant within ninety days of the date of service of the first or a preceding complaint;

(6) to enter orders disbarring members by consent;

(7) to enter an order suspending a member pending disposition of a disciplinary proceeding when the member has been convicted of a serious crime or has pled no contest to a serious crime and the court has accepted the plea.

(b) The vice-chairperson of the Disciplinary Hearing Commission may perform the function of the chairperson in any matter when the chairperson is absent or disqualified.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended September 7, 1995

.0109 Hearing Committee: Powers and Duties

Hearing committees of the Disciplinary Hearing Commission of the North Carolina State Bar will have the following powers and duties:

(1) to hold hearings on complaints alleging misconduct, or petitions seeking a determination of disability or reinstatement, or motions seeking the activation of suspensions which have been stayed, and to conduct proceedings to determine if persons or corporations should be held in contempt pursuant to G.S. 84-28.1(b1);

(2) to enter orders regarding discovery and other procedures in connection with such hearings, including, in disability matters, the examination of a member by such qualified medical experts as the committee will designate;

(3) to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. Subpoenas will be issued by the chairperson of the hearing committee in the name of the commission. The chairperson may direct the secretary to issue such subpoenas;

(4) to administer or direct the administration of oaths or affirmations to witnesses at hearings;

(5) to make findings of fact and conclusions of law;

(6) to enter orders dismissing complaints in matters before the committee;

(7) to enter orders of discipline against or letters of warning to defendants in matters before the committee;

(8) to tax costs of the disciplinary proceedings against any defendant against whom discipline is imposed, provided, however, that such costs will not include the compensation of any member of the council, committees, or agencies of the North Carolina State Bar;

(9) to enter orders transferring a member to disability inactive status;

(10) to report to the council its findings of fact and recommendations after hearings on petitions for reinstatement of disbarred attorneys;

(11) to grant or deny petitions of attorneys seeking transfer from disability inactive status to active status;

(12) to enter orders reinstating suspended attorneys or denying reinstatement. An order denying reinstatement may include additional sanctions in the event violations of the petitioner's order of suspension are found;

(13) to enter orders activating suspensions which have been stayed or continuing the stays of such suspensions.

(14) to enter orders holding persons and corporations in contempt pursuant to G.S. 84-28.1(b1) and imposing such sanctions allowed by law.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28; G.S. 84-28.1
Readopted Effective December 8, 1994
Amended March 3, 1999

.0110 Secretary: Powers and Duties in Discipline and Disability Matters

The secretary will have the following powers and duties in regard to discipline and disability procedures:

(1) to receive grievances for transmittal to the counsel, to receive complaints and petitions for transmittal to the commission chairperson, and to receive affidavits of surrender of license for transmittal to the council;

(2) to issue summonses and subpoenas when so directed by the president, the chairperson of the Grievance Committee, the chairperson of the commission, or the chairperson of any hearing committee;

(3) to maintain a record and file of all grievances not dismissed by the Grievance Committee;

(4) to perform all necessary ministerial acts normally performed by the clerk of the superior court in complaints filed before the commission;

(5) to enter orders of reinstatement where petitions for reinstatement of suspended attorneys are unopposed by the counsel;

(6) to dismiss reinstatement petitions based on the petitioner's failure to comply with the rules governing the provision and transmittal of the record of reinstatement proceedings;

(7) to determine the amount of costs assessed in disciplinary proceedings by the commission.

History Note - Statutory Authority G.S. 84-22; G.S. 84-23; G.S. 84-32(c)
Readopted Effective December 8, 1994

.0111 Grievances: Form and Filing

(a) A grievance may be filed by any person against a member of the North Carolina State Bar. Such grievance may be written or oral, verified or unverified, and may be made initially to the counsel. The counsel may require that a grievance be reduced to writing in affidavit form and may prepare and distribute standard forms for this purpose.

(b) Upon the direction of the council or the Grievance Committee, the counsel will investigate such conduct of any member as may be specified by the council or Grievance Committee.

(c) The counsel may investigate any matter coming to the attention of the counsel involving alleged misconduct of a member upon receiving authorization from the chairperson of the Grievance Committee. If the counsel receives information that a member has used or is using illicit drugs, the counsel will follow the provisions of Rule .0130 of this subchapter.

(d) The North Carolina State Bar may keep confidential the identity of an attorney or judge who reports alleged misconduct of another attorney pursuant to Rule 8.3 of the Revised Rules of Professional Conduct and who requests to remain anonymous. Notwithstanding the foregoing, the North Carolina State Bar will reveal the identity of a reporting attorney or judge to the respondent attorney where such disclosure is required by law, or by considerations of due process or where identification of the reporting attorney or judge is essential to

preparation of the attorney's defense to the grievance and/or a formal disciplinary complaint.

(e) Grievances must be instituted by the filing of a written or oral grievance with the North Carolina State Bar Grievance Committee or a district bar Grievance Committee within six years from the accrual of the offense, provided that grievances alleging fraud by a lawyer or an offense the discovery of which has been prevented by concealment by the accused lawyer shall not be barred until six years from the accrual of the offense or one year after discovery of the offense by the aggrieved party or by the North Carolina State Bar counsel, whichever is later. Notwithstanding the foregoing, grievances which allege felonious criminal misconduct may be filed with the Grievance Committee at any time.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended February 20, 1995

.0112 Investigations: Initial Determination

(a) Subject to the policy supervision of the council and the control of the chairperson of the Grievance Committee, the counsel, or other personnel under the authority of the counsel, will investigate the grievance and submit to the chairperson of the Grievance Committee a report detailing the findings of the investigation.

(b) As soon as practicable after the receipt of the initial or any interim report of the counsel concerning any grievance, the chairperson of the Grievance Committee may

(1) treat the report as a final report;
(2) direct the counsel to conduct further investigation, including contacting the respondent in writing or otherwise; or
(3) send a letter of notice to the respondent.

(c) If a letter of notice is sent to the respondent, it will be by certified mail and will direct that a response be made within 15 days of receipt of the letter of notice. Such response will be a full and fair disclosure of all the facts and circumstances pertaining to the alleged misconduct. The counsel will provide the respondent with a copy of the grievance upon request, except where the complainant requests to remain anonymous pursuant to Rule .0111(d) of this subchapter.

(d) The counsel may provide a copy of the respondent's response(s) to the letter of notice to the complaining party unless the respondent objects thereto in writing.

(e) After a response to a letter of notice is received, the counsel may conduct further investigation or terminate the investigation, subject to the control of the chairperson of the Grievance Committee.

(f) For reasonable cause, the chairperson of the Grievance Committee may issue subpoenas to compel the attendance of witnesses, including the respondent, for examination concerning the grievance and may compel the production of books, papers, and other documents or writings deemed necessary or material to the inquiry. Each subpoena will be issued by the chairperson of the Grievance Committee, or by the secretary at the direction of the chairperson. The counsel, deputy counsel, investigator, or any members of the Grievance Committee designated by the chairperson may examine any such witness under oath or otherwise.

(g) As soon as practicable after the receipt of the final report of the counsel or the termination of an investigation, the chairperson will convene the Grievance Committee to consider the grievance except as otherwise provided in these rules.

(h) The investigation into the conduct of an attorney will not be abated by the failure of the complainant to sign a grievance, settlement, compromise, or restitution. The chairperson of the Grievance Committee may dismiss a grievance upon request of the complainant and with consent of counsel where it appears that there is no probable cause to believe that the respondent has violated the Revised Rules of Professional Conduct.

(i) If at any time prior to a finding of probable cause, the chairperson of the Grievance Committee, upon the recommendation of the counsel or the Grievance Committee, determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound law office management techniques and procedures, the chairperson of the Grievance Committee may, with the respondent's consent, refer the case to a program of law office management training approved by the State Bar. The respondent will then be required to complete a course of training in law office management prescribed by the chairperson of the Grievance Committee which may include a comprehensive site audit of the respondent's records and procedures as well as continuing legal education seminars. Upon the respondent's successful completion of the prescribed training, the same will be reported to the chairperson of the Grievance Committee, who will order the dismissal of the grievance. If the respondent fails to cooperate with the training program's employees or fails to complete the prescribed training, that will be reported to the chairperson of the Grievance Committee and the investigation of the original grievance shall resume.

(j) If at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's substance abuse or mental health problem, the Committee may refer the matter to the Lawyer Assistance Program Board. The respondent must consent to the referral and must waive any right of confidentiality that the respondent might otherwise have had regarding communications with persons acting under the supervision of the Lawyer Assistance Program Board.

If the respondent successfully completes the rehabilitation program, the Grievance Committee can consider that as a mitigating factor and may, for good cause shown, dismiss the grievance. If the respondent fails to complete the rehabilitation program or fails to cooperate with the Lawyer Assistance Program Board, the failure will be reported to the chairperson of the Grievance Committee and the investigation of the grievance will resume.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended February 20, 1995
Amended March 6, 1997
Amended December 20, 2000

.0113 Proceedings before the Grievance Committee

(a) The Grievance Committee or any of its panels acting as the Grievance Committee with respect to grievances referred to it by the chairperson of the Grievance Committee will determine whether there is probable cause to believe that a respondent is guilty of misconduct justifying disciplinary action. In its discretion, the Grievance Committee or a panel thereof may find probable cause regardless of whether the respondent has been served with a written letter of notice. The respondent may waive the necessity of a finding of probable cause with the consent of the counsel and the chairperson of the Grievance Committee. A decision of a panel of the committee may not be appealed to the Grievance Committee as a whole or to another panel (except as provided in 27 N.C.A.C. 1A, .0701(a)(3)).

(b) The chairperson of the Grievance Committee will have the power to administer oaths and affirmations.

(c) The chairperson will keep a record of the Grievance Committee's determination concerning each grievance and file the record with the secretary.

(d) The chairperson will have the power to subpoena witnesses, to compel their attendance, and compel the production of books, papers, and other documents deemed necessary or material to any preliminary hearing. The chairperson may designate the secretary to issue such subpoenas.

(e) The counsel and deputy counsel, the witness under examination, interpreters when needed, and, if deemed necessary, a stenographer or operator of a recording device may be present while the committee is in session and deliberating, but no persons other than members may be present while the committee is voting.

(f) The results of any deliberation by the Grievance Committee will be disclosed to the counsel and the secretary for use in the performance of their duties. Otherwise, a member of the committee, the staff of the North Carolina State Bar, any interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the committee only when so directed by the committee or a court of record.

(g) At any preliminary hearing held by the Grievance Committee, a quorum of one-half of the members will be required to conduct any business. Affirmative vote of a majority of members present will be necessary to find that probable cause exists. The chairperson will not be counted for quorum purposes and will

be eligible to vote regarding the disposition of any grievance only in case of a tie among the regular voting members.

(h) If probable cause is found and the committee determines that a hearing is necessary, the chairperson will direct the counsel to prepare and file a complaint against the defendant. If the committee finds probable cause but determines that no hearing is necessary, it will direct the counsel to prepare for the chairperson's signature an admonition, reprimand, or censure. If no probable cause is found, the grievance will be dismissed or dismissed with a letter of warning or a letter of caution.

(i) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is unprofessional or not in accord with accepted professional practice, the committee may issue a letter of caution to the respondent recommending that the respondent be more professional in his or her practice in one or more ways which are to be specifically identified.

(j) Letters of warning

(1) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is an unintentional, minor, or technical violation of the Rules of Professional Conduct, the committee may issue a letter of warning to the respondent. The letter of warning will advise the respondent that he or she may be subject to discipline if such conduct is continued or repeated. The letter will specify in one or more ways the conduct or practice for which the respondent is being warned. The letter of warning will not constitute discipline of the respondent.

(2) A copy of the letter of warning will be maintained in the office of the counsel for three years. If relevant, a copy of the letter of warning may be offered into evidence in any proceeding filed against the respondent before the commission within three years after the letter of warning is issued to the respondent. In every case filed against the respondent before the commission within three years after the letter of warning is issued to the respondent, the letter of warning may be introduced into evidence as an aggravating factor concerning the issue of what disciplinary sanction should be imposed. A copy of the letter of warning may be disclosed to the Grievance Committee if another grievance is filed against the respondent within three years after the letter of warning is issued to the respondent.

(3) A copy of the letter of warning will be served upon the respondent in person or by certified mail. A respondent who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the letter of warning to the respondent's last known address on file with the NC State Bar. Service shall be deemed complete upon deposit of the letter of warning in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service. Within 15 days after service the respondent may refuse the letter of warning and request a hearing before the commission to determine whether a violation of the Rules of Professional Conduct has occurred. Such refusal and request will be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. The refusal will state that the letter of warning is refused. If a refusal and request are not served within 15 days after service upon the respondent of the letter of warning, the letter of warning will be deemed accepted by the respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.

(4) In cases in which the respondent refuses the letter of warning, the counsel will prepare and file a complaint against the respondent for a hearing pursuant to Rule .0114 of this subchapter.

(k) Admonitions and Reprimands

(1) If probable cause is found but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the committee may issue an admonition or reprimand to the defendant, depending upon the seriousness of the violation of the Rules of Professional Conduct. A record of such admonition or reprimand will be maintained in the office of the secretary.

(2) A copy of the admonition or reprimand will be served upon the defendant in person or by certified mail. A defendant who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the admonition or reprimand to the defendant's last known address on file with the NC State Bar. Service shall be deemed complete upon deposit of the admonition or reprimand in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(3) Within 15 days after service the defendant may refuse the admonition or reprimand and request a hearing before the commission. Such refusal and request will be in writing, addressed to the Grievance Committee, and served upon the secretary by certified mail, return receipt requested. The refusal will state that the admonition or reprimand is refused.

(4) In cases in which the defendant refuses an admonition or reprimand, the counsel will prepare and file a complaint against the defendant pursuant to Rule .0114 of this subchapter. If a refusal and request are not served upon the secretary within 15 days after service upon the defendant of the admonition or reprimand, the admonition or reprimand will be deemed accepted by the defendant. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.

(l) Censures

(1) If probable cause is found and the Grievance Committee determines that the defendant has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or significant potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the defendant's license, the committee will issue a notice of proposed censure and a proposed censure to the defendant.

(2) A copy of the notice and the proposed censure will be served upon the defendant in person or by certified mail. A defendant who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the notice and proposed censure to the defendant's last known address on file with the NC State Bar. Service shall be deemed complete upon deposit of the notice and proposed censure in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service. The defendant must be advised that he or she may accept the censure within 15 days after service upon him or her or a formal complaint will be filed before the commission.

(3) The defendant's acceptance must be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. Once the censure is accepted by the defendant, the discipline becomes public and must be filed as provided by Rule .0123(a)(3) of this subchapter.

(4) If the defendant does not accept the censure, the counsel will file a complaint against the defendant pursuant to Rule .0114 of this subchapter.

(m) Formal complaints will be issued in the name of the North Carolina State Bar as plaintiff and signed by the chairperson of the Grievance Committee. Amendments to complaints may be signed by the counsel alone, with the approval of the chairperson of the Grievance Committee.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28
Readopted Effective December 8, 1994
Amended March 3, 1999
Amended February 3, 2000

.0114 Formal Hearing

(a) Complaints will be filed with the secretary. The secretary will cause a summons and a copy of the complaint to be served upon the defendant and thereafter a copy of the complaint will be delivered to the chairperson of the commission, informing the chairperson of the date service on the defendant was effected.

(b) Service of complaints and summonses and other documents or papers will be accomplished as set forth in the North Carolina Rules of Civil Procedure.

(c) Complaints in disciplinary actions will allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint.

(d) Within 14 days of the receipt of return of service of a complaint by the

secretary, the chairperson of the commission will designate a hearing committee from among the commission members. The chairperson will notify the counsel and the defendant of the composition of the hearing committee. Such notice will also contain the time and place determined by the chairperson for the hearing to commence. The commencement of the hearing will be initially scheduled not less than 60 nor more than 90 days from the date of service of the complaint upon the defendant, unless one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint. When one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint, the chairperson of the commission may consolidate the cases for hearing, and the hearing will be initially scheduled not less than 60 nor more than 90 days from the date of service of the last complaint upon the defendant.

(e) Within 20 days after the service of the complaint, unless further time is allowed by the chairperson of the hearing committee upon good cause shown, the defendant will file an answer to the complaint with the secretary and will serve a copy on the counsel.

(f) Failure to file an answer admitting, denying or explaining the complaint or asserting the grounds for failing to do so, within the time limited or extended, will be grounds for entry of the defendant's default and in such case the allegations contained in the complaint will be deemed admitted. The secretary will enter the defendant's default when the fact of default is made to appear by motion of the counsel or otherwise. The counsel may thereupon apply to the hearing committee for a default order imposing discipline, and the hearing committee will thereupon enter an order, make findings of fact and conclusions of law based on the admissions, and order the discipline deemed appropriate. The hearing committee may, in its discretion, hear such additional evidence as it deems necessary prior to entering the order of discipline. For good cause shown, the hearing committee may set aside the secretary's entry of default. After an order imposing discipline has been entered by the hearing committee upon the defendant's default, the hearing committee may set aside the order in accordance with Rule 60(b) of the North Carolina Rules of Civil Procedure.

(g) Discovery will be available to the parties in accordance with the North Carolina Rules of Civil Procedure. Any discovery undertaken must be completed before the date scheduled for commencement of the hearing unless the time for discovery is extended for good cause shown by the chairperson of the hearing committee. The chairperson of the hearing committee may thereupon reset the time for the hearing to commence to accommodate completion of reasonable discovery.

(h) The parties may meet by mutual consent prior to the hearing on the complaint to discuss the possibility of settlement of the case or the stipulation of any issues, facts, or matters of law. Any proposed settlement of the case will be subject to the approval of the hearing committee. If the committee rejects a proposed settlement, another hearing committee must be empaneled to try the case, unless all parties consent to proceed with the original committee. The parties may submit a proposed settlement to a second hearing committee, but the parties shall not have the right to request a third hearing committee if the settlement order is rejected by the second hearing committee. The second hearing committee shall either accept the settlement proposal or hear the disciplinary matter.

(i) At the discretion of the chairperson of the hearing committee, and upon five days' notice to parties, a conference may be ordered before the date set for commencement of the hearing for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such conference may be held before any member of the committee designated by its chairperson, who shall have the power to issue such orders as may be appropriate. At any conference which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, in addition to any offers of settlement or proposals of adjustment, the following:

(1) the simplification of the issues;

(2) the exchange of exhibits proposed to be offered in evidence;

(3) the stipulation of facts not remaining in dispute or the authenticity of documents;

(4) the limitation of the number of witnesses;

(5) the discovery or production of data;

(6) such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.

The chairperson may impose sanctions as set out in Rule 37(b) of the N.C. Rules of Civil Procedure against any party who willfully fails to comply with a prehearing order issued pursuant to this section.

(j) The chairperson of the hearing committee, without consulting the other committee members, may hear and dispose of all pretrial motions except motions the granting of which would result in dismissal of the charges or final judgment for either party. All motions which could result in dismissal of the charges or final judgment for either party will be decided by a majority of the members of the hearing committee. Any pretrial motion may be decided on the basis of the parties' written submissions. Oral argument may be allowed in the discretion of the chairperson of the hearing committee.

(k) The initial hearing date as set by the chairperson in accordance with Rule .0114(d) above may be reset by the chairperson, and said initial hearing or reset hearing may be continued by the chairperson of the hearing committee for good cause shown.

(l) After a hearing has commenced, no continuances other than an adjournment from day to day will be granted, except to await the filing of a controlling decision of an appellate court, by consent of all parties, or where extreme hardship would result in the absence of a continuance.

(m) The defendant will appear in person before the hearing committee at the time and place named by the chairperson. The hearing will be open to the public except that for good cause shown the chairperson of the hearing committee may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of the defendant. The defendant will, except as otherwise provided by law, be competent and compellable to give evidence for either of the parties. The defendant may be represented by counsel, who will enter an appearance.

(n) Pleadings and proceedings before a hearing committee will conform as nearly as practicable with requirements of the North Carolina Rules of Civil Procedure and for trials of nonjury civil causes in the superior courts except as otherwise provided herein.

(o) Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing by the secretary within the time limits, if any, for such filing. The date of receipt by the secretary, and not the date of deposit in the mails, is determinative.

(p) All papers presented to the commission for filing will be on letter size paper (8 1/2 x 11 inches) with the exception of exhibits. The secretary will require a party to refile any paper that does not conform to this size.

(q) When a defendant appears in his or her own behalf in a proceeding, the defendant will file with the secretary, with proof of delivery of a copy to the counsel, an address at which any notice or other written communication required to be served upon the defendant may be sent, if such address differs from that last reported to the secretary by the defendant.

(r) When a defendant is represented by counsel in a proceeding, counsel will file with the secretary, with proof of delivery of a copy to the counsel, a written notice of such appearance which will state his or her name, address and telephone number, the name and address of the defendant on whose behalf he or she appears, and the caption and docket number of the proceeding. Any additional notice or other written communication required to be served on or furnished to a defendant during the pendency of the hearing may be sent to the counsel of record for such defendant at the stated address of the counsel in lieu of transmission to the defendant.

(s) The hearing committee will have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. Such process will be issued in the name of the committee by its chairperson, or the chairperson may designate the secretary of the North Carolina State Bar to issue such process. Both parties have the right to invoke the powers of the committee with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents.

(t) In any hearing admissibility of evidence will be governed by the rules of evidence applicable in the superior court of the state at the time of the hearing. The chairperson of the hearing committee will rule on the admissibility of evidence, subject to the right of any member of the hearing committee to question

the ruling. If a member of the hearing committee challenges a ruling relating to admissibility of evidence, the question will be decided by majority vote of the hearing committee.

(u) If the hearing committee finds that the charges of misconduct are not established by clear, cogent, and convincing evidence, it will enter an order dismissing the complaint. If the hearing committee finds that the charges of misconduct are established by clear, cogent, and convincing evidence, the hearing committee will enter an order of discipline. In either instance, the committee will file an order which will include the committee's findings of fact and conclusions of law.

(v) The secretary will ensure that a complete record is made of the evidence received during the course of all hearings before the commission as provided by G.S. 7A-95 for trials in the superior court. The secretary will preserve the record and the pleadings, exhibits, and briefs of the parties.

(w) If the charges of misconduct are established, the hearing committee will then consider any evidence relevant to the discipline to be imposed, including the record of all previous misconduct for which the defendant has been disciplined in this state or any other jurisdiction and any evidence in aggravation or mitigation of the offense.

(1) The hearing committee may consider aggravating factors in imposing discipline in any disciplinary case, including the following factors:

(A) prior disciplinary offenses;

(B) dishonest or selfish motive;

(C) a pattern of misconduct;

(D) multiple offenses;

(E) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency;

(F) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(G) refusal to acknowledge wrongful nature of conduct;

(H) vulnerability of victim;

(I) substantial experience in the practice of law;

(J) indifference to making restitution;

(K) issuance of a letter of warning to the defendant within the three years immediately preceding the filing of the complaint.

(2) The hearing committee may consider mitigating factors in imposing discipline in any disciplinary case, including the following factors:

(A) absence of a prior disciplinary record;

(B) absence of a dishonest or selfish motive;

(C) personal or emotional problems;

(D) timely good faith efforts to make restitution or to rectify consequences of misconduct;

(E) full and free disclosure to the hearing committee or cooperative attitude toward proceedings;

(F) inexperience in the practice of law;

(G) character or reputation;

(H) physical or mental disability or impairment;

(I) delay in disciplinary proceedings through no fault of the defendant attorney;

(J) interim rehabilitation;

(K) imposition of other penalties or sanctions;

(L) remorse;

(M) remoteness of prior offenses.

(x) In any case in which a period of suspension is stayed upon compliance by the defendant with conditions, the commission will retain jurisdiction of the matter until all conditions are satisfied. If, during the period the stay is in effect, the counsel receives information tending to show that a condition has been violated, the counsel may, with the consent of the chairperson of the Grievance Committee, file a motion in the cause with the secretary specifying the violation and seeking an order requiring the defendant to show cause why the stay should not be lifted and the suspension activated for violation of the condition. The counsel will also serve a copy of any such motion upon the defendant. The secretary will promptly transmit the motion to the chairperson of the commission who, if he or she enters an order to show cause, will appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter, appointing the members of the hearing committee that originally heard the matter wherever practicable. The chairperson of the commission will also schedule a time and a place for a hearing and notify the counsel and the defendant of the composition of the hearing committee and the time and place for the hearing. After such a hearing, the hearing committee may enter an order lifting the stay and activating the suspension, or any portion thereof, and taxing the defendant with the costs, if it finds that the North Carolina State Bar has proven, by the greater weight of the evidence, that the defendant has violated a condition. If the hearing committee finds that the North Carolina State Bar has not carried its burden, then it will enter an order continuing the stay. In any event, the hearing committee will include in its order findings of fact and conclusions of law in support of its decision.

(y) All reports and orders of the hearing committee will be signed by the members of the committee, or by the chairperson of the committee on behalf of the committee, and will be filed with the secretary. The copy to the defendant will be served by certified mail, return receipt requested or personal service. A defendant who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the order to the defendant's last known address on file with the N.C. State Bar. Service by mail shall be deemed complete upon deposit of the report or order enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(z) Posttrial Motions

(1) Consent Orders After Trial - At any time after a disciplinary hearing and prior to the execution of the committee's final order pursuant to Rule .0114(y) above, the committee may, with the consent of the parties, amend its decision regarding the findings of fact, conclusions of law, or the disciplinary sanction imposed.

(2) New Trials and Amendment of Judgments

(A) As provided in Rule .0114(z)(2)(B) below, following a disciplinary hearing before the commission, either party may request a new trial or amendment of the hearing committee's final order, based on any of the grounds set out in Rule 59 of the North Carolina Rules of Civil Procedure.

(B) A motion for a new trial or amendment of judgment will be served, in writing, on the chairperson of the hearing committee which heard the disciplinary case no later than 20 days after service of the final order upon the defendant. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, will be filed with the motion.

(C) The opposing party will have 20 days from service of the motion to file a written response, any reply affidavits, and a memorandum with supporting authorities.

(D) The hearing committee may rule on the motion based on the parties' written submissions or may, in its discretion, permit the parties to present oral argument.

(3) Relief from Judgment or Order

(A) Following a disciplinary proceeding before the commission, either party may file a motion for relief from the final judgment or order, based on any of the grounds set out in Rule 60 of the North Carolina Rules of Civil Procedure.

(B) Motions made under Rule .0114(z)(2)(B) above will be made no later than one year after the effective date of the order from which relief is sought. Motions pursuant to this section will be heard and decided in the same manner as motions submitted pursuant to Rule .0114(z)(2) above.

(4) Effect of Filing Motion - The filing of a motion under Rule .0114(z)(2) above or Rule .0114(z)(3) above will not automatically stay or otherwise affect the effective date of an order of the commission.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28; G.S. 84-28.1; G.S. 84-29; G.S. 84-30; G.S. 84-32(a)

Readopted Effective December 8, 1994

Amended October 2, 1997

.0115 Effect of a Finding of Guilt in Any Criminal Case

(a) Any member who has been found guilty of or has tendered and has had accepted a plea of guilty or no contest to a criminal offense showing profession-

al unfitness in any state or federal court, may be suspended from the practice of law as set out in Rule .0115(d) below.

(b) A certificate of the conviction of an attorney for any crime or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court will be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member.

(c) Upon the receipt of a certified copy of a jury verdict showing a verdict of guilty, a certificate of the conviction of a member of a criminal offense showing professional unfitness, or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court, the Grievance Committee, at its next meeting following notification of the conviction, may authorize the filing of a complaint if one is not pending. In the hearing on such complaint, the sole issue to be determined will be the extent of the discipline to be imposed. The attorney may be disciplined based upon the conviction without awaiting the outcome of any appeals of the conviction or judgment, unless the attorney has obtained a stay of the disciplinary action as set out in G.S. §84-28(d1). Such a stay shall not prevent the North Carolina State Bar from proceeding with a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

(d) Upon the receipt of a certificate of conviction of a member of a criminal offense showing professional unfitness, or a certified copy of a plea of guilty or no contest to such an offense, or a certified copy of a jury verdict showing a verdict of guilty to such an offense, the commission chairperson may, in the chairperson's discretion, enter an order suspending the member pending the disposition of the disciplinary proceeding against the member before the commission. The provisions of Rule .0124(c) of this subchapter will apply to the suspension.

(e) Upon the receipt of a certificate of conviction of a member of a criminal offense which does not show professional unfitness, or a certificate of judgment against a member upon a plea of no contest to such an offense, or a certified copy of a jury verdict showing a verdict of guilty to such an offense, the Grievance Committee will take whatever action, including authorizing the filing of a complaint, it may deem appropriate. In a hearing on any such complaint, the sole issue to be determined will be the extent of the discipline to be imposed. The attorney may be disciplined based upon the conviction without awaiting the outcome of any appeals of the conviction or judgment, unless the attorney has obtained a stay of the disciplinary action as set out in G.S. §84-28(d1). Such a stay shall not prevent the North Carolina State Bar from proceeding with a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28
Readopted Effective December 8, 1994
Amended November 7, 1996
Amended March 6, 1997
Amended December 30, 1998
Amended February 3, 2000

.0116 Reciprocal Discipline & Disability Proceedings

(a) All members who have been disciplined in any state or federal court for a violation of the Rules of Professional Conduct in effect in such state or federal court or who have been transferred to disability inactive status or its equivalent will inform the secretary of such action in writing no later than 30 days after entry of the order of discipline or transfer to disability inactive status. Failure to make the report required in this section may subject the member to professional discipline as set out in Rule 8.3 of the Revised Rules of Professional Conduct.

(b) Except as provided in subsection (c) below which applies to disciplinary proceedings in certain federal courts, reciprocal discipline and disability proceedings will be administered as follows:

(1) Upon receipt of a certified copy of an order demonstrating that a member has been disciplined or transferred to disability inactive status or its equivalent in another jurisdiction, state or federal, the Grievance Committee will forthwith issue a notice directed to the member containing a copy of the order from the other jurisdiction and an order directing that the member inform the committee within 30 days from service of the notice of any claim by the member that the imposition of the identical discipline or an order transferring the member to disability inactive status in this state would be unwarranted and the reasons therefor. This notice is to be served on the member in accordance with the provisions of Rule 4 of the North Carolina Rules of Civil Procedure.

(2) If the discipline or transfer order imposed in the other jurisdiction has been stayed, any reciprocal discipline or transfer to disability inactive status imposed in this state will be deferred until such stay expires.

(3) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of Rule .0116(b)(1) above, the chairperson of the Grievance Committee will impose the identical discipline or enter an order transferring the member to disability inactive status unless the Grievance Committee concludes

(A) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(B) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Grievance Committee could not, consistent with its duty, accept as final the conclusion on that subject;

(C) that the imposition of the same discipline would result in grave injustice; or

(D) that the misconduct established warrants substantially different discipline in this state; or

(E) that the reason for the original transfer to disability inactive status no longer exists.

(4) Where the Grievance Committee determines that any of the elements listed in Rule .0116(b)(3) above exist, the committee will dismiss the case or direct that a complaint be filed.

(5) If the elements listed in Rule .0116(b)(3) above are found not to exist, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct or should be transferred to disability inactive status will establish the misconduct or disability for purposes of reciprocal discipline or disability proceedings in this state.

(c) Reciprocal discipline with certain federal courts will be administered as follows:

(1) Upon receipt of a certified copy of an order demonstrating that a member has been disciplined in a United States District Court in North Carolina, in the United States Fourth Circuit Court of Appeals, or in the United States Supreme Court, the chairperson of the Grievance Committee will forthwith issue a notice directed to the member. The notice will contain a copy of the order from the court and an order directing the member to inform the committee within 10 days from service of the notice whether the member will accept reciprocal discipline which is substantially similar to that imposed by the federal court. This notice is to be served on the member in accordance with the provisions of Rule 4 of the North Carolina Rules of Civil Procedure. The member will have 30 days from service of the notice to file a written challenge with the committee on the grounds that the imposition of discipline by the North Carolina State Bar would be unwarranted because the facts found in the federal disciplinary proceeding do not involve conduct which violates the North Carolina Rules of Professional Conduct. If the member notifies the North Carolina State Bar within 10 days after service of the notice that he or she accepts reciprocal discipline which is substantially similar to that imposed by the federal court, substantially similar discipline will be ordered as provided in Rule .0116(c)(2) below and will run concurrently with the discipline ordered by the federal court.

(2) If the member notifies the North Carolina State Bar of his or her acceptance of reciprocal discipline as provided in Rule .0116(c)(1) above the chairperson of the Grievance Committee will execute an order of discipline which is of a type permitted by these rules and which is substantially similar to that ordered by the federal court and will cause said order to be served upon the member.

(3) If the discipline imposed by the federal court has been stayed, any reciprocal discipline imposed by the North Carolina State Bar will be deferred until such stay expires.

(4) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of Rule .0116(c)(1) above, the chairperson of the

Grievance Committee will enter an order of reciprocal discipline imposing substantially similar discipline of a type permitted by these rules to be effective throughout North Carolina unless the member requests a hearing before the Grievance Committee and at such hearing

(A) the member demonstrates that the facts found in the federal disciplinary proceeding did not involve conduct which violates the North Carolina Rules of Professional Conduct, in which event the case will be dismissed; or

(B) the Grievance Committee determines that the discipline imposed by the federal court is not of a type described in Rule .0123(a) of this subchapter and, therefore, cannot be imposed by the North Carolina State Bar, in which event the Grievance Committee may dismiss the case or direct that a complaint be filed in the commission.

(5) All findings of fact in the federal disciplinary proceeding will be binding upon the North Carolina State Bar and the member.

(6) Discipline imposed by any other federal court will be administered as provided in Rule .0116(b) above.

(d) If the member fails to accept reciprocal discipline as provided in Rule .0116(c) above or if a hearing is held before the Grievance Committee under either Rule .0116(b) above or Rule .0116(c) above and the committee orders the imposition of reciprocal discipline, such discipline will run from the date of service of the final order of the chairperson of the Grievance Committee unless the committee expressly provides otherwise.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28
Readopted Effective December 8, 1994
Amended March 7, 1996

.0117 Surrender of License While Under Investigation

(a) A member who is the subject of an investigation into allegations of misconduct, but against whom no formal complaint has been filed before the commission may tender his or her license to practice by delivering to the secretary for transmittal to the council an affidavit stating that the member desires to resign and that

(1) the resignation is freely and voluntarily rendered, is not the result of coercion or duress, and the member is fully aware of the implications of submitting the resignation;

(2) the member is aware that there is presently pending an investigation or other proceedings regarding allegations that the member has been guilty of misconduct, the nature of which will specifically be set forth;

(3) the member acknowledges that the material facts upon which the grievance is predicated are true;

(4) the resignation is being submitted because the member knows that if charges were predicated upon the misconduct under investigation, the member could not successfully defend against them.

(b) The council may accept a member's resignation only if the affidavit required under Rule .0117(a) above satisfies the requirements stated therein and the member has provided to the North Carolina State Bar all documents and financial records required to be kept pursuant to the Rules of Professional Conduct and requested by the counsel. If the council accepts a member's resignation, it will enter an order disbarring the member. The order of disbarment is effective on the date the council accepts the member's resignation.

(c) The order disbarring the member and the affidavit required under Rule .0117(a) above are matters of public record.

(d) If a defendant against whom a formal complaint has been filed wishes to consent to disbarment, the defendant may do so by filing an affidavit with the chairperson of the commission. If the chairperson determines that the affidavit meets the requirements set out above, the chairperson will accept the surrender and issue an order of disbarment. The order of disbarment becomes effective 30 days after service of the order upon the defendant. If the affidavit does not meet the requirements set out above, the consent to disbarment will not be accepted and the disciplinary complaint will be heard pursuant to Rule .0114 of this subchapter.

(e) After a member tenders his or her license or consents to disbarment under this section the member may not undertake any new legal matters. The member may complete any legal matters which were pending on the date of the tender of the affidavit or consent to disbarment which can be completed within 30 days. The member has 30 days from the date on which the member tenders the affidavit of surrender or consent to disbarment in which to comply with all of the duties set out in Rule .0124 of this subchapter.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28; G.S. 84-32(b)
Readopted Effective December 8, 1994

.0118 Disability Hearings

(a) Disability Proceedings

Where Member Involuntarily Committed or Judicially Declared Incompetent

Where a member of the North Carolina State Bar has been judicially declared incapacitated or mentally ill under the provisions of Chapter 122C of the General Statutes or similar laws of any jurisdiction, the secretary, upon proper proof of the fact, will enter an order transferring the member to disability inactive status effective immediately and for an indefinite period until further order of the commission. A copy of the order will be served upon the member, the member's guardian, or the director of the institution to which the member has been committed.

(b) Disability Proceedings Initiated by the North Carolina State Bar

(1) When the North Carolina State Bar obtains evidence that a member has become disabled, the Grievance Committee will conduct a hearing in a manner that will conform as nearly as is possible to the procedures set forth in Rule .0113 of this subchapter. The Grievance Committee will determine whether there is probable cause to believe that the member is disabled within the meaning of Rule .0103(19) of this subchapter. If the committee finds probable cause, a petition alleging disability will be filed in the name of the North Carolina State Bar by the counsel and signed by the chairperson of the Grievance Committee.

(2) Whenever the counsel files a petition alleging the disability of a member, the chairperson of the commission will appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter to determine whether such member is disabled. The hearing committee will conduct a hearing on the petition in the same manner as a disciplinary proceeding under Rule .0114 of this subchapter. The hearing will be open to the public.

(3) The hearing committee may require the member to undergo psychiatric, physical, or other medical examination or testing by qualified medical experts selected by the hearing committee.

(4) In any proceeding seeking a transfer to disability inactive status under this rule, the North Carolina State Bar will have the burden of proving by clear, cogent, and convincing evidence that the member is disabled within the meaning of Rule .0103(19) of this subchapter.

(5) The hearing committee may appoint an attorney to represent the member in a disability proceeding, if the hearing committee concludes that justice so requires.

(6) If the hearing committee finds that the member is disabled, the committee will enter an order transferring the member to disability inactive status. The order of transfer will become effective immediately. A copy of the order will be served upon the member or the member's guardian or attorney.

(c) Disability Proceedings Where Defendant Alleges Disability in Disciplinary Proceeding

(1) If, during the course of a disciplinary proceeding, the defendant contends that he or she is disabled within the meaning of Rule .0103(19) of this subchapter, the disciplinary proceeding will be stayed pending a determination by the hearing committee whether such disability exists. The defendant will be immediately transferred to disability inactive status pending the conclusion of the disability hearing.

(2) The hearing committee scheduled to hear the disciplinary charges will hold the disability proceeding. The hearing will be conducted pursuant to the procedures outlined in Rule .0118(b)(3) and (5)-(6) above.

(3) The defendant will have the burden of proving by clear, cogent, and convincing evidence that he or she is disabled within the meaning of Rule .0103(19) of this subchapter. If the hearing committee concludes that the defendant is disabled, the disciplinary proceedings will be stayed as long as the defendant remains in disability inactive status.

(4) If the hearing committee determines that the defendant is not disabled,

the chairperson of the hearing committee will set a date for resumption of the disciplinary proceeding.

(d) Disability Hearings Initiated by a Hearing Committee

(1) If, during the pendency of a disciplinary proceeding a majority of the members of the hearing committee find reason to believe that the defendant is disabled, the committee will enter an order staying the disciplinary proceeding until the question of disability can be determined by the committee in accordance with the procedures set out in Rules .0118(b)(2)-(6) above. The State Bar will have the burden of proving by clear, cogent, and convincing evidence that the defendant is disabled within the meaning of Rule .0103(19) of this subchapter.

(2) If the hearing committee determines that the defendant is not disabled, the chairperson of the hearing committee will set a date for resumption of the disciplinary proceeding.

(3) If the hearing committee determines that the defendant is disabled, the disciplinary proceeding will be stayed as long as the defendant remains in disability inactive status. If the defendant is returned to active status by the commission, the disciplinary proceeding will be rescheduled by the chairperson of the commission.

(e) Fees and Costs

The hearing committee may direct the member to pay the costs of the disability proceeding, including the cost of any medical examination and the fees of any attorney appointed to represent the member.

(f) Preservation of Evidence

In any case in which disciplinary proceedings against a defendant have been stayed by reason of the defendant's disability, counsel may continue to investigate allegations of misconduct and may seek orders from the chairperson of the commission to preserve evidence of any alleged professional misconduct by the disabled defendant, including orders which permit the taking of depositions. The chairperson may order appointment of counsel to represent the disabled defendant when necessary to protect the interests of the disabled defendant.

(g) A member of the North Carolina State Bar may be transferred to disability inactive status with the consent of the member, the counsel, and the chairperson of the Grievance Committee.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(g); G.S. 84-28.1; G.S. 84-29; G.S. 84-30

Readopted Effective December 8, 1994

Amended March 5, 1998

Amended March 6, 2002

.0119 Enforcement of Powers

In addition to the other powers contained herein, in proceedings before any committee or subcommittee of the Grievance Committee or the commission, if any person refuses to respond to a subpoena, refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, refuses to obey any order in aid of discovery, or refuses to obey any lawful order of the committee contained in its decision rendered after hearing, the counsel or secretary may apply to the appropriate court for an order directing that person to comply by taking the requisite action.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(i)

Readopted Effective December 8, 1994

.0120 Notice to Member of Action and Dismissal

In every disciplinary case wherein the respondent has received a letter of notice and the grievance has been dismissed, the respondent will be notified of the dismissal by a letter by the chairperson of the Grievance Committee. The chairperson will have discretion to give similar notice to the respondent in cases wherein a letter of notice has not been issued but the chairperson deems such notice to be appropriate.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.0121 Notice to Complainant

(a) If the Grievance Committee finds probable cause and imposes discipline, the chairperson of the Grievance Committee will notify the complainant of the action of the committee.

(b) If the Grievance Committee finds probable cause and refers the matter to the commission, the chairperson of the Grievance Committee will advise the complainant that the grievance has been received and considered and has been referred to the commission for hearing.

(c) If the Grievance Committee finds that there is no probable cause to believe that misconduct occurred and votes to dismiss a grievance, the chairperson of the Grievance Committee will advise the complainant that the committee did not find probable cause to justify imposing discipline and dismissed the grievance.

(d) If final action on a grievance is taken by the Grievance Committee in the form of a letter of caution or a letter of warning, the chairperson of the Grievance Committee will so advise the complainant. The communication to the complainant will explain that the letter of caution or letter of warning is not a form of discipline.

(e) If a grievance is referred to the Board of Continuing Legal Education, the chairperson of the Grievance Committee will advise the complainant of that fact and the reason for the referral. If the respondent successfully completes the prescribed training and the grievance is dismissed, the chairperson of the Grievance Committee will advise the complainant. If the respondent does not successfully complete the prescribed course of training, the chairperson of the Grievance Committee will advise the complainant that investigation of the original grievance has resumed.

History Note: Statutory Authority G.S. 84-23;

Readopted Effective December 8, 1994

Amended March 7, 1996

.0122 Appointment of Counsel to Protect Clients' Interests When Attorney Disappears, Dies, or Is Transferred to Disability Inactive Status

(a) Whenever a member of the North Carolina State Bar has been transferred to disability inactive status, disappears, or dies and no partner or other member of the North Carolina State Bar capable of protecting the interests of the attorney's clients is known to exist, the senior resident judge of the superior court in the district of the member's most recent address on file with the North Carolina State Bar, if it is in this state, will be requested by the secretary to appoint an attorney or attorneys to inventory the files of the member and to take action to protect the interests of the member and his or her clients.

(b) Any member so appointed will not be permitted to disclose any information contained in any files inventoried without the consent of the client to whom such files relate except as necessary to carry out the order of the court which appointed the attorney to make such inventory.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(j)

Readopted Effective December 8, 1994

.0123 Imposition of Discipline; Findings of Incapacity or Disability; Notice to Courts

(a) Upon the final determination of a disciplinary proceeding wherein discipline is imposed, one of the following actions will be taken:

(1) Admonition - An admonition will be prepared by the chairperson of the Grievance Committee or the chairperson of the hearing committee depending upon the agency ordering the admonition. The admonition will be served upon the defendant. The admonition will not be recorded in the judgment docket of the North Carolina State Bar. Where the admonition is imposed by the Grievance Committee, the complainant will be notified that the defendant has been admonished, but will not be entitled to a copy of the admonition. An order of admonition imposed by the commission will be a public document.

(2) Reprimand - The chairperson of the Grievance Committee or chairperson of the hearing committee depending upon the body ordering the discipline, will file an order of reprimand with the secretary, who will record the order on the judgment docket of the North Carolina State Bar and will forward a copy to the complainant.

(3) Censure, suspension, or disbarment - The chairperson of the hearing committee will file the censure, order of suspension, or disbarment with the secretary, who will record the order on the judgment docket of the North Carolina State Bar and will forward a copy to the complainant. The secretary will also cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county of the defendant's last known address and of any county where the defendant maintains an

office. A copy of the censure, order of suspension, or disbarment will also be sent to the North Carolina Court of Appeals, the North Carolina Supreme Court, the United States District Courts in North Carolina, the Fourth Circuit Court of Appeals, and to the United States Supreme Court. Censures imposed by the Grievance Committee will be filed by the committee chairperson with the secretary. Notice of the censure will be given to the complainant and to the courts in the same manner as censures imposed by the commission.

(b) Upon the final determination of incapacity or disability, the chairperson of the hearing committee or the secretary, depending upon the agency entering the order, will file with the secretary a copy of the order transferring the member to disability inactive status. The secretary will cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county of the disabled member's last address on file with the North Carolina State Bar and any county where the disabled member maintains an office and will forward a copy of the order to the courts referred to in Rule .0123(a)(3) above.

History Note: Statutory Authority G.S. 84-23; G.S. 84-32(a)
Readopted Effective December 8, 1994
Amended November 7, 1996

.0124 Obligations of Disbarred or Suspended Attorneys

(a) A disbarred or suspended member of the North Carolina State Bar will promptly notify by certified mail, return receipt requested, all clients being represented in pending matters of the disbarment or suspension, the reasons for the disbarment or suspension, and consequent inability of the member to act as an attorney after the effective date of disbarment or suspension and will advise such clients to seek legal advice elsewhere. The written notice must be received by the client before a disbarred or suspended attorney enters into any agreement with or on behalf of any client to settle, compromise, or resolve any claim, dispute, or lawsuit of the client. The disbarred or suspended attorney will take reasonable steps to avoid foreseeable prejudice to the rights of his or her clients, including promptly delivering all file materials and property to which the clients are entitled to the clients or the clients' substituted attorney. No disbarred or suspended attorney will transfer active client files containing confidential information or property to another attorney, nor may another attorney receive such files or property, without prior written permission from the client.

(b) The disbarred or suspended member will withdraw from all pending administrative or litigation matters before the effective date of the suspension or disbarment and will follow all applicable laws and disciplinary rules regarding the manner of withdrawal.

(c) In cases not governed by Rule .0117 of this subchapter, orders imposing suspension or disbarment will be effective 30 days after being served upon the defendant. In such cases, after entry of the disbarment or suspension order, the disbarred or suspended attorney will not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. However, between the entry date of the order and its effective date, the member may complete, on behalf of any client, matters which were pending on the entry date and which can be completed before the effective date of the order.

(d) Within 10 days after the effective date of the disbarment or suspension order, the disbarred or suspended attorney will file with the secretary an affidavit showing that he or she has fully complied with the provisions of the order, with the provisions of this section, and with the provisions of all other state, federal, and administrative jurisdictions to which he or she is admitted to practice. The affidavit will also set forth the residence or other address of the disbarred or suspended member to which communications may thereafter be directed.

(e) The disbarred or suspended member will keep and maintain records of the various steps taken under this section so that, upon any subsequent proceeding, proof of compliance with this section and with the disbarment or suspension order will be available. Proof of compliance with this section will be a condition precedent to consideration of any petition for reinstatement.

(f) A suspended or disbarred attorney who fails to comply with Rules .0124(a)-(e) above may be subject to an action for contempt instituted by the appropriate authority. Failure to comply with the requirements of Rule .0124(a) above will be grounds for appointment of counsel pursuant to Rule .0122 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended March 6, 1997

.0125 Reinstatement

(a) After disbarment

(1) No person who has been disbarred may have his or her license restored but upon order of the council after the filing of a verified petition for reinstatement and the holding of a hearing before a hearing committee as provided herein. No such hearing will commence until security for the costs of such hearing has been deposited with the secretary in an amount not to exceed $500.00.

(2) No disbarred attorney may petition for reinstatement until the expiration of at least five years from the effective date of the disbarment.

(3) The petitioner will have the burden of proving by clear, cogent, and convincing evidence that

(A) not more than six months or less than 60 days before filing the petition for reinstatement, a notice of intent to seek reinstatement has been published by the petitioner in an official publication of the North Carolina State Bar. The notice will inform members of the Bar about the application for reinstatement and will request that all interested individuals file notice of their opposition or concurrence with the secretary within 60 days after the date of publication;

(B) not more than six months or less than 60 days before filing the petition for reinstatement, the petitioner has notified the complainant(s) in the disciplinary proceeding which led to the lawyer's disbarment of the notice of intent to seek reinstatement. The notice will specify that each complainant has 60 days from the date of publication in which to raise objections or support the lawyer's petition;

(C) the petitioner has reformed and presently possesses the moral qualifications required for admission to practice law in this state taking into account the gravity of the misconduct which resulted in the order of disbarment;

(D) permitting the petitioner to resume the practice of law within the state will not be detrimental to the integrity and standing of the bar, to the administration of justice, or to the public interest, taking into account the gravity of the misconduct which resulted in the order of disbarment;

(E) the petitioner's citizenship has been restored if the petitioner has been convicted of or sentenced for the commission of a felony;

(F) the petitioner has complied with Rule .0124 of this subchapter;

(G) the petitioner has complied with all applicable orders of the commission and the council;

(H) the petitioner has complied with the orders and judgments of any court relating to the matters resulting in the disbarment;

(I) the petitioner has not engaged in the unauthorized practice of law during the period of disbarment;

(J) the petitioner has not engaged in any conduct during the period of disbarment constituting grounds for discipline under G.S. 84-28(b);

(K) the petitioner understands the current Rules of Professional Conduct. Participation in continuing legal education programs in ethics and professional responsibility for each of the three years preceding the petition date may be considered on the issue of the petitioner's understanding of the Rules of Professional Conduct. Such evidence creates no presumption that the petitioner has met the burden of proof established by this section;

(L) the petitioner has reimbursed the Client Security Fund of the North Carolina State Bar for all sums, including costs other than overhead expenses, disbursed by the Client Security Fund as a result of the petitioner's misconduct. This section shall not be deemed to permit the petitioner to collaterally attack the decision of the Client Security Fund Board of Trustees regarding whether to reimburse losses occasioned by the misconduct of the petitioner. This provision shall apply to petitions for reinstatement submitted by attorneys who were disciplined after the effective date of this amendment;

(M) the petitioner has reimbursed all sums which the Disciplinary Hearing Commission found in the order of disbarment were misappro-

priated by the petitioner and which have not been reimbursed by the Client Security Fund;

(N) the petitioner paid all dues, Client Security Fund assessments, and late fees owed to the North Carolina State Bar as well as all attendee fees and late penalties due and owing to the Board of Continuing Legal Education at the time of disbarment.

(4) Petitions filed less than seven years after disbarment

(A) If less than seven years have elapsed between the effective date of the disbarment and the filing date of the petition for reinstatement, the petitioner will also have the burden of proving by clear, cogent, and convincing evidence that the petitioner has the competency and learning in the law required to practice law in this state.

(B) Factors which may be considered in deciding the issue of competency include

(i) experience in the practice of law;

(ii) areas of expertise;

(iii) certification of expertise;

(iv) participation in continuing legal education programs in each of the three years immediately preceding the petition date;

(v) certification by three attorneys who are familiar with the petitioner's present knowledge of the law that the petitioner is competent to engage in the practice of law.

(C) The factors listed in Rule .0125(a)(4)(B) above are provided by way of example only. The petitioner's satisfaction of one or all of these factors creates no presumption that the petitioner has met the burden of proof established by this section.

(D) The attainment of a passing grade on a regularly scheduled written bar examination administered by the North Carolina Board of Law Examiners and taken voluntarily by the petitioner shall be conclusive evidence on the issue of the petitioner's competence to practice law.

(5) If seven years or more have elapsed between the effective date of disbarment and the filing of the petition for reinstatement, reinstatement will be conditioned upon the petitioner's attaining a passing grade on a regularly scheduled written bar examination administered by the North Carolina Board of Law Examiners.

(6) Verified petitions for reinstatement of disbarred attorneys will be filed with the secretary. Upon receipt of the petition, the secretary will transmit the petition to the chairperson of the commission and serve a copy on the counsel. The chairperson will within 14 days appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter and schedule a time and place for a hearing to take place within 60 to 90 days after the filing of the petition with the secretary. The chairperson will notify the counsel and the petitioner of the composition of the hearing committee and the time and place of the hearing, which will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as possible and the rules of evidence applicable in superior court.

(7) As soon as possible after the conclusion of the hearing, the hearing committee will file a report containing its findings, conclusions, and recommendations with the secretary.

(8) A petitioner in whose case the hearing committee recommends that reinstatement be denied may file notice of appeal to the council. Appeal from the report of the hearing committee must be taken within 30 days after service of the committee report upon the petitioner and shall be filed with the secretary. If no appeal is timely filed, the recommendation of the hearing committee to deny reinstatement will be deemed final. All cases in which the hearing committee recommends reinstatement of a disbarred attorney's license shall be heard by the council and no notice of appeal need be filed by the N.C. State Bar.

(9) Transcript of Hearing Committee Proceedings

The petitioner will have 60 days following the filing of the notice of appeal in which to produce a transcript of the trial proceedings before the hearing committee. The chairperson of the hearing committee, may, for good cause shown, extend the time to produce the record.

(10) Record to the Council

(A) Composition of the Record

The petitioner will provide a record of the proceedings before the hearing committee, including a legible copy of the complete transcript, all exhibits introduced into evidence, and all pleadings, motions, and orders, unless the petitioner and the counsel agree in writing to shorten the record. The petitioner will provide the proposed record to the counsel not later than 90 days after the hearing before the hearing committee, unless an extension of time is granted by the secretary for good cause shown. Any agreement regarding the record will be in writing and will be included in the record transmitted to the council.

(B) Settlement of the Record

(i) By agreement—At any time following service of the proposed record upon the counsel, the parties may by agreement entered in the record settle the record to the council.

(ii) By counsel's failure to object to the proposed record—Within 20 days after service of the proposed record, the counsel may serve a written objection or a proposed alternative record upon the petitioner. If the counsel fails to serve a notice of approval or an objection or a proposed alternative record, the petitioner's proposed record will constitute the record to the council.

(iii) By judicial settlement—If the counsel raises a timely objection to the proposed record or serves a proposed alternative record upon the petitioner, either party may request the chairperson of the hearing committee which heard the reinstatement petition to settle the record. Such request shall be filed in writing with the hearing committee chairperson no later than 15 days after the counsel files an objection or proposed alternative record. Each party shall promptly provide to the chairperson a reference copy of the proposed record, amendments and objections filed by that party in the case. The chairperson of the hearing committee shall settle the record on appeal by order not more than 20 days after service of the request for judicial settlement upon the chairperson. The chairperson may allow oral argument by the parties or may settle the record based upon written submissions by the parties.

(C)The petitioner will transmit a copy of the settled record to each member of the council and to the counsel no later than 30 days before the council meeting at which the petition is to be considered.

(D) The petitioner will bear the costs of transcribing, copying, and transmitting the record to the council.

(E) If the petitioner fails to comply with any of the subsections of Rule .0125(a)(8) above, the counsel may petition the secretary to dismiss the petition.

(11) The council will review the report of the hearing committee and the record and determine whether, and upon what conditions, the petitioner will be reinstated.

(12) No person who has been disbarred and has unsuccessfully petitioned for reinstatement may reapply until the expiration of one year from the date of the last order denying reinstatement.

(b) After suspension

(1) No attorney who has been suspended may have his or her license restored but upon order of the commission or the secretary after the filing of a verified petition as provided herein.

(2) No attorney who has been suspended for a period of 120 days or less is eligible for reinstatement until the expiration of the period of suspension and, in no event, until 10 days have elapsed from the date of filing the petition for reinstatement. No attorney whose license has been suspended for a period of more than 120 days is eligible for reinstatement until the expiration of the period of suspension and, in no event, until 30 days have elapsed from the date of the filing of the petition for reinstatement.

(3) Any suspended attorney seeking reinstatement must file a verified petition with the secretary, a copy of which the secretary will transmit to the counsel. The petitioner will have the burden of proving the following by clear, cogent and convincing evidence:

(A) compliance with Rule .0124 of this subchapter;

(B) compliance with all applicable orders of the commission and the council;

(C) abstention from the unauthorized practice of law during the period of suspension;

(D) attainment of a passing grade on a regularly scheduled North Carolina bar examination, if the suspended attorney applies for reinstatement of his or her license more than seven years after the effective date of the suspension;

(E) abstention from conduct during the period of suspension constituting grounds for discipline under G.S. 84-28(b);

(F) reimbursement of the Client Security Fund of the North Carolina State Bar for all sums, including costs other than overhead expenses, disbursed by the Client Security Fund as a result of the petitioner's misconduct. This section shall not be deemed to permit the petitioner to collaterally attack the decision of the Client Security Fund Board of Trustees regarding whether to reimburse losses occasioned by the misconduct of the petitioner. This provision shall apply to petitions for reinstatement submitted by attorneys who were disciplined after the effective date of this amendment;

(G) reimbursement of all sums which the Disciplinary Hearing Commission found in the order of suspension were misappropriated by the petitioner and which have not been reimbursed by the Client Security Fund;

(H) satisfaction of the minimum continuing legal education requirements, as set forth in Rule .1517 of Subchapter 1D of these rules, for the two calendar years immediately preceding the year in which the petitioner was suspended; provided that the petitioner may attend CLE programs after the effective date of the suspension to make up any unsatisfied requirement. These requirements shall be in addition to any continuing legal education requirements imposed by the Disciplinary Hearing Commission;

(I) [effective for petitioners suspended on or after January 1, 1997] if two or more years have elapsed between the effective date of the suspension order and the date on which the reinstatement petition is filed with the secretary, the petitioner must, within one year prior to filing the petition, complete 15 hours of CLE approved by the Board of Continuing Legal Education pursuant to Subchapter 1D, Rule .1519 of these rules. Three hours of the 15 hours must be earned by attending a three-hour block course of instruction devoted exclusively to professional responsibility and/or professionalism. These requirements shall be in addition to any continuing legal education requirements imposed by the Disciplinary Hearing Commission;

(J) payment of all dues, Client Security Fund assessments, and late fees due and owing to the North Carolina State Bar as well as all attendee fees and late penalties due and owing to the Board of Continuing Legal Education at the time of suspension.

(4) The counsel will conduct any necessary investigation regarding the compliance of the petitioner with the requirements set forth in Rule .0125(b)(3) above, and the counsel may file a response to the petition with the secretary prior to the date the petitioner is first eligible for reinstatement. The counsel will serve a copy of any response filed upon the petitioner.

(5) If the counsel does not file a response to the petition before the date the petitioner is first eligible for reinstatement, then the secretary will issue an order of reinstatement.

(6) If the counsel files a timely response to the petition, such response must set forth specific objections supported by factual allegations sufficient to put the petitioner on notice of the events at issue.

(7) The secretary will, upon the filing of a response to the petition, refer the matter to the chairperson of the commission. The chairperson will within 14 days appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter, schedule a time and place for a hearing, and notify the counsel and the petitioner of the composition of the hearing committee and the time and place of the hearing. The hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as possible and the rules of evidence applicable in superior court.

(8) The hearing committee will determine whether the petitioner's license should be reinstated and enter an appropriate order which may include additional sanctions in the event violations of the petitioner's order of suspension are found. In any event, the hearing committee must include in its order findings of fact and conclusions of law in support of its decision and tax such costs as it deems appropriate for the necessary expenses attributable to the investigation and processing of the petition against the petitioner.

(c) After transfer to disability inactive status:

(1) No member of the North Carolina State Bar transferred to disability inactive status may resume active status until reinstated by order of the commission. Any member transferred to disability inactive status will be entitled to apply to the commission for reinstatement to active status once a year or at such shorter intervals as are stated in the order transferring the member to disability inactive status or any modification thereof.

(2) Petitions for reinstatement by members transferred to disability inactive status will be filed with the secretary. Upon receipt of the petition the secretary will refer the petition to the commission chairperson. The chairperson will appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter. A hearing will be conducted pursuant to the procedures set out in Rule .0114 of this subchapter.

(3) The member will have the burden of proving by clear, cogent, and convincing evidence that he or she is no longer disabled within the meaning of Rule .0103(19) of this subchapter and that he or she is fit to resume the practice of law.

(4) Within 10 days of filing the petition for reinstatement, the member will provide the secretary with a list of the name and address of every psychiatrist, psychologist, physician, hospital, and other health care provider by whom or in which the member has been examined or treated or sought treatment while disabled. At the same time, the member will also furnish to the secretary a written consent to release all information and records relating to the disability.

(5) Where a member has been transferred to disability inactive status based solely upon a judicial finding of incapacity, and thereafter a court of competent jurisdiction enters an order adjudicating that the member's incapacity has ended, the chairperson of the commission will enter an order returning the member to active status upon receipt of a certified copy of the court's order. Entry of the order will not preclude the North Carolina State Bar from bringing an action pursuant to Rule .0118 of this subchapter to determine whether the member is disabled.

(6) The hearing committee may direct the member to pay the costs of the reinstatement hearing, including the cost of any medical examination ordered by the committee.

(d) The hearing committee may impose reasonable conditions on a lawyer's reinstatement from disbarment, suspension or disability inactive status in any case in which the hearing committee concludes that such conditions are necessary for the protection of the public.

(e) After entry of a reciprocal order of suspension or disbarment:

No member whose license to practice law has been suspended or who has been disbarred by any state or federal court and who is the subject of a reciprocal discipline order in North Carolina may seek reinstatement of his or her North Carolina law license until the member provides to the Secretary a certified copy of an order reinstating the member to the active practice of law in the state or federal court which entered the original order of discipline.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28.1; G.S. 84-29; G.S. 84-30

Readopted Effective December 8, 1994
Amended February 20, 1995
Amended March 6, 1997
Amended October 2, 1997
Amended July 22, 1999
Amended August 24, 2000

.0126 Address of Record

Except where otherwise specified, any provision herein for notice to a respondent, member, petitioner, or a defendant will be deemed satisfied by appropriate correspondence addressed to that attorney by mail to the last address maintained by the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.0127 Disqualification Due to Interest

No member of the council or hearing commission will participate in any disciplinary matter involving the member, any partner, or associate in the practice of law of the member, or in which the member has a personal interest.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.0128 Trust Accounts; Audit

(a) For reasonable cause, the chairperson of the Grievance Committee is empowered to issue an investigative subpoena to a member compelling the production of any records required to be kept relative to the handling of client funds and property by the Rules of Professional Conduct for inspection, copying, or audit by the counsel or any auditor appointed by the counsel. For the purposes of this rule, any of the following will constitute reasonable cause:

(1) any sworn statement of grievance received by the North Carolina State Bar alleging facts which, if true, would constitute misconduct in the handling of a client's funds or property;

(2) any facts coming to the attention of the North Carolina State Bar, whether through random review as contemplated by Rule .0128(b) below or otherwise, which if true, would constitute a probable violation of any provision of the Rules of Professional Conduct concerning the handling of client funds or property; or

(3) any finding of probable cause, indictment, or conviction relative to a criminal charge involving moral turpitude. The grounds supporting the issuance of any such subpoena will be set forth upon the face of the subpoena.

(b) The chairperson of the Grievance Committee may randomly issue investigative subpoenas to members compelling the production of any records required to be kept relative to the handling of client funds or property by the Rules of Professional Conduct for inspection by the counsel or any auditor appointed by the counsel to determine compliance with the Rules of Professional Conduct. Any such subpoena will disclose upon its face its random character and contain a verification of the secretary that it was randomly issued. No member will be subject to random selection under this section more than once in three years. The auditor may report any violation of the Rules of Professional Conduct discovered during the random audit to the Grievance Committee for investigation. The auditor may allow the attorney a reasonable amount of time to correct any procedural violation in lieu of reporting the matter to the Grievance Committee. The auditor shall have authority under the original subpoena for random audit to compel the production of any documents necessary to determine whether the attorney has corrected any violation identified during the audit.

(c) No subpoena issued pursuant to this rule may compel production within five days of service.

(d) The rules of evidence applicable in the superior courts of the state will govern the use of any material subpoenaed pursuant to this rule in any hearing before the commission.

(e) No assertion of attorney-client privilege or confidentiality will prevent an inspection or audit of a trust account as provided in this rule.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.0129 Confidentiality

(a) Except as otherwise provided in this rule and G.S. 84-28(f), all proceedings involving allegations of misconduct by or alleged disability of a member will remain confidential until

(1) a complaint against a member has been filed with the secretary after a finding by the Grievance Committee that there is probable cause to believe that the member is guilty of misconduct justifying disciplinary action or is disabled;

(2) the member requests that the matter be made public prior to the filing of a complaint;

(3) the investigation is predicated upon conviction of the member of or sentencing for a crime;

(4) a petition or action is filed in the general courts of justice; or

(5) the member files an affidavit of surrender of license.

(b) The previous issuance of a letter of warning, formerly known as a letter of admonition, or an admonition to a member may be revealed in any subsequent disciplinary proceeding.

(c) This provision will not be construed to prohibit the North Carolina State Bar from providing a copy of an attorney's response to a grievance to the complaining party where such attorney has not objected thereto in writing or to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, to other jurisdictions investigating qualifications for admission to practice, or to law enforcement agencies investigating qualifications for government employment or allegations of criminal conduct by attorneys. Further, this provision will not be construed to prohibit the North Carolina State Bar, with the consent of the chairperson of the Grievance Committee, from providing relevant information concerning a letter of caution, letter of warning or admonition, to authorized agencies investigating complaints against North Carolina attorneys, so long as the inquiring jurisdiction maintains the same level of confidentiality respecting the information as the North Carolina State Bar. In addition, the secretary will transmit notice of all public discipline imposed and transfers to disability inactive status to the National Discipline Data Bank maintained by the American Bar Association. The secretary may also transmit any relevant information to the Client Security Fund Board of Trustees to assist the Client Security Fund Board in determining losses caused by dishonest conduct of members of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended February 20, 1996
Amended November 7, 1996

.0130 Disciplinary Amnesty in Illicit Drug Use Cases

(a) The North Carolina State Bar will not treat as a grievance information that a member has used or is using illicit drugs except as provided in Rules .0130(c), (d) and (e) below. The information will be provided to director of the lawyer assistance program of the North Carolina State Bar.

(b) If the director of the lawyer assistance program concludes after investigation that a member has used or is using an illicit drug and the member participates and successfully complies with any course of treatment prescribed by the lawyer assistance program, the member will not be disciplined by the North Carolina State Bar for illicit drug use occurring prior to the prescribed course of treatment.

(c) If a member under Rule .0130(b) above fails to cooperate with the Lawyer Assistance Program Board or fails to successfully complete any treatment prescribed for the member's illicit drug use, the director of the lawyer assistance program will report such failure to participate in or complete the prescribed treatment to the chairperson of the Grievance Committee. The chairperson of the Grievance Committee will then treat the information originally received as a grievance.

(d) A member charged with a crime relating to the use or possession of illicit drugs will not be entitled to amnesty from discipline by the North Carolina State Bar relating to the illicit drug use or possession.

(e) If the North Carolina State Bar receives information that a member has used or is using illicit drugs and that the member has violated some other provision of the Revised Rules of Professional Conduct, the information regarding the member's alleged illicit drug use will be referred to the director of lawyer assistance program pursuant to Rule .0130(a) above. The information regarding the member's alleged additional misconduct will be reported to the chairperson of the Grievance Committee.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended February 20, 1995
Amended February 3, 2000

Section .0200 Rules Governing Judicial District Grievance Committees

.0201 Organization of Judicial District Grievance Committees

(a) Judicial Districts Eligible to Form District Grievance Committees

(1) Any judicial district which has more than 100 licensed attorneys as determined by the North Carolina State Bar's records may establish a judicial district grievance committee (hereafter, "district grievance committee") pursuant to the rules and regulations set out herein. A judicial district with fewer than 100 licensed attorneys may establish a district grievance committee with consent of the Council of the North Carolina State Bar.

(2) One or more judicial districts, including those with fewer than 100 licensed attorneys, may also establish a multi-district grievance committee, as set out in Rule .0201(b)(2) below. Such multi-district grievance committees shall be subject to all of the rules and regulations set out herein and all references to district grievance committees in these rules shall also apply to multi-district grievance committees.

(b) Creation of District Grievance Committees

(1) A judicial district may establish a district grievance committee at a duly called meeting of the judicial district bar, at which a quorum is present, upon the affirmative vote of a majority of the active members present. Within 30 days of the election, the president of the judicial district bar shall certify in writing the establishment of the district grievance committee to the secretary of the North Carolina State Bar.

(2) A multi-district grievance committee may be established by affirmative vote of a majority of the active members of each participating judicial district present at a duly called meeting of each participating judicial district bar, at which a quorum is present. Within 30 days of the election, the chairperson of the multi-district grievance committee shall certify in writing the establishment of the district grievance committee to the secretary of the North Carolina State Bar. The active members of each participating judicial district may adopt a set of bylaws not inconsistent with these rules by majority vote of the active members of each participating judicial district present at a duly called meeting of each participating judicial district bar, at which a quorum is present. The chairperson of the multi-district grievance committee shall promptly provide a copy of any such bylaws to the secretary of the North Carolina State Bar.

(c) Appointment of District Grievance Committee Members

(1) Each district grievance committee shall be composed of not fewer than five nor more than 13 members, all of whom shall be active members in good standing both of the judicial district bar to which they belong and of the North Carolina State Bar. In addition to the attorney members, each district grievance committee may also include one to three public members who have never been licensed to practice law in any jurisdiction. Public members shall not perform investigative functions regarding grievances but in all other respects shall have the same authority as the attorney members of the district grievance committee.

(2) The chairperson of the district grievance committee shall be selected by the president of the judicial district and shall serve at his or her pleasure. Alternatively, the chairperson may be selected and removed as provided in the district bar bylaws.

(3) The attorney and public members of the district grievance committee shall be selected by and serve at the pleasure of the president of the judicial district bar and the chairperson of the district grievance committee. Alternatively, the district grievance committee members may be selected and removed as provided in the district bar bylaws.

(4) The members of the district grievance committee, including the chairperson, shall be appointed for staggered three-year terms, except that the president and chairperson shall appoint some of the initial committee members to terms of less than three years, to effectuate the staggered terms. No member shall serve more than one term, without first having rotated off the committee for a period of at least one year between three-year terms. Any member who resigns or otherwise becomes ineligible to continue serving as a member shall be replaced by appointment by the president of the judicial district bar and the chairperson of the committee or as provided in the district bar bylaws as soon as practicable.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.0202 Jurisdiction & Authority of District Grievance Committees

(a) District Grievance Committees Are Subject to the Rules of the North Carolina State Bar - The district grievance committee shall be subject to the rules and regulations adopted by the Council of the North Carolina State Bar.

(b) Grievances Filed With District Grievance Committee - A district grievance committee may investigate and consider grievances filed against attorneys who live or maintain offices within the judicial district and which are filed in the first instance with the chairperson of the district grievance committee. The chairperson of the district grievance committee will immediately refer to the State Bar any grievance filed locally in the first instance which

(1) alleges misconduct against a member of the district grievance committee;

(2) alleges that any attorney has embezzled or misapplied client funds; or

(3) alleges any other serious violation of the Rules of Professional Conduct which may be beyond the capacity of the district grievance committee to investigate.

(c) Grievances Referred to District Grievance Committee - The district grievance committee shall also investigate and consider such grievances as are referred to it for investigation by the counsel of the North Carolina State Bar.

(d) Grievances Involving Fee Disputes

(1) Notice to Complainant of Fee Arbitration - If a grievance filed initially with the district bar consists solely or in part of a fee dispute, the chairperson of the district grievance committee shall notify the complainant in writing within 10 working days of receipt of the grievance that the complainant may elect to participate in the North Carolina State Bar Fee Dispute Arbitration Program. If the grievance consists solely of a fee dispute, the letter to the complainant shall follow the format set out in Rule .0208 of this subchapter. If the grievance consists in part of matters other than a fee dispute, the letter to the complainant shall follow the format set out in Rule .0209 of this subchapter. A respondent attorney shall not have the right to elect to participate in fee arbitration.

(2) Handling Claims Not Involving Fee Dispute - Where a grievance alleges multiple claims, the allegations not involving a fee dispute will be handled in the same manner as any other grievance filed with the district grievance committee.

(3) Handling Claims Not Submitted to Arbitration by Complainant - If the complainant elects not to participate in the State Bar's Fee Dispute Arbitration Program, or fails to notify the chairperson that he or she elects to participate within 20 days following mailing of the notice referred to in Rule .0202(d)(1) above, the grievance will be handled in the same manner as any other grievance filed with the district grievance committee.

(4) Referral to Fee Dispute Arbitration Program - Where a complainant timely elects to participate in fee arbitration, and the judicial district in which the respondent attorney maintains his or her principal office has a fee arbitration committee, the chairperson of the district grievance committee shall refer the portion of the grievance involving a fee dispute to the judicial district fee arbitration committee. If the judicial district in which the respondent attorney maintains his or her principal office does not have a fee arbitration committee, the chairperson of the district grievance committee shall refer the portion of the grievance involving a fee dispute to the State Bar Fee Dispute Arbitration Program for resolution. If the grievance consists entirely of a fee dispute, and the complainant timely elects to participate in arbitration, no grievance file will be established.

(e) Authority of District Grievance Committees - The district grievance committee shall have authority to

(1) assist a complainant who requests assistance to reduce a grievance to writing;

(2) investigate complaints described in Rule .0202(b) and(c) above by interviewing the complainant, the attorney against whom the grievance was filed and any other persons who may have relevant information regarding the grievance and by requesting written materials from the complainant, respondent attorney, and other individuals;

(3) explain the procedures of the district grievance committee to complainants and respondent attorneys;

(4) find facts and recommend whether or not the State Bar's Grievance Committee should find that there is probable cause to believe that the respondent has violated one or more provisions of the Revised Rules of Professional Conduct. The district grievance committee may also make a

recommendation to the State Bar regarding the appropriate disposition of the case, including referral to the Lawyer Assistance Program pursuant to Rule .0112(j) or to a program of law office management training approved by the State Bar;

(5) draft a written report stating the grounds for the recommended disposition of a grievance assigned to the district grievance committee;

(6) notify the complainant and the respondent attorney where the district grievance committee recommends that the State Bar find that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct. Where the district grievance committee recommends that the State Bar find that there is probable cause to believe that the respondent has violated one or more provisions of the Rules of Professional Conduct, the committee shall notify the respondent attorney of its recommendation and shall notify the complainant that the district grievance committee has concluded its investigation and has referred the matter to the State Bar for final resolution. Where the district grievance committee recommends a finding of no probable cause, the letter of notification to the respondent attorney and to the complainant shall follow the format set out in Rule .0210 of this subchapter. Where the district grievance committee recommends a finding of probable cause, the letter of notification to the respondent attorney shall follow the format set out in Rule .0211 of this subchapter. The letter of notification to the complainant shall follow the format set out in Rule .0212 of this subchapter;

(7) maintain records of grievances investigated by the district grievance committee for at least one year from the date on which the district grievance committee makes its final recommendation regarding a grievance to the State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended March 3, 1999
Amended December 20, 2000

.0203 Meetings of the District Grievance Committees

(a) Notice of Meeting - The district grievance committee shall meet at the call of the chairperson upon reasonable notice, as often as is necessary to dispatch its business and not less than once every 60 days, provided the committee has grievances pending.

(b) Confidentiality - The district grievance committee shall meet in private. Discussions of the committee, its records and its actions shall be confidential. The names of the members of the committee shall not be confidential.

(c) Quorum - A simple majority of the district grievance committee must be present at any meeting in order to constitute a quorum. The committee may take no action unless a quorum is present. A majority vote in favor of a motion or any proposed action shall be required for the motion to pass or the action to be taken.

(d) Appearances by Complainants and Respondents - No complainant nor any attorney against whom a grievance has been filed may appear before the district grievance committee, present argument to or be present at the committee's deliberations.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.0204 Procedure Upon Institution of a Grievance

(a) Receipt of Grievance - A grievance may be filed by any person against a member of the North Carolina State Bar. Such grievance must be in writing and signed by the complaining person. A district grievance committee may, however, investigate matters which come to its attention during the investigation of a grievance, whether or not such matters are included in the original written grievance.

(b) Acknowledgment of Receipt of Grievance from State Bar - The chairperson of the district grievance committee shall send a letter to the complainant within 10 working days of receipt of the grievance from the State Bar, acknowledging that a grievance file has been set up. The acknowledgment letter shall include the name of the district grievance committee member assigned to investigate the matter and shall follow the format set out in Rule .0213 of this subchapter. A copy of the letter shall be sent contemporaneously to the office of counsel of the State Bar.

(c) Notice to State Bar of Locally Filed Grievances

(1) Where a grievance is filed in the first instance with the district grievance committee, the chairperson of the district grievance committee shall notify the office of counsel of the State Bar of the name of the complainant, respondent attorney, file number and nature of the grievance within 10 working days of receipt of the grievance.

(2) The chairperson of the district grievance committee shall send a letter to the complainant within 10 working days of receipt of the grievance, acknowledging that a grievance file has been set up. The acknowledgment letter shall include the name of the district grievance committee member assigned to investigate the matter and shall follow the format set out in Rule .0213 of this subchapter.

(3) Grievances filed initially with the district grievance committee shall be assigned a local file number which shall be used to refer to the grievance. The first two digits of the file number shall indicate the year in which the grievance was filed, followed by the number of the judicial district, the letters GR, and ending with the number of the file. File numbers shall be assigned sequentially during the calendar year, beginning with the number 1. For example, the first locally filed grievance set up in the 10th judicial district in 1994 would bear the following number: 9410GR001.

(d) Assignment to Investigating Member - Within 10 working days after receipt of a grievance, the chairperson shall appoint a member of the district grievance committee to investigate the grievance and shall forward the relevant materials to the investigating member. The letter to the investigating member shall follow the format set out in Rule .0214 of this subchapter.

(e) Investigation of the Grievance

(1) The investigating member shall attempt to contact the complainant as soon as possible but no later than 15 working days after receiving notice of the assignment. If the initial contact with the complainant is made in writing, the letter shall follow the format set out in Rule .0215 of this subchapter.

(2) The investigating member shall have the authority to contact other witnesses or individuals who may have information about the subject of the grievance, including the respondent.

(3) The failure of the complainant to cooperate shall not cause a grievance to be dismissed or abated. Once filed, grievances shall not be dismissed or abated upon the request of the complainant.

(f) Letter of Notice to Respondent Attorney and Responses

(1) Within 10 working days after receipt of a grievance, the chairperson of the district grievance committee shall send a copy of the grievance and a letter of notice to the respondent attorney. The letter to the respondent attorney shall follow the form set out in Rule .0216 of this subchapter and shall be sent by U.S. Mail to the attorney's last known address on file with the State Bar. The letter of notice shall request the respondent to reply to the investigating attorney in writing within 15 days after receipt of the letter of notice.

(2) A substance of grievance will be provided to the district grievance committee by the State Bar at the time the file is assigned to the committee. The substance of grievance will summarize the nature of the complaint against the respondent attorney and cite the applicable provisions of the Rules of Professional Conduct, if any.

(3) The respondent attorney shall respond in writing to the letter of notice from the district grievance committee within 15 days of receipt of the letter. The chairperson of the district grievance committee may allow a longer period for response, for good cause shown.

(4) If the respondent attorney fails to respond in a timely manner to the letter of notice, the chairperson of the district grievance committee may seek the assistance of the State Bar to issue a subpoena or take other appropriate steps to ensure a proper and complete investigation of the grievance. District grievance committees do not have authority to issue a subpoena to a witness or respondent attorney.

(5) Unless necessary to complete its investigation, the district grievance committee should not release copies of the respondent attorney's response to the grievance to the complainant. The investigating attorney may summarize the response for the complainant orally or in writing.

(g) District Grievance Committee Deliberations

(1) Upon completion of the investigation, the investigating member shall promptly report his or her findings and recommendations to the district grievance committee in writing.

(2) The district grievance committee shall consider the submissions of the parties, the information gathered by the investigating attorney and such other material as it deems relevant in reaching a recommendation. The district grievance committee may also make further inquiry as it deems appropriate, including investigating other facts and possible violations of the Rules of Professional Conduct discovered during its investigation.

(3) The district grievance committee shall make a determination as to whether or not it finds that there is probable cause to believe that the respondent violated one or more provisions of the Rules of Professional Conduct.

(h) Report of Committee's Decision

(1) Upon making a decision in a case, the district grievance committee shall submit a written report to the office of counsel, including its recommendation and the basis for its decision. The original file and grievance materials of the investigating attorney shall be sent to the State Bar along with the report. The letter from the district bar grievance committee enclosing the report shall follow the format set out in Rule .0217 of this subchapter.

(2) The district grievance committee shall submit its written report to the office of counsel no later than 180 days after the grievance is initiated or received by the district committee. The State Bar may recall any grievance file which has not been investigated and considered by a district grievance committee within 180 days after the matter is assigned to the committee. The State Bar may also recall any grievance file for any reason.

(3) Within 10 working days of submitting the written report and returning the file to the office of counsel, the chairperson of the district grievance committee shall notify the respondent attorney and the complainant in writing of the district grievance committee's recommendation, as provided in Rule .0202(d)(6) of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.0205 Record Keeping

The district grievance committee shall maintain records of all grievances referred to it by the State Bar and all grievances initially filed with the district grievance committee for at least one year. The district grievance committee shall provide such reports and information as are requested of it from time to time by the State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.0206 Miscellaneous

(a) Assistance and Questions - The office of counsel, including the staff attorneys and the grievance coordinator, are available to answer questions and provide assistance regarding any matters before the district grievance committee.

(b) Missing Attorneys - Where a respondent attorney is missing or cannot be located, the district grievance committee shall promptly return the grievance file to the office of counsel for appropriate action.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.0207 Conflicts of Interest

(a) No district grievance committee shall investigate or consider a grievance which alleges misconduct by any current member of the committee. If a file is referred to the committee by the State Bar or is initiated locally which alleges misconduct by a member of the district grievance committee, the file will be sent to the State Bar for investigation and handling within 10 working days after receipt of the grievance.

(b) A member of a district grievance committee shall not investigate or participate in deliberations concerning any of the following matters:

(1) alleged misconduct of an attorney who works in the same law firm or office with the committee member;

(2) alleged misconduct of a relative of the committee member;

(3) a grievance involving facts concerning which the committee member or a partner or associate in the committee member's law firm acted as an attorney.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.0208 Letter to Complainant Where Local Grievance Alleges Fee Dispute Only

John Smith
Anywhere, N.C.
Re: Your complaint against Jane Doe
Dear Mr. Smith:

The [ ] district grievance committee has received your complaint against the above-listed attorney. Based upon our initial review of the materials which you submitted, it appears that your complaint involves a fee dispute. Accordingly, I would like to take this opportunity to notify you of the North Carolina State Bar Fee Dispute Arbitration Program. The program is designed to provide citizens with a means of resolving disputes over attorney fees at no cost to them and without going to court. A pamphlet which describes the program in greater detail is enclosed, along with an application form.

If you would like to participate in the fee arbitration program, please complete and return the form to me within 20 days of the date of this letter. If you decide to go through arbitration, no grievance file will be opened and the [ ] district bar grievance committee will take no other action against the attorney.

If you do not wish to participate in the fee arbitration program, you may elect to have your complaint investigated by the [ ] district grievance committee. If we do not hear from you within 20 days of the date of this letter, we will assume that you do not wish to participate in fee arbitration, and we will handle your complaint like any other grievance. However, the [ ] district grievance committee has no authority to attempt to resolve a fee dispute between an attorney and his or her client. Its sole function is to investigate your complaint and make a recommendation to the North Carolina State Bar regarding whether there is probable cause to believe that the attorney has violated one or more provisions of the Rules of Professional Conduct which govern attorneys in this state.

Thank you for your cooperation.
Sincerely yours,
[ ] Chairperson
[ ] District Bar Grievance Committee
cc: PERSONAL & CONFIDENTIAL
Director of Investigations, The N.C. State Bar

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.0209 Letter to Complainant Where Local Grievance Alleges Fee Dispute and Other Violations

John Smith
Anywhere, N.C.
Re: Your complaint against Jane Doe
Dear Mr. Smith:

The [ ] district grievance committee has received your complaint against the above-listed attorney. Based upon our initial review of the materials which you submitted, it appears that your complaint involves a fee dispute as well as other possible violations of the rules of ethics. Accordingly, I would like to take this opportunity to notify you of the North Carolina State Bar Fee Dispute Arbitration Program. The program is designed to provide citizens with a means of resolving disputes over attorney fees at no cost to them and without going to court. A pamphlet which describes the program in greater detail is enclosed, along with an application form.

If you would like to participate in the fee arbitration program, please complete and return the form to me within 20 days of the date of this letter. If you decide to go through arbitration, the fee arbitration committee will handle those portions of your complaint which involve an apparent fee dispute. The remaining parts of your complaint which do not involve a fee dispute will be investigated by the [ ] district grievance committee.

If you do not wish to participate in the fee arbitration program, you may elect to have your entire complaint investigated by the [ ] district grievance committee. If we do not hear from you within 20 days of the date of this letter, we will assume that you do not wish to participate in fee arbitration, and we will

handle your entire complaint like any other grievance. However, the [ ] district grievance committee has no authority to attempt to resolve a fee dispute between an attorney and his or her client. Its sole function is to investigate your complaint and make a recommendation to the North Carolina State Bar regarding whether there is probable cause to believe that the attorney has violated one or more provisions of the Rules of Professional Conduct which govern attorneys in this state.

Thank you for your cooperation.

Sincerely yours,

[ ] Chairperson

[ ] District Bar Grievance Committee

cc: PERSONAL & CONFIDENTIAL

Director of Investigations, The N.C. State Bar

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.0210 Letter to Complainant Where District Committee Recommends Finding of No Probable Cause

John Smith

Anywhere, N.C.

Re: Your complaint against Jane Doe Our File No. [ ]

Dear Mr. Smith:

The [ ] district grievance committee has completed its investigation of your grievance. Based upon its investigation, the committee does not believe that there is probable cause to find that the attorney has violated any provisions of the Rules of Professional Conduct. The committee will forward a report with its recommendation to the North Carolina State Bar Grievance Committee. The final decision regarding your grievance will be made by the North Carolina State Bar Grievance Committee. You will be notified in writing of the State Bar's decision.

If you have any questions or wish to communicate further regarding your grievance, you may contact the North Carolina State Bar at the following address: The North Carolina State Bar Grievance Committee, P.O. Box 25908, Raleigh, N.C. 27611.

Neither I nor any member of the [ ] district grievance committee can give you any advice regarding any legal rights you may have regarding the matters set out in your grievance. You may pursue any questions you have regarding your legal rights with an attorney of your choice.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Chairperson

[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL

[ ] Respondent Attorney

PERSONAL AND CONFIDENTIAL

Director of Investigations, The N.C. State Bar

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.0211 Letter to Respondent Where District Committee Recommends Finding of Probable Cause

Ms. Jane Doe

Anywhere, N.C.

Re: Grievance of John Smith Our File No. [ ]

Dear Ms. Doe:

The [ ] district grievance committee has completed its investigation of Mr. Smith's grievance and has voted to recommend that the North Carolina State Bar Grievance Committee find probable cause to believe that you violated one or more provisions of the Rules of Professional Conduct. Specifically, the [ ] district grievance committee found that there is probable cause to believe that you may have violated [set out brief description of rule allegedly violated and pertinent facts].

The final decision in this matter will be made by the North Carolina State Bar Grievance Committee and you will be notified in writing of the State Bar's decision. The complainant has been notified that the [ ] district grievance committee has concluded its investigation and that the grievance has been sent to the North Carolina State Bar for final resolution, but has not been informed of the [ ] district grievance committee's specific recommendation.

If you have any questions or wish to communicate further regarding this grievance, you may contact the North Carolina State Bar at the following address: The North Carolina State Bar Grievance Committee, P.O. Box 25908, Raleigh, N.C. 27611, Tel. 919-828-4620.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Chairperson

[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL

Director of Investigations, The N.C. State Bar

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.0212 Letter to Complainant Where District Committee Recommends Finding of Probable Cause

John Smith

Anywhere, N.C.

Re: Your complaint against Jane Doe Our File No. [ ]

Dear Mr. Smith:

The [ ] district grievance committee has completed its investigation of your grievance and has forwarded its file to the North Carolina State Bar Grievance Committee in Raleigh for final resolution. The final decision in this matter will be made by the North Carolina State Bar Grievance Committee and you will be notified in writing of the State Bar's decision.

If you have any questions or wish to communicate further regarding your grievance, you may contact the North Carolina State Bar at the following address: The North Carolina State Bar Grievance Committee P.O. Box 25908 Raleigh, N.C. 27611.

Neither I nor any member of the [ ] district grievance committee can give you any advice regarding any legal rights you may have regarding the matters set out in your grievance. You may pursue any questions you have regarding your legal rights with an attorney of your choice.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Chairperson

[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL

[ ] Respondent Attorney

PERSONAL AND CONFIDENTIAL

Director of Investigations, The N.C. State Bar

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.0213 Letter to Complainant Acknowledging Grievance

John Smith

Anywhere, N.C.

Re: Your complaint against Jane Doe Our File No. [ ]

Dear Mr. Smith:

I am the chairperson of the [ ] district grievance committee. Your grievance against [respondent attorney] [was received in my office]\[has been forwarded to my office by the North Carolina State Bar] on [date]. I have assigned [investigator's name], a member of the [ ] district grievance committee, to investigate your grievance. [ ]'s name, address and telephone number are as follows: [ ].

Please be sure that you have provided all information and materials which relate to or support your complaint to the [ ] district grievance committee. If you have other information which you would like our committee to consider, or if you wish to discuss your complaint, please contact the investigating attorney by telephone or in writing as soon as possible.

After [ ]'s investigation is complete, the [ ] district grievance committee will make a recommendation to the North Carolina State Bar Grievance Committee regarding whether or not there is probable cause to believe that [respondent attorney] violated one or more provisions of the Rules of Professional Conduct.

Your complaint and the results of our investigation will be sent to the North Carolina State Bar at that time. The [ ] district grievance committee's recommendation is not binding upon the North Carolina State Bar Grievance Committee, which will make the final determination. You will be notified in writing when the [ ] district grievance committee's investigation is concluded.

Neither the investigating attorney nor any member of the [ ] district grievance committee can give you any legal advice or represent you regarding any underlying legal matter in which you may be involved. You may pursue any questions you have about your legal rights with an attorney of your own choice.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Chairperson

[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL

Director of Investigations, The N.C. State Bar

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.0214 Letter to Investigating Attorney Assigning Grievance

James Roe

[ ] District Grievance Committee Member

Anywhere, N.C.

Re: Grievance of John Smith against Jane Doe Our File No. [ ]

Dear Mr. Roe:

Enclosed you will find a copy of the grievance which I recently received regarding the above-captioned matter. Please investigate the complaint and provide a written report with your recommendations by [deadline].

Thank you very much.

Sincerely yours,

[ ] Chairperson

[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL

Director of Investigations, The N.C. State Bar

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.0215 Letter to Complainant from Investigating Attorney

John Smith

Anywhere, N.C.

Re: Your complaint against Jane Doe Our File No. [ ]

Dear Mr. Smith:

I am the member of the [ ] district grievance committee assigned to investigate your grievance against [respondent attorney]. It is part of my job to ensure that you have had a chance to explain your complaint and that the [ ] district grievance committee has copies of all of the documents which you believe relate to your complaint.

If you have other information or materials which you would like the [ ] district grievance committee to consider, or if you would like to discuss this matter, please contact me as soon as possible.

If you have already fully explained your complaint, you do not need to take any additional action regarding your grievance. The [ ] district grievance committee will notify you in writing when its investigation is complete. At that time, the matter will be forwarded to the North Carolina State Bar Grievance Committee in Raleigh for its final decision. You will be notified in writing of the North Carolina State Bar's decision.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Investigating Member

[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL

Chairperson, [ ] District Grievance Committee

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.0216 Letter of Notice to Respondent Attorney

Ms. Jane Doe

Anywhere, N.C.

Re: Grievance of John Smith Our File No. [ ]

Dear Ms. Doe:

Enclosed you will find a copy of a grievance which has been filed against you by [complainant] and which was received in my office on [date]. As chairperson of the [ ] district grievance committee, I have asked [investigating attorney], a member of the committee, to investigate this grievance.

Please file a written response with [investigating attorney] within 15 days from receipt of this letter. Your response should provide a full and fair disclosure of all of the facts and circumstances relating to the matters set out in the grievance.

Thank you.

Sincerely yours,

[ ] Chairperson

[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL

[ ] Investigating member

[ ] District Grievance Committee

Director of Investigations, N.C. State Bar

[ ] Complainant

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.0217 Letter Transmitting Completed File to North Carolina State Bar

Director of Investigations

N.C. State Bar

P.O. Box 25908

Raleigh, N.C. 27611

Re: Grievance of John Smith Our File No. [ ]

Dear Director:

The [ ] district grievance committee has completed its investigation in the above-listed matter. Based upon our investigation, the committee determined in its opinion that there is/is not probable cause to believe that the respondent violated one or more provisions of the Rules of Professional Conduct for the reasons set out in the enclosed report.

We are forwarding this matter for final determination by the North Carolina State Bar Grievance Committee along with the following materials:

1. The original grievance of [complainant].
2. A copy of the file of the investigating attorney.
3. The investigating attorney's report, which includes a summary of the facts and the reason(s) for the committee's decision.

Please let me know if you have any questions or if you need any additional information. Thank you.

Sincerely yours,

[ ] Chairperson

[ ] District Grievance Committee

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

SUBCHAPTER C

Rules Governing the Board of Law Examiners and the Training of Law Students

Section .0200 Rules Governing Practical Training of Law Students

.0201 Purpose

The following rules are adopted to encourage law schools to provide their students with supervised practical training of varying kinds during the period of their formal legal education.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended June 7, 2001

.0202 Definitions

The following definitions shall apply to the terms used in this section:

(1) Legal aid clinic - A department, division, program or course in a law school, approved by the Council of the North Carolina State Bar, which operates under the supervision of an active member of the State Bar and renders legal services to indigent persons.

(2) Indigent persons - Persons who are financially unable to pay for the legal services of an attorney as determined by a standard established by a judge of the General Court of Justice, a legal services corporation, or the legal aid clinic providing representation.

(3) Legal intern - A law student who is certified to provide supervised representation to clients under the provisions of the rules of this Subchapter.

(4) Legal services corporation - A nonprofit North Carolina corporation organized exclusively to provide representation to indigent persons.

(5) Supervising attorney - An active member of the North Carolina State Bar who satisfies the requirements of Rule .0205 of this Subchapter and who supervises one or more legal interns.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended June 7, 2001

.0203 Eligibility

To engage in activities permitted by these rules, a law student must satisfy the following requirements:

(1) be enrolled in a law school approved by the Council of the North Carolina State Bar;

(2) have completed at least three semesters of the requirements for a professional degree in law (J.D. or its equivalent);

(3) be certified in writing by a representative of his or her law school, authorized by the dean of the law school to provide such certification, as being of good character with requisite legal ability and training to perform as a legal intern;

(4) be introduced to the court in which he or she is appearing by an attorney admitted to practice in that court;

(5) neither ask for nor receive any compensation or remuneration of any kind from any client for whom he or she renders services, but this shall not prevent an attorney, legal services corporation, law school, public defender agency, or the state from paying compensation to the law student or charging or collecting a fee for legal services performed by such law student;

(6) certify in writing that he or she has read and is familiar with the North Carolina Revised Rules of Professional Conduct and the opinions interpretive thereof.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended June 7, 2001

.0204 Form and Duration of Certification

Upon receipt of the written materials required by Rule .0203(3) and (6) and Rule .0205(6), the North Carolina State Bar shall certify that the law student may serve as a legal intern. The certification shall be subject to the following limitations:

(a) Duration. The certification shall be effective for 18 months or until the announcement of the results of the first bar examination following the legal intern's graduation whichever is earlier. If the legal intern passes the bar examination, the certification shall remain in effect until the legal intern is sworn-in by a court and admitted to the bar.

(b) Withdrawal of Certification. The certification shall be withdrawn by the State Bar, without hearing or a showing of cause, upon receipt of

(1) notice from a representative of the legal intern's law school, authorized to act by the dean of the law school, that the legal intern has not graduated but is no longer enrolled;

(2) notice from a representative of the legal intern's law school, authorized to act by the dean of the law school, that the legal intern is no longer in good standing at the law school;

(3) notice from a supervising attorney that the supervising attorney is no longer supervising the legal intern and that no other qualified attorney has assumed the supervision of the legal intern; or

(4) notice from a judge before whom the legal intern has appeared that the certification should be withdrawn.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended June 7, 2001

.0205 Supervision

(a) A supervising attorney shall

(1) be an active member of the North Carolina State Bar who practiced law as a full-time occupation for at least two years;

(2) supervise no more than five legal interns concurrently, unless such attorney is a full-time member of a law school's faculty or staff whose primary responsibility is supervising legal interns in a legal aid clinic;

(3) assume personal professional responsibility for any work undertaken by a legal intern while under his or her supervision;

(4) assist and counsel with a legal intern in the activities permitted by these rules and review such activities with the legal intern, all to the extent required for the proper practical training of the legal intern and the protection of the client;

(5) read, approve and personally sign any pleadings or other papers prepared by a legal intern prior to the filing thereof, and read and approve any documents prepared by a legal intern for execution by a client or third party prior to the execution thereof;

(6) prior to commencing the supervision, assume responsibility for supervising a legal intern by filing with the North Carolina State Bar a signed notice setting forth the period during which supervising attorney expects to supervise the activities of an identified legal intern, and that the supervising attorney will adequately supervise the legal intern in accordance with these rules;

(7) notify the North Carolina State Bar in writing promptly whenever the supervision of a legal intern ceases.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended June 7, 2001

.0206 Activities

(a) A properly certified legal intern may engage in the activities provided in this rule under the supervision of an attorney qualified and acting in accordance with the provisions of Rule .0205 of this subchapter.

(b) Without the presence of the supervising attorney, a legal intern may give advice to a client on legal matters provided that the legal intern gives a clear prior explanation to the client that the legal intern is not an attorney and the supervising attorney has given the legal intern permission to render legal advice in the subject area involved.

(c) A legal intern may represent an indigent person, or the state in criminal prosecutions, in any proceeding before a federal, state or local tribunal, including an administrative agency, if prior consent is obtained from the tribunal or agency upon application of the supervising attorney. Each appearance before the tribunal or agency shall be subject to any limitations imposed by the tribunal or agency including, but not limited to, the requirement that the supervising attorney physically accompany the legal intern.

(d) In all cases under this rule in which a legal intern makes an appearance before a tribunal or agency on behalf of a client, the legal intern shall have the written consent in advance of the client. The client shall be given a clear explanation, prior to the giving of his or her consent, that the legal intern is not an attorney. This consent shall be filed with the tribunal and made a part of the record in the case.

(e) In all cases under this rule in which a legal intern is permitted to make an appearance before a tribunal or agency, subject to any limitations imposed by the tribunal, the legal intern may engage in all activities appropriate to the representation of the client, including, without limitation, selection of and argument to the jury, examination and cross-examination of witnesses, motions and arguments thereon, and giving notice of appeal.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended June 7, 2001

.0207 Use of Student's Name

((a) A legal intern's name may properly

(1) be printed or typed on briefs, pleadings, and other similar documents on which the legal intern has worked with or under the direction of the supervising attorney, provided the legal intern is clearly identified as a legal intern certified under these rules, and provided further that the legal intern shall not sign his or her name to such briefs, pleadings, or other similar documents;

(2) be signed to letters written on the letterhead of the supervising attorney, legal aid clinic, or district attorney's office, provided there appears below the legal intern's signature a clear identification that the legal intern is certified under these rules, An appropriate designation is "Certified Legal Intern under the Supervision of [supervising attorney]."

(b) A student's name may not appear

(1) on the letterhead of a supervising attorney, legal aid clinic, or district attorney's office;

(2) on a business card bearing the name of a supervising attorney, legal aid clinic, or district attorney's office; or

(3) on a business card identifying the legal intern as certified under these rules.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended June 7, 2001

SUBCHAPTER D

Rules of the Standing Committees of the North Carolina State Bar

Section .0100 Procedures for Ruling on Questions of Legal Ethics

Rule .0101 Definitions

(1) "Assistant executive director" shall mean the assistant executive director of the Bar.

(2) "Attorney" shall mean any active member of the Bar.

(3) "Bar" shall mean the North Carolina State Bar.

(4) "Chairperson" shall mean the chairperson, or in his or her absence, the vice-chairperson of the Ethics Committee of the Bar.

(5) "Committee" shall mean the Ethics Committee of the Bar.

(6) "Council" shall mean the council of the Bar.

(7) "Ethics advisory" shall mean a legal ethics opinion issued in writing by the executive director, the assistant executive director, or a designated member of the Bar's staff counsel. All ethics advisories shall be subsequently reviewed and approved, withdrawn or modified by the committee. Ethics advisories shall be designated by the letters "EA," numbered by year and order of issuance, and kept on file at the Bar.

(8) "Ethics decision" shall mean a written ethics opinion issued by the council in response to a request for an ethics opinion which, because of its special facts or for other reasons, does not warrant issuance of a formal ethics opinion. Ethics decisions shall be designated by the letters "ED," numbered by year and order of issuance, and kept on file at the Bar.

(9) "Executive director" shall mean the executive director of the Bar.

(10) "Formal ethics opinion" shall mean a published opinion issued by the council to provide ethical guidance for attorneys and to establish a principle of ethical conduct. A formal ethics opinion adopted under the Revised Rules of Professional Conduct (effective July 24, 1997) shall be designated as a "Formal Ethics Opinion" and numbered by year and order of issuance. Formal ethics opinions adopted under the repealed Rules of Professional Conduct (effective October 7, 1985 to July 23, 1997) are designated by the letters "RPC" and numbered serially. Formal ethics opinions adopted under the repealed Code of Professional Conduct (effective January 1, 1974 to October 6, 1985) are designated by the letters "CPR" and numbered serially. Formal ethics opinions adopted under the repealed Rules of Professional Conduct and the repealed Code of Professional Conduct are binding unless overruled by a provision of the Bar's current code of ethics; a revision of the rule of ethics upon which the opinion is based; or a subsequent formal ethics opinion on point.

(11) "Grievance Committee" shall mean the Grievance Committee of the Bar.

(12) "Informal ethics advisory" shall mean an informal ethics opinion communicated verbally or via electronic mail by the executive director, the assistant executive director, or a designated member of the Bar's staff counsel. A written record documenting the name of the inquiring attorney, the date of the informal ethics advisory, and the substance of the advice given shall be kept on file at the Bar. An informal ethics advisory is not binding upon the Bar in a subsequent disciplinary proceeding.

(13) "President" shall mean the president of the Bar, or, in his or her absence, the presiding officer of the council.

(14) "Published" shall mean published for comment in the North Carolina State Bar Newsletter (prior to fall 1996), the North Carolina State Bar Journal (fall 1996 and thereafter) or other appropriate publication of the North Carolina State Bar.

(15) "Revised Rules of Professional Conduct" shall mean the code of ethics of the Bar effective July 24, 1997.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended March 5, 1998

Rule .0102 General Provisions

(a) An attorney may ask the Bar to rule on actual or contemplated professional conduct of an attorney as provided in this section .0100 of this subchapter. In special circumstances, a ruling on the contemplated professional conduct of an attorney may be provided in response to the request of a person who is not a member of the Bar. The grant or denial of a request rests within the discretion of the executive director, assistant executive director, designated staff counsel, the chairperson, the committee, or the council, as appropriate.

(b) An attorney may request an informal ethics advisory by letter, electronic mail, telephone, or personal meeting with an appropriate member of the Bar staff. The executive director, assistant executive director, or designated staff counsel may provide an informal ethics advisory to guide the inquiring attorney's own prospective conduct if the inquiry is routine, the responsive advice is readily ascertainable from the Revised Rules of Professional Conduct and formal ethics opinions, or the inquiry requires urgent action to protect some legal right, privilege, or interest.

(c) An attorney may request an ethics advisory or formal ethics opinion by sending a written inquiry to the Bar. The executive director, assistant executive director, or designated staff counsel may issue an ethics advisory to guide the inquiring attorney's own prospective conduct if the inquiry is routine, the responsive advice is readily ascertainable from the Revised Rules of Professional Conduct and formal ethics opinions, or the inquiry requires urgent action to protect some legal right, privilege, or interest. An inquiry requesting an opinion about the professional conduct of another attorney, past conduct, or that presents a matter of first impression or of general interest to the Bar shall be referred to the committee for response by ethics decision or formal ethics opinion.

(d) All ethics inquiries, whether written or verbal, shall present in detail all operative facts upon which the request is based. Inquiries should not disclose client confidences or other sensitive information not necessary to the resolution of the ethical question presented.

(e) Any attorney who requests an ethics opinion on the acts or contemplated professional conduct of another attorney, shall state, in the written inquiry, the name of the attorney and identify all persons whom the requesting attorney has reason to believe may be substantially affected by the response to the inquiry. The inquiry shall also provide evidence that the attorney whose conduct is at issue and all other identified interested persons have received copies of the inquiry from the requesting attorney.

(f) When a written ethics inquiry discloses conduct which may be actionable as a violation of the Revised Rules of Professional Conduct, the executive director, the assistant executive director, chairperson or the committee may refer the matter to the Grievance Committee for investigation.

(g) In general, no response shall be provided to an ethics inquiry that seeks an opinion on an issue of law.

(h) A decision not to issue a response to an ethics inquiry, whether by the executive director, assistant executive director, designated staff counsel, chairperson or the committee, shall not be appealable.

(i) Except as provided in Rule .0103(b) of this subchapter, the information contained in a request for an ethics opinion shall not be confidential.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended March 5, 1998

Rule .0103 Informal Ethics Advisories and Ethics Advisories

(a) The executive director, assistant executive director, or designated staff counsel may honor or deny a request for an informal ethics advisory. Except as provided in Rule .0102(b), an attorney requesting an opinion concerning another attorney's professional conduct, past conduct, or matters of first impression shall be asked to submit a written inquiry for referral to the committee. An attorney requesting an opinion involving matters of widespread interest to the Bar or particularly complex factual circumstances may also be asked to submit a written inquiry for referral to the committee.

(b) The Bar's program for providing informal ethics advisories to inquiring attorneys is a designated lawyers' assistance program approved by the Bar and information received by the executive director, assistant executive director, or designated staff counsel from an attorney seeking an informal ethics advisory shall be confidential information as defined in Rule 1.6(a) and (b) of the Revised Rules of Professional Conduct; provided, however, such confidential information may be disclosed as allowed by Rule 1.6(d) and as necessary to respond to a false or misleading statement made about an informal ethics advisory. Further, if an attorney's response to a grievance proceeding relies in whole or in part upon the receipt of an informal ethics advisory, confidential information may be disclosed to Bar counsel, the Grievance Committee or other appropriate disciplinary authority.

(c) An ethics advisory issued by the executive director, assistant executive director, or designated staff counsel shall be promulgated under the authority of the committee and in accordance with such guidelines as the committee may establish and prescribe from time to time.

(d) An ethics advisory shall sanction or disapprove only the matter in issue, shall not otherwise serve as precedent and shall not be published.

(e) Ethics advisories shall be reviewed periodically by the committee. If, upon review, a majority of the committee present and voting decides that an ethics advisory should be withdrawn or modified, the requesting attorney shall be notified in writing of the committee's decision by the executive director or assistant executive director. Until such notification, the attorney shall be deemed to have acted ethically and in good faith if he or she acts pursuant to the ethics advisory which is later withdrawn or modified.

(f) If an inquiring attorney disagrees with the ethics advisory issued to him or her, the attorney may request reconsideration of the ethics advisory by writing to the committee prior to the next regularly scheduled meeting of the committee.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended March 5, 1998

Rule .0104 Formal Ethics Opinions and Ethics Decisions

(a) Requests for formal ethics opinions or ethics decisions shall be made in writing and submitted to the executive director or assistant executive director who, after determining that the request is in compliance with Rule .0102 of this subchapter, shall transmit the requests to the chairperson of the committee.

(b) If a formal ethics opinion or ethics decision is requested concerning contemplated or actual conduct of another attorney, that attorney shall be given an opportunity to be heard by the committee, along with the person who requested the opinion, under such guidelines as may be established by the committee. At the discretion of the chairperson and the committee, additional persons or groups shall be notified by the method deemed most appropriate by the chairperson and provided an opportunity to be heard by the committee.

(c) The committee shall prepare a written proposed formal ethics opinion or ethics decision which shall state its conclusion in respect to the question asked and the reasons therefor.

(d) The committee shall determine whether to issue an ethics decision or a formal ethics opinion in response to an inquiry.

(e) A proposed formal ethics opinion or ethics decision shall be provided to interested persons by the method deemed most appropriate by the chairperson and shall also be transmitted to the president for consideration by the council. All proposed formal ethics opinions shall be published.

(f) Prior to the next regularly scheduled meeting of the committee, any interested person or group may submit a written request to reconsider a proposed or final formal ethics opinion or ethics decision and may ask to be heard by the committee. The committee, under such guidelines as it may adopt, may allow or deny such request. If a proposed or final ethics decision is withdrawn or revised, interested persons shall be notified by the method deemed most appropriate by the chairperson. If a proposed or final formal ethics opinion is withdrawn or revised, notice of the action and any proposed revised formal ethics opinion shall be published.

(g) If the committee declines to revise a proposed formal ethics opinion or ethics decision in response to a written request, any interested person or group may request to be heard by the council prior to a vote on the adoption of the proposed formal ethics opinion or ethics decision. Whether permitted to appear before the council or not, the person or group has the right to file a written brief with the council under such rules as may be established by the council.

(h) The council's action on the proposed formal ethics opinion or ethics decision shall be determined by vote of the majority of the council present and voting. Notice of such action shall be provided to interested persons by the method deemed most appropriate by the chairperson.

(i) A formal ethics opinion or ethics decision may be reconsidered or withdrawn by the council pursuant to rules which it may establish from time to time.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 5, 1994
Amended March 8, 1998

Section .0200 Procedures for the Authorized Practice Committee

.0201 General Provisions

The purpose of the committee on the authorized practice of law is to protect the public from being unlawfully advised and represented in legal matters by unqualified persons.

History Note: Statutory Authority G.S. 84-37
Readopted Effective December 8, 1994
Amended February 3, 2000

.0202 Procedure

(a) The procedure to prevent and restrain the unauthorized practice of law shall be in accordance with the provisions hereinafter set forth.

(b) District bars shall not conduct separate proceedings into unauthorized practice of law matters but shall assist and cooperate with the North Carolina State Bar in reporting and investigating matters of alleged unauthorized practice of law.

History Note: Statutory Authority G.S. 84-37
Readopted Effective December 8, 1994

.0203 Definitions

Subject to additional definitions contained in other provisions of this subchapter, the following words and phrases, when used in this subchapter, have the meanings set forth in this rule, unless the context clearly indicates otherwise.

(1) Appellate division - the appellate division of the General Court of Justice.

(2) Chairperson of the Authorized Practice Committee - the councilor appointed to serve as chairperson of the Authorized Practice Committee of the State Bar.

(3) Complainant or the complaining witness - any person who has complained of the conduct of any person, firm or corporation as relates to alleged unauthorized practice of law.

(4) Complaint - a formal pleading filed in the name of the North Carolina State Bar in the superior court against a person, firm or corporation after a finding of probable cause.

(5) Council - the Council of the North Carolina State Bar.

(6) Councilor - a member of the Council of the North Carolina State Bar.

(7) Counsel - the counsel of the North Carolina State Bar appointed by the council.

(8) Court or courts of this state - a court authorized and established by the Constitution or laws of the state of North Carolina.

(9) Defendant - any person, firm or corporation against whom a complaint is filed after a finding of probable cause.

(10) Investigation - the gathering of information with respect to alleged unauthorized practice of law.

(11) Investigator - any person designated to assist in investigation of alleged unauthorized practice of law.

(12) Letter of caution - a communication from the Authorized Practice Committee to any person stating that past conduct of the person, while not the basis for formal action, is questionable as relates to the practice of law or may be the basis for injunctive relief if continued or repeated.

(13) Letter of notice - a communication to an accused individual or corporation setting forth the substance of alleged conduct involving unauthorized practice of law.

(14) Office of the counsel - the office and staff maintained by the counsel of the North Carolina State Bar.

(15) Office of the secretary - the office and staff maintained by the secretary of the North Carolina State Bar.

(16) Party - after a complaint has been filed, the North Carolina State Bar as plaintiff and the accused individual or corporation as defendant.

(17) Plaintiff - after a complaint has been filed, the North Carolina State Bar.

(18) Preliminary Hearing - hearing by the Authorized Practice Committee to determine whether probable cause exists.

(19) Cause - a finding by the Authorized Practice Committee that there is reasonable cause to believe that a person or corporation is guilty of unauthorized practice of law justifying legal action against such person or corporation.

(20) Secretary - the secretary of the North Carolina State Bar.

(21) Supreme Court - the Supreme Court of North Carolina.

History Note: Statutory Authority G.S. 84-37
Readopted Effective December 8, 1994
Amended February 3, 2000

.0204 State Bar Council - Powers and Duties

The Council of the North Carolina State Bar shall have the power and duty

(1) to supervise the administration of the Authorized Practice Committee in accordance with the provisions of this subchapter;

(2) to appoint a counsel. The counsel shall serve at the pleasure of the council. The counsel shall be a member of the North Carolina State Bar but shall not be permitted to engage in the private practice of law.

History Note: Statutory Authority G.S. 84-37
Readopted Effective December 8, 1994
Amended February 3, 2000

.0205 Chairperson of the Authorized Practice Committee - Powers and Duties

(a) The chairperson of the Authorized Practice Committee shall have the power and duty

(1) to supervise the activities of the counsel;

(2) to recommend to the Authorized Practice Committee that an investigation be initiated;

(3) to recommend to the Authorized Practice Committee that a complaint be dismissed;

(4) to direct a letter of notice to an accused person or corporation or direct the counsel to issue letters of notice in such cases or under such circumstances as the chairperson deems appropriate;

(5) to notify the accused and any complainant that a complaint has been dismissed;

(6) to call meetings of the Authorized Practice Committee for the purpose of holding preliminary hearings;

(7) to issue subpoenas in the name of the North Carolina State Bar or direct the secretary to issue such subpoenas;

(8) to administer oaths or affirmations to witnesses;

(9) to file and verify complaints and petitions in the name of the North Carolina State Bar.

(b) The president, vice-chairperson or senior council member of Authorized Practice Committee shall perform the functions of the chairperson of the committee in any matter when the chairperson or vice-chairperson is absent or disqualified.

History Note: Statutory Authority G.S. 84-37
Readopted Effective December 8, 1994
Amended February 3, 2000

.0206 Authorized Practice Committee - Powers and Duties

The Authorized Practice Committee shall have the power and duty

(1) to direct the counsel to investigate any alleged unauthorized practice of law by any person, firm, or corporation in this State;

(2) to hold preliminary hearings, find probable cause, and recommend to the Executive Committee that complaints be filed;

(3) to dismiss complaints upon a finding of no probable cause;

(4) to issue a letter of caution to a respondent in cases wherein probable cause is not established but the activities of the respondent are deemed to be improper or may become the basis for injunctive relief if continued or repeated;

(5) to issue advisory opinions in accordance with procedures adopted by the council as to whether the actual or contemplated conduct of nonlawyers would constitute the unauthorized practice of law in North Carolina.

History Note: Statutory Authority G.S. 84-37
Readopted Effective December 8, 1994
Amended February 20, 1995
Amended February 3, 2000

.0207 Counsel - Powers and Duties

The counsel shall have the power and duty

(1) to initiate an investigation concerning the alleged unauthorized practice of law;

(2) to direct a letter of notice to a respondent when authorized by the chairperson of the Authorized Practice Committee;

(3) to investigate all matters involving alleged unauthorized practice of law whether initiated by the filing of a complaint or otherwise;

(4) to recommend to the chairperson of the Authorized Practice Committee that a matter be dismissed because the complaint is frivolous or falls outside the council's jurisdiction; that a letter of notice be issued; or that the matter be considered by the Authorized Practice Committee to determine whether probable cause exists;

(5) to prosecute all unauthorized practice of law proceedings before the Authorized Practice Committee and the courts;

(6) to represent the State Bar in any trial or other proceedings concerned with the alleged unauthorized practice of law;

(7) to employ assistant counsel, investigators, and other administrative personnel in such numbers as the council may from time to time authorize;

(8) to maintain permanent records of all matters processed and the disposition of such matters;

(9) to perform such other duties as the council may from time to time direct.

History Note: Statutory Authority G.S. 84-37
Readopted Effective December 8, 1994
Amended February 3, 2000

.0208 Suing for Injunctive Relief

(a) Upon receiving a recommendation from the Authorized Practice Committee that a complaint seeking injunctive relief be filed, the Executive Committee shall review the matter at the same quarterly meeting and determine whether the recommended action is necessary to protect the public interest and ought to be prosecuted.

(b) If the Executive Committee decides to follow the Authorized Practice Committee's recommendation, it shall direct the counsel to prepare the necessary pleadings as soon as practical for signature by the chairperson and filing with the appropriate tribunal.

(c) If the Executive Committee decides not to follow the Authorized Practice Committee's recommendation, the matter shall go before the council at the same quarterly meeting to determine whether the recommended action is necessary to protect the public interest and ought to be prosecuted.

(d) If the council decides not to follow the Authorized Practice Committee's recommendation, the matter shall be referred back to the Authorized Practice Committee for alternative disposition.

(e) If probable cause exists to believe that a respondent is engaged in the

unauthorized practice of law and action is needed to protect the public interest before the next quarterly meeting of the Authorized Practice Committee, the chairperson, with the approval of the president, may file and verify a complaint or petition in the name of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-37
Adopted February 3, 2000

Section .0600 Rules Governing the Lawyer Assistance Program

.0601 Purpose

The purpose of the lawyer assistance program is to: (1) protect the public by assisting lawyers and judges who are professionally impaired by reason of substance abuse, addiction, or debilitating mental condition; (2) assist impaired lawyers and judges in recovery; and (3) educate lawyers and judges concerning the causes of and remedies for such impairment.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Readopted Effective December 8, 1994
Amended February 3, 2000

.0602 Authority

The council of the North Carolina State Bar hereby establishes the Lawyer Assistance Program Board (the board) as a standing committee of the council. The board has the authority to establish policies governing the State Bar's lawyer assistance program as needed to implement the purposes of this program. The authority conveyed is not limited by, but is fully coextensive with, the authority previously vested in State Bar's predecessor program, the Positive Action for Lawyers (PALS) program.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Readopted Effective December 8, 1994
Amended February 3, 2000

.0603 Operational Responsibility

The board shall be responsible for operating the lawyer assistance program subject to the statutes governing the practice of law, the authority of the council, and the rules of the board.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Adopted February 3, 2000

.0604 Size of Board

The board shall have nine members. Three of the members shall be councilors of the North Carolina State Bar at the time of appointment; three of the members shall be non-lawyers or lawyers with experience and training in the fields of mental health, substance abuse or addiction; and three of the members shall be lawyers who are currently volunteers to the lawyer assistance program. No member of the Grievance Committee shall be a member of the board.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Adopted February 3, 2000

.0605 Appointment of Members; When; Removal

The initial members of the board shall be appointed at the next meeting of the council following the creation of the board. Thereafter, members shall be appointed or reappointed, as the case may be, at the first quarterly meeting of the council each calendar year, provided that a vacancy occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Adopted February 3, 2000

.0606 Term of Office and Succession

The members of the board shall be divided into three classes of equal size to serve in the first instance for terms expiring one, two and three years, respectively, after the first quarterly meeting of the council following creation of the board. Of the initial board, three members (one councilor, one mental health, substance abuse or addiction professional, and one lawyer-volunteer to the lawyer assistance program) shall be appointed to terms of one year; three members (one councilor, one mental health, substance abuse or addiction professional, and one lawyer-volunteer) shall be appointed to terms of two years; and three members (one councilor, one mental health, substance abuse or addiction professional, and one lawyer-volunteer) shall be appointed to terms of three years. Thereafter, the successors in each class of board members shall be appointed to serve for terms of three years. No member shall serve more than two consecutive three-year terms, in addition to service prior to the beginning of a full three-year term, without having been off the board for at least three years.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Adopted February 3, 2000

.0607 Appointment of Chairperson

The chairperson of the board shall be appointed by the council annually at the time of its appointment of board members. The chairperson may be re-appointed for an unlimited number of one-year terms. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and shall represent the board in its dealings with the public. A vacancy occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Adopted February 3, 2000

.0608 Appointment of Vice-Chairperson

The vice-chairperson of the board shall be appointed by the council annually at the time of its appointment of board members. The vice-chairperson may be re-appointed for an unlimited number of one-year terms. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board. A vacancy occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Adopted February 3, 2000

.0609 Source of Funds

Funding for the program shall be provided from the general and appropriate special funds of the North Carolina State Bar and such other funds as may become available by grant or otherwise.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Adopted February 3, 2000

.0610 Meetings

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the North Carolina State Bar. The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson, or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission, electronic mail or telephone. A quorum of the board for conducting its official business shall be a majority of the members serving at a particular time.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Adopted February 3, 2000

.0611 Annual Report

The board shall prepare at least annually a report of its activities and shall present the same at the annual meeting of the council.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Adopted February 3, 2000

.0612 Powers and Duties of the Board

In addition to the powers and duties set forth elsewhere in these rules, the board shall have the following powers and duties:

(1) to exercise general supervisory authority over the administration of the lawyer assistance program consistent with these rules;

(2) to implement programs to investigate and evaluate reports that a lawyer's ability to practice law is impaired because of substance abuse, depression, or other debilitating mental condition; to confer with any lawyer who is the subject of such a report; and, if the report is verified, to provide referrals and assistance to the impaired lawyer;

(3) to adopt and amend regulations consistent with these rules with the approval of the council;

(4) to delegate authority to the staff of the lawyer assistance program subject to the review of the council;

(5) to delegate authority to investigate, evaluate, and intervene with impaired lawyers to committees composed of qualified volunteer lawyers and non-lawyers;

(6) to submit an annual budget for the lawyer assistance program to the council for approval and to ensure that expenses of the board do not exceed the annual budget approved by the council;

(7) to report annually on the activities and operations of the board to the council and make any recommendations for changes in the rules or methods of operation of the lawyer assistance program;

(8) to implement programs to investigate, evaluate, and intervene in cases referred to it by a disciplinary body, and to report the results of the investigation and evaluation to the referring body;

(9) to promote programs of education and awareness for lawyers, law students, and judges about the causes and remedies of lawyer impairment;

(10) to train volunteer lawyers to provide peer support, assistance and monitoring for impaired lawyers; and

(11) to administer the PALS revolving loan fund or other similar fund that may be established for the board's program to assist lawyers who are impaired because of a debilitating mental condition.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23

Adopted February 3, 2000

.0613 Confidentiality

The lawyer assistance program is an approved lawyers' assistance program in accordance with the requirements of Rule 1.6(b) of the Revised Rules of Professional Conduct. Except as noted herein and otherwise required by law, information received during the course of investigating, evaluating, and assisting an impaired lawyer shall be privileged and held in the strictest confidence by the staff of the lawyer assistance program, the members of the board, and the members of any committee of the board. If a report of impaired condition is made by members of a lawyer's family, and there is good cause shown, the board may, in its discretion, release information to appropriate members of the lawyer's family if the board or its duly authorized committee determines that such disclosure is in the best interest of the impaired lawyer.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23

Readopted Effective December 8, 1994

Amended February 3, 2000

.0614 Referral to the Grievance Committee

If an investigation and evaluation clearly indicate that a lawyer's impairment due to substance abuse or mental condition is detrimental to the public, the courts, or the legal profession, the board shall take appropriate action, including, if warranted, the filing of a grievance. Notwithstanding the foregoing, no grievance shall be filed by the board or any member thereof against a lawyer using information received by the board or one of its committees if the lawyer, or a member of the lawyer's family, initially sought the assistance of a program administered by the board or the lawyer is cooperating in good faith with a program administered by the board.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23; G.S. 84-28

Readopted Effective December 8, 1994

Amended February 3, 2000

.0615 Regional Chapters

A committee may, under appropriate rules and regulations promulgated by the, board, establish regional chapters, composed of qualified volunteer lawyers and non-lawyers. A regional chapter may perform any or all of the duties and functions set forth in Section .0600 of this subchapter to the extent provided by the rules of the board.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23

Readopted Effective December 8, 1994

Amended February 3, 2000

.0616 Suspension for Impairment, Reinstatement

If it appears that a lawyer's ability to practice law is impaired by substance abuse and/or chemical addiction, the board, or its duly authorized committee, may petition any superior court judge to issue an order, pursuant to the court's inherent authority, suspending the lawyer's license to practice law in this state for up to 180 days.

(a) The petition shall be supported by affidavits of at least two persons setting out the evidence of the lawyer's impairment.

(b) The petition shall be signed by the executive director of the lawyer assistance program and the executive director of the State Bar.

(c) The petition shall contain a request for a protective order sealing the petition and all proceedings respecting it.

(d) Except as set out in Rule .0606(j) below, the petition shall request the court to issue an order requiring the attorney to appear in not less than 10 days and show cause why the attorney should not be suspended from the practice of law. No order suspending an attorney's license shall be entered without notice and a hearing, except as provided in Rule .0606(j) below.

(e) The order to show cause shall be served upon the attorney, along with the State Bar's petition and supporting affidavits, as provided in Rule 4 of the North Carolina Rules of Civil Procedure.

(f) At the show cause hearing, the State Bar shall have the burden of proving by clear, cogent, and convincing evidence that the lawyer's ability to practice law is impaired.

(g) If the court finds that the attorney is impaired, the court may enter an order suspending the attorney from the practice of law for up to 180 days. The order shall specifically set forth the reasons for its issuance.

(h) At any time following entry of an order suspending an attorney, the attorney may petition the court for an order reinstating the attorney to the practice of law.

(i) A hearing on the reinstatement petition will be held no later than 10 days from the filing of the petition, unless the suspended lawyer agrees to a continuance. At the hearing, the suspended lawyer will have the burden of establishing by clear, cogent, and convincing evidence the following: (1) the lawyer's ability to practice law is no longer impaired; (2) the lawyer's debilitating condition is being treated and/or managed; (3) it is unlikely that the inability to practice law due to the impairment will recur; and (4) it is unlikely that the interest of the public will be unduly threatened by the reinstatement of the lawyer.

(j) No suspension of an attorney's license shall be allowed without notice and a hearing unless

(1) the State Bar files a petition with supporting affidavits, as provided in Rule .0606(a)-(c) above.

(2) the State Bar's petition and supporting affidavits demonstrate by clear, cogent, and convincing evidence that immediate and irreparable harm, injury, loss, or damage will result to the public, to the lawyer who is the subject of the petition, or to the administration of justice before notice can be given and a hearing had on the petition.

(3) the State Bar's petition specifically seeks the temporary emergency relief of suspending ex parte the attorney's license for up to 10 days or until notice be given and a hearing held, whichever is shorter, and the State Bar's petition requests the court to endorse an emergency order entered hereunder with the hour and date of its entry.

(4) the State Bar's petition requests that the emergency suspension order expire by its own terms 10 days from the date of entry, unless, prior to the expiration of the initial 10-day period, the court agrees to extend the order for an additional 10-day period for good cause shown or the respondent attorney agrees to an extension of the suspension period.

(k) The respondent attorney may apply to the court at any time for an order dissolving the emergency suspension order. The court may dissolve the emergency suspension order without notice to the State Bar or hearing, or may order a hearing on such notice as the court deems proper.

(l) The North Carolina State Bar shall not be required to provide security for payment of costs or damages prior to entry of a suspension order with or without notice to the respondent attorney.

(m) No damages shall be awarded against the State Bar in the event that a restraining order entered with or without notice and a hearing is dissolved.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(i)

Readopted Effective December 8, 1994

Amended September 7, 1995

Amended February 3, 2000

.0617 Consensual Suspension

Notwithstanding the provisions of Rule .0616 of this subchapter, the court may enter an order suspending a lawyer's license if the lawyer consents to such

suspension. The order may contain such other terms and provisions as the parties agree to and which are necessary for the protection of the public.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(i)
Readopted Effective December 8, 1994
Amended February 3, 2000

.0618 Agents of the State Bar

All members of the board and its duly appointed committees shall be deemed to be acting as agents of the State Bar when performing the functions and duties set forth in this subchapter.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Readopted Effective December 8, 1994
Amended February 3, 2000

.0619 Judicial Committee

The Judicial Committee of the Lawyer Assistance Program Board shall implement a program of intervention for members of the judiciary with substance abuse problems affecting their professional conduct. The committee shall consist of at least two members of the state's judiciary. The committee will be governed by the rules of the Lawyer Assistance Program Board where applicable. Rules .0616 and .0617 of this subchapter are not applicable to the committee.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Readopted Effective December 8, 1994
Amended February 3, 2000

.0620 Rehabilitation Contracts for Lawyers Impaired by Substance Abuse

The board, or its duly authorized committee, has the authority to enter into rehabilitation contracts with lawyers suffering from substance abuse including contracts that provide for alcohol and/or drug testing. Such contracts may include the following conditions among others:

(a) that upon receipt of a report of a positive alcohol or drug test for a substance prohibited under the contract, the contract may be amended to include additional provisions considered to be in the best rehabilitative interest of the lawyer and the public; and

(b) that the lawyer stipulates to the admission of any alcohol and/or drug-testing results into evidence in any in camera proceeding brought under this section without the necessity of further authentication.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Adopted March 7, 1996
Amended February 3, 2000

.0621 Evaluations for Substance Abuse, Alcoholism, and/or other Chemical Addictions

(a) Notice of Need for Evaluation. The Lawyer Assistance Program Board, or its duly authorized committee, may demand that a lawyer obtain a comprehensive evaluation of his or her condition by an approved addiction specialist if the lawyer's ability to practice law is apparently being impaired by substance abuse, alcoholism and/or other chemical addictions. This authority may be exercised upon recommendation of the director of the lawyer assistance program and the approval of at least three members of the board or appropriate committee, which shall include at least one person with professional expertise in chemical addiction. Written notice shall be provided to the lawyer informing the lawyer that the board has determined that an evaluation is necessary and demanding that the lawyer obtain the evaluation by a date set forth in the written notice.

(b) Failure to Comply. If the lawyer does not obtain an evaluation, the director of the lawyer assistance program shall obtain the approval of the chairperson of the board, or the chairperson of the appropriate committee of the board, to file a motion to compel an evaluation pursuant to the authority set forth in G.S. § 84-28(i) and (j) and in accordance with the procedure set forth in Rule 35 of the North Carolina Rules of Civil Procedure. All pleadings in such a proceeding shall be filed under seal and all hearings shall be held in camera. Written notice of the motion to compel an examination shall be served upon the lawyer in accordance with the North Carolina Rules of Civil Procedure at least ten days before the hearing on the matter.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Adopted February 3, 2000

.0622 Grounds for Compelling an Evaluation

An order compelling the lawyer to obtain a comprehensive evaluation by an addiction specialist may be issued if the board establishes that the evaluation will assist the lawyer and the lawyer assistance program to assess the lawyer's condition and any risk that the condition may present to the public, and to determine an appropriate treatment for the lawyer.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Adopted February 3, 2000

.0623 Failure to Comply with an Order Compelling an Evaluation

If a lawyer fails to comply with an order compelling a comprehensive evaluation by an addiction specialist, the board, or its duly authorized committee, may file a contempt proceeding to be held in camera. If the lawyer fails to comply with a contempt order, the lawyer shall be deemed to have waived confidentiality respecting communications made by the lawyer to the board or its committee. The board, or its duly authorized committee, may seek further relief and may file motions or proceedings in open court.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Adopted February 3, 2000

Section .0700 Procedures for Fee Dispute Resolution

.0701 Purpose and Implementation

The purpose of the Fee Dispute Resolution Program shall be to determine the appropriate fee for legal services rendered. The State Bar shall implement a fee dispute resolution program under the auspices of the Client Assistance Committee (the committee), which shall be offered to clients and their lawyers at no cost.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended February 3, 2000
Amended May 4, 2000

.0702 Jurisdiction

The committee shall have jurisdiction over all disagreements concerning the fees and expenses charged or incurred for legal services provided by an attorney licensed to practice law in North Carolina arising out of a client-lawyer relationship. Jurisdiction shall also extend to any person, other than the client, who pays the fee of such an attorney.

The committee shall not have jurisdiction over the following:

1. disputes concerning fees or expenses established by a court, federal or state administrative agency, or federal or state official;
2. disputes involving services that are the subject of a pending grievance complaint alleging the violation of the Revised Rules of Professional Conduct;
3. fee disputes that are or were the subject of litigation;
4. fee disputes between lawyers and service providers, such as court reporters and expert witnesses;
5. fee disputes between lawyers and individuals with whom the lawyer had no client-lawyer relationship, except in those case where the fee has been paid by a person other than the client; and
6. disputes concerning fees charged for ancillary services provided by the lawyer not involving the practice of law.

The committee shall encourage mediated settlement of fee disputes falling within its jurisdiction pursuant to Rule .0706 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended May 4, 2000

.0703 Coordinator of Fee Dispute Resolution

The secretary-treasurer of the North Carolina State Bar shall designate a member of the staff to serve as coordinator of the fee dispute program. The coordinator shall develop forms, maintain records, and provide statistics on the fee dispute resolution program. The coordinator shall also assist the chairperson of the committee in developing an annual report to the council.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended May 4, 2000

.0704 Reserved

.0705 Selection of Mediators

The State Bar will select a pool of qualified mediators. Selected mediators shall be certified by the North Carolina Dispute Resolution Commission or have a minimum of three (3) years experience as a mediator.

History Note: Statutory Authority G.S. 84-23
Adopted May 4, 2000

.0706 Processing Requests for Fee Dispute Resolution

(a) Requests for fee dispute resolution shall be timely submitted in writing to the coordinator of fee dispute resolution addressed to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. The attorney must allow at least 30 days after the client shall have received written notice of the fee dispute resolution program before filing a lawsuit. An attorney may file a lawsuit prior to expiration of the required 30-day notice period or after the petition is filed by the client if such is necessary to preserve a claim. However, the attorney must not take any further steps to pursue the litigation until he/she complies with the provision of the fee dispute resolution rules. Clients may request fee dispute resolution at any time prior to the filing of a lawsuit. No filing fee shall be required. The request should state with clarity and brevity the facts of the fee dispute and the names and addresses of the parties. It should also state that, prior to requesting fee dispute resolution, a reasonable attempt was made to resolve the dispute by agreement, the matter has not been adjudicated, and the matter is not presently the subject of litigation. All requests for resolution of a disputed fee must be filed before the statute of limitation has run or within three years of the ending of the client/attorney relationship, whichever comes first.

(b) The coordinator of fee dispute resolution or his/her designee shall investigate the request to determine its suitability for fee dispute resolution. If it is determined that the matter is not suitable for fee dispute resolution, the coordinator shall prepare a brief written report setting forth the facts and a recommendation for dismissal. Grounds for dismissal include, but are not limited to, the following:

(1) the request is frivolous or moot;
(2) the absence of jurisdiction; or
(3) the facts as stated support the conclusion that the fee was earned and is not excessive.

The report shall be forwarded to the chairperson of the committee. If the chairperson of the Client Assistance Committee of the State Bar concurs with the recommendation, the matter shall be dismissed and the parties notified.

(c) If the chairperson disagrees with the recommendation for dismissal, or the fee dispute coordinator concludes that a matter is suitable for fee dispute resolution, an attempt will be made through informal means to resolve the issue. If informal methods are not successful, the parties will be notified and the case scheduled for mediation.

History Note: Statutory Authority G.S. 84-23
Adopted May 4, 2000
Amended February 5, 2002

.0707 Mediation Proceedings

(a) The coordinator shall assign the case to a mediator who shall conduct a mediated settlement conference. The fee dispute coordinator or mediator shall be responsible for reserving a place and making arrangements for the conference at a time and place convenient to all parties.

(b) The attorney against whom a request for fee arbitration is filed must attend the mediated settlement conference in person and may not send another representative of his or her law firm. If a party fails to attend a mediated settlement conference without good cause, the mediator may either reschedule the conference or recommend dismissal.

(c) The mediator shall at all times be in control of the conference and the procedures to be followed. The mediator may communicate privately with any participant prior to and during the conference. Any private communication with a participant shall be disclosed to all other participants at the beginning of the conference. The mediator shall define and describe the following at the beginning of the conference:

(1) the process of mediation;
(2) the differences between mediation and other forms of conflict resolution;
(3) that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;
(4) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;
(5) Whether and under what conditions communications with the mediator will be held in confidence during the conference;
(6) The duties and responsibilities of the mediator and the participants; and
(7) That any agreement reached will be reached by mutual consent, reduced to writing and signed by all parties.

The mediator has a duty to be impartial and advise all participants of any circumstance bearing on possible bias, prejudice, or partiality. It is the duty of the mediator timely to determine and declare that an impasse exists and that the conference should end.

History Note: Statutory Authority G.S. 84-23
Adopted May 4, 2000

.0708 Finalizing the Agreement

If an agreement is reached in the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel, if any, prior to leaving the conference.

History Note: Statutory Authority G.S. 84-23
Adopted May 4, 2000

.0709 Record Keeping

The coordinator of fee dispute resolution shall keep a record of each request for fee dispute resolution. The record must contain the following information:

(1) the client's name;
(2) date of the request;
(3) the lawyer's name;
(4) the district in which the lawyer resides or maintains a place of business;
(5) how the dispute was resolved (dismissed for non-merit, mediated agreement, arbitration, etc.); and
(6) the time necessary to resolve the dispute.

History Note: Statutory Authority G.S. 84-23
Adopted May 4, 2000

.0710 District Bar Fee Dispute Resolution

For the purpose of resolving disputes involving attorneys residing or doing business in the district, any district bar may adopt a fee dispute resolution program, subject to the approval of the council, which shall operate in lieu of the program described herein. Although such programs may be tailored to accommodate local conditions, they must be offered without cost, comply with the jurisdictional restrictions set forth in Rule .0702 of this subchapter, and be consistent with the provisions of Rules .0706 and .0707.

History Note: Statutory Authority G.S. 84-23
Adopted May 4, 2000

Section .0900 Procedures for Administrative Committee

.0901 Transfer to Inactive Status

(a) Petition for Transfer to Inactive Status

Any member who desires to be transferred to inactive status shall file a petition with the secretary addressed to the council setting forth fully

(1) the member's name and current address;
(2) the date of the member's admission to the North Carolina State Bar;
(3) the reasons why the member desires transfer to inactive status;
(4) that at the time of filing the petition the member is in good standing having paid all membership fees, Client Security Fund assessments, late fees and costs assessed by the North Carolina State Bar, as well as all past due fees, fines and penalties owed to the Board of Continuing Legal Education and without any grievances or disciplinary complaints pending against him or her;

(5) any other matters pertinent to the petition.

(b) Conditions Upon Transfer

No member may be voluntarily transferred to disability-inactive status or retired/nonpracticing status until:

(1) the member has paid all membership fees, Client Security Fund assessments, late fees, and costs assessed by the North Carolina State Bar, as well as all past due fees, fines and penalties owed to the Board of Continuing Legal Education, and

(2) all grievances and disciplinary matters pending against the member have been finally resolved.

(c) Order Transferring Member to Inactive Status

Upon receipt of a petition which satisfies the provisions of Rule .0901(a) above, the council may, in its discretion, enter an order transferring the member to inactive status. The order shall become effective immediately upon entry by the council. A copy of the order shall be mailed to the member.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended March 7, 1996
Amended February 3, 2000

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement

Any member who has been transferred to inactive status may petition the council for an order reinstating the member as an active member of the North Carolina State Bar.

(b) Contents of Reinstatement Petition

The petition shall set out facts showing the following:

(1) that the member has provided all information requested in an application form prescribed by the council and has signed the form under oath;

(2) that the member satisfied the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the member was transferred to inactive status, unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter;

(3) that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and that the member's resumption of the practice of law within this state will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest;

(4) [this provision shall be effective for all members who are transferred to inactive status on or after January 1, 1996] if 2 or more years have elapsed between the date of the entry of the order transferring the member to inactive status and the date the petition is filed with the secretary of the State Bar, that during the period of inactive status, the member has completed 15 hours of continuing legal education (CLE) approved by the Board of Continuing Legal Education pursuant to Rule .1519. of this subchapter. Of the required 15 CLE hours, 3 hours must be earned by attending a 3-hour block course of instruction devoted exclusively to the area of professional responsibility; and

(5) that the member has paid all of the following:

(A) a $125.00 reinstatement fee;

(B) the membership fee and Client Security Fund assessment for the year in which the application is filed;

(C) the annual membership fee, if any, of the member's district bar for the year in which the application is filed and any past due annual membership fees for any district bar with which the member was affiliated prior to transferring to inactive status;

(D) all attendee fees owed the Board of Continuing Legal Education for CLE courses taken to satisfy the requirements of Rule .0902(b)(2) and (4) above;

(E) any costs previously assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission; and/or the secretary or council of the North Carolina State Bar; and

(F) all costs incurred by the North Carolina State Bar in investigating and processing the application for reinstatement.

The reinstatement fee, costs, and any past due district bar annual membership fees shall be retained; however, the State Bar and district bar membership fees assessed for the year in which the application is filed shall be refunded if the petition is denied.

(c) Service of Reinstatement Petition

The petitioner shall serve the petition on the secretary. The secretary shall transmit a copy of the petition to the members of the Administrative Committee and to the counsel.

(d) Investigation by Counsel

The counsel may conduct any necessary investigation regarding the petition and shall advise the members of the Administrative Committee of any findings from such investigation.

(e) Response by Administrative Committee

After any investigation of the petition by the counsel is complete, the Administrative Committee will consider the petition at its next meeting and shall make a recommendation to the council regarding whether the petition should be granted.

(f) Hearing Upon Denial of Petition for Reinstatement

(1) Notice of Council Action and Request for Hearing

If the council denies a petition for reinstatement from inactive status, the member shall be notified in writing within 14 days after such action by the council. The notice shall be served upon the member pursuant to Rule 4 of the N.C. Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the N.C. Rules of Civil Procedure to serve process.

(2) The member shall have 30 days from the date of service of the notice to file a written request for hearing upon the secretary. The request shall be served upon the secretary pursuant to Rule 4 of the N.C. Rules of Civil Procedure.

(3) Hearing Procedure

The procedure for the hearing shall be as provided in Section .1000 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended September 7, 1995
Amended March 7, 1996
Amended March 5, 1998
Amended March 3, 1999
Amended February 3, 2000

.0903 Suspension for Nonpayment of Membership Fees, Late Fee, Client Security Fund Assessment, or Assessed Costs

(a) Notice of Overdue Fees or Costs

Whenever it appears that a member has failed to comply, in a timely fashion, with the rules regarding payment of the annual membership fee, late fee, the Client Security Fund assessment, and/or any district bar annual membership fee, or that the member has failed to pay, in a timely fashion, the costs of a disciplinary, disability, reinstatement, show cause, or other proceeding of the North Carolina State Bar as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, or a notice of the secretary or the council of the North Carolina State Bar, the secretary shall prepare a written notice

(1) directing the member to show cause, in writing, within 30 days of the date of service of the notice why he or she should not be suspended from the practice of law, and

(2) demanding payment of a $30 late fee for the failure to pay the annual membership fee to the North Carolina State Bar and/or Client Security Fund assessment in a timely fashion.

(b) Service of the Notice

The notice shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(c) Entry of Order of Suspension Upon Failure to Respond to Notice to Show Cause

Whenever a member fails to respond in writing within 30 days of the service of the notice to show cause upon the member, and it appears that the mem-

ber has failed to comply with the rules regarding payment of the annual membership fee, any late fees imposed pursuant to Rule .0203(b) of subchapter A, the Client Security Fund assessment, and/or any district bar annual membership fee, and/or it appears that the member has failed to pay any costs assessed against the member as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, and/or a notice of the secretary or council of the North Carolina State Bar, the council may enter an order suspending the member from the practice of law. The order shall be effective when entered by the council. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(d) Procedure Upon Submission of a Timely Response to a Notice to Show Cause

(1) Consideration by Administrative Committee

If a member submits a written response to a notice to show cause within 30 days of the service of the notice upon the member, the Administrative Committee shall consider the matter at its next regularly scheduled meeting. The member may personally appear at the meeting and be heard, may be represented by counsel, and may offer witnesses and documents. The counsel may appear at the meeting on behalf of the State Bar and be heard, and may offer witnesses and documents. The burden of proof shall be upon the member to show cause by clear, cogent and convincing evidence why the member should not be suspended from the practice of law for the apparent failure to comply with the rules regarding payment of the annual membership fee, late fee, Client Security Fund assessment, and/or any district bar annual membership fee, and/or the apparent failure to pay costs assessed against the member as required by a notice of the chairperson of the Grievance Committee, an order of the Disciplinary Hearing Commission, and/or a notice of the secretary or council of the North Carolina State Bar.

(2) Recommendation of Administrative Committee

The Administrative Committee shall determine whether the member has shown cause why the member should not be suspended. If the committee determines that the member has failed to show cause, the committee shall recommend to the council that the member be suspended.

(3) Order of Suspension

Upon the recommendation of the Administrative Committee, the council may enter an order suspending the member from the practice of law. The order shall be effective when entered by the council. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(e) Late Tender of Membership Fees or Assessed Costs

If a member tenders to the North Carolina State Bar the annual membership fee, the $30 late fee, Client Security Fund assessment, any district bar annual membership fee, and/or any costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar before a suspension order is entered by the council, no order of suspension will be entered.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended September 7, 1995
Amended December 7, 1995
Amended March 7, 1996
Amended March 5, 1998
Amended February 3, 2000

.0904 Reinstatement After Suspension for Failure to Pay Fees or Assessed Costs

(a) Reinstatement Within 30 Days of Service of Suspension Order

A member who has been suspended for nonpayment of the annual membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar, may petition the secretary for an order of reinstatement of the member's license at any time up to 30 days after service of the suspension order upon the member. The secretary shall enter an order reinstating the member to active status upon receipt of a timely written request and satisfactory showing by the member of payment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, assessed costs, and the costs of the suspension and reinstatement procedure, including the costs of service. Such member shall not be required to file a formal reinstatement petition or pay a $125 reinstatement fee.

(b) Reinstatement More than 30 Days After Service of Suspension Order

At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for nonpayment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar, may petition the council for an order of reinstatement.

(c) Contents of Reinstatement Petition

The petition shall set out facts showing the following:

(1) that the member has provided all information requested in a form to be prescribed by the council and has signed the form under oath;

(2) that the member satisfied the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year immediately preceding the year in which the member was suspended, and for any calendar year which has elapsed since the date of entry of the order of suspension unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter;

(3) that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and that the member's resumption of the practice of law will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest; and

(4) that the member has paid all of the following:

(A) a $125.00 reinstatement fee;

(B) all past and current membership fees and late fees;

(C) all annual Client Security Fund assessments;

(D) all past and current district bar annual membership fees;

(E) all attendee fees, fines and penalties owed the Board of Continuing Legal Education, including attendee fees for CLE courses taken to satisfy the requirements of Rule .0904(c)(2) above;

(F) any costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar; and

(G) all costs incurred by the North Carolina State Bar in suspending the member, including the costs of service, and in investigating and processing the application for reinstatement.

(d) Procedure for Review of Reinstatement Petition

The procedure for review of the reinstatement petition shall be as set forth in Rule .0902(c)-(f) above.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended September 7, 1995
Amended March 7, 1996
Amended March 5, 1998

Section .1400 Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar

.1401 Purpose; Definitions

(a) The Client Security Fund of the North Carolina State Bar was established by the Supreme Court of North Carolina pursuant to an order dated August 29, 1984. The fund is a standing committee of the North Carolina State Bar Council pursuant to an order of the Supreme Court dated October 10, 1984, as amended. Its purpose is to reimburse, in whole or in part in appropriate cases

and subject to the provisions and limitations of the Supreme Court's orders and these rules, clients who have suffered financial loss as the result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina, which conduct occurred on or after January 1, 1985.

(b) As used herein the following terms have the meaning indicated.

(1) "Applicant" shall mean a person who has suffered a reimbursable loss because of the dishonest conduct of an attorney and has filed an application for reimbursement.

(2) "Attorney" shall mean an attorney who, at the time of alleged dishonest conduct, was licensed to practice law by the North Carolina State Bar. The fact that the alleged dishonest conduct took place outside the state of North Carolina does not necessarily mean that the attorney was not engaged in the practice of law in North Carolina.

(3) "Board" shall mean the Board of Trustees of the Client Security Fund.

(4) "Council" shall mean the North Carolina State Bar Council.

(5) "Dishonest conduct" shall mean wrongful acts committed by an attorney against an applicant in the nature of embezzlement from the applicant or the wrongful taking or conversion of monies or other property of the applicant, which monies or other property were entrusted to the attorney by the applicant by reason of an attorney-client relationship between the attorney and the applicant or by reason of a fiduciary relationship between the attorney and the applicant customary to the practice of law.

(6) "Fund" shall mean the Client Security Fund of the North Carolina State Bar.

(7) "Reimbursable losses" shall mean only those losses of money or other property which meet all of the following tests:

(A) the dishonest conduct which occasioned the loss occurred on or after January 1, 1985;

(B) the loss was caused by the dishonest conduct of an attorney acting either as an attorney for the applicant or in a fiduciary capacity for the benefit of the applicant customary to the private practice of law in the matter in which the loss arose;

(C) the applicant has exhausted all viable means to collect applicant's losses and has complied with these rules.

(8) The following shall not be deemed "reimbursable losses":

(A) losses of spouses, parents, grandparents, children and siblings (including foster and half relationships), partners, associates or employees of the attorney(s) causing the losses;

(B) losses covered by any bond, security agreement or insurance contract, to the extent covered thereby;

(C) losses incurred by any business entity with which the attorney or any person described in Rule .1401(b)(8)(A) above is an officer, director, shareholder, partner, joint venturer, promoter or employee;

(D) losses, reimbursement for which has been otherwise received from or paid by or on behalf of the attorney who committed the dishonest conduct;

(E) losses arising in investment transactions in which there was neither a contemporaneous attorney-client relationship between the attorney and the applicant nor a contemporaneous fiduciary relationship between the attorney and the applicant customary to the practice of law. By way of illustration but not limitation, for purposes of this rule (Rule .1401(b)(8)(E)), an attorney authorized or permitted by a person or entity other than the applicant as escrow or similar agent to hold funds deposited by the applicant for investment purposes shall not be deemed to have a fiduciary relationship with the applicant customary to the practice of law.

(9) "State Bar" shall mean the North Carolina State Bar.

(10) "Supreme Court" shall mean the North Carolina Supreme Court.

(11) " Supreme Court orders" shall mean the orders of the Supreme Court dated August 29, 1984, and October 10, 1984, as amended, authorizing the establishment of the Client Security Fund of the North Carolina State Bar and approving the rules of procedure of the Fund.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

.1402 Jurisdiction: Authority

(a) Chapter 84 of the General Statutes vests in the State Bar authority to control the discipline, disbarment, and restoration of licenses of attorneys; to formulate and adopt rules of professional ethics and conduct; and to do all such things necessary in the furtherance of the purposes of the statutes governing the practice of the law as are not themselves prohibited by law. G.S. 84-22 authorizes the State Bar to establish such committees, standing or special, as from time to time the council deems appropriate for the proper discharge of its duties; and to determine the number of members, composition, method of appointment or election, functions, powers and duties, structure, authority to act, and other matters relating to such committees. The rules of the State Bar, as adopted and amended from time to time, are subject to approval by the Supreme Court under G.S. 84-21.

(b) The Supreme Court orders, entered in the exercise of the Supreme Court's inherent power to supervise and regulate attorney conduct, authorized the establishment of the Fund, as a standing committee of the council, to be administered by the State Bar under rules and regulations approved by the Supreme Court.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

.1403 Operational Responsibility

The responsibility for operating the Fund and the program of the board rests with the board, subject to the Supreme Court orders, the statutes governing the practice of law, the authority of the council, and the rules of the board.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

.1404 Size of Board

The board shall have five members, four of whom must be attorneys in good standing and authorized to practice law in the state of North Carolina.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

.1405 Lay Participation

The board shall have one member who is not a licensed attorney.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

.1406 Appointment of Members; When; Removal

The members of the board shall be appointed by the council. Any member of the board may be removed at any time by the affirmative vote of a majority of the members of the council at a regularly called meeting. Vacancies occurring by reason of death, disability, resignation, or removal of a member shall be filled by appointment of the president of the State Bar with the approval of the council at its next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

.1407 Term of Office

Each member who is appointed to the board, other than a member appointed to fill a vacancy created by the death, disability, removal or resignation of a member, shall serve for a term of five years beginning as of the first day of the month following the date upon which the appointment is made by the council. A member appointed to fill a vacancy shall serve the remainder of the vacated term.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

.1408 Staggered Terms

It is intended that members of the board shall be elected to staggered terms

such that one member is appointed in each year.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

.1409 Succession

Each member of the board shall be entitled to serve for one full five-year term. A member appointed to fill a vacated term may be appointed to serve one full five-year term immediately following the expiration of the vacated term but shall not be entitled as of right to such appointment. No person shall be reappointed to the board until the expiration of three years following the last day of the previous term of such person on the board.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

.1410 Appointment of Chairperson

The chairperson of the board shall be appointed from the members of the board annually by the council. The term of the chairperson shall be one year. The chairperson may be reappointed by the council thereafter during tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

.1411 Appointment of Vice-Chairperson

The vice-chairperson of the board shall be appointed from the members of the board annually by the council. The term of the vice-chairperson shall be one year. The vice-chairperson may be reappointed by the council thereafter during tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him by the chairperson or by the board.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

.1412 Source of Funds

Funds for the program carried out by the board shall come from assessments of members of the State Bar as ordered by the Supreme Court, from voluntary contributions, and as may otherwise be received by the Fund.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

.1413 Fiscal Responsibility

All funds of the board shall be considered funds of the State Bar and shall be maintained, invested, and disbursed as follows:

(a) Maintenance of Accounts; Audit - The State Bar shall maintain a separate account for funds of the board such that such funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited annually in connection with the audits of the State Bar.

(b) Investment Criteria - The funds of the board shall be kept, invested, and reinvested in accordance with investment policies adopted by the council for dues, rents, and other revenues received by the State Bar in carrying out its official duties. In no case shall the funds be invested or reinvested in investments other than such as are permitted to fiduciaries under the General Statutes of North Carolina.

(c) Disbursement - Disbursement of funds of the board shall be made by or under the direction of the secretary of the State Bar.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

.1414 Meetings

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the State Bar. The board by resolution may set other regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson, or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission or telephone. A quorum of the board for conducting its official business shall be a majority of the members serving at a particular time. Written minutes of all meetings shall be prepared and maintained.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

.1415 Annual Report

The board shall prepare at least annually a report of its activities and shall present the same to the council at the annual meeting of the State Bar.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

.1416 Appropriate Uses of the Client Security Fund

(a) The board may use or employ the Fund for any of the following purposes within the scope of the board's objectives as heretofore outlined:

(1) to make reimbursements on approved applications as herein provided;

(2) to purchase insurance to cover such losses in whole or in part as is deemed appropriate;

(3) to invest such portions of the Fund as may not be needed currently to reimburse losses, in such investments as are permitted to fiduciaries by the General Statutes of North Carolina;

(4) to pay the administrative expenses of the board, including employment of counsel to prosecute subrogation claims.

(b) The board with the authorization of the council shall, in the name of the North Carolina State Bar, enforce any claims which the board may have for restitution, subrogation, or otherwise, and may employ and compensate consultants, agents, legal counsel, and such other employees as it deems necessary and appropriate.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

.1417 Applications for Reimbursement

(a) The board shall prepare a form of application for reimbursement which shall require the following minimum information, and such other information as the board may from time to time specify:

(1) the name and address of the applicant;

(2) the name and address of the attorney who is alleged to have engaged in dishonest conduct;

(3) the amount of the alleged loss for which application is made;

(4) the date on or period of time during which the alleged loss occurred;

(5) a general statement of facts relative to the application;

(6) a description of any relationship between the applicant and the attorney of the kinds described in Rules .1401(b)(8)(A) and (C) of this subchapter;

(7) verification by the applicant;

(8) all supporting documents, including

(A) copies of any court proceedings against the attorney;

(B) copies of all documents showing any reimbursement or receipt of funds in payment of any portion of the loss.

(b) The application shall contain the following statement in boldface type:

IN ESTABLISHING THE CLIENT SECURITY FUND PURSUANT TO ORDER OF THE SUPREME COURT OF NORTH CAROLINA, THE NORTH CAROLINA STATE BAR DID NOT CREATE OR ACKNOWLEDGE ANY LEGAL RESPONSIBILITY FOR THE ACTS OF INDIVIDUAL ATTORNEYS IN THE PRACTICE OF LAW. ALL REIMBURSEMENTS OF LOSSES FROM THE CLIENT SECURITY FUND SHALL BE A MATTER OF GRACE IN THE SOLE DISCRETION OF THE BOARD ADMINISTERING THE FUND AND NOT A MATTER OF RIGHT. NO APPLICANT OR MEMBER OF THE PUBLIC SHALL HAVE ANY RIGHT IN THE

CLIENT SECURITY FUND AS A THIRD PARTY BENEFICIARY OR OTHERWISE.

(c) The application shall be filed in the office of the State Bar in Raleigh, North Carolina, attention Client Security Fund Board, and a copy shall be transmitted by such office to the chairperson of the board.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

.1418 Processing Applications

(a) The board shall cause an investigation of all applications filed with the State Bar to determine whether the application is for a reimbursable loss and the extent, if any, to which the applicant should be paid from the Fund.

(b) The chairperson of the board shall assign each application to a member of the board for review and report. Wherever possible, the member to whom such application is referred shall practice in the county wherein the attorney practices or practiced.

(c) A copy of the application shall be served upon or sent by registered mail to the last known address of the attorney who it is alleged committed an act of dishonest conduct.

(d) After considering a report of investigation as to an application, any board member may request that testimony be presented concerning the application. In all cases, the alleged defalcating attorney or his or her representative will be given an opportunity to be heard by the board if the attorney so requests.

(e) The board shall operate the Fund so that, taking into account assessments ordered by the Supreme Court but not yet received and anticipated investment earnings, a principal balance of approximately $1,000,000 is maintained. Subject to the foregoing, the board shall, in its discretion, determine the amount of loss, if any, for which each applicant should be reimbursed from the Fund. In making such determination, the board shall consider, *inter alia*, the following:

(1) the negligence, if any, of the applicant which contributed to the loss;

(2) the comparative hardship which the applicant suffered because of the loss;

(3) the total amount of reimbursable losses of applicants on account of any one attorney or firm or association of attorneys;

(4) the total amount of reimbursable losses in previous years for which total reimbursement has not been made and the total assets of the Fund;

(5) the total amount of insurance or other source of funds available to compensate the applicant for any reimbursable loss.

(f) The board may, in its discretion, allow further reimbursement in any year of a reimbursable loss reimbursed in part by it in prior years.

(g) Provided, however, and the foregoing notwithstanding, in no case shall the Fund reimburse the otherwise reimbursable losses sustained by any one applicant as a result of the dishonest conduct of one attorney in an amount in excess of $100,000.

(h) No reimbursement shall be made to any applicant unless reimbursement is approved by a majority vote of the entire board at a duly held meeting at which a quorum is present.

(i) No attorney shall be compensated by the board for prosecuting an application before it.

(j) An applicant may be advised of the status of the board's consideration of the application and shall be advised of the final determination of the board.

(k) All applications, proceedings, investigations, and reports involving applicants for reimbursement shall be kept confidential until and unless the board authorizes reimbursement to the applicant, or the attorney alleged to have engaged in dishonest conduct requests that the matter be made public. All participants involved in an application, investigation, or proceeding (including the applicant) shall conduct themselves so as to maintain the confidentiality of the application, investigation or proceeding. This provision shall not be construed to deny relevant information to be provided by the board to disciplinary committees or to anyone else to whom the council authorizes release of information.

(l) The board may, in its discretion, for newly discovered evidence or other compelling reason, grant a request to reconsider any application which the board has denied in whole or in part; otherwise, such denial is final and no further consideration shall be given by the board to such application or another application upon the same alleged facts.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

Amended March 6, 1997

.1419 Subrogation for Reimbursement

(a) In the event reimbursement is made to an applicant, the State Bar shall be subrogated to the amount reimbursed and may bring an action against the attorney or the attorney's estate either in the name of the applicant or in the name of the State Bar. As a condition of reimbursement, the applicant may be required to execute a "subrogation agreement" to such effect. Filing of an application constitutes an agreement by the applicant that the North Carolina State Bar shall be subrogated to the rights of the applicant to the extent of any reimbursement. Upon commencement of an action by the State Bar pursuant to its subrogation rights, it shall advise the reimbursed applicant at his or her last known address. A reimbursed applicant may then join in such action to recover any loss in excess of the amount reimbursed by the Fund. Any amounts recovered from the attorney by the board in excess of the amount to which the Fund is subrogated, less the board's actual costs of such recovery, shall be paid to or retained by the applicant as the case may be.

(b) Before receiving a payment from the Fund, the person who is to receive such payment or his or her legal representative shall execute and deliver to the board a written agreement stating that in the event the reimbursed applicant or his or her estate should ever receive any restitution from the attorney or his or her estate, the reimbursed applicant agrees that the Fund shall be repaid up to the amount of the reimbursement from the Fund plus expenses.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

.1420 Authority Reserved by the Supreme Court

The Fund may be modified or abolished by the Supreme Court. In the event of abolition, all assets of the Fund shall be disbursed by order of the Supreme Court.

History Note: Authority - Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984

Readopted Effective December 8, 1994

Section .1500 Rules Governing the Administration of the Continuing Legal Education Program

.1501 Purpose and Definitions

(a) Purpose

The purpose of these continuing legal education rules is to assist lawyers licensed to practice and practicing law in North Carolina in achieving and maintaining professional competence for the benefit of the public whom they serve. The North Carolina State Bar, under Chapter 84 of the General Statutes of North Carolina, is charged with the responsibility of providing rules of professional conduct and with disciplining attorneys who do not comply with such rules. The Revised Rules of Professional Conduct adopted by the North Carolina State Bar and approved by the Supreme Court of North Carolina require that lawyers adhere to important ethical standards, including that of rendering competent legal services in the representation of their clients.

At a time when all aspects of life and society are changing rapidly or becoming subject to pressures brought about by change, laws and legal principles are also in transition (through additions to the body of law, modifications and amendments) and are increasing in complexity. One cannot render competent legal services without continuous education and training.

The same changes and complexities, as well as the economic orientation of society, result in confusion about the ethical requirements concerning the practice of law and the relationships it creates. The data accumulated in the discipline program of the North Carolina State Bar argue persuasively for the establishment of a formal program for continuing and intensive training in professional responsibility and legal ethics.

It has also become clear that in order to render legal services in a professionally responsible manner, a lawyer must be able to manage his or her law practice

competently. Sound management practices enable lawyers to concentrate on their clients' affairs while avoiding the ethical problems which can be caused by disorganization. These rules therefore provide for the administration of a law practice assistance program which is expected to emphasize training in law office management.

It is in response to such considerations that the North Carolina State Bar has adopted these minimum continuing legal education requirements. The purpose of these minimum continuing legal education requirements is the same as the purpose of the Revised Rules of Professional Conduct themselves—to ensure that the public at large is served by lawyers who are competent and maintain high ethical standards.

(b) Definitions

(1) "Accredited sponsor" shall mean an organization whose entire continuing legal education program has been accredited by the Board of Continuing Legal Education.

(2) "Active member" shall include any person who is licensed to practice law in the state of North Carolina and who is an active member of the North Carolina State Bar.

(3) "Administrative Committee" shall mean the Administrative Committee of the North Carolina State Bar.

(4) "Approved activity" shall mean a specific, individual legal education activity presented by an accredited sponsor or presented by other than an accredited sponsor if such activity is approved as a legal education activity under these rules by the Board of Continuing Legal Education.

(5) "Board" means the Board of Continuing Legal Education created by these rules.

(6) "Continuing legal education" or "CLE" is any legal, judicial or other educational activity accredited by the board. Generally, CLE will include educational activities designed principally to maintain or advance the professional competence of lawyers and/or to expand an appreciation and understanding of the professional responsibilities of lawyers.

(7) "Council" shall mean the North Carolina State Bar Council.

(8) "Credit hour" means an increment of time of 60 minutes which may be divided into segments of 30 minutes or 15 minutes, but no smaller.

(9) "Inactive member" shall mean a member of the North Carolina State Bar who is on inactive status.

(10) "In-house continuing legal education" shall mean courses or programs offered or conducted by law firms, either individually or in connection with other law firms, corporate legal departments, or similar entities primarily for the education of their members. The board may exempt from this definition those programs which it finds

(A) to be conducted by public or quasi-public organizations or associations for the education of their employees or members;

(B) to be concerned with areas of legal education not generally offered by sponsors of programs attended by lawyers engaged in the private practice of law.

(11) "Law practice assistance program" shall mean a program administered by the board to provide training in the area of law office management.

(12) A "newly admitted active member" is one who becomes an active member of the North Carolina State Bar for the first time, has been reinstated, or has changed from inactive to active status.

(13) "Participatory CLE" shall mean courses or segments of courses that encourage the participation of attendees in the educational experience through, for example, the analysis of hypothetical situations, role playing, mock trials, roundtable discussions, or debates.

(14) "Professional responsibility" shall mean those courses or segments of courses devoted to a) the substance, the underlying rationale, and the practical application of the Revised Rules of Professional Conduct; b) the professional obligations of the attorney to the client, the court, the public, and other lawyers; and c) the effects of substance abuse and chemical dependency, or debilitating mental condition on a lawyer's professional responsibilities. This definition shall be interpreted consistent with the provisions of Rule .1501(b)(5) above.

(15) "Professionalism" courses are courses or segments of courses devoted to the identification and examination of, and the encouragement of adherence to, non-mandatory aspirational standards of professional conduct which transcend the requirements of the Revised Rules of Professional Conduct. Such courses address principles of competence and dedication to the service of clients, civility, improvement of the justice system, advancement of the rule of law, and service to the community.

(16) "Rules" shall mean the provisions of the continuing legal education rules established by the Supreme Court of North Carolina (Section .1500 of this subchapter).

(17) "Sponsor" is any person or entity presenting or offering to present one or more continuing legal education programs, whether or not an accredited sponsor.

(18) "Year" shall mean calendar year.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Amended March 6, 1997

Amended March 3, 1999

Amended June 7, 2001

.1502 Jurisdiction: Authority

The Council of the North Carolina State Bar hereby establishes the Board of Continuing Legal Education (board) as a standing committee of the council, which board shall have authority to establish regulations governing a continuing legal education program and a law practice assistance program for attorneys licensed to practice law in this state.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1503 Operational Responsibility

The responsibility for operating the continuing legal education program and the law practice assistance program shall rest with the board, subject to the statutes governing the practice of law, the authority of the council, and the rules of governance of the board.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1504 Size of Board

The board shall have nine members, all of whom must be attorneys in good standing and authorized to practice in the state of North Carolina.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1505 Lay Participation

The board shall have no members who are not licensed attorneys.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1506 Appointment of Members; When; Removal

The members of the board shall be appointed as of the quarterly meeting of the council. The first members of the board shall be appointed as of the quarterly meeting of the council following the creation of the board. Thereafter, members shall be appointed annually as of the same quarterly meeting. Vacancies occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1507 Term of Office

Each member who is appointed to the board shall serve for a term of three years beginning as of the first day of the month following the date on which the

appointment is made by the council. See, however, Rule .1508 of this subchapter.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1508 Staggered Terms

It is intended that members of the board shall be elected to staggered terms such that three members are appointed in each year. Of the initial board, three members shall be elected to terms of one year, three members shall be elected to terms of two years, and three members shall be elected to terms of three years. Thereafter, three members shall be elected each year.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1509 Succession

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Thereafter, no person may be reappointed without having been off the board for at least three years.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1510 Appointment of Chairperson

The chairperson of the board shall be appointed from time to time as necessary by the council. The term of such individual as chairperson shall be one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1511 Appointment of Vice-Chairperson

The vice-chairperson of the board shall be appointed from time to time as necessary by the council. The term of such individual as vice-chairperson shall be one year. The vice-chairperson may be reappointed thereafter during tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1512 Source of Funds

(a) Funding for the program carried out by the board shall come from sponsor's fees and attendee's fees as provided below, as well as from duly assessed penalties for noncompliance and from reinstatement fees.

(1) Accredited sponsors located in North Carolina (for courses offered within or outside North Carolina), or accredited sponsors not located in North Carolina (for courses given in North Carolina), or unaccredited sponsors located within or outside of North Carolina (for accredited courses within North Carolina) shall, as a condition of conducting an approved activity, agree to remit a list of North Carolina attendees and to pay a fee for each active member of the North Carolina State Bar who attends the program for CLE credit. The sponsor's fee shall be based on each credit hour of attendance, with a proportional fee for portions of a program lasting less than an hour. The fee shall be set by the board upon approval of the council. Any sponsor, including an accredited sponsor, which conducts an approved activity which is offered without charge to attendees shall not be required to remit the fee under this section. Attendees who wish to receive credit for attending such an approved activity shall comply with Rule .1512(a)(2) below.

(2) The board shall fix a reasonably comparable fee to be paid by individual attorneys who attend for CLE credit approved continuing legal education activities for which the sponsor does not submit a fee under Rule .1512(a)(1) above. Such fee shall accompany the member's annual affidavit. The fee shall be set by the board upon approval of the council.

(b) Funding for a law practice assistance program shall be from user fees set by the board upon approval of the council and from such other funds as the council may provide.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1513 Fiscal Responsibility

All funds of the board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

(a) Maintenance of Accounts: Audit - The North Carolina State Bar shall maintain a separate account for funds of the board such that such funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited on an annual basis in connection with the audits of the North Carolina State Bar.

(b) Investment Criteria - The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the council for the handling of dues, rents, and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) Disbursement - Disbursement of funds of the board shall be made by or under the direction of the secretary-treasurer of the North Carolina State Bar pursuant to authority of the council. The members of the board shall serve on a voluntary basis without compensation, but may be reimbursed for the reasonable expenses incurred in attending meetings of the board or its committees.

(d) All revenues resulting from the CLE program, including fees received from attendees and sponsors, late filing penalties, late compliance fees, reinstatement fees, and interest on a reserve fund shall be applied first to the expense of administration of the CLE program including an adequate reserve fund; provided, however, that a portion of each sponsor or attendee fee, in an amount to be determined by the council but not to exceed $1.00 for each credit hour, shall be paid to the Chief Justice's Commission on Professionalism for administration of the activities of the commission. Excess funds may be expended by the council on lawyer competency programs approved by the council.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1514 Meetings

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the North Carolina State Bar. The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson, or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission or telephone. A quorum of the board for conducting its official business shall be a majority of the members serving at a particular time.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1515 Annual Report

The board shall prepare at least annually a report of its activities and shall present the same to the council one month prior to its annual meeting.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1516 Powers and Duties of the Board

The board shall have the following powers and duties:

(1) to exercise general supervisory authority over the administration of these rules;

(2) to adopt and amend regulations consistent with these rules with the approval of the council;

(3) to establish an office or offices and to employ such persons as the board

deems necessary for the proper administration of these rules, and to delegate to them appropriate authority, subject to the review of the council;

(4) to report annually on the activities and operations of the board to the council and make any recommendations for changes in the rules or methods of operation of the continuing legal education program;

(5) to submit an annual budget to the council for approval and to ensure that expenses of the board do not exceed the annual budget approved by the council;

(6) to administer a law office assistance program for the benefit of lawyers who request or are required to obtain training in the area of law office management.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1517 Scope and Exemptions

(a) Except as provided herein, these rules shall apply to every active member licensed by the North Carolina State Bar.

(b) The governor, the lieutenant governor, and all members of the council of state, all members of the federal and state judiciary, members of the United States Senate, members of the United States House of Representatives, members of the North Carolina General Assembly and members of the United States Armed Forces on full-time active duty are exempt. All active members, including members of the judiciary, who are exempt are encouraged to attend and participate in legal education programs.

(c) Any active member residing outside of North Carolina or any active member residing inside North Carolina who is a full-time teacher at the Institute of Government of the University of North Carolina at Chapel Hill or at a law school in North Carolina accredited by the American Bar Association and who in each case neither practices in North Carolina nor represents North Carolina clients on matters governed by North Carolina law shall be exempt from the requirements of these rules upon written application to the board. Such application shall be filed on or before the due date for the payment of annual dues, or sooner as the circumstances may require, and shall be in effect for the year for which the application was made.

(d) The board may exempt an active member from the continuing legal education requirements for a period of not more than one year at a time upon a finding by the board of special circumstances unique to that member constituting undue hardship or other reasonable basis for exemption, or for a longer period upon a finding of a permanent disability.

(e) Nonresident attorneys from other jurisdictions who are temporarily admitted to practice in a particular case or proceeding pursuant to the provisions of G.S. 84-4.1 shall not be subject to the requirements of these rules.

(f) The board may exempt an active member from the continuing legal education requirements if

(1) the member is sixty-five years of age or older and

(2) the member does not render legal advice to or represent a client unless the member associates another active member who assumes responsibility for the advice or representation.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Amended February 12, 1997

.1518 Continuing Legal Education Program

(a) Each active member subject to these rules shall complete 12 hours of approved continuing legal education during each calendar year beginning January 1, 1988, as provided by these rules and the regulations adopted thereunder.

(b) Of the 12 hours

(1) at least 2 hours shall be devoted to the area of professional responsibility or professionalism or any combination thereof; and

(2) effective January 1, 2002, at least once every three calendar years, each member shall complete an additional hour of continuing legal education instruction on substance abuse and debilitating mental conditions, as defined in Rule .1602 (c), which shall be in addition to the requirement of Rule .1518(b)(1) above.

(c) Members may carry over up to 12 credit hours earned in one calendar year to the next calendar year, which may include those hours required by Rule .1518(b) above. Additionally, a newly admitted active member may include as credit hours which may be carried over to the next succeeding year, any approved CLE hours earned after that member's graduation from law school.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Amended February 12, 1997

Amended March 3, 1999

Amended November 6, 2001

.1519 Accreditation Standards

The board shall approve continuing legal education activities which meet the following standards and provisions.

(1) They shall have significant intellectual or practical content and the primary objective shall be to increase the participant's professional competence and proficiency as a lawyer.

(2) They shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility, professionalism, or ethical obligations of lawyers.

(3) Credit may be given for continuing legal education activities where live instruction is used or mechanically or electronically recorded or reproduced material is used, including videotape or satellite transmitted programs. Subject to the limitations set forth in Rule .1611 of this subchapter, credit may also be given for continuing legal education activities on CD-ROM and on a computer website accessed via the Internet.

(4) Continuing legal education materials are to be prepared, and activities conducted, by an individual or group qualified by practical or academic experience in a setting physically suitable to the educational activity of the program and equipped with suitable writing surfaces or sufficient space for taking notes.

(5) Thorough, high quality, and carefully prepared written materials should be distributed to all attendees at or before the time the course is presented. These may include written materials printed from a computer website or CD-ROM. It is recognized that written materials are not suitable or readily available for some types of subjects. The absence of written materials for distribution should, however, be the exception and not the rule.

(6) Any accredited sponsor must remit fees as required and keep and maintain attendance records of each continuing legal education program sponsored by it, which shall be furnished to the board in accordance with regulations.

(7) Except as provided in Rule .1611 of this subchapter, in-house continuing legal education and self-study shall not be approved or accredited for the purpose of complying with Rule .1518 of this subchapter.

(8) Programs that cross academic lines, such as accounting-tax seminars, may be considered for approval by the board. However, the board must be satisfied that the content of the activity would enhance legal skills or the ability to practice law.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Amended March 1, 2001

.1520 Accreditation of Sponsors and Programs

(a) An organization desiring accreditation as an accredited sponsor of courses, programs, or other continuing legal education activities may apply for accredited sponsor status to the board. The board shall approve a sponsor as an accredited sponsor if it is satisfied that the sponsor's programs have met the standards set forth in Rule .1519 of this subchapter and regulations established by the board.

(b) Once an organization has been accredited as an accredited sponsor, then the continuing legal education programs sponsored by that organization are presumptively approved for credit, provided that the standards set out in Rule .1519 of this subchapter and the provisions of Rule .1512 of this subchapter are met. The board may at any time reevaluate and grant or revoke the presumptive approval status of an accredited sponsor.

(c) Any organization not accredited as an accredited sponsor which desires approval of a course or program shall apply to the board which shall adopt reg-

ulations to administer the accreditation of such programs consistent with the provisions of Rule .1519 of this subchapter. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.

(d) An active member desiring approval of a course or program which has not otherwise been approved shall apply to the board which shall adopt regulations to administer approval requests consistent with the requirements Rule .1519 of this subchapter. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of the receipt of the notice of disapproval. The decision by the board on an appeal is final.

(e) The board may provide by regulation for an announcement of accreditation for an approved continuing legal education program.

(f) The board may provide by regulation for the accredited sponsor, sponsor, or active member for whom a continuing legal education program has been approved to maintain and provide such records as required by the board.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1521 Credit Hours

The board may designate by regulation the number of credit hours to be earned by participation, including, but not limited to, teaching, in continuing legal education activities approved by the board.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1522 Annual Report

Commencing in 1989, each active member of the North Carolina State Bar shall make an annual written report to the North Carolina State Bar in such form as the board shall prescribe by regulation concerning compliance with the continuing legal education program for the preceding year or declaring an exemption under Rule .1517 of this subchapter, unless the board's records indicate that such member has been previously exempted and the circumstances resulting in the exemption are unchanged. It shall be the responsibility of any previously exempted member whose circumstances have changed and who is therefore not presently qualified for an exemption to notify the board of such changed circumstances within 30 days after such become apparent and to satisfy fully the requirements of these rules for the year following such change in circumstances.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1523 Noncompliance

(a) Failure to Comply with Rules May Result in Suspension

A member who is required to file a report of CLE credits and does not do so or who fails to meet the minimum requirements of these rules, including the payment of duly assessed penalties and attendee fees, may be suspended from the practice of law in the state of North Carolina.

(b) Notice of Failure to Comply

The board shall notify a member who appears to have failed to meet the requirements of these rules that the member will be suspended from the practice of law in this state, unless the member shows good cause in writing why the suspension should not be made or the member shows in writing that he or she has complied with the requirements within a 90-day period after receiving the notice. Notice shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized thereunder to serve process.

(c) Entry of Order of Suspension Upon Failure to Respond to Notice to Show Cause

Ninety-three days after mailing such notice, if no written response is filed with the board by the member attempting to show good cause or attempting to show that the member has complied with the requirements of these rules, upon the recommendation of the board and the Administrative Committee, the council may enter an order suspending the member from the practice of law. The order shall be entered and served as set forth in Rule .0903(c) of this subchapter.

(d) Procedure Upon Submission of a Timely Response to a Notice to Show Cause

(1) Consideration by the Board

If the member files a timely written response to the notice, the board shall consider the matter at its next regularly scheduled meeting or may delegate consideration of the matter to a duly appointed committee of the board. The board shall review all evidence presented by the member to determine whether good cause has been shown or to determine whether the member has complied with the requirements of these rules within the 90-day period after receiving the notice to show cause.

(2) Recommendation of the Board

The board shall determine whether the member has shown good cause why the member should not be suspended. If the board determines that good cause has not been shown and that the member has not shown compliance with these rules within the 90-day period after receipt of the notice to show cause, then the board shall refer the matter to the Administrative Committee for hearing together with a written recommendation to the Administrative Committee that the member be suspended.

(3) Consideration by and Recommendation of the Administrative Committee

The Administrative Committee shall consider the matter at its next regularly scheduled meeting. The burden of proof shall be upon the member to show cause by clear, cogent, and convincing evidence why the member should not be suspended from the practice of law for the apparent failure to comply with the rules governing the continuing legal education program. Except as set forth above, the procedure for such hearing shall be as set forth in Rule .0903(d)(1) and (2) of this subchapter.

(4) Order of Suspension

Upon the recommendation of the Administrative Committee, the council may determine that the member has not complied with these rules and may enter an order suspending the member from the practice of law. The order shall be entered and served as set forth in Rule .0903(d)(3) of this subchapter.

(e) Late Compliance Fee

Any member who complies with the requirements of the rules during the 90-day period after receiving the notice to show cause shall pay a late compliance fee as set forth in Rule .1608(b) of this subchapter.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Amended March 7, 1996

Amended March 6, 1997

Amended February 3, 2000

.1524 Reinstatement

(a) Reinstatement Within 30 Days of Service of Suspension Order

A member who is suspended for noncompliance with the rules governing the continuing legal education program may petition the secretary for an order of reinstatement of the member's license at any time up to 30 days after the service of the suspension order upon the member. The secretary shall enter an order reinstating the member to active status upon receipt of a timely written request and satisfactory showing by the member that the member cured the continuing legal education deficiency for which the member was suspended. Such member shall not be required to file a formal reinstatement petition or pay a $250 reinstatement fee.

(b) Procedure for Reinstatement More that 30 Days After Service of the Order of Suspension

Except as noted below, the procedure for reinstatement more than 30 days after service of the order of suspension shall be as set forth in Rule .0904(c) and (d) of this subchapter, and shall be administered by Administrative Committee.

(c) Reinstatement Petition

At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for noncompliance with the rules

governing the continuing legal education program may seek reinstatement by filing a reinstatement petition with the secretary. The secretary shall transmit a copy of the petition to each member of the board. The reinstatement petition shall contain the information and be in the form required by Rule .0904(c) of this subchapter. If not otherwise set forth in the petition, the member shall attach a statement to the petition in which the member shall state with particularity the accredited legal education courses which the member has attended and the number of credit hours obtained in order to cure any continuing legal education deficiency for which the member was suspended.

(d) Reinstatement Fee

In lieu of the $125.00 reinstatement fee required by Rule .0904(c)(4)(A), the petition shall be accompanied by a reinstatement fee payable to the board, in the amount of $250.00 as required by Rule .1609(a) of this subchapter.

(e) Determination of Board; Transmission to Administrative Committee

Within 30 days of the filing of the petition for reinstatement with the secretary, the board shall determine whether the deficiency has been cured. The board's written determination and the reinstatement petition shall be transmitted to the secretary within five days of the determination by the board. The secretary shall transmit a copy of the petition and the board's recommendation to each member of the Administrative Committee.

(f) Consideration by Administrative Committee

The Administrative Committee shall consider the reinstatement petition, together with the board's determination, pursuant to the requirements of Rule .0902(c)-(f) of this subchapter.

(g) Hearing Upon Denial of Petition for Reinstatement

The procedure for hearing upon the denial by the Administrative Committee of a petition for reinstatement shall be as provided in Section .1000 of this subchapter.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Amended March 7, 1996

Amended March 6, 1997

Amended February 3, 2000

.1525 Reserved

.1526 Effective Date

(a) The effective date of these rules shall be January 1, 1988.

(b) Active members licensed prior to July 1 of any calendar year shall meet the continuing legal education requirements of these rules for such year.

(c) Active members licensed after June 30 of any calendar year must meet the continuing legal education requirements of these rules for the next calendar year.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1527 Regulations

The following regulations (Section .1600 of the Rules of the North Carolina State Bar) for the continuing legal education program are hereby adopted and shall remain in effect until revised or amended by the board with the approval of the council. The board may adopt other regulations to implement the continuing legal education program with the approval of the council.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Section .1600 Regulations Governing the Administration of the Continuing Legal Education Program

.1601 Organization

(a) Quorum - Five members shall constitute a quorum of the board.

(b) The Executive Committee - The executive committee of the board shall be comprised of the chairperson, a vice-chairperson elected by the members of the board, and a member to be appointed by the chairperson. Its purpose is to conduct all necessary business of the board that may arise between meetings of the full board. In such matters it shall have complete authority to act for the board.

(c) Other Committees - The chairperson may appoint from time to time any committees he or she deems advisable of not less than three members for the purpose of considering and deciding matters submitted to them.

(d) Definitions - As used herein, "board" means the Board of Continuing Legal Education, "CLE" means continuing legal education, and "rules" means the rules for the continuing legal education program adopted by the Supreme Court of North Carolina (Section .1500 of this subchapter). All other definitions shall be as set forth in the rules.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1602 General Course Approval

(a) Law School Courses - Courses offered by an ABA accredited law school with respect to which academic credit may be earned may be approved activities. Computation of CLE credit for such courses shall be as prescribed in Rule .1605(a) of this subchapter. No more than 12 CLE hours in any year may be earned by such courses. No credit is available for law school courses attended prior to becoming an active member of the North Carolina State Bar.

(b) Bar Review/Refresher Course - Courses designed to review or refresh recent law school graduates or attorneys in preparation for any bar exam shall not be approved for CLE credit.

(c) Professional Responsibility Courses on Substance Abuse, Chemical Dependency, and Debilitating Mental Conditions - Accredited professional responsibility courses on substance abuse, chemical dependency, and debilitating mental conditions shall concentrate on the relationship between substance abuse, chemical dependency, debilitating mental conditions, and a lawyer's professional responsibilities. Such courses may also include (1) education on the prevention, detection, treatment and etiology of substance abuse, chemical dependency, and debilitating mental conditions, and (2) information about assistance for chemically dependent or mentally impaired lawyers available through lawyers' professional organizations.

(d) Approval - CLE activities may be approved upon the written application of a sponsor, other than an accredited sponsor, or of an active member on an individual program basis. An application for such CLE course approval shall meet the following requirements:

(1) If advance approval is requested by a sponsor, the application and supporting documentation, including two substantially complete sets of the written materials to be distributed at the course or program, shall be submitted at least 45 days prior to the date on which the course or program is scheduled. If advance approval is requested by an active member, the application need not include a complete set of written materials.

(2) In all other cases, the application and supporting documentation shall be submitted not later than 45 days after the date the course or program was presented or prior to the end of the calendar year in which the course or program was presented, whichever is earlier.

(3) The application shall be submitted on a form furnished by the board.

(4) The application shall contain all information requested on the form.

(5) The application shall be accompanied by a course outline or brochure that describes the content, identifies the teachers, lists the time devoted to each topic and shows each date and location at which the program will be offered.

(6) The application shall include a detailed calculation of the total CLE hours and hours of professional responsibility.

(e) Course Quality - The application and materials provided shall reflect that the program to be offered meets the requirements of Rule .1519 of this subchapter. Written materials consisting merely of an outline without citation or explanatory notations generally will not be sufficient for approval. Any sponsor, including an accredited sponsor, who expects to conduct a CLE activity for which suitable written materials will not be made available to all attendees may obtain approval for that activity only by application to the board at least 45 days in advance of the presentation showing why written materials are not suitable or readily available for such a program.

(f) Records - Sponsors, including accredited sponsors, shall within 30 days after the course is concluded

(1) furnish to the board a list in alphabetical order, on magnetic tape if available, of the names of all North Carolina attendees and their North Carolina State Bar membership numbers;

(2) remit to the board the appropriate sponsor fee;

(3) furnish to the board a complete set of all written materials distributed to attendees at the course or program.

(g) Announcement - Accredited sponsors and sponsors who have advanced approval for courses may include in their brochures or other course descriptions the information contained in the following illustration:

This course [or seminar or program] has been approved by the Board of Continuing Legal Education of the North Carolina State Bar for continuing legal education credit in the amount of ____ hours, of which ____ hours will also apply in the area of professional responsibility. This course is not sponsored by the board.

(h) Notice - Sponsors not having advanced approval shall make no representation concerning the approval of the course for CLE credit by the board. The board will mail a notice of its decision on CLE activity approval requests within 15 days of their receipt when the request for approval is submitted before the program and within 30 days when the request is submitted after the program. Approval thereof will be deemed if the notice is not timely mailed. This automatic approval will not operate if the sponsor contributes to the delay by failing to provide the complete information requested by the board or if the board timely notifies the sponsor that the matter has been tabled and the reason therefor.

(i) In-House CLE and Self-Study - No approval will be provided for in-house CLE or self-study by attorneys, except those programs exempted by the board under Rule .1501(b)(9) of this subchapter or as provided in Rule .1611 of this subchapter.

(j) Facilities - Sponsors must provide a facility conductive to learning with sufficient space for taking notes.

(k) Course Materials - In addition to the requirements of Rule .1602(d) and (f) above, sponsors, including accredited sponsors, and active members seeking credit for an approved activity shall furnish upon request of the board a copy of all materials presented and distributed at a CLE course or program.

(l) Nonlegal Educational Activities - A course or segment of a course presented by a bar organization may be granted up to three hours of credit if the bar organization's course trains volunteer attorneys in service to the profession, and if such course or course segment meets the requirements of Rule .1519(2)-(7) and Rule .1602(e), (h)-(j) of this subchapter; if appropriate, up to three hours of professional responsibility credit may be granted for such course or course segment. Except as noted in the preceding sentence or in extraordinary circumstances, approval will not be given for general and personal educational activities. For example, the following types of courses will not receive approval:

(1) courses within the normal college curriculum such as English, history, social studies, and psychology;

(2) courses which deal with the individual lawyer's human development, such as stress reduction, quality of life, or substance abuse unless a course on substance abuse or mental health satisfies the requirements of Rule .1602(c);

(3) courses which deal with the development of personal skills generally, such as public speaking (other than oral argument and courtroom presentation), nonlegal writing, and financial management;

(4) courses designed primarily to sell services or products or to generate greater revenue, such as marketing or advertising (as distinguished from courses dealing with development of law office procedures and management designed to raise the level of service provided to clients).

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Amended March 6, 1997

Amended March 5, 1998

Amended March 3, 1999

Amended March 1, 2001

Amended June 7, 2001

.1603 Accredited Sponsors

In order to receive designation as an accredited sponsor of courses, programs or other continuing legal education activities under Rule .1520(a) of this subchapter, the application of the sponsor must meet the following requirements:

(1) The application for accredited sponsor status shall be submitted on a form furnished by the board.

(2) The application shall contain all information requested on the form.

(3) The application shall be accompanied by course outlines or brochures that describe the content, identify the instructors, list the time devoted to each topic, show each date and location at which three programs have been sponsored in each of the last three consecutive years, and enclose the actual course materials.

(4) The application shall include a detailed calculation of the total CLE hours specified in each of the programs sponsored by the organization.

(5) The application shall reflect that the previous programs offered by the organization in continuing legal education have been of consistently high quality and would otherwise meet the standards set forth in Rule .1519 of this subchapter.

(6) Notwithstanding the provisions of Rule .1603 (3),(4) and(5) above, any law school which has been approved by the North Carolina State Bar for purposes of qualifying its graduates for the North Carolina bar examination, may become an accredited sponsor upon application to the board.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711. Readopted Effective December 8, 1994

.1604 Accreditation of Prerecorded Programs and Live Programs Broadcast to Remote Locations by Telephone, Satellite, or Video Conferencing Equipment

(a) An active member may receive credit for attendance at, or participation in, a presentation where prerecorded material is used.

(b) An active member may receive credit for participation in a live presentation which is simultaneously broadcast by telephone, satellite, or video conferencing equipment. The member may participate in the presentation by listening to or viewing the broadcast from a location that is remote from the origin of the broadcast.

(c) A member attending a prerecorded presentation is entitled to credit hours if

(1) the presentation from which the program is recorded would, if attended by an active member, be an accredited course;

(2) all other conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, are met.

(d) A member attending a presentation broadcast by telephone, satellite, or video conferencing equipment is entitled to credit if

(1) the live presentation of the program would, if attended by an active member, be an accredited course;

(2) there is a question and answer session with the presenter or presenters subject to the limitations set forth in Rule .1605(b)(5) of the subchapter; and

(3) all other conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, are met.

(e) To receive approval for attendance at programs described in paragraphs (a) and (b) above, the following conditions must be met:

(1) Unless the entire program was produced by an accredited sponsor, the person or organization sponsoring the program must receive advance approval and accreditation from the board. Board Form 2 may be utilized for this purpose.

(2) The person or organization sponsoring the program must have a reliable method for recording and verifying attendance. Attendance at a telephone broadcast may be verified by assigning a personal identification number to a member. If attendance is recorded by a person, the person may not earn credit hours by virtue of attendance at that presentation. A copy of the record of attendance of active members must be forwarded to the board within 30 days after the presentation of the program is completed. Proof of attendance may be made by the verifying person on Board Form 5.

(3) Unless clearly inappropriate for the particular course, detailed papers, manuals, study materials, or written outlines are presented to the persons

attending the program which substantially pertain to the subject matter of the program. Any materials made available to persons attending the original or live program must be made available to those persons attending the prerecorded or broadcast program who desire to receive credit under these regulations.

(4) A suitable room must be available for viewing the program and taking of notes.

(f) A minimum of five active members must physically attend the presentation of a prerecorded program. This requirement does not apply to participation from a remote location in the presentation of a live broadcast by telephone, satellite, or video conferencing equipment.

(g) EXAMPLES:

EXAMPLE (1): Attorney X, an active member, attends a videotape seminar sponsored by an accredited sponsor. If a person attending the program from which the videotape is made would receive credit, Attorney X is also entitled to receive credit, if the additional conditions under this Rule .1604 are also met.

EXAMPLE (2): Attorney Y, an active member, desires to attend a videotape program. However, the proposed videotape program (a) is not presented by an accredited sponsor, and (b) has not received individual course approval from the board. Attorney Y may not receive any credit hours for attending that videotape presentation without advance approval from the board.

EXAMPLE (3): Attorney Z, an active member, attends a videotape program. The presentation of the program from which the videotape was made has already been held and approved by the board for credit. However, no person is present at the videotape program to record attendance. Attorney Z may not obtain credit for viewing the videotape program unless it is viewed in the presence of a person who is not attending the videotape program for credit and who verifies the attendance of Attorney Z and of other attorneys at the program. All other conditions of this Rule .1604 must also be met.

EXAMPLE (4): Attorney Q, an active member, listens to a live telephone seminar using the telephone in the conference room of her law firm. To record her attendance, Attorney Q was assigned a person identification number (PIN) by the seminar sponsor. Once connected, Attorney Q punched in the PIN number on her touch tone phone and her attendance was recorded. The seminar received individual course approval from the board. Attorney Q may receive credit if the additional conditions under this Rule .1604 are also met.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Amended March 6, 1997

.1605 Computation of Credit

(a) Computation Formula - CLE and professional responsibility hours shall be computed by the following formula:

$$\frac{\text{Sum of the total minutes of actual instruction}}{60} = \text{Total Hours}$$

For example, actual instruction totaling 195 minutes would equal 3.25 hours toward CLE.

(b) Actual Instruction - Only actual education shall be included in computing the total hours of actual instruction. The following shall not be included:

(1) introductory remarks;

(2) breaks;

(3) business meetings;

(4) speeches in connection with banquets or other events which are primarily social in nature;

(5) question and answer sessions at a ratio in excess of 15 minutes per CLE hour and programs less than 30 minutes in length provided, however, that the limitation on question and answer sessions shall not limit the length of time that may be devoted to participatory CLE.

(c) Teaching - As a contribution to professionalism, credit may be earned for teaching in an approved continuing legal education activity. Presentations accompanied by thorough, high quality, readable, and carefully prepared written materials will qualify for CLE credit on the basis of three hours of credit for each thirty minutes of presentation. Repeat presentations qualify for one-half of the credits available for the initial presentation. For example, an initial presentation of 45 minutes would qualify for 4.5 hours of credit.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711. Readopted Effective December 8, 1994

Amended March 3, 1999

.1606 Fees

(a) Sponsor Fee - The sponsor fee, a charge paid directly by the sponsor, shall be paid by all sponsors of approved activities presented in North Carolina and by accredited sponsors located in North Carolina for approved activities wherever presented, except that no sponsor fee is required where approved activities are offered without charge to attendees. In any other instance, payment of the fee by the sponsor is optional. The amount of the fee, per approved CLE hour per active member of the North Carolina State Bar in attendance, is $1.25 plus such additional amount as determined by the council as necessary to support the Chief Justice's Commission on Professionalism but not to exceed $1.00. The fee is computed as shown in the following formula and example which assumes a 6-hour course attended by l00 North Carolina lawyers seeking CLE credit and further assumes that the fee-per-hour is $2.25 which includes an assessment of $1.00 for the Chief Justice's Commission on Professionalism:

Fee: $ 2.25 x Total Approved CLE hours (6) x Number of NC Attendees (100) = Total Sponsor Fee ($1350)

(b) Attendee Fee - The attendee fee is paid by the North Carolina attorney who requests credit for a program for which no sponsor fee was paid. An attorney should remit the fees along with his or her affidavit before February 28 following the calendar year for which the report is being submitted. The amount of the fee, per approved CLE hour which the attorney claims credit, is set at $1.25 plus such additional amount as determined by the council as necessary to support the Chief Justice's Commission on Professionalism but not to exceed $1.00. It is computed as shown in the following formula and example which assumes that the attorney attended an activity approved for 3 hours of CLE credit and that the fee-per-hour is $2.25 which includes an assessment of $1.00 for the Chief Justice's Commission on Professionalism:

Fee: $2.25 x Total Approved CLE hours (3.0) = Total Attendee Fee ($6.75)

(c) Fee Review - The board will review the level of the fee at least annually and adjust it as necessary to maintain adequate finances for prudent operation of the board in a nonprofit manner. The fee of $1.25 charged to sponsors and attendees will be increased only to the extent necessary for those fees to pay the costs of administration of the CLE program. The council shall annually review the assessment for the Chief Justice's Commission on Professionalism and adjust it as necessary to maintain adequate finances for the operation of the commission.

(d) Uniform Application - The fee shall be applied uniformly without exceptions or other preferential treatment for a sponsor or attendee.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1607 Special Cases and Exemptions

(a) Attorneys who have a permanent disability which makes attendance at CLE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out continuing legal education plans tailored to their specific interests and physical ability. The board shall review and approve or disapprove such plans on an individual basis and without delay.

(b) Other requests for substitute compliance, partial waivers, other exemptions for hardship or extenuating circumstances may be granted by the board on a yearly basis upon written application of the attorney.

(c) Credit is earned through service as a bar examiner of the North Carolina Board of Law Examiners. The board will award 12 hours of CLE credit for the preparation and grading of a bar examination by a member of the North Carolina Board of Law Examiners.

(d) Newly admitted active members who have previously been licensed to practice law in this state or in some other state and who have actually practiced law for a period of at least five years may apply to the board for an exemption from the practical skills requirement of Rule .1518(c) of this subchapter. This application must be filed prior to July 31 of the year for which the exemption is initially sought.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1608 General Compliance Procedures

(a) Affidavit - Prior to January 31 of each year, commencing in 1990, the prescribed affidavit form shall be mailed to all active members of the North Carolina State Bar concerning compliance with the continuing legal education program for the preceding year.

(b) Late Filing Penalty - Any attorney who, for whatever reasons, files the affidavit showing compliance or declaring an exemption after the February 28 due date shall pay a $75.00 late filing penalty. This penalty shall be submitted with the affidavit. An affidavit that is either received by the board or postmarked on or before February 28 shall be considered to have been timely filed. An attorney who complies with the requirements of the rules during the probationary period under Rule .1523(c) of this subchapter shall pay a late compliance fee of $125.00 pursuant to Rule .1524 of this subchapter.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1609 Noncompliance Procedures

(a) Reinstatement Fee

The uniform reinstatement fee is $250 and must accompany the reinstatement petition.

(b) Petition

The attachment to the petition for reinstatement required by Rule .1524(b) of this subchapter shall list the CLE activities according to a form provided by the board.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Amended March 7, 1996

.1610 Authority For Appeals

(a) Appeals - Except as otherwise provided, the board is the final authority on all matters entrusted to it under Section .1500 and Section .1600 of this subchapter. Therefore, any decision by a committee of the board pursuant to a delegation of authority may be appealed to the full board.

(b) Procedure - A decision made by the staff of the board pursuant to a delegation of authority may also be reviewed by the full board but should first be appealed to any committee of the board having jurisdiction on the subject involved. All appeals shall be in writing. The board has the discretion to, but is not obligated to, grant a hearing in connection with any appeal regarding the accreditation of a program.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

.1611 Accreditation of Computer-Based CLE

(a) Effective for courses attended on or after July 1, 2001, a member may receive up to four (4) hours of credit annually for participation in a course on CD-ROM or on-line. A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer. An on-line course is an educational seminar available on a provider's website reached via the Internet.

(b) Any credit hours carried-over from one calendar year to another pursuant to Rule .1518(c) of this subchapter will not be included in calculating the four (4) hours of computer-based CLE allowed in any one calendar year.

(c) To be accredited, a computer-based CLE course must meet all of the conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, except where otherwise noted, and be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and/or other participants.

(d) The sponsor of an on-line course must have a reliable method for recording and verifying attendance. The sponsor of a CD-ROM course must demonstrate that there is a reliable method for the user or the sponsor to record and verify participation in the course. A participant may periodically log on and off of a computer-based CLE course provided the total time spent participating in the course is equal to or exceeds the credit hours assigned to the program. A copy of the record of attendance must be forwarded to the board within 30 days after a member completes his or her participation in the course.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Adopted March 1, 2001

Section .1700 The Plan of Legal Specialization

.1701 Purpose

The purpose of this plan of certified legal specialization is to assist in the delivery of legal services to the public by identifying to the public those lawyers who have demonstrated special knowledge, skill, and proficiency in a specific field, so that the public can more closely match its needs with available services; and to improve the competency of the bar by establishing an additional incentive for lawyers to participate in continuing legal education and meet the other requirements of specialization.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.1702 Jurisdiction: Authority

The Council of the North Carolina State Bar (the council) with the approval of the Supreme Court of North Carolina hereby establishes the Board of Legal Specialization (board) as a standing committee of the council, which board shall be the authority having jurisdiction under state law over the subject of specialization of lawyers.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.1703 Operational Responsibility

The responsibility for operating the specialization program rests with the board, subject to the statutes governing the practice of law, the authority of the council and the rules of governance of the board.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.1704 Size of Board

The board shall have nine members, six of whom must be attorneys in good standing and authorized to practice law in the state of North Carolina. The lawyer members of the board shall be representative of the legal profession and shall include lawyers who are in general practice as well as those who specialize.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.1705 Lay Participation

The board shall have three members who are not licensed attorneys.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.1706 Appointment of Members; When; Removal

The members of the board shall be appointed by the council. The first members of the board shall be appointed as of the quarterly meeting of the council following the creation of the board. Thereafter, members shall be appointed annually as of the same quarterly meeting. Vacancies occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.1707 Term of Office

Each member who is appointed to the board shall serve for a term of three years beginning as of the first day of the month following the date on which the appointment is made by the council. See, however, Rule .1708 of this subchapter.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.1708 Staggered Terms

It is intended that members of the board shall be elected to staggered terms such that three members are appointed in each year. Of the initial board, three members (two lawyers and one nonlawyer) shall be elected to terms of one year; three members (two lawyers and one nonlawyer) shall be elected to terms of two years; and three members (two lawyers and one nonlawyer) shall be elected to terms of three years. Thereafter, three members (two lawyers and one nonlawyer) shall be elected in each year.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.1709 Succession

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Thereafter, no person may be reappointed without having been off of the board for at least three years.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.1710 Appointment of Chairperson

The chairperson of the board shall be appointed from time to time as necessary by the council from among the lawyer members of the board. The term of such individual as chairperson shall be one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.1711 Appointment of Vice-Chairperson

The vice-chairperson of the board shall be appointed from time to time as necessary by the council from among the lawyer members of the board. The term of such individual as vice-chairperson shall be one year. The vice-chairperson may be reappointed thereafter during his or her tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.1712 Source of Funds

Funding for the program carried out by the board shall come from such application fees, examination fees, course accreditation fees, annual fees or recertification fees as the board, with the approval of the council, may establish.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.1713 Fiscal Responsibility

All funds of the board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

(a) Maintenance of Accounts: Audit - The North Carolina State Bar shall maintain a separate account for funds of the board such that such funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited on an annual basis in connection with the audits of the North Carolina State Bar.

(b) Investment Criteria - The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the council for the handling of dues, rents and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) Disbursement - Disbursement of funds of the board shall be made by or under the direction of the secretary-treasurer of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.1714 Meetings

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the North Carolina State Bar. The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission, or telephone. A quorum of the board for conducting its official business shall be four or more of the members serving at the time of the meeting.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.1715 Annual Report

The board shall prepare at least annually a report of its activities and shall present same to the council one month prior to its annual meeting.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.1716 Powers and Duties of the Board

Subject to the general jurisdiction of the council and the North Carolina Supreme Court, the board shall have jurisdiction of all matters pertaining to regulation of certification of specialists in the practice of law and shall have the power and duty

(1) to administer the plan;

(2) subject to the approval of the council and the Supreme Court, to designate areas in which certificates of specialty may be granted and define the scope and limits of such specialities and to provide procedures for the achievement of these purposes;

(3) to appoint, supervise, act on the recommendations of and consult with specialty committees as hereinafter identified;

(4) to make and publish standards for the certification of specialists, upon the board's own initiative or upon consideration of recommendations made by the specialty committees, such standards to be designed to produce a uniform level of competence among the various specialties in accordance with the nature of the specialties;

(5) to certify specialists or deny, suspend or revoke the certification of specialists upon the board's own initiative, upon recommendations made by the specialty committees or upon requests for review of recommendations made by the specialty committees;

(6) to establish and publish procedures, rules, regulations, and bylaws to implement this plan;

(7) to propose and request the council to make amendments to this plan whenever appropriate;

(8) to cooperate with other boards or agencies in enforcing standards of professional conduct and to report apparent violations of the Revised Rules of Professional Conduct to the appropriate disciplinary authority;

(9) to evaluate and approve, or disapprove, any and all continuing legal education courses, or educational alternatives, for the purpose of meeting the continuing legal education requirements established by the board for the certification of specialists and in connection therewith to determine the specialties for which credit shall be given and the number of hours of credit to be given in cooperation with the providers of continuing legal education; to determine whether and what credit is to be allowed for educational alternatives, including other methods of legal education, teaching, writing and the like; to issue rules and regulations for obtaining approval of continuing legal education courses and educational alternatives; to publish or cooperate with others in publishing current lists of approved continuing legal education courses and educational alternatives; and to encourage and assist law schools, organizations providing continuing legal education, local bar associations and other groups engaged in continuing legal education to offer and maintain programs of continuing legal education designed to develop, enhance and maintain the skill and competence of legal specialists;

(10) to cooperate with other organizations, boards and agencies engaged in the recognition of legal specialists or concerned with the topic of legal specialization;

(11) notwithstanding any conflicting provision of the certification standards for any area of specialty, to direct any of the specialty committees not to administer a specialty examination if, in the judgment of the board, there are insuffi-

cient applicants or such would otherwise not be in the best interest of the specialization program.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.1717 Retained Jurisdiction of the Council

The council retains jurisdiction with respect to the following matters:

(1) upon recommendation of the board, establishing areas in which certificates of specialty may be granted;

(2) amending this plan;

(3) hearing appeals taken from actions of the board;

(4) establishing or approving fees to be charged in connection with the plan;

(5) regulating attorney advertisements of specialization under the Revised Rules of Professional Conduct.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.1718 Privileges Conferred and Limitations Imposed

The board in the implementation of this plan shall not alter the following privileges and responsibilities of certified specialists and other lawyers.

(1) No standard shall be approved which shall in any way limit the right of a certified specialist to practice in all fields of law. Subject to Rule 1.1 of the Revised Rules of Professional Conduct, any lawyer, alone or in association with any other lawyer, shall have the right to practice in all fields of law, even though he or she is certified as a specialist in a particular field of law.

(2) No lawyer shall be required to be certified as a specialist in order to practice in the field of law covered by that specialty. Subject to Rule 1.1 of the North Carolina Revised Rules of Professional Conduct, any lawyer, alone or in association with any other lawyer, shall have the right to practice in any field of law, or advertise his or her availability to practice in any field of law consistent with Rule 7.1 of the Revised Rules of Professional Conduct, even though he or she is not certified as a specialist in that field.

(3) All requirements for and all benefits to be derived from certification as a specialist are individual and may not be fulfilled by nor attributed to the law firm of which the specialist may be a member.

(4) Participation in the program shall be on a completely voluntary basis.

(5) A lawyer may be certified as a specialist in no more than two fields of law.

(6) When a client is referred by another lawyer to a lawyer who is a recognized specialist under this plan on a matter within the specialist's field of law, such specialist shall not take advantage of the referral to enlarge the scope of his or her representation and, consonant with any requirements of the Revised Rules of Professional Conduct, such specialist shall not enlarge the scope of representation of a referred client outside the area of the specialty field.

(7) Any lawyer certified as a specialist under this plan shall be entitled to advertise that he or she is a "Board Certified Specialist" in his or her specialty to the extent permitted by the Revised Rules of Professional Conduct.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.1719 Specialty Committees

(a) The board shall establish a separate specialty committee for each specialty in which specialists are to be certified. Each specialty committee shall be composed of seven members appointed by the board, one of whom shall be designated annually by the chairperson of the board as chairperson of the specialty committee. Members of each specialty committee shall be lawyers licensed and currently in good standing to practice law in this state who, in the judgment of the board, are competent in the field of law to be covered by the specialty. Members shall hold office for three years, except those members initially appointed who shall serve as hereinafter designated. Members shall be appointed by the board to staggered terms of office and the initial appointees shall serve as follows: two shall serve for one year after appointment; two shall serve for two years after appointment; and three shall serve for three years after appointment. Appointment by the board to a vacancy shall be for the remaining term of the member leaving the specialty committee. All members shall be eligible for reappointment to not more than one additional three-year term after having served one full three-year term, provided, however, that the board may reappoint the chairperson of a committee to a third three-year term if the board determines that the reappointment is in the best interest of the specialization program. Meetings of the specialty committee shall be held at regular intervals at such times, places and upon such notices as the specialty committee may from time to time prescribe or upon direction of the board.

(b) Each specialty committee shall advise and assist the board in carrying out the board's objectives and in the implementation and regulation of this plan in that specialty. Each specialty committee shall advise and make recommendations to the board as to standards for the specialty and the certification of individual specialists in that specialty. Each specialty committee shall be charged with actively administering the plan in its specialty and with respect to that specialty shall

(1) after public hearing on due notice, recommend to the board reasonable and nondiscriminatory standards applicable to that specialty;

(2) make recommendations to the board for certification, continued certification, denial, suspension, or revocation of certification of specialists and for procedures with respect thereto;

(3) administer procedures established by the board for applications for certification and continued certification as a specialist and for denial, suspension, or revocation of such certification;

(4) administer examinations and other testing procedures, if applicable, investigate references of applicants and, if deemed advisable, seek additional information regarding applicants for certification or continued certification as specialists;

(5) make recommendations to the board concerning the approval of and credit to be allowed for continuing legal education courses, or educational alternatives, in the specialty;

(6) perform such other duties and make such other recommendations as may be delegated to or requested of the specialty committee by the board.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended November 7, 1996

.1720 Minimum Standards for Certification of Specialists

(a) To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the board for the particular area of specialty.

(1) The applicant must be licensed and currently in good standing to practice law in this state.

(2) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of substantial involvement in the specialty during the five years immediately preceding his or her application according to objective and verifiable standards. Such substantial involvement shall be defined as to each specialty from a consideration of its nature, complexity, and differences from other fields and from consideration of the kind and extent of effort and experience necessary to demonstrate competence in that specialty. It is a measurement of actual experience within the particular specialty according to any of several standards. It may be measured by the time spent on legal work within the areas of the specialty, the number or type of matters handled within a certain period of time or any combination of these or other appropriate factors. However, within each specialty, experience requirements should be measured by objective standards. In no event should they be either so restrictive as to unduly limit certification of lawyers as specialists or so lax as to make the requirement of substantial involvement meaningless as a criterion of competence. Substantial involvement may vary from specialty to specialty, but, if measured on a time-spent basis, in no event shall the time spent in practice in the specialty be less than 25 percent of the total practice of a lawyer engaged in a normal full-time practice. Reasonable and uniform practice equivalents may be established including, but not limited to, successful pursuit of an advance educational degree, teaching, judicial, government, or corporate legal experience.

(3) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of continuing legal education in the specialty accredited by the board for the specialty, the minimum being an average of 12 hours of credit for continuing legal education, or its equivalent, for each of the three years immediately

preceding application. Upon establishment of a new specialty, this standard may be satisfied in such manner as the board, upon advice from the appropriate specialty committee, may prescribe or may be waived if, and to the extent, accreditable continuing legal education courses have not been available during the three years immediately preceding establishment of the specialty.

(4) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of qualification in the specialty through peer review by providing, as references, the names of at least five lawyers, all of whom are licensed and currently in good standing to practice law in this state, or in any state, or judges, who are familiar with the competence and qualification of the applicant as a specialist. None of the references may be persons related to the applicant or, at the time of application, a partner of or otherwise associated with the applicant in the practice of law. The applicant by his or her application consents to confidential inquiry by the board or appropriate disciplinary body and other persons regarding the applicants competence and qualifications to be certified as a specialist.

(5) The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability in the specialty for which certification is applied. The examination must be applied uniformly to all applicants within each specialty area. The board shall assure that the contents and grading of the examination are designed to produce a uniform level of competence among the various specialties.

(b) All matters concerning the qualification of an applicant for certification, including, but not limited to, applications, references, tests and test scores, files, reports, investigations, hearings, findings, recommendations, and adverse determinations shall be confidential so far as is consistent with the effective administration of this plan, fairness to the applicant and due process of law.

(c) The board may adopt uniform rules waiving the requirements of Rules .1720(a)(4) and(5) above for members of a specialty committee at the time the initial written examination for that specialty is given and permitting said members to file applications to become a board certified specialist in that specialty upon compliance with all other required minimum standards for certification of specialists.

(d) Upon written request of the applicant and with the recommendation of the appropriate specialty committee, the board may for good cause shown waive strict compliance with the criteria relating to substantial involvement, continuing legal education, or peer review, as those requirements are set forth in the standards for certification for specialization. However, there shall be no waiver of the requirements that the applicant pass a written examination and be licensed to practice law in North Carolina for five years preceding the application.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.1721 Minimum Standards for Continued Certification of Specialists

(a) The period of certification as a specialist shall be five years. During such period the board or appropriate specialty committee may require evidence from the specialist of his or her continued qualification for certification as a specialist, and the specialist must consent to inquiry by the board, or appropriate specialty committee of lawyers and judges, the appropriate disciplinary body, or others in the community regarding the specialist's continued competence and qualification to be certified as a specialist. Application for and approval of continued certification as a specialist shall be required prior to the end of each five-year period. To qualify for continued certification as a specialist, a lawyer applicant must pay any required fee, must demonstrate to the board with respect to the specialty both continued knowledge of the law of this state and continued competence and must comply with the following minimum standards.

(1) The specialist must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of substantial involvement (which shall be determined in accordance with the principles set forth in Rule .1720(a)(2) of this subchapter) in the specialty during the entire period of certification as a specialist.

(2) The specialist must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of continuing legal education accredited by the board for the specialty during the period of certification as a specialist, the minimum being an average of l2 hours of credit for continuing legal education, or its equivalent, for each year during the entire period of certification as a specialist.

(3) The specialist must comply with the requirements set forth in Rules .1720(a)(1) and (4) of this subchapter.

(b) Upon written request of the applicant and with the recommendation of the appropriate specialty committee, the board may for good cause shown waive strict compliance with the criteria relating to substantial involvement, continuing legal education, or peer review, as those requirements are set forth in the standards for continued certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.1722 Establishment of Additional Standards

The board may establish, on its own initiative or upon the specialty committee's recommendation, additional or more stringent standards for certification than those provided in Rules .1720 and .172l of this subchapter. Additional standards or requirements established under this rule need not be the same for initial certification and continued certification as a specialist. It is the intent of the plan that all requirements for certification or recertification in any area of specialty shall be no more or less stringent than the requirements in any other area of specialty.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.1723 Suspension or Revocation of Certification as a Specialist

(a) The board may revoke its certification of a lawyer as a specialist in the specialization program if the specialty is terminated or may suspend or revoke such certification if it is determined, upon the board's own initiative or upon recommendation of the appropriate specialty committee and after hearing before the board on appropriate notice, that

(1) the certification of the lawyer as a specialist was made contrary to the rules and regulations of the board;

(2) the lawyer certified as a specialist made a false representation, omission or misstatement of material fact to the board or appropriate specialty committee;

(3) the lawyer certified as a specialist has failed to abide by all rules and regulations promulgated by the board;

(4) the lawyer certified as a specialist has failed to pay the fees required;

(5) the lawyer certified as a specialist no longer meets the standards established by the board for the certification of specialists; or

(6) the lawyer certified as a specialist has been disciplined, disbarred, or suspended from practice by the Supreme Court of any other state or federal court or agency.

(b) The lawyer certified as a specialist has a duty to inform the board promptly of any fact or circumstance described in Rules .1723(a)(1) through (6) above.

(c) If the board revokes its certification of a lawyer as a specialist, the lawyer cannot again be certified as a specialist unless he or she so qualifies upon application made as if for initial certification as a specialist and upon such other conditions as the board may prescribe. If the board suspends certification of a lawyer as a specialist, such certification cannot be reinstated except upon the lawyer's application therefor and compliance with such conditions and requirements as the board may prescribe.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.1724 Right to Hearing and Appeal to Council

A lawyer who is denied certification or continued certification as a specialist or whose certification is suspended or revoked shall have the right to a hearing before the board and, thereafter, the right to appeal the ruling made thereon by the board to the council under such rules and regulations as the board and council may prescribe. (*See* Section .1800 of this subchapter.)

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.1725 Areas of Specialty

There are hereby recognized the following specialties:

(1) bankruptcy law
  (a) consumer bankruptcy law
  (b) business bankruptcy law
(2) estate planning and probate law
(3) real property law
  (a) real property - residential
  (b) real property - business, commercial, and industrial
(4) family law
(5) criminal law
  (a) criminal appellate practice
  (b) state criminal law
(6) immigration law.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.1726 Certification Standards of the Specialties of Bankruptcy Law, Estate Planning and Probate Law, Real Property Law, Family Law, and Criminal Law

Previous decisions approving the certification standards for the areas of specialty listed above are hereby reaffirmed.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

Section .2100 Certification Standards for the Real Property Law Specialty

.2101 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates real property law, including the subspecialties of real property-residential transactions and real property-business, commercial, and industrial transactions, as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (*see* Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2102 Definition of Specialty

The specialty of real property law is the practice of law dealing with real property transactions, including title examination, property transfers, financing, leases, and determination of property rights. Subspecialties in the field are identified and defined as follows:

(a) Real Property Law-Residential Transactions - The practice of law dealing with the acquisition, ownership, leasing, financing, use, transfer and disposition, of residential and real property by individuals;

(b) Real Property Law-Business, Commercial, and Industrial Transactions - The practice of law dealing with the acquisition, ownership, leasing, management, financing, development, use, transfer, and disposition of residential, business, commercial, and industrial real property.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2103 Recognition as a Specialist in Real Property Law

A lawyer may qualify as a specialist by meeting the standards set for one or both of the subspecialties. If a lawyer qualifies as a specialist in real property law by meeting the standards set for the real property law-residential transactions subspecialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law-Residential Transactions." If a lawyer qualifies as a specialist in real property law by meeting the standards set for the real property law-business, commercial, and industrial transactions, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law-Business, Commercial, and Industrial Transactions." If a lawyer qualifies as a specialist in real property law by meeting the standards set for both the real property law-residential transactions subspecialty and the real property law-business, commercial, and industrial transactions subspecialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law-Residential, Business, Commercial, and Industrial Transactions."

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2104 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in real property law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (*see* Section .1700 of this subchapter) as supplemented by these standards for certification.

.2105 Standards for Certification as a Specialist in Real Property Law

Each applicant for certification as a specialist in real property law shall meet the minimum standards set forth in Rule .1720 of this subchapter.

In addition, each applicant shall meet the following standards for certification in real property law:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of real property law.

(1) Substantial involvement shall mean during the five years preceding the application, the applicant has devoted an average of at least 500 hours a year to the practice of real property law, but not less than 400 hours in any one year.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent means service as a law professor concentrating in the teaching of real property law. Teaching may be substituted for one year of experience to meet the five-year requirement.

(c) Continuing Legal Education - An applicant must have earned no less than 36 hours of accredited continuing legal education (CLE) credits in real property law during the three years preceding application with not less than 6 credits in any one year.

(d) Peer review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) Examinations - The applicant must pass a written examination designed to test the applicant's knowledge and ability in real property law.

(1) Terms - The examination(s) shall be in written form and shall be given annually. The examination(s) shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter - The examination shall cover the applicant's knowledge in the following topics in real property law or in the subspecialty or subspecialties that the applicant has elected:

(A) title examinations, property transfers, financing, leases, and determination of property rights;

(B) the acquisition, ownership, leasing, financing, use, transfer, and disposition of residential real property by individuals;

(C) the acquisition, ownership, leasing, management, financing, development, use, transfer, and disposition of residential, business, commercial, and industrial real property.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2106 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2106(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2105(b) of this subchapter.

(b) Continuing Legal Education - The specialist must have earned no less than 60 hours of accredited continuing legal education credits in real property law as accredited by the board with not less than 6 credits earned in any one year.

(c) Peer Review - The specialist must comply with the requirements of Rule .2105(d) of this subchapter.

(d) Time for Application - Application for continued certification shall be made not more than one hundred eighty (180) days nor less than ninety days prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2105 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2105 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2107 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in real property law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

Section .2200 Certification Standards for the Bankruptcy Law Specialty

.2201 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates bankruptcy law, including the subspecialties of consumer bankruptcy law and business bankruptcy law, as a field of law for which certification of specialists under the Plan of Legal Specialization (*see* Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2202 Definition of Specialty

The specialty of bankruptcy law is the practice of law dealing with all laws and procedures involving the rights, obligations, and remedies between debtors and creditors in potential or pending federal bankruptcy cases and state insolvency actions. Subspecialties in the field are identified and defined as follows:

(a) Consumer Bankruptcy Law - The practice of law dealing with consumer bankruptcy and the representation of interested parties in contested matters or adversary proceedings in individual filings of Chapter 7, Chapter 12, or Chapter 13;

(b) Business Bankruptcy Law - The practice of law dealing with business bankruptcy and the representation of interested parties in contested matters or adversary proceedings in bankruptcy cases filed on behalf of debtors who are or have been engaged in business prior to an entity filing Chapter 7, Chapter 9, Chapter 11, or Chapter 12.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2203 Recognition as a Specialist in Bankruptcy Law

A lawyer may qualify as a specialist by meeting the standards set for one or both of the subspecialties. If a lawyer qualifies as a specialist in bankruptcy law by meeting the standards set for the consumer bankruptcy law subspecialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Consumer Bankruptcy Law." If a lawyer qualifies as a specialist in bankruptcy law by meeting the standards set for the business bankruptcy law subspecialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Business Bankruptcy Law." If a lawyer qualifies as a specialist in bankruptcy law by meeting the standards set for both the consumer bankruptcy law and the business bankruptcy law subspecialties, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Business and Consumer Bankruptcy Law."

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2204 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in bankruptcy law shall be governed by the provisions of the Plan of Legal Specialization (*see* Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2205 Standards for Certification as a Specialist in Bankruptcy Law

Each applicant for certification as a specialist in bankruptcy law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification as a specialist in bankruptcy law:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of bankruptcy law.

(1) Substantial involvement shall mean during the five years preceding the application, the applicant has devoted an average of at least 500 hours a year to the practice of bankruptcy law, but not less than 400 hours in any one year.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent shall mean, after admission to the bar of any state, District of Columbia, or a U.S. territorial possession

(A) service as a judge of any bankruptcy court, service as a clerk of any bankruptcy court, or service as a standing trustee;

(B) corporate or government service, including military service, after admission to the bar of any state, the District of Columbia, or any U.S. territorial possession, but only if the bankruptcy work done was legal advice or representation of the corporation, governmental unit, or individuals connected therewith;

(C) service as a deputy or assistant clerk of any bankruptcy court, as a research assistant to a bankruptcy judge, or as a law professor teaching bankruptcy and/or debtor-creditor related courses may be substituted for one year of experience to meet the five-year requirement.

(c) Continuing Legal Education - An applicant must have earned no less than 36 hours of accredited continuing legal education (CLE) credits in bankruptcy law, during the three years preceding application with not less than 6 credits in any one year.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the appli-

cant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be a judge of any bankruptcy court.

(2) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(3) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge and ability in bankruptcy law.

(1) Terms - The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter - The examination shall cover the applicant's knowledge and application of the law in the following topics in the subspecialty or subspecialties that the applicant has elected:

(A) all provisions of the Bankruptcy Reform Act of 1978, as amended, and legislative history related thereto, except subchapters III and IV of Chapter 7 and Chapter 9 of Title II, United States Code;

(B) the Rules of Bankruptcy Procedure effective as of August 1, 1983, as amended;

(C) bankruptcy crimes and immunity;

(D) state laws affecting debtor-creditor relations, including, but not limited to, state court insolvency proceedings; Chapter 1C of the North Carolina General Statutes; the creation, perfection, enforcement, and priorities of secured claims; claim and delivery; and attachment and garnishment;

(E) judicial interpretations of any of the above.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2206 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2206(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2205(b) of this subchapter.

(b) Continuing Legal Education - Since last certified, a specialist must have earned no less than 60 hours of accredited continued legal education credits in bankruptcy law with not less than 6 credits earned in any one year.

(c) Peer Review - The specialist must comply with the requirements of Rule .2205(d) of this subchapter.

(d) Application for continued certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2205 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2205 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2207 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in bankruptcy law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

Section .2300 Certification Standards for the Estate Planning and Probate Law Specialty

.2301 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates estate planning and probate law as a field of law for which certification of specialists under the Plan of Legal Specialization (*see* Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2302 Definition of Specialty

The specialty of estate planning and probate law is the practice of law dealing with planning for conservation and disposition of estates, including consideration of federal and state tax consequences; preparation of legal instruments to effectuate estate plans; and probate of wills and administration of estates, including federal and state tax matters.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2303 Recognition as a Specialist in Estate Planning and Probate Law

If a lawyer qualifies as a specialist in estate planning and probate law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Estate Planning and Probate Law."

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2304 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in estate planning and probate law shall be governed by the provisions of the Plan of Legal Specialization (*see* Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2305 Standards for Certification as a Specialist in Estate Planning and Probate Law

Each applicant for certification as a specialist in estate planning and probate law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification as a specialist in estate planning and probate law:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - The applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of estate planning and probate law.

(1) Substantial involvement shall be measured as follows:

(A) Time Spent - During the five years preceding the application, the applicant has devoted an average of at least 500 hours a year to the practice of estate planning and probate law, but not less than 400 hours in any one year;

(B) Experience Gained - During the five years immediately preceding application, the applicant shall have had continuing involvement in a substantial portion of the activities described in each of the following paragraphs:

(i) counseled persons in estate planning, including giving advice with respect to gifts, life insurance, wills, trusts, business arrangements and agreements, and other estate planning matters;

(ii) prepared or supervised the preparation of (1) estate planning instruments, such as simple and complex wills (including provisions for testamentary trusts, marital deductions and elections), revocable and irrevocable inter vivos trusts (including short-term and minor's trusts), business planning agreements (including buy-sell agreements and employment contracts), powers of attorney and other estate planning instruments; and (2) federal and state gift tax returns, including representation before the Internal Revenue Service and the North Carolina Department of Revenue in connection with gift tax returns;

(iii) handled or advised with respect to the probate of wills and the administration of decedents' estates, including representation of the personal representative before the clerk of superior court, guardianship, will contest, and declaratory judgment actions;

(iv) prepared, reviewed or supervised the preparation of federal estate tax returns, North Carolina inheritance tax returns, and federal and state fiduciary income tax returns, including representation before the Internal Revenue Service and the North Carolina Department of Revenue in connection with such tax returns and related controversies.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent shall mean

(A) receipt of an LL.M. degree in taxation or estate planning and probate law (or such other related fields approved by the specialty committee and the board from an approved law school) may be substituted for one year of experience to meet the five-year requirement;

(B) service as a trust officer with a corporate fiduciary having duties primarily in the area of estate and trust administration, may be substituted for one year of experience to meet the five-year requirement;

(C) service as a law professor concentrating in the teaching of taxation or estate planning and probate law (or such other related fields approved by the specialty committee and the board). Such service may be substituted for one year of experience to meet the five-year requirement.

(c) Continuing Legal Education - An applicant must have earned no less than 72 hours of accredited continuing legal education (CLE) credits in estate planning and probate law during the three years preceding application. Of the 72 hours of CLE, at least 45 hours shall be in estate planning and probate law, and the balance may be in the related areas of taxation, business organizations, real property, and family law.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges, all of whom are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge and ability in estate planning and probate law.

(1) Terms - The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter - The examination shall cover the applicant's knowledge and application of the law in the following topics:

(A) federal and North Carolina gift taxes;

(B) federal estate tax;

(C) North Carolina inheritance tax;

(D) federal and North Carolina fiduciary income taxes;

(E) federal and North Carolina income taxes as they apply to the final returns of the decedent and his or her surviving spouse;

(F) North Carolina law of wills and trusts;

(G) North Carolina probate law, including fiduciary accounting;

(H) federal and North Carolina income and gift tax laws as they apply to revocable and irrevocable inter vivos trusts:

(I) North Carolina law of business organizations, family law, and property law as they may be applicable to estate planning transactions;

(J) federal and North Carolina tax law applicable to partnerships and corporations (including S corporations) which may be encountered in estate planning and administration.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2306 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2306(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2305(b) of this subchapter.

(b) Continuing Legal Education - Since last certified, a specialist must have earned no less than 120 hours of accredited continuing legal education credits in estate planning and probate law. Of the 120 hours of CLE at least 75 hours shall be in estate planning and probate law, and the balance may be in the related areas of taxation, business organizations, real property, and family law.

(c) Peer Review - The specialist must comply with the requirements of Rule .2305(d) of this subchapter.

(d) Time for Application - Application for continued certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2305 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2305 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2307 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in estate planning and probate law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

Section .2400 Certification Standards for the Family Law Specialty

.2401 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates family law as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (*see* Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.2402 Definition of Specialty

The specialty of family law is the practice of law relating to marriage, divorce, alimony, child custody and support, equitable distribution, enforcement of support, domestic violence, bastardy, and adoption.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2403 Recognition as a Specialist in Family Law

If a lawyer qualifies as a specialist in family law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Family Law."

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2404 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in family law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (*see* Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2405 Standards for Certification as a Specialist in Family Law

Each applicant for certification as a specialist in family law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification as a specialist in family law:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of family law.

(1) Substantial involvement shall mean during the five years preceding the application, the applicant has devoted an average of at least 600 hours a year to the practice of family law, and not less than 400 hours during any one year.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent shall mean

(A) service as a law professor concentrating in the teaching of family law. Such service may be substituted for one year of experience to meet the five-year requirement.

(B) service as a district court judge in North Carolina, hearing a substantial number of family law cases. Such service may be substituted for one year of experience to meet the five-year requirement.

(c) Continuing Legal Education - An applicant must have earned no less than 45 hours of accredited continuing legal education (CLE) credits in family law, 9 of which may be in related fields, during the three years preceding application, with not less than 9 credits in any one year. Related fields shall include taxation, trial advocacy, evidence, negotiation, and juvenile law.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge and ability in family law.

(1) Terms - The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter - The examination shall cover the applicant's knowledge and application of the law relating to marriage, divorce, alimony, child custody and support, equitable distribution, enforcement of support, domestic violence, bastardy, and adoption including, but not limited to, the following:

(A) contempt (Chapter 5A of the North Carolina General Statutes);
(B) adoptions (Chapter 48);
(C) bastardy (Chapter 49);
(D) divorce and alimony (Chapter 50);
(E) Uniform Child Custody Jurisdiction and Enforcement Act (Chapter 50A);
(F) domestic violence (Chapter 50B);
(G) marriage (Chapter 51);
(H) powers and liabilities of married persons (Chapter 52);
(I) Uniform Interstate Family Support Act (Chapter 52C);
(J) Uniform Premarital Agreement Act (Chapter 52B);
(K) termination of parental rights, as relating to adoption and termination for failure to provide support (Chapter 7B, Article 11);
(L) garnishment and enforcement of child support obligations (Chapter 110, Article 9);
(M) Parental Kidnapping Prevention Act (28 U.S.C.§1738A);
(N) Internal Revenue Code §§ 71 (Alimony), 215 (Alimony Deduction), 121 (Exclusion of Gain from the Sale of Principal Residence), 151 and 152 (Dependency Exemptions), 1041 (Transfer of Property Incidental to Divorce), 2043 and 2516 (Gift Tax Exception), 414(p) (Defining QDRO Requirements), 408 (d)(6) (IRA Transfer Requirements for Non-Taxable Event), and regulations interpretive of these Code sections; and
(O) Federal Wiretap Law.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended February 5, 2002

.2406 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2406(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2405(b) of this subchapter.

(b) Continuing Legal Education - Since last certified, a specialist must have earned no less than 60 hours of accredited continuing legal education credits in family law or related fields. Not less than nine credits may be earned in any one year, and no more than twelve credits may be in related fields. Related fields shall include taxation, trial advocacy, evidence, negotiations, and juvenile law.

(c) Peer Review - The specialist must comply with the requirements of Rule .2405(d) of this subchapter.

(d) Time for Application - Application for continued certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2405 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2405 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2407 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in family law are subject to any general requirement, standards, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

Section .2500 Certification Standards for the Criminal Law Specialty

.2501 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates criminal law, including the subspecialties of criminal appellate practice and state criminal law, as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (*see* Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2502 Definition of Specialty

The specialty of criminal law is the practice of law dealing with the defense or prosecution of those charged with misdemeanor and felony crimes in state and federal trial and appellate courts. Subspecialties in the field are identified and defined as follows:

(a) Criminal Appellate Practice - The practice of criminal law at the appellate court level;

(b) State Criminal Law - The practice of criminal law in state trial and appellate courts.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2503 Recognition as a Specialist in Criminal Law

A lawyer may qualify as a specialist by meeting the standards set for criminal law or the subspecialties of criminal appellate practice or state criminal law. If a lawyer qualifies as a specialist by meeting the standards set for the criminal law specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law." If a lawyer qualifies as a specialist by meeting the standards set for the subspecialty of criminal appellate practice, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Appellate Practice." If a lawyer qualifies as a specialist by meeting the standards set for the subspecialty of state criminal law, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in State Criminal Law." If a lawyer qualifies as a specialist by meeting the standards set for both criminal law and the subspecialty of criminal appellate practice, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law and Criminal Appellate Practice."

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2504 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in criminal law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (*see* Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2505 Standards for Certification as a Specialist

Each applicant for certification as a specialist in criminal law, the subspecialty of state criminal law, or the subspecialty of criminal appellate practice shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of the application. During the period of certification an applicant shall continue to be licensed and in good standing to practice law in North Carolina.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of criminal law.

(1) For the specialty of criminal law and the subspecialty of state criminal law, the applicant must have been engaged in the active practice of law for at least five years prior to certification with a substantial involvement in the area of criminal law. Substantial involvement shall mean

(A) during the applicant's entire legal career, the applicant must have been participating counsel of record in criminal proceedings as follows:

(i) five felony jury trials in cases submitted to jury for decision;

(ii) ten additional jury trials, regardless of offenses, submitted to jury for decision;

(iii) fifty additional criminal matters to disposition in the state district or superior courts, or in the U.S. district court (disposition being defined as the conclusion of a criminal matter);

(iv) any one of the following:

(a) two oral appearances before an appellate court of the State of North Carolina or the United States; or

(b) three written appearances before any appellate court in which the applicant certifies that he or she had primary responsibility for the preparation of the record on appeal and brief; or

(c) 25 additional criminal trials in any jurisdiction which were submitted to the judge or jury for decision.

(B) during the five years immediately preceding application to the board, the applicant must have

(i) appeared as participating counsel for at least 25 days in the jury trial of one or more criminal cases, whether to verdict or not;

(ii) made 75 court appearances in any substantive nonjury trials or proceedings (excluding calendar calls, continuance motions, or other purely administrative matters) in a criminal court of any jurisdiction;

(iii) devoted an average of 500 hours per year in the area of criminal law but not less than 400 hours in any one year.

(C) upon recommendation by the specialty committee and approval by the board, where the profession or the geographical location of an applicant prohibits his or her completing the requirements in Rule .2505(b)(1)(A) and (B) above, and the applicant shows substantial involvement in other areas of law requiring similar skills, or has engaged in research, writing, or teaching special studies of criminal law and procedure, to include criminal appellate law, said applicant may substitute such experience for one year of the five required years of Rule .2505(b)(1)(B)(iii) above and must meet all of the requirements of Rule .2505(b)(1)(A)(iv) above and three-fifths of the remaining requirements of Rule .2505(b)(1)(B) above.

(2) For the subspecialty of criminal appellate practice, the applicant must have been engaged in the active practice of law for at least five years prior to certification with a substantial involvement in the area of criminal law. For the subspecialty of criminal appellate practice, substantial involvement shall mean

(A) the applicant must have been engaged in the active practice of law for at least five years prior to certification (unless excepted under Rule .2505(b)(2)(B)(ii) below). During the applicant's entire legal career, the applicant must have completed the requirements set forth in Rule .2505(b)(1)(A) above;

(B) during the applicant's entire legal career, the applicant must have also

(i) represented a party in at least 15 criminal appeals, 5 of which must have been within the two years preceding the application;

(ii) had substantial involvement in criminal appellate work, including

brief writing, motion practice, oral arguments, and extraordinary writs. Sitting as an appellate court judge for at least one year of the three years preceding application will fulfill three years of the practice requirements.

(C) upon recommendation by the specialty committee and approval by the board, where the profession or the geographical location of an applicant prohibits his or her completion of all or a portion of the requirements of Rule .2505(b)(2)(A) above and the applicant can show substantial involvement in other areas of law requiring similar skills, or has engaged in research, writing, or teaching special studies of criminal law and procedure, to include criminal appellate law, said applicant may substitute such experience for one year of the required five years and may qualify by meeting all of the requirements of Rules .2505(b)(1)(A)(i) and (ii) above, and upon the showing of the representation of at least five criminal appellate actions within the last two years.

(c) Continuing Legal Education

(1) In the specialty of criminal law, the state criminal law subspecialty, and the criminal appellate practice subspecialty, an applicant must have earned no less than 40 hours of accredited continuing legal education credits in criminal law during the three years preceding the application, which 40 hours must include the following:

(A) at least 34 hours in skills pertaining to criminal law, such as evidence, substantive criminal law, criminal procedure, criminal trial advocacy, criminal trial tactics, and appellate advocacy;

(B) at least 6 hours in the area of ethics and criminal law.

(2) In order to be certified as a specialist in both criminal law and the subspecialty of criminal appellate law, an applicant must have earned no less than 46 hours of accredited continuing legal education credits in criminal law during the three years preceding application, which 46 hours must include the following:

(A) at least 40 hours in skills pertaining to criminal law, such as evidence, substantive criminal law, criminal procedure, criminal trial advocacy, criminal trial tactics, and appellate advocacy;

(B) at least 6 hours in the area of ethics and criminal law.

(d) Peer Review

(1) Each applicant for certification as a specialist in criminal law, the subspecialty of state criminal law, and the subspecialty of criminal appellate practice, must make a satisfactory showing of qualification through peer review.

(2) All references must be licensed and in good standing to practice in North Carolina and must be familiar with the competence and qualifications of the applicant in the specialty field. The applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualifications.

(3) Written peer reference forms will be sent by the board or the specialty committee to the references. Completed peer reference forms must be received from at least five of the references. The board or the specialty committee may contact in person or by telephone any reference listed by an applicant.

(A) Each applicant for certification as a specialist in the specialty of criminal law and in the subspecialty of state criminal law must provide for reference and independent inquiry the names and addresses of the following:

(i) four attorneys of generally recognized stature who practice in the field of criminal law:

(ii) two judges of different jurisdictions before whom the applicant has litigated a case to disposition within the previous two years;

(iii) opposing counsel, co-counsel, and judges in the last five jury trials conducted by the applicant;

(iv) opposing counsel, co-counsel, and judges in the last five nonjury trials or procedures conducted by the applicant;

(v) if the applicant has participated in appellate matters, opposing counsel, co-counsel, and judges in the last two appellate matters conducted by the applicant as well as copies of all briefs filed by the applicant in these two appellate matters;

(vi) if an applicant has not prepared any appellate briefs, then the applicant shall submit to the specialty committee two separate trial court memoranda submitted to a trial court within the last three years which were prepared and filed by the applicant.

(B) An applicant for the subspecialty of criminal appellate practice shall provide the names and addresses of the following:

(i) four attorneys of generally recognized stature to attest to the applicant's substantial involvement and competence in criminal appellate practice. Such lawyers shall be substantially involved in criminal appellate practice and familiar with the applicant's practice;

(ii) two judges before whom the applicant has appeared in criminal appellate matters within the last two years to attest to the applicant's substantial involvement and competence in criminal appellate practice;

(iii) opposing counsel, judges, and any co-counsel in the last two appellate matters the applicant has handled. The applicant shall also provide all briefs filed in these matters.

(C) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge and ability.

(1) Terms - The examination(s) shall be in written form and shall be given at such times as the board deems appropriate. The examination(s) shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter

(A) The examination shall cover the applicant's knowledge in the following topics in criminal law, in the subspecialty of state criminal law, and/or in the subspecialty of criminal appellate practice, as the applicant has elected:

(i) the North Carolina and Federal Rules of Evidence;

(ii) state and federal criminal procedure and state and federal laws affecting criminal procedure;

(iii) constitutional law;

(iv) appellate procedure and tactics;

(v) trial procedure and trial tactics;

(vi) criminal substantive law;

(vii) the North Carolina Rules of Appellate Procedure.

(B) An applicant for certification in the specialty of criminal law shall take part I (covering state law) and part II (covering federal law) of the criminal law examination. An applicant for certification in subspecialty of state criminal law shall take part I of the criminal law examination.

(3) Requirement of Criminal Law Examination for Criminal Appellate Practice - An applicant for certification in the subspecialty of criminal appellate practice must successfully pass the examination in criminal law. If an applicant for certification in criminal appellate practice is already certified as a specialist in the subspecialty of state criminal law, then the applicant must take part II (covering federal law) of the examination in criminal law as well as the criminal appellate practice examination.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.2506 Standards for Continued Certification as a Specialist

The period of certification is five years. A certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2506(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that for the five years preceding reapplication he or she has had substantial involvement in the specialty or subspecialty as defined in Rule .2505(b)(1)(B) and (C) of this subchapter for the specialty of criminal law and the subspecialty of state criminal law, and Rule .2505(b)(2) of this subchapter for the subspecialty of criminal appellate practice.

(b) Continuing Legal Education - The specialist must have earned no less than 65 hours of accredited continuing legal education credits in criminal law with not less than 6 credits earned in any one year.

(c) Peer Review - The specialist must comply with the requirements of Rule .2505(d) of this subchapter.

(d) Time for Application - Application for continuing certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2505 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2505 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.2507 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in criminal law, the subspecialty of state criminal law and the subspecialty of criminal appellate practice are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

Section .2600 Certification Standards for the Immigration Law Specialty

.2601 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates immigration law as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (*see* Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23
Adopted March 6, 1997

.2602 Definition of Specialty

The specialty of immigration law is the practice of law dealing with obtaining and retaining permission to enter and remain in the United States including, but not limited to, such matters as visas, changes of status, deportation and exclusion, naturalization, appearances before courts and governmental agencies, and protection of constitutional rights.

History Note: Statutory Authority G.S. 84-23
Adopted March 6, 1997

.2603 Recognition as a Specialist in Immigration Law

If a lawyer qualifies as a specialist in immigration law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Immigration Law."

History Note: Statutory Authority G.S. 84-23
Adopted March 6, 1997

.2604 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in immigration law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (*see* Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23
Adopted March 6, 1997

.2605 Standards for Certification as a Specialist in Immigration Law

Each applicant for certification as a specialist in immigration law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in immigration law:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of immigration law.

(1) An applicant shall affirm that during the five years immediately preceding the application, the applicant devoted an average of at least 700 hours a year to the practice of immigration law, but not less than 400 hours in any one year. Service as a law professor concentrating in the teaching of immigration law may be substituted for one year of experience to meet the five-year requirement.

(2) An applicant shall show substantial involvement in immigration law for the required period by providing such information as may be required by the board regarding the applicant's participation in at least five of the seven categories of activities listed below during the five years immediately preceding the date of application:

(A) Family Immigration.
Representation of clients before the U.S. Immigration and Naturalization Service and the State Department in the filing of petitions and applications.

(B) Employment Related Immigration.
Representation of employers and/or aliens before at least one of the following: the N.C. Employment Security Commission, U.S. Department of Labor, U.S. Immigration and Naturalization Service, U.S. Department of State or U.S. Information Agency.

(C) Naturalization.
Representation of clients before the U.S. Immigration and Naturalization Service and judicial courts in naturalization matters.

(D) Administrative Hearings and Appeals.
Representation of clients before immigration judges in deportation, exclusion, bond redetermination, and other administrative matters; and the representation of clients in appeals taken before the Board of Immigration Appeals, Administrative Appeals Unit, Board of Alien Labor Certification Appeals, Regional Commissioners, Commissioner, Attorney General, Department of State Board of Appellate Review, and Office of Special Counsel for Immigration Related Unfair Employment Practices (OCAHO).

(E) Administrative Proceedings and Review in Judicial Courts.
Representation of clients in judicial matters such as applications for habeas corpus, mandamus and declaratory judgments; criminal matters involving immigration law; petitions for review in judicial courts; and ancillary proceedings in judicial courts.

(F) Asylum and Refugee Status.
Representation of clients in these matters.

(G) Employer Verification, Sanctions, Document Fraud, Bond and Custody, Rescission, Registry, and Fine Proceedings.
Representation of clients in these matters.

(c) Continuing Legal Education - An applicant must earn no less than 48 hours of accredited continuing legal education (CLE) credits in immigration law during the four years preceding application. At least 20 of the 48 CLE credit hours must be earned during the first and second year preceding application and at least 20 of the CLE hours must be earned during the third and fourth years preceding application. Of the 48 hours, at least 42 must be in immigration law; the balance may be in the related areas of federal administrative procedure, trial advocacy, evidence, taxation, family law, employment law, and criminal law and procedure.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must

be licensed and in good standing to practice in North Carolina. At least two of the completed peer reference forms received by the board must be from lawyers or judges who have substantial practice or judicial experience in immigration law. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge, skills, and proficiency in immigration law. The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

History Note: Statutory Authority G.S. 84-23
Adopted March 6, 1997

.2606 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2606(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2605(b) of this subchapter.

(b) Continuing Legal Education - The specialist must have earned no less than 60 hours of accredited continuing legal education credits in immigration law as accredited by the board. At least 30 of the 60 CLE credit hours must be earned during the first three years after certification or recertification, as applicable. Of the 60 hours, at least 52 must be in immigration law; the balance may be in the related areas of federal administrative procedure, trial advocacy, evidence, taxation, family law, employment law, and criminal law and procedure.

(c) Peer Review - The specialist must comply with the requirements of Rule .2605(d) of this subchapter.

(d) Time for Application - Application for continued certification shall be made not more than one hundred eighty (l80) days nor less than ninety days prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2605 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2605 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Adopted March 6, 1997

.2607 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in immigration law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23
Adopted March 6, 1997

Section .2700 Certification Standards for the Workers' Compensation Law Specialty

.2701 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates workers' compensation as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23
Adopted May 4, 2000

.2702 Definition of Specialty

The specialty of workers' compensation is the practice of law involving the analysis of problems or controversies arising under the North Carolina Workers' Compensation Act (Chapter 97, North Carolina General Statutes) and the litigation of those matters before the North Carolina Industrial Commission.

History Note: Statutory Authority G.S. 84-23
Adopted May 4, 2000

.2703 Recognition as a Specialist in Workers' Compensation Law

If a lawyer qualifies as a specialist in workers' compensation law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Workers' Compensation Law."

History Note: Statutory Authority G.S. 84-23
Adopted May 4, 2000

.2704 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in workers' compensation law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23
Adopted May 4, 2000

.2705 Standards for Certification as a Specialist in Workers' Compensation Law

Each applicant for certification as a specialist in workers' compensation law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in workers' compensation law:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of workers' compensation law.

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of workers' compensation law, but not less than 400 hours in any one year. "Practice" shall mean substantive legal work done primarily for the purpose of providing legal advice or representation, or a practice equivalent.

(2) "Practice equivalent" shall mean:

(A) Service as a law professor concentrating in the teaching of workers' compensation law for one year or more may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2705(b)(1) above;

(B) Service as a mediator of workers' compensation cases may be included in the hours necessary to satisfy the requirement set forth in Rule .2705(b)(1) above;

(C) Service as a deputy commissioner or commissioner of the North Carolina Industrial Commission may be substituted for the substantial involvement requirements in Rule .2705(b)(1) above provided

(i) the applicant was a full time deputy commissioner or commissioner throughout the five years prior to application, or

(ii) the applicant was engaged in the private representation of clients for at least one year during the five years immediately preceding the application; and, during this year, the applicant devoted not less than 400 hours to the practice of workers' compensation law. During the remaining four years, the applicant was either engaged in the private representation of clients and devoted an average of at least 500 hours

a year to the practice of workers' compensation law, but not less than 400 hours in any one year, or served as a full time deputy commissioner or commissioner of the North Carolina Industrial Commission.

(3) The board may require an applicant to show substantial involvement in workers' compensation law by providing information regarding the applicant's participation, during the five years immediately preceding the date of the application, in activities such as those listed below:

(A) representation as principal counsel of record in complex cases tried to an opinion and award of the North Carolina Industrial Commission;

(B) representation in occupational disease cases tried to an opinion and award of the North Carolina Industrial Commission; and

(C) representation in appeals of decisions to the North Carolina Court of Appeals or the North Carolina Supreme Court.

(c) Continuing Legal Education - An applicant must earn no less than thirty-six hours of accredited continuing legal education (CLE) credits in workers' compensation law during the three years preceding application, with not less than six credits earned in any one year. Of the thirty-six hours of CLE, at least eighteen hours shall be in workers' compensation law, and the balance may be in the following related fields: civil trial practice and procedure; evidence; mediation; medical injuries, medicine or anatomy; labor and employment law; and Social Security disability law.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers, commissioners or deputy commissioners of the North Carolina Industrial Commission, or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina and have substantial practice or judicial experience in workers' compensation law. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms mailed by the board to each reference. These forms shall be returned directly to the specialty committee.

(e) Examination - An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of workers' compensation law to justify the representation of special competence to the legal profession and the public. The examination shall be given annually in written form and shall be administered and graded uniformly by the specialty committee.

History Note: Statutory Authority G.S. 84-23
Adopted May 4, 2000

.2706 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2706(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2705(b) of this subchapter, provided, however, that a specialist who served on the Industrial Commission as a full time commissioner or deputy commissioner during the five years preceding application may substitute each year of service on the Industrial Commission for one year of practice.

(b) Continuing Legal Education - The specialist must earn no less than sixty hours of accredited continuing legal education credits in workers' compensation law during the five years preceding application. Not less than six credits may be earned in any one year. Of the sixty hours of CLE, at least thirty hours shall be in workers' compensation law, and the balance may be in the following related fields: civil trial practice and procedure; evidence; mediation; medical injuries, medicine or anatomy; labor and employment law; and Social Security disability law.

(c) Peer Review - The specialist must comply with the requirements of Rule .2705(d) of this subchapter.

(d) Time for Application - Application for continued certification shall be made not more than 180 days nor less than ninety days prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2705 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2705 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Adopted May 4, 2000

.2707 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in workers' compensation law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23
Adopted May 4, 2000

SUBCHAPTER E

Regulations for Organizations Practicing Law

Section .0100 Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law

.0101 Authority, Scope, and Definitions

(a) Authority - Chapter 55B of the General Statutes of North Carolina, being "the Professional Corporation Act," particularly Section 55B-12, and Chapter 57C, being the "North Carolina Limited Liability Company Act," particularly Section 57C-2-01(c), authorizes the Council of the North Carolina State Bar (the council) to adopt regulations for professional corporations and professional limited liability companies practicing law. These regulations are adopted by the council pursuant to that authority.

(b) Statutory Law - These regulations only supplement the basic statutory law governing professional corporations (Chapter 55B) and professional limited liability companies (Chapter 57C) and shall be interpreted in harmony with those statutes and with other statutes and laws governing corporations and limited liability companies generally.

(c) Definitions - All terms used in these regulations shall have the meanings set forth below or shall be as defined in the Professional Corporation Act or the North Carolina Limited Liability Company Act as appropriate.

(1) "Council" shall mean the Council of the North Carolina State Bar.

(2) "Licensee" shall mean any natural person who is duly licensed to practice law in North Carolina.

(3) "Professional limited liability company or companies" shall mean any professional limited liability company or companies organized for the purpose of practicing law in North Carolina.

(4) "Professional corporations" shall mean any professional corporation or corporations organized for the purpose of practicing law in North Carolina.

(5) "Secretary" shall mean the secretary of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.0102 Name of Professional Corporation or Professional Limited Liability Company

(a) Name of Professional Corporation - The name of every professional corporation shall contain the surname of one or more of its shareholders or of one or more persons who were associated with its immediate corporate, individual, partnership, or professional limited liability company predecessor in the practice of law and shall not contain any other name, word, or character (other than punctuation marks and conjunctions) except as required or permitted by Rules .0102(a)(1),(2) and(5) below. The following additional requirements shall apply to the name of a professional corporation:

(1) Corporate Designation - The name of a professional corporation shall end with the following words:

(A) "Professional Association" or the abbreviation "P.A."; or

(B) "Professional Corporation" or the abbreviation "P.C."

(2) Deceased or Retired Shareholder - The surname of any shareholder of a professional corporation may be retained in the corporate name after such person's death, retirement or inactivity due to age or disability, even though such person may have disposed of his or her shares of stock in the professional corporation;

(3) Disqualified Shareholder - If a shareholder in a professional corporation whose surname appears in the corporate name becomes legally disqualified to render professional services in North Carolina or, if the shareholder is not licensed in North Carolina, in any other jurisdiction in which the shareholder is licensed, the name of the professional corporation shall be promptly changed to eliminate the name of such shareholder, and such shareholder shall promptly dispose of his or her shares of stock in the corporation;

(4) Shareholder Becomes Judge or Official - If a shareholder in a professional corporation whose surname appears in the corporate name becomes a judge or other adjudicatory officer or holds any other office which disqualifies such shareholder to practice law, the name of the professional corporation shall be promptly changed to eliminate the name of such shareholder and such person shall promptly dispose of his or her shares of stock in the corporation;

(5) Trade Name Allowed - A professional corporation shall not use any name other than its corporate name, except to the extent a trade name or other name is required or permitted by statute, rule of court or the Revised Rules of Professional Conduct.

(b) Name of Professional Limited Liability Company - The name of every professional limited liability company shall contain the surname of one or more of its members or one or more persons who were associated with its immediate corporate, individual, partnership, or professional limited liability company predecessor in the practice of law and shall not contain any other name, word or character (other than punctuation marks and conjunctions) except as required or permitted by Rules .0102(b)(1),(2) and(5) below. The following requirements shall apply to the name of a professional limited liability company:

(1) Professional Limited Liability Company Designation - The name of a professional limited liability company shall end with the words Professional Limited Liability Company or the abbreviations "P.L.L.C." or "PLLC;"

(2) Deceased or Retired Member - The surname of any member of a professional limited liability company may be retained in the limited liability company name after such person's death, retirement, or inactivity due to age or disability, even though such person may have disposed of his or her interest in the professional limited liability company;

(3) Disqualified Member - If a member of a professional limited liability company whose surname appears in the name of such professional limited liability company becomes legally disqualified to render professional services in North Carolina or, if the member is not licensed in North Carolina, in any other jurisdiction in which the member is licensed, the name of the professional limited liability company shall be promptly changed to eliminate the name of such member, and such member shall promptly dispose of his or her interest in the professional limited liability company;

(4) Member Becomes Judge or Official - If a member of a professional limited liability company whose surname appears in the professional limited liability company name becomes a judge or other adjudicatory official or holds any other office which disqualifies such person to practice law, the name of the professional limited liability company shall be promptly changed to eliminate the name of such member and such person shall promptly dispose of his or her interest in the professional limited liability company;

(5) Trade Name Allowed - A professional limited liability company shall not use any name other than its limited liability company name, except to the extent a trade name or other name is required or permitted by statute, rule of court, or the Revised Rules of Professional Conduct.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended March 6, 1997

.0103 Registration with the North Carolina State Bar

(a) Registration of Professional Corporation - At least one of the incorporators of a professional corporation shall be an attorney at law duly licensed to practice in North Carolina. The incorporators shall comply with the following requirements for registration of a professional corporation with the North Carolina State Bar:

(1) Filing with State Bar - Prior to filing the articles of incorporation with the secretary of state, the incorporators of a professional corporation shall file the following with the secretary of the North Carolina State Bar:

(A) the original articles of incorporation;

(B) an additional executed copy of the articles of incorporation;

(C) a conformed copy of the articles of incorporation;

(D) a registration fee of fifty dollars;

(E) an application for certificate of registration for a professional corporation (Form PC-1; *see* Section .0106(a) of this subchapter) verified by all incorporators, setting forth

(i) the name and address of each person who will be an original shareholder or an employee who will practice law for the corporation in North Carolina;

(ii) the name and address of at least one person who is an incorporator;

(iii) the name and address of at least one person who will be an original director; and

(iv) the name and address of at least one person who will be an original officer, and stating that all such persons are duly licensed to practice law in North Carolina. The application shall also

(a) set forth the name, address, and license information of each original shareholder who is not licensed to practice law in North Carolina but who shall perform services on behalf of the corporation in another jurisdiction in which the corporation maintains an office; and

(b) certify that all such persons are duly licensed to practice law in the appropriate jurisdiction. The application shall include a representation that the corporation will be conducted in compliance with the Professional Corporation Act and these regulations; and

(F) a certification for professional corporation by the Council of the North Carolina State Bar (Form PC-2; *see* Rule .0106(b) of this subchapter), a copy of which shall be attached to the original, the executed copy, and the conformed copy of the articles of incorporation, to be executed by the secretary in accordance with Rule .0103(a)(2) below.

(2) Certificates Issued by Secretary and Council - The secretary shall review the articles of incorporation for compliance with the laws relating to professional corporations and these regulations. If the secretary determines that all persons who will be original shareholders are active members in good standing with the North Carolina State Bar, or duly licensed to practice law in another jurisdiction in which the corporation shall maintain an office, and that the articles of incorporation conform with the laws relating to professional corporations and these regulations, the secretary shall take the following actions:

(A) execute the certification for professional corporation by the Council of the North Carolina State Bar (Form PC-2; *see* Rule .0106(b) of this subchapter) attached to the original, the executed copy, and the conformed copy of the articles of incorporation and return the original and the conformed copies of the articles of incorporation, together with the attached certificates, to the incorporators for filing with the secretary of state;

(B) retain the executed copy of the articles of incorporation together with the application (Form PC-1) and the certification of council (Form PC-2) in the office of the North Carolina State Bar as a permanent record;

(C) issue a certificate of registration for a professional corporation (Form PC-3; *see* Rule .0106(c) of this subchapter) to the professional corporation to become effective upon the effective date of the articles of incorporation after said articles are filed with the secretary of state.

(b) Registration of a Professional Limited Liability Company - At least one of the persons executing the articles of organization of a professional limited liability company shall be an attorney at law duly licensed to practice law in North Carolina. The persons executing the articles of organization shall comply with the following requirements for registration with the North Carolina State Bar:

(1) Filing with State Bar - Prior to filing the articles of organization with the secretary of state, the persons executing the articles of organization of a professional limited liability company shall file the following with the secretary of the North Carolina State Bar:

(A) the original articles of organization;

(B) an additional executed copy of the articles of organization;

(C) a conformed copy of the articles of organization;

(D) a registration fee of $50;

(E) an application for certificate of registration for a professional limited liability company (Form PLLC-1; *see* Rule .0106(f) of this subchapter) verified by all of the persons executing the articles of organization, setting forth

(i) the name and address of each original member or employee who will practice law for the professional limited liability company in North Carolina;

(ii) the name and address of at least one person executing the articles of organization; and

(iii) the name and address of at least one person who will be an original manager, and stating that all such persons are duly licensed to practice law in North Carolina. The application shall also

(a) set forth the name, address, and license information of each original member who is not licensed to practice law in North Carolina but who shall perform services on behalf of the professional limited liability company in another jurisdiction in which the professional limited liability company maintains an office; and

(b) certify that all such persons are duly licensed to practice law in the appropriate jurisdiction. The application shall include a representation that the professional limited liability company will be conducted in compliance with the North Carolina Limited Liability Company Act and these regulations;

(F) a certification for professional limited liability company by the Council of the North Carolina State Bar, (Form PLLC-2; *see* Rule .0106(g) of this subchapter), a copy of which shall be attached to the original, the executed copy, and the conformed copy of the articles of organization, to be executed by the secretary in accordance with Rule .0103(b)(2) below.

(2) Certificates Issued by the Secretary - The secretary shall review the articles of organization for compliance with the laws relating to professional limited liability companies and these regulations. If the secretary determines that all of the persons who will be original members are active members in good standing with the North Carolina State Bar, or duly licensed in another jurisdiction in which the professional limited liability company shall maintain an office, and the articles of organization conform with the laws relating to professional limited liability companies and these regulations, the secretary shall take the following actions:

(A) execute the certification for professional limited liability company by the Council of the North Carolina State Bar (Form PLLC-2) attached to the original, the executed copy and the conformed copy of the articles of organization and return the original and the conformed copy of the articles of organization, together with the attached certificates, to the persons executing the articles of organization for filing with the secretary of state;

(B) retain the executed copy of the articles of organization together with the application (Form PLLC-1) and the certification (Form PLLC-2) in the office of the North Carolina State Bar as a permanent record;

(C) issue a certificate of registration for a professional limited liability company (Form PLLC-3; *see* Rule .0106(h) of this subchapter) to the professional limited liability company to become effective upon the effective date of the articles of organization after said articles are filed with the secretary of state.

(c) Refund of Registration Fee - If the secretary is unable to make the findings required by Rules .0103(a)(2) or .0103(b)(2) above, the secretary shall refund the $50 registration fee.

(d) Expiration of Certificate of Registration - The initial certificate of registration for either a professional corporation or a professional limited liability company shall remain effective through June 30 following the date of registration.

(e) Renewal of Certificate of Registration - The certificate of registration for either a professional corporation or a professional limited liability company shall be renewed on or before July 1 of each year upon the following conditions:

(1) Renewal of Certificate of Registration for Professional Corporation - A professional corporation shall submit an application for renewal of certificate of registration for a professional corporation (Form PC-4; *see* Rule .0106(d) of this subchapter) to the secretary listing the names and addresses of all of the shareholders and employees of the corporation who practice law for the professional corporation in North Carolina and the name and address of at least one officer and one director of the professional corporation, and certifying that all such persons are duly licensed to practice law in the state of North Carolina and representing that the corporation has complied with these regulations and the provisions of the Professional Corporation Act. Such application shall also

(i) set forth the name, address, and license information of each shareholder who is not licensed to practice law in North Carolina but who performs services on behalf of the corporation in another jurisdiction in which the corporation maintains an office; and

(ii) certify that all such persons are duly licensed to practice law in the appropriate jurisdiction. Upon a finding by the secretary that all shareholders are active members in good standing with the North Carolina State Bar, or are duly licensed to practice law in another jurisdiction in which the corporation maintains an office, the secretary shall renew the certificate of registration by making a notation in the records of the North Carolina State Bar;

(2) Renewal of Certificate of Registration for a Professional Limited Liability Company - A professional limited liability company shall submit an application for renewal of certificate of registration for a professional limited liability company (Form PLLC-4; *see* Rule .0106(i) of this subchapter) to the secretary listing the names and addresses of all of the members and employees of the professional limited liability company who practice law in North Carolina, and the name and address of at least one manager, and certifying that all such persons are duly licensed to practice law in the state of North Carolina, and representing that the professional limited liability company has complied with these regulations and the provisions of the North Carolina Limited Liability Company Act. Such application shall also

(i) set forth the name, address, and license information of each member who is not licensed to practice law in North Carolina but who performs services on behalf of the professional limited liability company in another jurisdiction in which the professional limited liability company maintains an office; and

(ii) certify that all such persons are duly licensed to practice law in the appropriate jurisdiction. Upon a finding by the secretary that all members are active members in good standing with the North Carolina State

Bar, or are duly licensed to practice law in another jurisdiction in which the professional limited liability company maintains an office, the secretary shall renew the certificate of registration by making a notation in the records of the North Carolina State Bar;

(3) Renewal Fee - An application for renewal of a certificate of registration for either a professional corporation or a professional limited liability company shall be accompanied by a renewal fee of $25;

(4) Refund of Renewal Fee - If the secretary is unable to make the findings required by Rules .0103(e)(1) or .0103(e)(2) above, the secretary shall refund the $25 registration fee;

(5) Failure to Apply for Renewal of Certificate of Registration - In the event a professional corporation or a professional limited liability company shall fail to submit the appropriate application for renewal of certificate of registration, together with the renewal fee, to the North Carolina State Bar within 30 days following the expiration date of its certificate of registration, the secretary shall send a notice to show cause letter to the professional corporation or the professional limited liability company advising said professional corporation or professional limited liability company of the delinquency and requiring said professional corporation or professional limited liability company to either submit the appropriate application for renewal of certificate of registration, together with the renewal fee and a late fee of $10, to the North Carolina State Bar within 30 days or to show cause for failure to do so. Failure to submit the application, the renewal fee, and the late fee within said thirty days, or to show cause within said time period, shall result in the suspension of the certificate of registration for the delinquent professional corporation or professional limited liability company and the issuance of a notification to the secretary of state of the suspension of said certificate of registration;

(6) Reinstatement of Suspended Certificate of Registration - Upon (a) the submission to the North Carolina State Bar of the appropriate application for renewal of certificate of registration, together with all past due renewal fees and late fees; and (b) a finding by the secretary that the representations in the application are correct, a suspended certificate of registration of a professional corporation or professional limited liability company shall be reinstated by the secretary by making a notation in the records of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended March 6, 1997

.0104 Management and Financial Matters

(a) Management - At least one director and one officer of a professional corporation and at least one manager of a professional limited liability company shall be active members in good standing with the North Carolina State Bar.

(b) Authority Over Professional Matters - No person affiliated with a professional corporation or a professional limited liability company, other than a licensee, shall exercise any authority whatsoever over the rendering of professional services in North Carolina or in matters of North Carolina law.

(c) No Income to Disqualified Person - The income of a professional corporation or of a professional limited liability company attributable to the practice of law during the time that a shareholder of the professional corporation or a member of a professional limited liability company is legally disqualified to render professional services in North Carolina or, if the shareholder or member is not licensed in North Carolina, in any jurisdiction in which the shareholder or member is licensed, or after a shareholder or a member becomes a judge, other adjudicatory officer, or the holder of any other office, as specified in Rules .0102(a)(4) or .0102(b)(4) of this subchapter, shall not in any manner accrue to the benefit of such shareholder, or his or her shares, or to such member.

(d) Stock of a Professional Corporation - A professional corporation may acquire and hold its own stock.

(e) Acquisition of Shares of Deceased or Disqualified Shareholder - Subject to the provisions of G.S. 55B-7, a professional corporation may make such agreement with its shareholders or its shareholders may make such agreement between themselves as they may deem just for the acquisition of the shares of a deceased or retiring shareholder or a shareholder who becomes disqualified to own shares under the Professional Corporation Act or under these regulations.

(f) Stock Certificate Legend - There shall be prominently displayed on the face of all certificates of stock in a professional corporation a legend that any transfer of the shares represented by such certificate is subject to the provisions of the Professional Corporation Act and these regulations.

(g) Transfer of Stock of Professional Corporation - When stock of a professional corporation is transferred to a licensee, the professional corporation shall request that the secretary issue a stock transfer certificate (Form PC-5; *see* Rule .0106(e) of this subchapter) as required by G.S. 55B-6. The secretary is authorized to issue the certificate which shall be permanently attached to the stub of the transferee's stock certificate in the stock register of the professional corporation. The fee for such certificate shall be two dollars for each transferee listed on the stock transfer certificate.

(h) Stock Register of Professional Corporation - The stock register of a professional corporation shall be kept at the principal office of the corporation and shall be subject to inspection by the secretary or his or her delegate during business hours at the principal office of the corporation.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended March 6, 1997

.0105 General and Administrative Provisions

(a) Administration of Regulations - These regulations shall be administered by the secretary, subject to the review and supervision of the council. The council may from time to time appoint such standing or special committees as it may deem proper to deal with any matter affecting the administration of these regulations. It shall be the duty of the secretary to bring to the attention of the council or its appropriate committee any violation of the law or of these regulations.

(b) Appeal to Council - If the secretary shall decline to execute any certificate required by Rule .0103(a)(2), Rule .0103(b)(2), or Rule .0104(g) of this subchapter, or to renew the same when properly requested, or shall refuse to take any other action requested in writing by a professional corporation or a professional limited liability company, the aggrieved party may request in writing that the council review such action. Upon receipt of such a request, the council shall provide a formal hearing for the aggrieved party through a committee of its members.

(c) Articles of Amendment, Merger, and Dissolution - A copy of the following documents, duly certified by the secretary of state, shall be filed with the secretary within 10 days after filing with the secretary of state:

(1) all amendments to the articles of incorporation of a professional corporation or to the articles of organization of a professional limited liability company;

(2) all articles of merger to which a professional corporation or a professional limited liability company is a party;

(3) all articles of dissolution dissolving a professional corporation or a professional limited liability company;

(4) any other documents filed with the secretary of state changing the corporate structure of a professional corporation or the organizational structure of a professional limited liability company.

(d) Filing Fee - Except as otherwise provided in these regulations, all reports or papers required by law or by these regulations to be filed with the secretary shall be accompanied by a filing fee of two dollars.

(e) Accounting for Filing Fees - All fees provided for in these regulations shall be the property of the North Carolina State Bar and shall be deposited by the secretary to its account, and such account shall be separately stated on all financial reports made by the secretary to the council and on all financial reports made by the council.

(f) Records of State Bar - The secretary shall keep a file for each professional corporation and each professional limited liability company which shall contain the executed articles of incorporation or organization, all amendments thereto, and all other documents relating to the affairs of the corporation or professional limited liability company.

(g) Additional Information - A professional corporation or a professional limited liability corporation shall furnish to the secretary such information and documents relating to the administration of these regulations as the secretary or the council may reasonably request.

History Note: Statutory Authority G.S. 84-23

Readopted Effective December 8, 1994

.0106 Forms

(a) Form PC-1: Application for Certificate of Registration for a Professional Corporation

The undersigned, being all of the incorporators of _____, a professional corporation to be incorporated under the laws of the state of North Carolina for the purpose of practicing law, hereby certify to the Council of the North Carolina State Bar:

1. At least one person who is an incorporator, at least one person who will be an original officer, and at least one person who will be an original director, and all persons who, to the best knowledge and belief of the undersigned, will be original shareholders and employees who will practice law for said professional corporation in North Carolina are duly licensed to practice law in the state of North Carolina. The names and addresses of such persons are:

Name, Address, and Position (incorporator, officer, director, shareholder, employee)

_____

_____

_____

2. Each original shareholder who is not licensed to practice law in North Carolina but who performs services on behalf of the corporation in another jurisdiction in which the corporation maintains an office is duly licensed to practice law in that jurisdiction. The name, address, and license information of each such person are:

Name, Address, Jurisdiction of Licensure, License Number

_____

_____

_____

3. The jurisdiction(s) other than North Carolina in which the corporation will maintain an office are:

Name of Jurisdiction and Address of Office(s)

_____

4. The undersigned represent that the professional corporation will be conducted in compliance with the Professional Corporations Act and with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

5. Application is hereby made for a Certificate of Registration to be effective upon the effective date of the professional corporation's articles of incorporation after said articles are filed with the secretary of state.

6. Attached hereto is the registration fee of $50.

This the _____ day of _____, 19___.

Incorporator _____

Incorporator _____

Incorporator _____

[Signatures of all incorporators.]

[Notarization]

(b) Form PC-2: Certification for Professional Corporation by Council of the North Carolina State Bar

The incorporators of _____, a professional corporation, have certified to the Council of the North Carolina State Bar the names and addresses of all persons who will be original owners of said professional corporation's shares.

Based upon that certification and my examination of the roll of attorneys licensed to practice law in the state of North Carolina, I hereby certify that the ownership of the shares of stock is in compliance with the requirements of G.S. 55B-4(2) and G.S. 55B-6.

This certificate is executed under the authority of the Council of the North Carolina State Bar, this ____day of _____, 19__.

_____

Secretary of the North Carolina State Bar

[This certificate is required by G.S. 55B-4(4) and must be attached to the original articles of incorporation when filed with the secretary of state. *See* Rule .0103(a)(2) of this subchapter.]

(c) Form PC-3: Certificate of Registration for a Professional Corporation

It appears that _____, a professional corporation, has met all of the requirements of G.S. 55B-4, G.S. 55B-6 and the Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law of the North Carolina State Bar.

By the authority of the Council of the North Carolina State Bar, I hereby issue this Certificate of Registration for a Professional Corporation pursuant to the provisions of G.S. 55B-10 and the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

This registration is effective upon the effective date of the articles of incorporation of said professional corporation, after said articles are filed with the secretary of state, and expires on June 30, 19__.

This the ____day of _____, 19__.

_____ Secretary of the North Carolina State Bar

(d) Form PC-4: Application for Renewal of Certificate of Registration for Professional Corporation

Application is hereby made for renewal of the Certificate of Registration for Professional Corporation of _____, a professional corporation.

In support of this application, the undersigned hereby certifies to the Council of the North Carolina State Bar:

1. At least one of the officers and one of the directors, and all of the shareholders and employees of said professional corporation who practice law for said professional corporation in North Carolina are duly licensed to practice law in the state of North Carolina. The names and addresses of such persons are:

Name, Address, and Position (incorporator, officer, director, shareholder, employee)

_____

_____

_____

2. Each shareholder who is not licensed to practice law in North Carolina but who performs services on behalf of the corporation in another jurisdiction in which the corporation maintains an office is duly licensed to practice law in that jurisdiction. The name, address, and license information of each such person are:

Name, Address, Jurisdiction of Licensure, License Number

_____

_____

_____

3. The jurisdiction(s) other than North Carolina in which the corporation maintains an office is:

Name of Jurisdiction and Address of Office(s)

_____

_____

_____

4. At all times since the issuance of its Certificate of Registration for Professional Corporation, said professional corporation has complied with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law and with the Professional Corporations Act.

5. Attached hereto is the renewal fee of $25.

This the ____ day of _____, 19__.

_____

(Professional Corporation)

By _____

President (or Chief Executive)

[Notarization]

(e) Form PC-5: North Carolina State Bar Stock Transfer Certificate

I hereby certify that _____ (transferee) is duly licensed to practice law in the State of North Carolina and as of this

date may be a transferee of shares of stock in a professional corporation formed to practice law in the state of North Carolina.

This certificate is executed under the authority of the Council of the North Carolina State Bar, this ____ day of _____, 19___.

_____

Secretary of the North Carolina State Bar

[This certificate is required by G.S. 55B-6 and must be attached to the transferee's stock certificate. *See* Rule .0104(g) of this subchapter.]

(f) Form PLLC-1: Application for Certificate of Registration for a Professional Limited Liability Company

The undersigned, being all of the persons executing the articles of organization of _____, a professional limited liability company to be organized under the laws of the state of North Carolina for the purpose of practicing law, hereby certify to the Council of the North Carolina State Bar:

1. At least one person executing the articles of organization, at least one person who will be an original manager, and all persons who, to the best knowledge and belief of the undersigned, will be original members and employees who will practice law in North Carolina for said professional limited liability company are duly licensed to practice law in the state of North Carolina. The names and addresses of all such persons are:

Name, Address, and Position (incorporator, officer, director, shareholder, employee)

_____

_____

_____

2. Each original member who is not licensed to practice law in North Carolina but who will perform services on behalf of the professional limited liability company in another jurisdiction in which the professional limited liability company maintains an office is duly licensed to practice law in that jurisdiction. The name, address, and license information of each such person are:

Name, Address, Jurisdiction of Licensure, License Number

_____

_____

_____

3. The jurisdiction(s) other than North Carolina in which the professional limited liability company will maintain an office is:

Name of Jurisdiction and Address of Office(s)

_____

_____

_____

4. The undersigned represent that the professional limited liability company will be conducted in compliance with the North Carolina Limited Liability Company Act and with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

5. Application is hereby made for a Certificate of Registration to be effective upon the effective date of the professional limited liability company's articles of organization after said articles are filed with the secretary of state.

6. Attached hereto is the registration fee of $50.

This the ____ day of _____, 19___.

_____

_____

_____

[Signatures of all persons executing articles of organization.]

[Notarization]

(g) Form PLLC-2: Certification for Professional Limited Liability Company by Council of the North Carolina State Bar

All of the persons executing the articles of organization of _____, a professional limited liability company, have certified to the Council of the North Carolina State Bar the names and addresses of all persons who will be original members of said professional limited liability company.

Based upon that certification and my examination of the roll of attorneys licensed to practice law in the state of North Carolina, I hereby certify that the membership interest is in compliance with the requirements of G.S. 55C-2-01(c), and, by reference, G.S. 55B-4(2) and G.S. 55B-6.

This certificate is executed under the authority of the Council of the North Carolina State Bar, this ____ day of _____, 19__.

_____ Secretary of the North Carolina State Bar

[This certificate is required by G.S. 55B-4(4) and G.S. 57C-2-01 and must be attached to the original articles of organization when filed with the secretary of state. *See* Rule .103(b)(2) of this subchapter.]

(h) Form PLLC-3: Certificate of Registration for a Professional Limited Liability Company

It appears that _____, a professional limited liability company, has met all of the requirements of G.S. 57C-2-01 and the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

By the authority of the Council of the North Carolina State Bar, I hereby issue this Certificate of Registration for a Professional Limited Liability Company pursuant to the provisions of G.S. 55B-10, G.S. 57C-2-01 and the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

This registration is effective upon the effective date of the articles of organization of said professional limited liability company, after said articles are filed with the secretary of state, and expires on June 30, 19__.

This the ____day of _____, 19__.

_____

Secretary of the North Carolina State Bar

(i) Form PLLC-4: Application for Renewal of Certificate of Registration for Professional Limited Liability Company

Application is hereby made for renewal of the Certificate of Registration for Professional Limited Liability Company of _____, a professional limited liability company.

In support of this application, the undersigned hereby certifies to the Council of the North Carolina State Bar:

1. At least one of the managers, and all of the members and employees of said professional limited liability company who practice law for said professional limited liability company in North Carolina are duly licensed to practice law in the State of North Carolina. The names and addresses of all such persons are:

Name and Position Address (manager, member, employee)

_____

_____

_____

2. Each member who is not licensed to practice law in North Carolina but who performs services on behalf of the professional limited liability company in another jurisdiction in which the professional limited liability company maintains an office is duly licensed to practice law in that jurisdiction. The names, addresses, and license information of each such person are:

Name, Address, Jurisdiction of Licensure, License Number

_____

_____

_____

3. The jurisdiction(s) other than North Carolina in which the professional limited liability company maintains an office are:

Name of Jurisdiction and Address of Office(s)

_____

_____

_____

4. At all times since the issuance of its Certificate of Registration for Professional Limited Liability Company, said professional limited liability company has complied with the North Carolina State Bars Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law and with the provisions of the North Carolina Limited Liability Company Act.

5. Attached hereto is the renewal fee of $25.

This the ____ day of _____, 19__.

_____

(Professional Limited Liability Company)

By _____ Manager
[Notarization]
History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended March 6, 1997

Section .0200 Registration of Interstate and International Law Firms

.0201 Registration Requirement

No law firm or professional organization which maintains offices in North Carolina and one or more other jurisdictions may do business in North Carolina without first obtaining a certificate of registration from the North Carolina State Bar provided, however, that no law firm or professional organization shall be required to obtain a certificate of registration if all attorneys associated with the law firm or professional organization, or any law firm or professional organization that is in partnership with said law firm or professional organization, are licensed to practice law in North Carolina.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended March 5, 1998

.0202 Conditions of Registration

The secretary of the North Carolina State Bar shall issue such a certificate of registration upon satisfaction of the following conditions:

(1) There shall be filed with the secretary of the North Carolina State Bar a registration statement disclosing:

(a) all names used to identify the filing law firm or professional organization;

(b) addresses of all offices maintained by the filing law firm or professional organization;

(c) the name and address of any law firm or professional organization with which the filing law firm or professional organization is in partnership and the name and address of such partnership;

(d) the name and address of each attorney who is a partner, shareholder, member or employee of the filing law firm or professional organization or who is a partner, shareholder, member or employee of a law firm or professional organization with which the filing law firm or professional organization is in partnership;

(e) the relationship of each attorney identified in Rule .0202(1)(d) above to the filing law firm or professional organization;

(f) the jurisdictions to which each attorney identified in Rule .0202(1)(d) above is admitted to practice law.

(2) There shall be filed with the registration statement a notarized statement of the filing law firm or professional organization executed by a responsible attorney, associated with the filing law firm or professional organization, who is licensed in North Carolina certifying that each attorney identified in Rule .0202(1)(d) above who is not licensed to practice law in North Carolina is a member in good standing of the bar of each jurisdiction to which the attorney has been admitted.

(3) There shall be filed with the registration statement a notarized statement of the filing law firm or professional organization executed by a responsible attorney associated with the filing law firm or professional organization who is licensed in North Carolina affirming that each attorney identified in Rule .0202(1)(d) above who is not licensed to practice law in North Carolina will govern his or her professional conduct with respect to legal matters arising from North Carolina in accordance with the Revised Rules of Professional Conduct of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended March 5, 1998

.0203 Registration Fee

There shall be submitted with each registration statement and supporting documentation a registration fee of $500.00 as administrative cost.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.0204 Certificate of Registration

A certificate of registration shall remain effective until January 1 following the date of filing and may be renewed annually by the secretary of the North Carolina State Bar upon the filing of an updated registration statement which satisfies the requirements set forth above and the submission of the registration fee.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.0205 Effect of Registration

This rule shall not be construed to confer the right to practice law in North Carolina upon any lawyer not licensed to practice law in North Carolina.

History Note: Statutory Authority G.S. 84-16; G.S. 84-23
Readopted Effective December 8, 1994

Section .0300 Rules Concerning Prepaid Legal Services Plans

.0301 Registration Requirement

No licensed North Carolina attorney shall participate in a prepaid legal services plan in this state unless the plan has registered with the North Carolina State Bar and has complied with the rules set forth below.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Readopted Effective December 8, 1994.

.0302 Registration Site

A prepaid legal services plan must be registered in the office of the North Carolina State Bar prior to its implementation or operation in North Carolina on forms supplied by the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Readopted Effective December 8, 1994.

.0303 Requirement to File Amendments

Amendments to prepaid legal services plans and to other documents required to be filed upon registration of such plans shall be filed in the office of the North Carolina State Bar no later than 30 days after the adoption of such amendments.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Readopted Effective December 8, 1994.

.0304 Advertising of State Bar Approval Prohibited

Prepaid legal services plans approved by the North Carolina State Bar shall register with the North Carolina State Bar on or before January 31, 1992. Effective January 31, 1992, the approval of these existing plans is revoked and the plans shall not advertise, communicate, or represent in any way that the North Carolina State Bar approved the plan. If a plan advertises or otherwise represents that it is registered with the North Carolina State Bar, such advertisement or representation shall include a statement that registration with the North Carolina State Bar does not constitute approval of the plan by the State Bar. This statement shall be made in conjunction with the representation about registration and it shall be conspicuous.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Readopted Effective December 8, 1994.
Amended February 5, 2002

.0305 Annual Registration

Subsequent to initial registration, all prepaid legal services plans shall be registered annually on or before January 31 on forms supplied by the State Bar.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Readopted Effective December 8, 1994.

.0306 Registration Fee

The initial and annual registration fees for each prepaid legal services plan shall be $100.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Readopted Effective December 8, 1994.

.0307 Index of Registered Plans

The North Carolina State Bar shall maintain an index of the prepaid legal services plans registered pursuant to these rules. All documents filed in compliance with this rule are considered public documents and shall be available for public inspection during normal business hours.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Readopted Effective December 8, 1994.

.0308 State Bar May Not Approve or Disapprove Plans

The North Carolina State Bar shall not approve or disapprove any prepaid legal services plan or render any legal opinion regarding any plan. The registration of any plan under this rule shall not be construed to indicate approval or disapproval of the plan.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Readopted Effective December 8, 1994.

.0309 State Bar Jurisdiction

The North Carolina State Bar retains jurisdiction of North Carolina licensed attorneys who participate in prepaid legal services plans and North Carolina licensed attorneys are subject to the rules and regulations governing the practice of law.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Readopted Effective December 8, 1994.

.0310 Definition of Prepaid Plan

A prepaid legal services plan or a group legal services plan ("a plan") is any arrangement by which a person, firm, or corporation, not otherwise authorized to engage in the practice of law, in exchange for any valuable consideration, offers to provide or arranges the provision of legal services that are paid for in advance of the need for the service ("covered services"). In addition to covered services, a plan may provide specified legal services at fees that are less than what a non-member of the plan would normally pay. The legal services offered by a plan must be provided by a licensed lawyer who is not an employee, director, or owner of the plan. A plan does not include the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee. [This definition is also found in Rule 7.3(d) of the Revised Rules of Professional Conduct.]

History Note: Statutory Authority G.S. 84-23
Adopted February 5, 2002

Index—Revised Rules of Professional Conduct

0.1 Preamble: A Lawyer's Responsibilities 72
0.2 Scope 73
0.3 Terminology 74

Client-Lawyer Relationship

Rule 1.1 Competence 74
Rule 1.2 Scope Of Representation 75
Rule 1.3 Diligence 76
Rule 1.4 Communication 77
Rule 1.5 Fees 78
Rule 1.6 Confidentiality of Information 81
Rule 1.7 Conflict of Interest: General Rule 83
Rule 1.8 Conflict of Interest: Prohibited Transactions and Other Specific Applications 88
Rule 1.9 Conflict of Interest: Former Client 90
Rule 1.10 Imputed Disqualification: General Rule 92
Rule 1.11 Successive Government and Private Employment 93
Rule 1.12 Former Judge or Arbitrator 94
Rule 1.13 Organization As Client 94
Rule 1.14 Client Under a Disability 95
Rule 1.15 Preserving the Property of Others 96
Rule 1.15-1 Definitions 96
Rule 1.15-2 General Rules 96
Rule 1.15-3 Records and Accountings 97
Rule 1.15-4 Interest on Lawyers' Trust Accounts 100
Rule 1.16 Declining or Terminating Representation 100
Rule 1.17 Sale of a Law Practice 102
Rule 1.18 Sexual Relations with Clients Prohibited 103

Counselor

Rule 2.1 Advisor 104
Rule 2.2 Intermediary 104
Rule 2.3 Evaluation for Use by Third Persons 105

Advocate

Rule 3.1 Meritorious Claims and Contentions 106
Rule 3.2 Expediting Litigation 106
Rule 3.3 Candor Toward the Tribunal 106
Rule 3.4 Fairness to Opposing Party and Counsel 108
Rule 3.5 Impartiality and Decorum of the Tribunal 110
Rule 3.6 Trial Publicity 111
Rule 3.7 Lawyer as Witness 112
Rule 3.8 Special Responsibilities of a Prosecutor 113
Rule 3.9 Reserved 114

Transactions with Persons Other Than Clients

Rule 4.1 Truthfulness in Statements to Others 114
Rule 4.2 Communication with Person Represented by Counsel .114
Rule 4.3 Dealing with Unrepresented Person 115
Rule 4.4 Respect for Rights of Third Persons 115

Law Firms and Associations

Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer 116
Rule 5.2 Responsibilities of a Subordinate Lawyer 116
Rule 5.3 Responsibilities Regarding Nonlawyer Assistants 116
Rule 5.4 Professional Independence of a Lawyer 117
Rule 5.5 Unauthorized Practice of Law 118
Rule 5.6 Restrictions on Right to Practice 119

Public Service

Rule 6.1 Reserved 119
Rule 6.2 Reserved 119
Rule 6.3 Membership in Legal Services Organization 119
Rule 6.4 Law Reform Activities Affecting Client Interests 120
Rule 6.5 Action as a Public Official 120

Information About Legal Services

Rule 7.1 Communications Concerning a Lawyer's Services 120
Rule 7.2 Advertising 121
Rule 7.3 Direct Contact with Prospective Clients 122
Rule 7.4 Communication of Fields of Practice 124
Rule 7.5 Firm Names and Letterheads 124

Maintaining the Integrity of the Profession

Rule 8.1 Bar Admission and Disciplinary Matters 125
Rule 8.2 Judges and Other Adjudicatory Officers 126
Rule 8.3 Reporting Professional Misconduct 126
Rule 8.4 Misconduct 127
Rule 8.5 Disciplinary Authority; Choice of Law 129

Correlation Tables

Correlation Table 1: Revised Rules of Professional Conduct and Superseded N.C. Rules of Professional Conduct (1985) 131
Correlation Table 2: Superseded N.C. Rules of Professional Conduct, Revised Rules of Professional Conduct and Superseded Code of Professional Responsibility 122

Title 27 of the North Carolina Administrative Code
The North Carolina State Bar

Chapter 2
Revised Rules of Professional Conduct of The North Carolina State Bar

Editor's Note

On July 24, 1997, the North Carolina Supreme Court entered an order approving the Revised Rules of Professional Conduct of the North Carolina State Bar. The court's order also repealed the Rules of Professional Conduct which were originally enacted on October 7, 1985. The (1985) Rules of Professional Conduct governed the professional conduct of North Carolina lawyers from January 1, 1986 until July 24, 1997. From January 1, 1974 until the adoption of the 1985 rules, lawyers were regulated under the North Carolina Code of Professional Responsibility (adopted on April 30, 1973).

The complete text of the Revised Rules and all of the comments thereto, as approved by the North Carolina Supreme Court, follows this note. Correlation tables appear after the Revised Rules. These tables cross-reference the Revised Rules with the comparable provisions of the superseded (1985) Rules of Professional Conduct and (1973) Code of Professional Conduct.

Each revised rule is followed by annotations of cases, decisions of the Disciplinary Hearing Commission of the North Carolina State Bar, and ethics opinions of the State Bar which apply or interpret the rule. In the annotations, the terms "CPR" and "RPC" designate formal ethics opinions adopted under the superseded (1973) Code of Professional Responsibility and (1985) Rules of Professional Conduct respectively. These opinions still provide guidance on issues of professional conduct except to the extent that a particular opinion is overruled by a subsequent opinion or by a provision of the Revised Rules of Professional Conduct. Ethics opinions rendered invalid by subsequent opinion or the Revised Rules are generally not included in the annotations. (A CPR opinion may be obtained by calling the ethics department at the State Bar.) An ethics opinion promulgated under the Revised Rules is designated as a "Formal Ethics Opinion."

The case notes reprinted or quoted verbatim in the following pages are taken from the *General Statutes of North Carolina, Annotated Rules of North Carolina*, Copyright 2001, by Matthew Bender & Company, Inc., and are reprinted with permission. All rights reserved.

The primary source material for the Revised Rules is the ABA Model Rules of Professional Conduct (the "Model Rules"). North Carolina Rule 1.18, "Sexual Relations with Clients Prohibited," has no counterpart in the Model Rules. The text for this rule is derived from similar rules from three other states: the California Rules of Professional Conduct, Rule 3-120, "Sexual Relations with Client," adopted by the California State Bar Board of Governors on April 20, 1991, and approved by the California Supreme Court on August 13, 1992; the Minnesota Rules of Professional Conduct, Rule 1.8(k), "Conflict of Interest: Prohibited Transactions," adopted by the Supreme Court of Minnesota on June 10, 1994; and the Oregon Code of Professional Responsibility, DR 5-110, "Sexual Relations with Clients," adopted by the Oregon Supreme Court on December 31, 1992. The comment to Rule 1.18 draws heavily from the text of ABA Formal Opinion 92-364, "Sexual Relations with Clients," adopted by the ABA Standing Committee on Ethics and Professional Responsibility on July 6, 1992. Appreciation is expressed to the ABA and the bars of our sister states for use of these materials.

0.1 PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

[3] In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Revised Rules of Professional Conduct or other law.

[4] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[5] As a public citizen, a lawyer should seek improvement of the law, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education.

[6] A lawyer should render public interest legal service and provide civic leadership. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, society, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

[7] Traditionally, the legal profession has been a group of people united in a learned calling for the public good. At their best, lawyers have assured the availability of legal services to all, regardless of ability to pay, and as leaders of their communities, states, and nation have utilized their education and experience to improve society. It is acknowledged that it is the basic responsibility of each lawyer engaged in the practice of law to provide community service, community leadership, and public interest legal services without fee, or at a substantially reduced fee, in such areas as poverty law, civil rights, public rights law, charitable organization representation, and the administration of justice.

[8] The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, voluntary efforts by the profession to provide legal assistance in coping with the web of statutes, rules, and regulations are imperative for communities and persons of modest and limited means.

[9] The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer. Personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in, or otherwise support, the provision of legal services to the disadvantaged. The provision of free legal services to

those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed by the profession and the government. Every lawyer should support all proper efforts to meet this need for legal services.

[10] As important as the provision of pro bono legal services is, participation of lawyers in civic leadership is equally important. In the long run, because of their values, education, and experience, lawyers who render unpaid service in nonlegal settings to help provide new jobs, improve educational opportunities, and meet the spiritual needs of a community, can enhance the quality of life of all citizens.

[11] Many of a lawyer's professional responsibilities are prescribed in the Revised Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

[12] A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and, at the same time, assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves that public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private. In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Revised Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.

[13] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[14] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for the abuse of legal authority is more readily challenged by a self-regulated profession.

[15] The legal profession's relative autonomy carries with it a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Revised Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[16] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Revised Rules of Professional Conduct, when properly applied, serve to define that relationship.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

CASE NOTES

Respect for Other Lawyers. - Where a law firm represented a client for a number of years pursuant to a contingency fee arrangement, the firm should have been notified of its discharge when it became clear that a new attorney was taking over representation of the client. *Robinson, Bradshaw & Hinson v. Smith*, 129 N.C. App. 305, 498 S.E.2d 841 (1998), review dismissed, 348 N.C. 695, 511 S.E.2d 650 (1998).

Cited in *SuperGuide Corp. v. DirecTV Enters., Inc.*, 141 F. Supp. 2d 616 (W.D.N.C. 2001).

0.2 SCOPE

[1] The Revised 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 "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act, or acts within the bounds of such discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary, and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the comments use the term "should." Comments do not add obligations to the rules but provide guidance for practicing in compliance with the rules.

[2] The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law.

[3] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[4] 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 agency 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 to represent several government agencies in intragovernmental 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.

[5] Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

[6] Violation of a rule should not give rise to a cause of action, nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a

just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extradisciplinary consequences of violating such a duty.

[7] Moreover, these rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

[8] The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances to clients that communications will be protected against disclosure.

[9] The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The preamble and this note on scope provide general orientation. The comments are intended as guides to interpretation, but the text of each rule is authoritative. Research notes were prepared to compare counterparts in the original Rules of Professional Conduct (adopted 1985, as amended) and to provide selected references to other authorities. The notes have not been adopted, do not constitute part of the Revised Rules, and are not intended to affect the application or interpretation of the rules and comments.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

CASE NOTES

Violation Not Civil Liability *Per Se*. - Although a violation of a Rule of Professional Conduct does not constitute civil liability *per se*, the rules are some evidence of an attorney's duty to his client. *Booher v. Frue,* 98 N.C. App. 570, 394 S.E.2d 816, *cert. denied*, 327 N.C. 426, 395 S.E.2d 674 (1990).

Creation of Attorney-Client Relationship. - An express verbal agreement is not necessary to establish an attorney-client relationship, but such may be implied from the conduct of the parties, even in the absence of the payment of fees or the lack of a formal contract. *Broyhill v. Aycock & Spence*, 102 N.C. App. 382, 402 S.E.2d 167, *aff'd.*, 330 N.C. 438, 410 S.E.2d 392 (1991).

Question of Attorney-Client Relationship. - A genuine issue of material fact was presented as to whether there was an attorney-client relationship where defendant introduced a deposition in which he denied that he had ever represented plaintiff in any transaction and stated that, at one point, plaintiff claimed to defendant that he represented himself, and where plaintiff, on the other hand, presented his affidavit stating that defendant did represent plaintiff in the transaction at issue. *Broyhill v. Aycock & Spence*, 102 N.C. App. 382, 402 S.E.2d 167, *aff'd.*, 330 N.C. 438, 410 S.E.2d 392 (1991).

An attorney may be held liable for negligence by a non-client third party in the absence of privity of contract. *Broyhill v. Aycock & Spence*, 102 N.C. App. 382, 402 S.E.2d 167, *aff'd.*, 330 N.C. 438, 410 S.E.2d 392 (1991).

Insurance attorney had no authority to move against default judgment where there was no contact with the individual defendant-insured. *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 463 S.E. 2d 397 (1995).

Quoted in *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 535 S.E.2d 55 (2000).

0.3 TERMINOLOGY

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

(b) "Confidential information" denotes information described in Rule 1.6(a) and (b).

(c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(d) "Firm" or "law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization, and lawyers employed in a legal services organization. *See* comment, Rule 1.10.

(e) "Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a partner in a partnership or limited liability partnership, a shareholder in a professional corporation, and a member of a professional limited liability company.

(h) "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know," when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

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

(l) "Tribunal" denotes a court or a government body exercising adjudicative or quasi-adjudicative authority.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

RULE 1.1 COMPETENCE

(a) A lawyer shall not handle a legal matter which the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter without preparation adequate under the circumstances.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to, or consultation or association with, another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that which is reasonably necessary under the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of compe-

tence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

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.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

Distinguishing Professional Negligence

[7] An error by a lawyer may constitute professional malpractice under the applicable standard of care and subject the lawyer to civil liability. However, conduct that constitutes a breach of the civil standard of care owed to a client giving rise to liability for professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client competently. A lawyer who makes a good-faith effort to be prepared and to be thorough will not generally be subject to professional discipline, although he or she may be subject to a claim for malpractice. For example, a single error or omission made in good faith, absent aggravating circumstances, such as an error while performing a public records search, is not usually indicative of a violation of the duty to represent a client competently.

[8] Repeated failure to perform legal services competently is a violation of this rule. A pattern of incompetent behavior demonstrates that a lawyer cannot or will not acquire the knowledge and skills necessary for minimally competent practice. For example, a lawyer who repeatedly provides legal services that are inadequate or who repeatedly provides legal services that are unnecessary is not fulfilling his or her duty to be competent. This pattern of behavior does not have to be the result of a dishonest or sinister motive, nor does it have to result in damages to a client giving rise to a civil claim for malpractice in order to cast doubt on the lawyer's ability to fulfill his or her professional responsibilities.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 1.1 is similar to Model Rule 1.1 and Rule 6(a) of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

Cited in *State v. Rogers,* 352 N.C. 119, 529 S.E.2d 671 (2000).

ETHICS OPINION NOTES

RPC 198. Opinion explores the ethical responsibilities of stand-by defense counsel who are instructed to take over the defense in a capital murder case without an opportunity to prepare.

RPC 199. Opinion addresses the ethical responsibilities of a lawyer appointed to represent a criminal defendant in a capital case who, in good faith, believes he lacks the experience and ability to represent the defendant competently.

RPC 216. A lawyer may use the services of a nonlawyer independent contractor to search a title provided the nonlawyer is properly supervised by the lawyer.

99 Formal Ethics Opinion 12. Opinion rules that when a lawyer appears with a debtor at a meeting of creditors in a bankruptcy proceeding as a favor to the debtor's lawyer, the lawyer is representing the debtor and all of the ethical obligations attendant to legal representation apply.

RULE 1.2 SCOPE OF REPRESENTATION

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued.

(1) A lawyer shall abide by a client's decision whether to accept an offer of settlement of 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.

(2) A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, or by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(3) In the representation of a client, a lawyer may exercise his or her professional judgment to waive or fail to assert a right or position of the client.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the Revised Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Comment

Scope of Representation

[1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions. Lawyers are encouraged to treat opposing counsel with courtesy and to cooperate with opposing counsel when it will not prevent or unduly hinder the pursuit of the objective of the representation. To this end, a lawyer may waive a right or fail to assert a position of a client without first obtaining the client's consent. For example, a lawyer may consent to an extension of time for the opposing party to file pleadings or discovery without obtaining the client's consent.

[2] In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[3] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Services Limited in Objectives or Means

[4] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

[5] An agreement concerning the scope of representation must accord with the Revised Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Criminal, Fraudulent, and Prohibited Transactions

[6] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. There is also a distinction between giving a client legitimate advice about asset protection and assisting in the illegal or fraudulent conveyance of assets.

[7] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose; for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

[8] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[9] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 1.2 is substantially similar to Model Rule 1.2. Rule 1.2 is also similar to Rule 7.1 of the superseded (1985) Rules of Professional Conduct, although Rule 1.2(b) has no counterpart in the superseded (1985) Rules.

CASE NOTES

Law Firm as Interested Party. - Law firm which had no contact with defendant/phony psychiatric resident accused of sexual misconduct with client and which had not been authorized by him to undertake his representation lacked the authority under subsection (a) of this rule to represent him on a limited basis, but could intervene under § 1A-1, Rule 24(a)(2) as an interested party to protect its interests. *Dunkley v. Shoemate*, 350 N.C. 573, 515 S.E.2d 442 (1999).

ETHICS OPINION NOTES

CPR 110. An attorney may not advise client to seek a Dominican divorce knowing that the client will return immediately to North Carolina and continue residence.

CPR 267. An attorney may prepare a contractual agreement regarding property for a man and woman who contemplate living together without marriage so long as sexual intercourse is not part of the consideration supporting the agreement.

CPR 285. An attorney may advise his client in custody litigation of the legal consequences and practical effects of her decision to move into an apartment leased by her boyfriend.

RPC 44. A closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

RPC 103. A lawyer for the insured and the insurer may not enter voluntary dismissal of the insured's counterclaim without the insured's consent.

RPC 118. An attorney should not waive the statute of limitations without the client's consent.

RPC 129. Prosecutors and defense attorneys may negotiate plea agreements in which appellate and post-conviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct.

RPC 145. A lawyer may not include language in an employment agreement that divests the client of her exclusive authority to settle a civil case.

RPC 172. A lawyer retained by an insurer to defend its insured is not required to represent the insured on a compulsory counterclaim provided the lawyer apprises the insured of the counterclaim in sufficient time to retain separate counsel.

RPC 208. A lawyer should avoid offensive trial tactics and treat others with courtesy by attempting to ascertain the reason for the opposing party's failure to respond to a notice of hearing where there has been no prior lack of diligence or responsiveness on the part of opposing counsel.

RPC 212. A lawyer may contact an opposing lawyer who failed to file an answer on time to remind the other lawyer of the error and to give the other lawyer a last opportunity to file the pleading.

RPC 220. A lawyer should seek the court's permission to listen to a tape recording of a telephone conversation of his or her client made by a third party if listening to the tape recording would otherwise be a violation of the law.

RPC 223. When a lawyer's reasonable attempts to locate a client are unsuccessful, the client's disappearance constitutes a constructive discharge of the lawyer requiring the lawyer's withdrawal from the representation.

RPC 240. A lawyer may decline to represent a client on a property damage claim while agreeing to represent the client on a personal injury claim arising out of a motor vehicle accident provided the limited representation will not adversely affect the client's representation on the personal injury claim and the client consents after full disclosure.

RPC 252. A lawyer in receipt of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain from examining the materials and return them to the sender.

98 Formal Ethics Opinion 2. Opinion rules that a lawyer may explain the effect of service of process to a client but may not advise a client to evade service of process.

99 Formal Ethics Opinion 12. Opinion rules that when a lawyer appears with a debtor at a meeting of creditors in a bankruptcy proceeding as a favor to the debtor's lawyer, the lawyer is representing the debtor and all of the ethical obligations attendant to legal representation apply.

RULE 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2. A lawyer's workload should be controlled so that each matter can be handled adequately.

[2] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

[3] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the

matter.

Distinguishing Professional Negligence

[4] Conduct that may constitute professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client diligently. Generally speaking, a single instance of unaggravated negligence does not warrant discipline. For example, missing a statute of limitations may form the basis for a claim of professional malpractice. However, where the failure to file the complaint in a timely manner is due to inadvertence or a simple mistake such as mislaying the papers or miscalculating the date upon which the statute of limitations will run, absent some other aggravating factor, such an incident will not generally constitute a violation of this rule.

[5] Conduct sufficient to warrant the imposition of professional discipline is typically characterized by the element of intent or scienter manifested when a lawyer knowingly or recklessly disregards his or her obligations. Breach of the duty of diligence sufficient to warrant professional discipline occurs when a lawyer consistently fails to carry out the obligations that the lawyer has assumed for his or her clients. A pattern of delay, procrastination, carelessness, and forgetfulness regarding client matters indicates a knowing or reckless disregard for the lawyer's professional duties. For example, a lawyer who habitually misses filing deadlines and court dates is not taking his or her professional responsibilities seriously. A pattern of negligent conduct is not excused by a burdensome case load or inadequate office procedures.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 1.3 is identical to Model Rule 1.3 and Rule 6(b)(3) of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

Failure to Seek Appellate Review. - Appointed counsel who failed to seek appellate review in four criminal cases held in violation of the disciplinary rule. *In re Robinson*, 39 N.C. App. 345, 250 S.E.2d 79 (1979).

Failure to Perfect Appeal. - The failure of the respondent attorney to perfect an appeal in a criminal case in which the sentence of death had been imposed was a violation of the disciplinary rule. *In re Dale,* 39 N.C. App. 370, 250 S.E.2d 82, *appeal dismissed*, 296 N.C. 584, 254 S.E.2d 30 (1979).

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

The attorney failed to perfect an appeal or seek an extension. He did not inform his client of his neglect or return his client's money. Public Censure. 77 DHC 13.

The attorney failed to complete representation of a client in a property transaction by failing to have a final title insurance policy issued. Public Censure. 80 DHC 11.

The attorney was employed to represent a client's corporation in a civil action. When an action was subsequently filed against his client, the attorney failed to file an answer, causing default judgment to be entered. Although the attorney managed to have the default judgment set aside, his client was barred from asserting its claim due to the attorney's neglect. The attorney was also employed by another client to defend a civil action and prosecute a counterclaim. The attorney failed to file an answer or a counterclaim. Default judgment was entered which the attorney succeeded in having set aside. The attorney admitted neglect in these matters due to alcoholism. Two-Year Suspension. 80 DHC 13, 14.

The attorney agreed to undertake the task of obtaining access to his client's landlocked real property. Although the attorney failed to initiate any legal action on behalf of his client, he delivered to the client a document purporting to be an order of the superior court dismissing a petition for a cartway across adjoining land. The document was purportedly signed by a judge, and bore the seal and signature of an assistant clerk, but the document was never actually signed by the named individuals nor was it filed. One-Year Suspension. 81 DHC 1.

The attorney neglected a client's traffic ticket case by failing to appear in court for the hearing on the ticket. The attorney also failed to respond to the client's request for information about the case and failed to respond to the State Bar's inquiries and a subpoena regarding the matter. Three-Year Suspension. 88 DHC 4.

The attorney neglected his client's case by failing to appear at any of ten depositions scheduled in the matter. The attorney also failed to inform his client of a settlement offer made by the opposing party in the client's case. Public Reprimand. 89 DHC 27.

The attorney failed to prosecute civil actions on behalf of three different clients within the applicable statutes of limitation. Two-Year Suspension, one year stayed, on condition the attorney pay two malpractice judgments obtained by the injured clients. 90 DHC 9.

Attorney took $1500 from the proceeds of the sale of decedent's house as fee and costs for handling the estate. Attorney failed to deposit $1500 in trust account, failed to administer the estate, and failed to communicate with decedent's daughter who retained him. Five-Year Suspension, stayed for one year upon certain conditions. 93 DHC 7.

Among other things, attorney neglected several clients' matters, failed to communicate with clients, and neglected three appeals. Five-Year Suspension, one year stayed upon certain conditions. 93 DHC 22 and 94 DHC 2.

ETHICS OPINION NOTES

RPC 48. Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

99 Formal Ethics Opinion 5. Opinion rules that whether the lawyer for a residential real estate closing must obtain the cancellation of record of a prior deed of trust depends upon the agreement of the parties.

RULE 1.4 COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(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] 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. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. *See* Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

[2] Adequacy of communication depends, in part, on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, 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 might injure or coerce others. On the other hand, a lawyer ordinarily cannot 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.

[3] 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 mental disability. *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. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

[4] 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. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 1.4 is identical to Model Rule 1.4 and Rule 6(b)(1) and (2) of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

Failure to Notify Client of Dates. - The attorney violated the Code of Professional Responsibility by failing to notify the client of court dates. *North Carolina State Bar v. Frazier*, 62 N.C. App. 172, 302 S.E.2d 648, *appeal dismissed*, 308 N.C. 677, 303 S.E.2d 546 (1983).

A lawyer is ethically bound to advise his client of a plea bargain offer. *State v. Simmons*, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

The attorney failed to perfect an appeal or seek an extension. He did not inform his client of his neglect or return his client's money. Public Censure. 77 DHC 13.

The attorney neglected a client's traffic ticket case by failing to appear in court for the hearing on the ticket. The attorney also failed to respond to the client's request for information about the case and failed to respond to the State Bar's inquiries and a subpoena regarding the matter. Three-Year Suspension. 88 DHC 4.

The attorney neglected his client's case by failing to appear at any of ten depositions scheduled in the matter. The attorney also failed to inform his client of a settlement offer made by the opposing party in the client's case. Public Reprimand. 89 DHC 27.

The attorney handled a real estate closing in which the sellers provided additional financing to the buyer. The attorney failed to provide the lender with sufficient information about the secondary financing to permit the lender to make an informed decision regarding whether to proceed with the closing. Public Reprimand. 90 DHC 17.

Attorney took $1500 from the proceeds of the sale of decedent's house as fee and costs for handling the estate. Attorney failed to deposit $1500 in trust account, failed to administer the estate, and failed to communicate with decedent's daughter who retained him. Five-Year Suspension, stayed for one year upon certain conditions. 93 DHC 7.

Among other things, attorney neglected several clients' matters, failed to communicate with clients, and neglected three appeals. Five-Year Suspension, one year stayed upon certain conditions. 93 DHC 22 and 94 DHC 2.

ETHICS OPINION NOTES

CPR 24. Withdrawing partners and remaining partners should send clients a common announcement of the firm's dissolution so that the client may elect whom he wishes to handle his legal business.

RPC 48. Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

RPC 91. An attorney employed by the insurer to represent the insured and its own interests may not send the insurer a letter on behalf of the insured demanding settlement within the policy limits but must inform insurer of insured's wishes.

RPC 92. An attorney representing both the insurer and the insured need not surrender to the insured copies of all correspondence concerning the case between herself and the insurer.

RPC 99. A lawyer may tack onto an existing title insurance policy if such is disclosed to the client prior to undertaking the representation.

RPC 111. An attorney retained by a liability insurer to defend its insured may not advise insured or insurer regarding the plaintiff's offer to limit the insured's liability in exchange for consent to an amendment of the complaint to add a punitive damages claim but must communicate the proposal to both clients.

RPC 112. An attorney retained by an insurer to defend its insured may not advise insurer or insured regarding the plaintiff's offer to limit the insured's liability in exchange for an admission of liability but must communicate the proposal to both clients.

RPC 129. Prosecution and defense attorneys may negotiate plea agreements in which appellate and post-conviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct. Defense attorney must explain the consequences to the client.

RPC 156. An attorney who has been retained by an insurance company to represent an insured must inform and advise the insured to the degree necessary for the insured to make informed decisions about future representation when the insurance company pays its entire coverage and is released from further liability or obligation to participate in the defense under the provisions of N.C.G.S. 20-279.21(b)(4).

RPC 172. A lawyer retained by an insurer to defend its insured is not required to represent the insured on a compulsory counterclaim provided the lawyer apprises the insured of the counterclaim in sufficient time to retain separate counsel.

99 Formal Ethics Opinion 12. Opinion rules that when a lawyer appears with a debtor at a meeting of creditors in a bankruptcy proceeding as a favor to the debtor's lawyer, the lawyer is representing the debtor and all of the ethical obligations attendant to legal representation apply.

RULE 1.5 FEES

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence experienced in the area of law involved would be left with a definite and firm conviction that the fee is clearly excessive. Factors to be considered in determining whether a fee is clearly excessive include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) a contingent fee for representing a defendant in a criminal case; however, a lawyer may charge and collect a contingent fee for representation in a criminal or civil asset forfeiture proceeding if not otherwise prohibited by law; or

(2) a contingent fee in a civil case in which such a fee is prohibited by law.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of, and does not object to, the participation of all the lawyers involved; and

(3) the total fee is reasonable.

(f) Any lawyer having a dispute with a client regarding a fee for legal services must:

(1) make reasonable efforts to advise his or her client of the existence of the North Carolina State Bar's program of fee dispute resolution at least 30 days prior to initiating legal proceedings to collect the disputed fee; and

(2) participate in good faith in the fee dispute resolution process if the client submits a proper request for fee arbitration.

Comment

Basis or Rate of Fee

[1] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Terms of Payment

[2] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. *See* Rule 1.16(d). This does not apply when the advance payment is a true retainer to reserve services rather than an advance to secure the payment of fees yet to be earned. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, provided this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

[3] Once a fee agreement has been reached between attorney and client, the attorney has an ethical obligation to fulfill the contract and represent the client's best interests regardless of whether the lawyer has struck an unfavorable bargain. An attorney may seek to renegotiate the fee agreement in light of changed circumstances or for other good cause, but the attorney may not abandon or threaten to abandon the client to cut the attorney's losses or to coerce an additional or higher fee. Any fee contract made or remade during the existence of the attorney-client relationship must be reasonable and freely and fairly made by the client having full knowledge of all material circumstances incident to the agreement. If a dispute later arises concerning the fee, the burden of proving reasonableness and fairness will be upon the lawyer. Fees, including contingent fees, should not be excessive as to percentage or amount.

[4] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Division of Fee

[5] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.

Disputes over Fees and Expenses

[6] Participation in the fee dispute resolution program of the North Carolina State Bar is mandatory when a client requests resolution of a disputed fee. Before filing an action to collect a disputed fee, the client must be advised of the fee dispute resolution program. Notification must occur not only when there is a specific issue in dispute, but also when the client simply fails to pay. However, when the client expressly acknowledges liability for the specific amount of the bill and states that he or she cannot presently pay the bill, the fee is not disputed and notification of the client is not required. In making reasonable efforts to advise the client of the existence of the fee dispute resolution program, it is preferable to address a written communication to the client at the client's last known address. If the address of the client is unknown, the lawyer should use reasonable efforts to acquire the current address of the client. Notification is not required in those instances where the State Bar does not have jurisdiction over the fee dispute as set forth in 27 N.C.A.C. 1D, .0702.

[7] If fee dispute resolution is requested by a client, the lawyer must participate in the resolution process in good faith. The State Bar program of fee dispute resolution uses mediation to resolve fee disputes as an alternative to litigation. The lawyer must cooperate with the person who is charged with investigating the dispute and with the person(s) appointed to mediate the dispute. Further information on the fee dispute resolution program can be found at 27 N.C.A.C. 1D, .0700, et. seq. The lawyer should fully set forth his or her position and support that position by appropriate documentation.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Amended May 4, 2000

Editor's Note: Rule 1.5 corresponds to Model Rule 1.5. The Model Rule prohibits the collection of an unreasonable fee while Rule 1.5 prohibits a clearly excessive fee. Both Rule 1.5(d) and Model Rule 1.5(d) prohibit contingent fees in criminal cases. In civil cases, the Model Rule specifically prohibits such fees only in domestic matters while Rule 1.5(d) condemns contingent fee contracts whenever they are prohibited by law. Rule 1.5(e) and Model Rule 1.5(e) are identical. Rule 1.5(f) has no corresponding provision in the Model Rules.

Rule 1.5 is similar to Rule 2.6 of the superseded (1985) Rules of Professional Conduct, except that the superseded rule does not require that the basis or rate of the fee be communicated at the onset of representation.

LEGAL PERIODICALS

For comment on contingent fees in domestic relations actions, *see* 62 N.C.L. Rev. 381 (1984).

For Note, "The Contingent Fee Contract in Domestic Relations Cases," *see* 7 Campbell L. Rev. 427 (1985).

For article, "Nonrefundable Retainers Revisited," *see* 72 N.C.L. Rev. 1 (1993).

For Comment, "Creating the Legal Monster: The Expansion and Effect of Legal Malpractice Liability in North Carolina," *see* 18 Campbell L. Rev. 121 (1996).

CASE NOTES

Entitlement to Reasonable Value of Services. - An attorney discharged by his client is entitled to recover the reasonable value of the services he has already rendered. The reasonable value of such services is determined by the totality of the circumstances of each case. *O'Brien v. Plumides*, 79 N.C. App. 159, 339 S.E.2d 54, *cert. dismissed*, 318 N.C. 409, 348 S.E.2d 805 (1986).

Plaintiff's attorney brought an action to recover a contingent fee in a personal injury case where the client had discharged the attorney after he had begun working on the client's case. The court held that the attorney was entitled to the reasonable value of the services rendered before his discharge by the client. *Covington v. Rhodes,* 38 N.C. App. 61, 247 S.E.2d 305 (1978)*, disc. rev. denied*, 296 N.C. 410, 251 S.E.2d 468 (1979).

Determination of Reasonable Fees. - Reasonable counsel fees may be determined in part by the amount of the verdict obtained in a condemnation proceeding in light of proposals made to the property owner prior to his employment of an attorney. The results obtained by an attorney are a legitimate consid-

eration in determining the amount of his fee. *Redevelopment Comm'n v. Hyder*, 20 N.C. App. 241, 201 S.E.2d 236 (1973).

The court refused to issue a temporary restraining order where lawyer in fee dispute with client failed to follow the procedures of this section and there was a state court action pending. *Parker v. United States*, 948 F. Supp. 24 (E.D.N.C. 1996).

Contingent Fee Contracts in Domestic Cases. - A contingent fee contract for legal services in a divorce, alimony or child support proceeding is void. *Thompson v. Thompson*, 70 N.C. App. 147, 319 S.E.2d 315 (1984), *rev'd on other grounds*, 313 N.C. 313, 328 S.E.2d 288 (1985).

Contingent Fee Contracts in Obtaining Equitable Distribution. - A contingent fee contract for an attorney's services in obtaining an equitable distribution is valid if the contract does not compensate the attorney for securing a divorce for the same client. *In Re Cooper*, 81 N.C. App. 27, 344 S.E.2d 27 (1986).

Contingent Contract Held Void. - Fee contract which provided that the attorney would receive 20% of the total amount recovered in an action for alimony and child support was void as against public policy. *Townsend v. Harris*, 102 N.C. App. 131, 401 S.E.2d 132, *appeal dismissed*, 328 N.C. 734, 404 S.E.2d 877, *cert. denied*, 502 U.S. 919, 112 S. Ct. 329 116 L. Ed. 2d. 270 (1991).

Quoted in *Robinson, Bradshaw & Hinson, P.A. v. Smith*, 139 N.C. App. 1, 532 S.E.2d 815 (2000).

Cited in *West ex rel. Farris v. Tilley*, 120 N.C. App. 145, 461 S.E.2d 1 (1995).

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

Attorney who was administrator of estate authorized payment of a fee from estate account to attorney's partners for legal services rendered to the estate without first obtaining a court order or approval of all of the heirs of the estate. Public Censure. 89 DHC 21.

The attorney filed pleadings which were not well grounded in fact or law and falsely certified to the court that he had served the pleadings on opposing counsel. The client later discharged the attorney, who refused to withdraw, refused to return the client's file, and insisted on charging a contingent fee, rather than the reasonable value of his services. Two-Year Suspension, with reinstatement conditioned on the attorney passing the bar examination. 90 DHC 22.

Attorney assisted former in-house counsel to Firestone Tire & Rubber Company to engage in conflict of interest by accepting assistance of the former in-house counsel in preparing complex products liability action against Firestone. Attorney also improperly divided settlement proceeds with the former in-house counsel. Disbarred. 96 DHC 16.

Attorney told client that attorney could get murder charge pending against client dismissed on payment of $10,000 fee, concealing fact that District Attorney had already decided to dismiss charge for lack of evidence. After client discovered deception and demanded return of fee, attorney threatened to reveal confidential communications of client. Attorney engaged in criminal and fraudulent conduct, implied ability to influence government official and collected excessive fee. Disbarred. 97 DHC 12.

ETHICS OPINION NOTES

CPR 11. An attorney may accept an interest in land as a fee for title examination and representation in an action to clear title.

CPR 37. An attorney may charge interest on delinquent accounts.

CPR 47. A Legal Aid Society may receive fees awarded by the court.

CPR 54. An attorney may submit a fee schedule to a savings and loan association.

CPR 79. An attorney serving as a trustee in bankruptcy or as a fiduciary in state proceedings may receive legal fees for acting as his own attorney.

CPR 129. An attorney may accept payment of legal fees by credit card.

CPR 217. An attorney appointed to represent an indigent may not receive compensation from any source other than the court.

CPR 312. Contingent fees may be charged in equitable distribution cases.

CPR 375. An attorney may agree for his fee to be the interest earned on an amount escrowed at a loan closing to guarantee completion of repairs.

RPC 2. Contingent fees may be charged to collect liquidated amounts of past due child support.

RPC 7. An attorney may employ a collection agency to collect a past due fee so long as the fee agreement out of which the account arose was permitted by law and by the Rules of Professional Conduct; the lawyer, at the time the underlying fee agreement was made, did not believe, and had no reason to believe, that he was undertaking to represent a client who was unable to afford his services; the legal services giving rise to the fee out of which the account arose have been completed so that the lawyer has no further responsibilities as the client's attorney; there is no genuine dispute between the lawyer and the client about the existence, amount, or delinquent status of the indebtedness; and the lawyer does not believe, and has no reason to believe, that the agency which he employs will use any illegal means to collect the account.

RPC 35. An attorney may not charge an elevated contingent fee to collect "med-pay" or any other claim with respect to which liability is clear and there is no real dispute as to the amount due.

RPC 50. A lawyer may charge nonrefundable retainers that are reasonable in amount.

RPC 52. Opinion describes circumstances under which a lawyer who has been appointed to represent an indigent person may accept payment directly from the client.

RPC 106. Opinion discusses circumstances under which a refund of a prepaid fee is required.

RPC 107. A lawyer and her client may agree to employ alternative dispute resolution procedures to resolve disputes between themselves about legal fees.

RPC 141. An attorney's contingent fee in a case resolved by a structured settlement should, if paid in a lump sum, be calculated in terms of the settlement's present value.

RPC 148. A lawyer may not split a fee with another lawyer who does not practice in her law firm unless the division is based upon the work done by each lawyer or the client consents in writing, the fee is reasonable, and responsibility is joint.

RPC 155. An attorney may charge a contingent fee to collect delinquent child support.

RPC 158. A sum of money paid to a lawyer in advance to secure payment of a fee which is yet to be earned and to which the lawyer is not entitled must be deposited in the lawyer's trust account.

RPC 166. A lawyer may seek to renegotiate a fee agreement with a client provided he does not abandon or threaten to abandon his client to cut his losses or to coerce a higher fee.

RPC 174. A legal fee for the collection of "med-pay" which is based upon the amount collected is unreasonable.

RPC 190. A lawyer who agreed to bill a client on the basis of hours expended may not bill the client on the same basis for reused work product.

RPC 196. A law firm may not charge a clearly excessive fee for legal representation even if the legal fee may be recovered from an opposing party.

RPC 205. A lawyer may receive a fee for referring a case to another lawyer provided that, by written agreement with the client, both lawyers assume responsibility for the representation and the total fee is reasonable.

RPC 222. Prior to the completion of legal services for a client, a lawyer may not obtain a confession of judgment from a client to secure a fee.

RPC 231. A lawyer may not collect a contingent fee on the reimbursement paid to the client's medical insurance provider in addition to a contingent fee on the gross recovery if the total fee received by the lawyer is clearly excessive.

RPC 235. A lawyer may charge a client an hourly rate, or a flat rate, for his or her services plus a contingent fee on the client's recovery provided the ultimate fee paid by the client is not clearly excessive and the client is given an honest assessment of the potential for recovery.

RPC 247. Opinion provides guidelines for receipt of payment of earned and unearned fees by electronic transfers.

97 Formal Ethics Opinion 4. Opinion provides that flat fees may be collected at the beginning of a representation, treated as presently owed to the lawyer, and deposited into the lawyer's general operating account or paid to the lawyer but that if a collected fee is clearly excessive under the circumstances of the representation a refund to the client of some or all of the fee is required.

98 Formal Ethics Opinion 3. Opinion rules that, subject to the requirements of law, a lawyer may add a finance charge to a client's account if the client fails to

pay the balance when due as agreed with the client.

98 Formal Ethics Opinion 9. Opinion rules that a lawyer may charge a client the actual cost of retrieving a closed client file from storage, subject to certain conditions, provided the lawyer does not withhold the file to extract payment.

98 Formal Ethics Opinion 14. Opinion rules that a lawyer may participate in the solicitation of funds from third parties to pay the legal fees of a client provided there is disclosure to contributors and the funds are administered honestly.

99 Formal Ethics Opinion 1. Opinion rules that a lawyer may not accept a referral fee or solicitor's fee for referring a client to an investment advisor.

2000 FEO 5. Opinion rules that a lawyer may not tell a client that any fee paid prior to the rendition of legal services is "nonrefundable" although, by agreement with the client, a lawyer may collect a flat fee for legal services to be rendered in the future and treat the fee as earned immediately upon receipt subject to certain conditions.

2000 FEO 7. Opinion rules that a lawyer may not charge the client a legal fee for the time required to participate in the State Bar's fee dispute resolution program.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) "Confidential information" refers to information protected by the attorney-client privilege under applicable law, and other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. For the purposes of this rule, "client" refers to present and former clients.

(b) "Confidential information" also refers to information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered. For the purposes of this rule, "client" refers to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

(c) Except when permitted under paragraph (d), a lawyer shall not knowingly:

(1) reveal confidential information of a client;

(2) use confidential information of a client to the disadvantage of the client; or

(3) use confidential information of a client for the advantage of the lawyer or a third person, unless the client consents after consultation.

(d) A lawyer may reveal:

(1) confidential information, the disclosure of which is impliedly authorized by the client as necessary to carry out the goals of the representation;

(2) confidential information with the consent of the client or clients affected, but only after consultation with them;

(3) confidential information when permitted under the Rules of Professional Conduct or required by law or court order;

(4) confidential information concerning the intention of a client to commit a crime and the information necessary to prevent the crime;

(5) confidential information to the extent the lawyer reasonably believes necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;

(6) confidential information to the extent the lawyer reasonably believes necessary 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; and

(7) confidential information to the extent permitted by the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court.

Comment

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

[2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client, but also encourages people to seek early legal assistance.

[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given and the law is upheld.

[4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[5] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence, and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. *See also* 0.2 Scope.

[6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Lawyer's Assistance Program

[7] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers' or judges' assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek help through such programs. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance, which may then result in harm to their professional careers and injury to their clients and the public. The rule, therefore, requires that any information received by a lawyer on behalf of an approved lawyers' or judges' assistance program be regarded as confidential and protected from disclosure to the same extent as information received by a lawyer in any conventional attorney-client relationship.

Authorized Disclosure

[8] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[9] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[10] The confidentiality rule is subject to limited exceptions. For instance, in becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's confidences even though the client's purpose is wrongful. However, to the extent a lawyer is required or permitted to disclose a client's purpose, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. A rule governing disclosure of threatened criminal activity thus involves balancing the interests of one group of potential victims against those of another.

[11] Generally speaking, information relating to the representation must be kept confidential, as stated in paragraph (c). However, where the client is or has been engaged in criminal or fraudulent conduct or the integrity of the lawyer's own conduct is involved, the principle of confidentiality may have to yield, depending on the lawyer's knowledge about and relationship to the conduct in question and the seriousness of that conduct. Several situations must be distin-

guished.

[12] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. *See* Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

[13] Second, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (d)(4), the lawyer has the professional discretion to reveal information in order to prevent such consequences. It is very difficult for a lawyer to "know" when such a purpose will actually be carried out, for the client may have a change of mind.

[14] Third, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. Even if the involvement was innocent, however, the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right, although not a professional duty, to rectify the situation. Exercising that right may require revealing information relating to the representation. Paragraph (d)(5) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification.

[15] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. When practical, the lawyer should first seek to persuade the client to take suitable action, making it unnecessary for the lawyer to make any disclosure. In any case, a disclosure adverse to the client's interests should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to make the disclosure permitted by paragraphs (d)(4) and (d)(5) does not violate this rule.

[16] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[17] Paragraph (b)(5) does not apply where a lawyer is employed after a crime or fraud has been committed to represent the client in matters ensuing therefrom.

Dispute Concerning a Lawyer's Conduct

[18] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (d)(6) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[19] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal, or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (d)(6) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

[20] If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (c) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

[21] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. *See* Rules 2.2, 2.3, 3.3, and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.

Former Client

[22] The duty of confidentiality continues after the client-lawyer relationship has terminated.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 1.6 is similar to Model Rule 1.6 and Rule 4 of the superseded (1985) Rules of Professional Conduct. However, there are some important differences between the revised rule and the Model Rule. The Model Rule permits disclosure of confidential information to prevent a crime likely to result in imminent death or substantial bodily harm, whereas Rule 1.6 permits disclosure of information necessary to prevent any crime. Rule 1.6 also permits disclosure to the extent the lawyer reasonably believes necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used. Neither the Model Rule nor Rule 4 of the superseded (1985) Rules of Professional Conduct contains this provision. Finally, the Model Rules do not expressly prohibit a lawyer from using confidential information for his or her own advantage or for the advantage of a third person as does Rule 1.6(c)(3). The Model Rules only condemn use of such information to the disadvantage of the client or former client. *See* Model Rules 1.8(b) and 1.9(c).

LEGAL PERIODICALS

For article, "Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds," *see* 64 N.C.L. Rev. 443 (1986).

For article, "Incriminating Physical Evidence: The Defense Attorney's Dilemma and the Need for Rules," *see* 64 N.C.L. Rev. 897 (1986).

For Comment, "Grand Jury Subpoenas to Defense Attorneys Representing Targets: An Ethical/Legal Tug of War," *see* 9 Campbell L. Rev. 347 (1987).

CASE NOTES

Statement to Insurance Adjuster. - The attorney-client privilege does not cover a statement made to an insurance adjuster, not in the presence or at the request of counsel, and even before an attorney-client relationship exists. *Phillips v. Dallas Carrier Corp.*, 133 F.R.D. 475 (M.D.N.C. 1990).

Law firm was disqualified from representing plaintiff computer company in copyright case against another company which hired three of plaintiff's engineers where the law firm had previously represented one of the engineers. *Robert Woodhead, Inc. v. Datawatch Corp.*, 934 F. Supp. 181 (E.D.N.C. 1995).

Applied in *SuperGuide Corp. v. DirecTV Enters., Inc.*, 141 F. Supp. 2d 616 (W.D.N.C. 2001).

Quoted in *Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 332 N.C. 288, 420 S.E.2d 426 (1992).

Stated in *Furbush v. Otsego Mach. Shop, Inc.,* 914 F. Supp. 1275 (E.D.N.C. 1996).

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a search-

able database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

The attorney revealed confidential information of a client by disclosing to a creditor of the client that the attorney's law firm was holding funds belonging to the client. Public Censure. 89 DHC 4.

ETHICS OPINION NOTES

CPR 284. An attorney who, in the course of representing one spouse, obtains confidential information bearing upon the criminal conduct of the other spouse must not disclose such information.

CPR 299. An attorney, with the consent of the client, may utilize the services of a letter writing service in collection matters.

CPR 300. An attorney, after being discharged, cannot discuss the client's case with the client's new attorney without the client's consent.

CPR 313. An attorney may not voluntarily disclose confidential information concerning a client's criminal record.

CPR 362. An attorney may not disclose the perjury of his partner's client.

CPR 374. Information concerning apparent tax fraud obtained by an attorney employed by a fire insurer to depose insureds concerning claims is confidential and may not be disclosed without the insurer's consent.

RPC 12. An attorney may reveal confidential information to correct a mistake if disclosure is impliedly authorized by the client.

RPC 21. An attorney may send a demand letter to an adverse party without identifying the client by name.

RPC 23. An attorney does not need the consent of the client to file Form 1099 including confidential information with the IRS incident to a real estate transaction since such is required by law.

RPC 33. An attorney may not disclose confidential information concerning the client's identity and criminal record without the client's consent nor may an attorney misrepresent such information to the court. In response to a direct question from the court concerning such matters, an attorney may not misrepresent the defendant's criminal record but is under no ethical obligation to respond. If the client misrepresents his identity or record under oath, the attorney must ask the client to correct the misstatements. If the client refuses, the attorney must seek to withdraw.

RPC 62. An attorney may disclose client confidences necessary to protect her reputation where a claim alleging malpractice is brought by a former client against the insurance company which employed the attorney to represent the former client.

RPC 77. A lawyer may disclose confidential information to his or her liability insurer to defend against a claim but not for the sole purpose of assuring coverage.

RPC 113. A lawyer may disclose information concerning advice given to a client at a closing in regard to the significance of the client's lien affidavit.

RPC 117. An attorney may not reveal confidential information concerning a client's contagious disease without the client's consent.

RPC 120. An attorney may, but need not necessarily, disclose confidential information concerning child abuse pursuant to a statutory requirement.

RPC 133. A law firm may make its waste paper available for recycling.

RPC 157. A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent but in so doing the lawyer may disclose only her belief that there exists a good faith basis for the relief requested and may not disclose confidential information which led her to conclude the client is incompetent.

RPC 175. A lawyer may ethically exercise his or her discretion to decide whether to reveal confidential information concerning child abuse or neglect pursuant to a statutory requirement.

RPC 179. A lawyer must comply with the client's request that the information regarding a settlement be kept confidential if the client enters into a settlement agreement conditioned upon maintaining the confidentiality of the terms of the settlement.

RPC 195. The attorney who represented an estate and the personal representative in her official capacity may divulge confidential information relating to the representation of the estate and the personal representative to the substitute personal representative of the estate.

RPC 206. A lawyer may disclose the confidential information of a deceased client to the personal representative of the client's estate but not to the heirs of the estate.

RPC 209. Opinion provides guidelines for the disposal of closed client files.

RPC 215. When using a cellular or cordless telephone or any other unsecure method of communication, a lawyer must take steps to minimize the risk that confidential information may be disclosed.

RPC 230. A lawyer representing a client on a good faith claim for social security disability benefits may withhold evidence of an adverse medical report in a hearing before an administrative law judge if not required by law or court order to produce such evidence. (*But see* Rule 3.3(d).)

RPC 244. Although a lawyer asks a prospective client to sign a form stating that no client-lawyer relationship will be created by reason of a free consultation with the lawyer, the lawyer may not subsequently disclaim the creation of a client-lawyer relationship and represent the opposing party.

RPC 246. Under certain circumstances, a lawyer may not represent a party whose interests are opposed to the interests of a prospective client if confidential information of the prospective client must be used in the representation.

RPC 252. A lawyer in receipt of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain from examining the materials and return them to the sender.

98 Formal Ethics Opinion 5. Opinion rules that a defense lawyer may remain silent while the prosecutor presents an inaccurate driving record to the court provided the lawyer and client did not criminally or fraudulently misrepresent the driving record to the prosecutor or the court, and further provided, that on application for a limited driving privilege, there is no misrepresentation to the court about the client's prior driving record.

98 Formal Ethics Opinion 10. Opinion rules that an insurance defense lawyer may not disclose confidential information about an insured's representation in bills submitted to an independent audit company at the insurance carrier's request unless the insured consents.

98 Formal Ethics Opinion 16. Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

98 Formal Ethics Opinion 18. Opinion rules that a lawyer representing a minor owes the duty of confidentiality to the minor and may only disclose confidential information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation.

98 Formal Ethics Opinion 20. Opinion rules that, subject to a statute prohibiting the withholding of the information, a lawyer's duty to disclose confidential client information to a bankruptcy court ends when the case is closed although the debtor's duty to report new property continues for 180 days after the date of filing the petition.

99 Formal Ethics Opinion 11. Opinion rules that an insurance defense lawyer may not submit billing information to an independent audit company at the insurance carrier's request unless the insured's consent to the disclosure, obtained by the insurance carrier, was informed.

99 FEO 15. Opinion rules that a lawyer with knowledge that a former client is defrauding a bankruptcy court may reveal the confidences of the former client if required by law or if necessary to rectify the fraud.

2000 FEO 11. Opinion rules that a lawyer who was formerly in-house legal counsel for a corporation must obtain the permission of a court prior to disclosing confidential information of the corporation to support a personal claim for wrongful termination.

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be, or is likely to be, directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the interest of the other client; and

(2) each client consents after consultation which shall include explanation

of the implications of the common representation and the advantages and risks involved.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation which shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) A lawyer shall have a continuing obligation to evaluate all situations involving potentially conflicting interests, and shall withdraw from the representation of any party the lawyer cannot adequately represent without using the confidential information of another client or a former client except as Rule 1.6 allows.

Comment

Loyalty to a Client

[1] Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved, and to determine whether there are actual or potential conflicts of interest.

[2] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. *See* Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. *See also* Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, *see* comment to Rule 1.3 and 0.2 Scope.

[3] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

[4] Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict, in effect, forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

[5] A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's Interests

[6] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. *See* Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation; for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation

[7] Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. *Compare* Rule 2.2 involving intermediation between clients.

[8] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit, and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

[9] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of Person Paying for a Lawyer's Service

[10] A lawyer may be paid from a source other than the client if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. *See* Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations

[11] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

[12] For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

[13] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration, the clients are the estate as an entity

and the personal representative in his or her official capacity. The lawyer should make clear the relationship to the parties involved.

[14] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

[15] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict clearly calls into question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. *See* scope.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 1.7 is similar to Model Rule 1.7 and Rule 5.1(a), (b), and (c) of the superseded (1985) Rules of Professional Conduct. In addition to prohibiting the representation of interests that are directly adverse to those of another client as does the Model Rule, Rule 1.7 also condemns a representation that "is likely to be" directly adverse. Rule 1.7(c) expands upon Model Rule 1.9(c) to state clearly the lawyer's continuing obligation to a former client to avoid the use of confidential information.

CASE NOTES

Conflict of Interest Not Shown - A law firm which represented an insurance company in securing information to bring the insurance company back into compliance with North Carolina law and in rehabilitation proceedings was not prohibited from representing minority shareholders of the company in a derivative action against the company's directors. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), *appeal dismissed*, 296 N.C. 740, 254 S.E.2d 181 (1979).

Conflict of Interest Shown. - The attorneys for the plaintiffs could not represent the receivers of a group of corporations who were appointed to preserve assets of all the corporations when the plaintiffs were seeking to have assets transferred from some corporations in the group to other corporations. *Lowder v. All Star Mills*, Inc., 60 N.C. App. 275, 300 S.E.2d 230, *aff'd in part, rev'd in part*, 309 N.C. 695, 309 S.E.2d 193 (1983).

In a suit against the United States to recover losses resulting from an airplane crash, representation by the Department of Justice of both the United States and individual air traffic controllers would create a conflict of interest and would prevent adequate representation of the individual controllers. *Aetna Cas. & Sur. Co. v. United States*, 438 F. Supp. 886 (W.D.N.C. 1977), *rev'd*, 570 F.2d 1187 (4th Cir.), *cert. denied*, 439 U.S. 821, 99 S. Ct. 87, 58 L. Ed. 2d 113 (1978).

Underinsured Motorist Carrier Could Appear as Unnamed Defendant Without Conflict of Interest. - On a motion by an underinsured motorist carrier to be allowed to appear in the liability phase of an action against its insured as an unnamed defendant, the court rejected the contention that an impermissible conflict of interest would arise if the carrier's attorney were to represent to the jury that he represented the interests of the tortfeasor. *Church v. Allstate Ins. Co.,* 143 N.C. App. 527, 547 S.E.2d 458 (2001).

Consent Procured Without Advice of Disinterested Counsel. - The consent of an individual litigant to representation by counsel with a potential conflict of interest cannot be presumed to be fully informed when it is procured without the advice of a lawyer who has no conflict of interest. *Aetna Cas. & Sur. Co. v. United States*, 438 F. Supp. 886 (W.D.N.C. 1977), *rev'd*, 570 F.2d 1187 (4th Cir.), *cert. denied*, 439 U.S. 821, 99 S. Ct. 87, 58 L. Ed. 2d 113 (1978).

Potential Conflict Not Sufficient to Interfere with Right of Counsel. - A potential conflict of interest, as distinguished from an actual conflict of interest, is not sufficient to warrant the State's interference with the constitutionally guaranteed right of a criminal defendant to retain and be represented by counsel of his choice. *State v. Yelton*, 87 N.C. App. 554, 361 S.E.2d 753 (1987).

Although defendant claimed that the joint representation of two accomplices created a conflict of interest between their attorney and the public's interest in the fair administration of justice due to what he labeled as the artificial conformity of the testimony of the accomplices, defendant's interests were not sufficient to overcome the accomplices' rights to representation by counsel of their choice where defendant failed to show that the potential conflict of interest prejudiced his rights. *State v. Whiteside*, 325 N.C. 389, 383 S.E.2d 911 (1989).

Hearing on Conflict of Interest. - Once a motion by the State or the defense, or the court on its own motion, raises a possible conflict of interest in a dual representation situation, the trial court must conduct a hearing. *State v. Yelton*, 87 N.C. App. 554, 361 S.E.2d 753 (1987).

Applied in *Chappell v. Roth*, 141 N.C. App. 502, 539 S.E.2d 666 (2000).

Quoted in *Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 332 N.C. 288, 420 S.E.2d 426 (1992); *State v. Reid*, 334 N.C. 551, 434 S.E.2d 193 (1993).

Stated in *Furbush v. Otsego Mach. Shop, Inc.*, 914 F. Supp. 1275 (E.D.N.C. 1996).

Cited in *Hieb v. Lowery*, 121 N.C. App. 33, 464 S.E.2d 308 (1995).

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

The attorney accepted employment to represent individuals against a company in which he owned an interest without disclosing his interest to his client. Private Reprimand. 79 DHC 26.

The attorney provided legal services to two clients regarding the purchase and development of real property owned by the attorney and the clients, despite the fact that the attorney's judgment was likely to be impaired by his own personal, financial and business interests respecting the property. One-Year Suspension. 89 DHC 14.

Among other things, the attorney hired his girlfriend to do work for a client and permitted his girlfriend to charge the client excessively. One-Year Suspension, stayed on certain conditions. 92 DHC 5.

The attorney represented the seller in commercial real estate transaction while he was also general partner of the buyer. The attorney also improperly directed a $165,000 credit to the buyer and a corresponding debit to the seller at the closing of the transaction without the seller's consent and paid himself $150,000 in attorneys' fees from funds held in escrow, in violation of the escrow agreement. Three-Year Suspension. 92 DHC 16.

Attorney, who obtained a judgment on a debt, purchased property at the execution sale on the judgment through a corporation controlled by attorney without the informed consent of the attorney's client. Six-Month Suspension, stayed on certain conditions. 93 DHC 15.

Attorney made unwanted sexual advances to several female clients and thereby engaged in conflicts of interest and conduct prejudicial to the administration of justice. Disbarred. 95 DHC l3.

ETHICS OPINION NOTES

I. GENERAL CONFLICTS

CPR 9. An attorney may not give a title opinion to an individual and then represent another person in a boundary dispute against that individual.

CPR 15. A lawyer/guardian may not give a title opinion to the purchaser of his ward's property.

CPR 46. Once it is determined that attorneys from same firm have undertaken to represent adverse parties, one must withdraw and the other may continue only with the consent of all involved.

CPR 55. An attorney appointed as examiner of title is not prohibited from representing petitioners or respondents in actions unrelated to the Torrens proceeding.

CPR 147. An attorney cannot defend an action brought by a former client when confidential information obtained during the prior representation would be relevant to the defense of the current action.

CPR 171. A part-time county attorney may not serve as guardian ad litem if official duties include advising Department of Social Services.

CPR 179. An attorney may not represent a municipality and a distributee of

an estate suing the municipality.

CPR 216. An attorney may not serve as receiver and as attorney for a judgment creditor.

CPR 249. An attorney who owns an insurance agency may not represent claimants against persons insured by companies his agency represents.

CPR 255. An attorney who is employed by an insurer to defend its insureds on a regular basis represents the insurer and the insureds and, if a conflict develops between the insurer and an insured, the attorney has a duty to advise the insured to seek independent counsel. The attorney may represent a plaintiff against the insurer, but he or she should notify the insurer and have the informed consent of plaintiff.

CPR 281. An attorney may sue another attorney for malpractice on behalf of a client even though the attorney for the plaintiff owns stock in the defendant's liability insurance company.

CPR 286. An attorney may participate in a mediation service with marriage counselors but should not later represent either party in domestic litigation.

CPR 317. An attorney appointed to represent a state official or agency may not represent other clients in a suit against the same official or agency, another official or agency under the jurisdiction of that same official or agency or another official or agency with authority over the official or agency. Nor should an attorney represent one official or agency while representing other clients against another official or agency if both of the officials or agencies are under the jurisdiction of the same official or agency.

CPR 323. An attorney may not act as a friend and attempt to mediate a domestic problem and later represent the wife in domestic litigation.

CPR 344. An attorney for a school board is not automatically disqualified from representing criminal defendants despite the school board's interest in fines and forfeitures.

RPC 18. An attorney may not simultaneously represent shareholders in a derivative action and the corporation's landlord on a claim for back rent.

RPC 22. An attorney may not represent the administratrix officially and personally where her interests in the two roles are in conflict without the consent of the heirs.

RPC 24. An attorney may not purchase his client's property at an execution sale on his own account.

RPC 28. An attorney may represent the estate of pilot and the estate of passenger in a wrongful death case against the airplane manufacturer if attorney is convinced that there was no pilot negligence and if the representatives of both estates consent.

RPC 53. A lawyer may sue a municipality his partner serves as a member of its governing body. (*But see* RPC 160.)

RPC 54. A lawyer who represents a criminal defendant from whose possession property was seized may not without consent seek the property as a fine or forfeiture on behalf of the local school board.

RPC 55. A member of the Attorney General's staff may prosecute appeals of adverse Medicaid decisions against the Department of Human Resources, which is represented by another member of the Attorney General's staff.

RPC 56. A lawyer may represent a plaintiff against an insurance company's insured while defending other persons insured by the company in unrelated matters.

RPC 59. A lawyer may represent an insurer and its insured as co-plaintiffs in a declaratory judgment action.

RPC 60. Subject to general conflict of interest rules, a lawyer may represent police officers who are referred by a professional organization of which they are members on a case-by-case basis and also represent criminal defendants.

RPC 65. The public defender's office should be considered as a single law firm and staff attorneys may not represent codefendants with conflicting interests unless both consent and can be adequately represented.

RPC 72. An attorney hired by the Bureau of Indian Affairs to prosecute criminal charges before a tribal court may represent defendants in state or federal court despite the fact that the defendants have been arrested by members of the tribal police force.

RPC 73. Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants where a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.

Where an attorney advises a governing body, such as a county commission, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.

RPC 74. A firm which employs a paralegal is not disqualified from representing an interest adverse to that of a party represented by the firm for which the paralegal previously worked if the paralegal is screened from participation in the case.

RPC 91. An attorney employed by the insurer to represent the insured and its own interests may not send the insurer a letter on behalf of the insured demanding settlement within the policy limits.

RPC 92. An attorney representing both the insurer and the insured need not surrender to the insured copies of all correspondence concerning the case between herself and the insurer.

RPC 95. An assistant district attorney may prosecute cases while serving on the school board.

RPC 100. An attorney serving on a hospital ethics committee is not automatically disqualified from representing interests adverse to the hospital or its staff physicians.

RPC 102. A lawyer may not permit the employment of court reporting services to be influenced by the possibility that the lawyer's employees might receive premiums, prizes or other personal benefits.

RPC 103. A lawyer for the insured and the insurer may not enter voluntary dismissal of the insured's counterclaim without the insured's consent.

RPC 105. A public defender may represent criminal defendants while serving on the school board.

RPC 109. An attorney may not represent parents as guardians ad litem for their injured child and as individuals concerning their related tort claims after having received a joint settlement offer which is insufficient to fully satisfy all claims.

RPC 110. An attorney employed by an insurer to defend in the name of the defendant pursuant to underinsured motorist coverage may not communicate with that individual without the consent of another attorney employed to represent that individual by her liability insurer, and the attorney employed by the liability insurer may not take a position on behalf of the insurer which is adverse to the insured.

RPC 111. An attorney retained by a liability insurer to defend its insured may not advise insured or insurer regarding the plaintiff's offer to limit the insured's liability in exchange for consent to an amendment of the complaint to add a punitive damages claim.

RPC 112. An attorney retained by an insurer to defend its insured may not advise insurer or insured regarding the plaintiff's offer to limit the insured's liability in exchange for an admission of liability.

RPC 123. An attorney may represent parents and an independent guardian ad litem for their child concerning related tort claims under certain circumstances.

RPC 131. An attorney employed to represent a county in appellate matters may also sue the county's department of social services if the county and the plaintiffs consent.

RPC 140. There is no disqualifying conflict of interest where an attorney is retained by an insurer to represent an insured during the pendency of a declaratory judgment action relating to coverage in which the attorney is a nonparticipant.

RPC 151. Where an insurance company and its policyholder are both parties to an action, a lawyer who is a full-time employee of the insurance company may not represent both the insurance company and the policyholder because of the "diluted responsibility" to the policyholder created by the employment relationship between the lawyer and the insurance company.

RPC 154. An attorney may not represent the insured, her liability insurer and the same insurer relative to underinsured motorist coverage carried by the plaintiff.

RPC 160. A lawyer whose associate is a member of a hospital's board of trustees may not sue the hospital on behalf of a client.

RPC 168. A lawyer may ask her client for a waiver of objection to a possible future representation presenting a conflict of interest if certain conditions are met.

RPC 170. A lawyer may jointly represent a personal injury victim and the medical insurance carrier that holds a subrogation agreement with the victim provided the victim consents and the lawyer withdraws upon the development of an actual conflict of interest.

RPC 177. A lawyer may represent the insured, his liability insurer, and the same insurer relative to underinsured motorist coverage carried by the plaintiff if the insurer waives its subrogation rights against the insured and the plaintiff executes a covenant not to enforce judgment.

RPC 207. A lawyer may represent an insured in a bad faith action against his insurer for failure to pay a liability claim brought by a claimant who is represented by the same lawyer.

RPC 228. A lawyer for a personal injury victim may not execute an agreement to indemnify the tortfeasor's liability insurance carrier against the unpaid liens of medical providers.

RPC 229. A lawyer who jointly represented a husband and wife in the preparation and execution of estate planning documents may not prepare a codicil to the will of one spouse without the knowledge of the other spouse if the codicil will affect adversely the interests of the other spouse or each spouse agreed not to change the estate plan without informing the other spouse.

RPC 251. A lawyer may represent multiple claimants in a personal injury case, even though the available insurance proceeds are insufficient to compensate all claimants fully, provided each claimant, or his or her legal representative, gives informed consent to the representation and the lawyer does not advocate against the interest of any client in the division of the insurance proceeds.

2000 FEO 2. Opinion rules that a lawyer who represented a husband and wife in a joint Chapter 13 bankruptcy case may continue to represent one of the spouses after the other spouse disappears or becomes unresponsive, unless the lawyer is aware of any fact or circumstance that would make the continued representation of the remaining spouse an actual conflict of interest with the prior representation of the other spouse.

2000 FEO 4. Opinion rules that a lawyer may sign a statement acknowledging a finance company's interest in a client's recovery subject to certain conditions.

2000 FEO 9. Opinion explores the situations in which a lawyer who is also a CPA may provide legal services and accounting services from the same office.

2001 Formal Ethics Opinion 6. Opinion examines when a lawyer has a conflict of interest in representing various family members on claims for a deceased employee's workers' compensation death benefits.

II. REAL PROPERTY CONFLICTS.

CPR 100. (*See also* RPC 210 and 97 Formal Ethics Opinion 8.) In the usual residential loan transaction:

(a) A lawyer may ethically represent both the borrower and the lender.

(b) If the lawyer intends not to represent both the borrower and the lender, he must give timely notice to the one he intends not to represent of this fact, so that the one not represented may secure separate and timely representation.

(c) If the lawyer does not give such notice, he shall be deemed to represent both the borrower and the lender.

(d) If the lawyer represents only the borrower, he may nevertheless ethically provide the title and lien priority assurances required by the lender as a condition of the loan.

(e) The lawyer shall clearly state to his client(s), whether the borrower or the lender, or both, whom he represents and the general scope of his representation.

(f) If the lawyer does not represent both principals, and the one he does not represent retains another lawyer to represent him, both lawyers should fully cooperate with each other in serving the interests of their respective clients and in closing the loan promptly.

(g) If the lawyer represents both the borrower and the lender, he may be ethically barred from representing either one (without the consent of the other) if a controversy arises between the borrower and the lender before, during or after the closing.

It is not unethical for a lawyer representing the borrower and the lender (or either) in the usual residential loan transaction to prepare a deed from the seller to the buyer, collect the purchase price for the seller, or draft other documents (such as a second deed of trust and not secured thereby) as may be necessary to complete the transaction between the seller and the buyer in accordance with their agreement, and charge the seller therefor.

It is not unethical for the lawyer representing the borrower, the lender and the seller (or one or more of them) to provide the title insurer with an opinion on title sufficient to issue a mortgagee's title insurance policy, the premium for which is normally paid by the borrower.

CPR 107. An attorney/trustee in a foreclosure proceeding which is not contested by the owner-borrower may represent the lender in resisting a tenant's suit to restrain foreclosure. (*But see* RPC 82.)

CPR 137. An attorney/trustee in a foreclosure proceeding may not represent the lender when the foreclosure is contested by the borrower. (*But see* RPC 82.)

CPR 166. An attorney/trustee cannot ethically represent either the lender or the borrower in a role of advocacy at any state of the foreclosure proceeding. In the absence of controversy the trustee may present, on behalf of the lender, the evidence necessary to support the clerk's findings essential to a foreclosure order. Even if the proceeding is adversary, he may ethically perform for himself such legal services as are necessary to the performance of his fiduciary duties. (*See also* RPC 82.)

CPR 201. When an attorney/trustee learns that a foreclosure will be contested, he may resign as trustee and represent the lender. (*See also* RPC 82.)

CPR 220. An attorney's secretary may not be trustee if the attorney wishes to represent the lender at a contested foreclosure.

CPR 264. After initiating foreclosure, an attorney/trustee may not represent the lender in defense of the borrower's suit for injunctive relief. (*See also* RPC 82.)

CPR 275. An attorney who is part owner of a mortgage brokerage firm may certify title to real property with respect to which the mortgage broker has arranged financing.

CPR 297. An attorney/trustee cannot represent a husband-debtor in a partition action against his wife-debtor, but he may resign as trustee and then represent the husband. (*See also* RPC 82.)

CPR 305. An attorney/trustee cannot represent the lender in bankruptcy court in seeking relief from an automatic stay in order to commence foreclosure. (*See also* RPC 82.)

RPC 3. An attorney/trustee is not prohibited from continuing to serve as trustee in a contested foreclosure if he represented the seller at the closing. (*See also* RPC 82.)

RPC 40. For the purposes of a real estate transaction, an attorney may, with proper notice to the borrower, represent only the lender, and the lender may prepare the closing documents. (*See also* RPC 41.)

RPC 44. A closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

RPC 46. An attorney acting as trustee in a foreclosure proceeding may not, while serving in that capacity, file a motion to have an automatic stay lifted in the debtor's bankruptcy proceeding. (*See also* RPC 82.)

RPC 49. Attorneys who own stock in a real estate company may refer clients to the company if such would be in the clients' best interest and there is full disclosure, and such attorneys may not close transactions brokered by the real estate firm.

RPC 64. A lawyer who served as a trustee may after foreclosure sue the former debtor on behalf of the purchaser. (*See also* RPC 82.)

RPC 78. A closing attorney cannot make conditional delivery of trustee account checks to real estate agent before depositing loan proceeds against which checks are to be drawn.

RPC 82. This opinion comprehensively revises the ethical responsibilities of the attorney-trustee.

RPC 83. The significance of an attorney's personal interest in property determines whether he or she has a conflict of interest sufficient to disqualify him or her from rendering a title opinion concerning that property.

RPC 86. Opinion discusses disbursement against uncollected funds, accounting for earnest money paid outside closing and representation of the seller. (*See also* RPC 191.)

RPC 88. A lawyer may close a real estate transaction brokered by a real estate firm which employs the attorney's secretary as a part-time real estate broker.

RPC 90. A lawyer who as a trustee initiated a foreclosure proceeding may resign as trustee after the foreclosure is contested and act as lender's counsel. (*See*

also RPC 82.)

RPC 121. A borrower's lawyer may render a legal opinion to the lender.

RPC 185. A lawyer who owns any stock in a title insurance agency may not give title opinions to the title insurance company for which the title insurance agency issues policies.

RPC 188. A lawyer may close a real estate transaction brokered by the lawyer's spouse with the consent of the parties to the transaction.

RPC 201. Opinion explores the circumstances under which a lawyer who is also a real estate salesperson may close real estate transactions brokered by the real estate company with which he is affiliated.

RPC 210. Opinion examines the circumstances in which it is acceptable for a lawyer to represent the buyer, seller, and the lender in the closing of a residential real estate transaction.

RPC 248. A lawyer who owns stock in a mortgage brokerage corporation may not act as the settlement agent for a loan brokered by the corporation nor may the other lawyers in the firm certify title or act as settlement agent for the closing.

97 Formal Ethics Opinion 8. Opinion examines the circumstances in which it is acceptable for the lawyer who regularly represents a real estate developer to represent the buyer and the developer in the closing of a residential real estate transaction.

98 Formal Ethics Opinion 10. Opinion rules that an insurance defense lawyer may not disclose confidential information about an insured's representation in bills submitted to an independent audit company at the insurance carrier's request unless the insured consents.

98 Formal Ethics Opinion 11. Opinion rules that the fiduciary relationship that arises when a lawyer serves as an escrow agent demands that the lawyer be impartial to both the obligor and the obligee and, therefore, the lawyer may not act as advocate for either party against the other. Once the fiduciary duties of the escrow agent terminate, the lawyer may take a position adverse to the obligor or the obligee provided the lawyer is not otherwise disqualified.

99 Formal Ethics Opinion 1. Opinion rules that a lawyer may not accept a referral fee or solicitor's fee for referring a client to an investment advisor.

99 Formal Ethics Opinion 8. Opinion rules that a lawyer may represent all parties in a residential real estate closing and subsequently represent only one party in an escrow dispute provided the lawyer insures that the conditions for waiver of an objection to a possible future conflict of interest set forth in RPC 168 are satisfied.

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS AND OTHER SPECIFIC APPLICATIONS

(a) A lawyer shall not enter into a business transaction with a client under any circumstances unless it is fair to the client. A lawyer shall not enter into a business transaction with a client in which the lawyer and the client have differing interests and wherein the client expects the lawyer to exercise his or her independent professional judgment for the protection of the client, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing.

(b) During or subsequent to legal representation of a client, a lawyer shall not enter into a business transaction with a client for which a fee or commission will be charged in lieu of, or in addition to, a legal fee if the business transaction is related to the subject matter of the legal representation, any financial proceeds from the representation, or any information, confidential or otherwise, acquired by the lawyer during the course of the representation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer publication, literary, or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation except that a lawyer may advance court costs and expenses of litigation including expenses of investigation and medical examinations and cost of obtaining and presenting evidence, provided the client remains ultimately liable for such costs and expenses.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of the client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case, an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship. This provision shall not be construed to disqualify other lawyers in the affected lawyer's firm.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien to secure the lawyer's fee or expenses, provided the requirements of Rule 1.8(a) are satisfied; and

(2) contract with a client for a reasonable contingent fee in a civil case, except as prohibited by Rule 1.5.

Comment

Transactions Between Client and Lawyer

[1] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions, a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others; for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utility services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Because of the actual and potential conflicts of interests, paragraph (b) prohibits the sale of business services to a client or former client if the proposed transaction relates to the subject matter or the proceeds of representation. For example, a lawyer who is also a securities broker or insurance agent should not endeavor to sell securities or insurance to a client when the lawyer knows by virtue of the representation that such client has received funds suitable for investment.

[3] A lawyer may accept a gift from a client if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift

requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

[4] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property if the arrangement conforms to Rule 1.5 and paragraph (j).

Person Paying for a Lawyer's Services

[5] A lawyer may be paid from a source other than the client. Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. For instance, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees if the clients consent after consultation and the arrangement ensures the lawyer's professional independence. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Limiting Liability

[6] Paragraph (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.

Family Relationships Between Lawyers

[7] Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.

Acquisition of Interest in Litigation

[8] Paragraph (j) states the general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. The rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e). The rule also permits a lawyer to acquire a lien to secure the lawyer's fee or expenses provided the requirements of Rule 1.7(b) are satisfied. Specifically, the lawyer must reasonably believe that the representation will not be adversely affected after taking into account the possibility that the acquisition of a proprietary interest in the client's cause of action or any res involved therein may cloud the lawyer's judgment and impair the lawyer's ability to function as an advocate. The lawyer must also disclose the risks involved prior to obtaining the client's consent. Prior to initiating a foreclosure on property subject to a lien securing a legal fee, the lawyer must notify the client of the right to require the lawyer to participate in the mandatory fee dispute arbitration program. *See* Rule 1.5(f).

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 1.8 is similar to Model Rule 1.8 except that Rule 1.8(b) has no counterpart in the Model Rules. Rule 1.8(a) is similar to Rule 5.4(a) of the superseded (1985) Rules of Professional Conduct. The provisions of Rule 1.8(b) through (j) correspond to Rules 5.4(c), 5.5, 5.4(b), 5.3(b), 5.6, 5.7, 5.8, 5.9 and 5.3(a) of the superseded (1985) Rules of Professional Conduct, respectively.

LEGAL PERIODICALS

For article, "Malpractice and Ethical Considerations," *see* 19 N.C. Cent. L.J. 165 (1991).

CASE NOTES

A fee arrangement whereby a law firm would receive a one-third interest in the shares it was representing in a derivative action by minority shareholders of a corporation against the directors of the corporation did not constitute an acquisition by the law firm of an improper interest in the subject matter of the litigation. *Swenson v. Thibaut,* 39 N.C. App. 77, 250 S.E.2d 279 (1978), *appeal dismissed*, 296 N.C. 740, 254 S.E.2d 181 (1979).

Release Exonerating Attorney. - The attorney violated the Code of Professional Responsibility by having his client sign a release in an attempt to exonerate himself from malpractice. *North Carolina State Bar v. Frazier,* 62 N.C. App. 172, 302 S.E.2d 648, *appeal dismissed*, 308 N.C. 677, 303 S.E.2d 546 (1983).

Obligation to Pay Expert. - When a lawyer hiring an expert to help on a case says or does nothing to indicate that the obligation to pay is not his, the expert can reasonably assume that the lawyer is the contracting party, rather than the client. *Gualtieri v. Burleson*, 84 N.C. App. 650, 353 S.E.2d 652, *disc. rev. denied*, 320 N.C. 168, 358 S.E.2d 50 (1987).

Lending Money to Clients. - The State Bar's hearing committee's finding adequately supported its conclusion that the defendant violated Rules of Professional Responsibility 5.3(B) and 1.2(A) where the undisputed facts were that: (1) the defendant kept $ 20,000.00 in his trust account for several years which came from his brother's company, and (2) he loaned this money to three clients to pay for one client's surgery; another client's rent and payments on a car note; and a third client's surgical, medical and travel expenses. *North Carolina State Bar v. Harris*, 137 N.C. App. 207, 527 S.E.2d 728 (2000).

Liability for Costs of Class Action. - Where class representative plaintiffs agreed with their counsel that counsel - rather than the class members or class representatives - would bear ultimate liability for the costs and expenses of litigation the arrangement was ethical and in no way impacted upon the adequacy of counsel under Federal Rules of Civil Procedure Rule 23(a)(4). *In re S.E. Hotel Properties Ltd. Partnership*, 151 F.R.D. 597 (W.D.N.C. 1993).

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

The attorney accepted compensation from someone other than his client without the knowledge or consent of his client. Private Reprimand. 79 DHC 26.

Among other things, the attorney invested the proceeds from a wrongful death action in a corporation in which the attorney owned a 90% interest, without the knowledge or consent of his client. Attorney also attempted to exonerate himself or limit his liability for malpractice by presenting his client with a document entitled "Release" and procuring his client's signature. Eighteen-Month Suspension. 80 DHC 16.

In addition to other misconduct, the attorney required the client to sign a release form exonerating the attorney from liability for malpractice before turning over the client's files. One-Year Suspension. 81 DHC 4.

The attorney certified title to 77 acres of his client's land. A dispute ensued over 47 acres. The attorney advised the client that it would cost $5,000 to settle the dispute. The client could not afford this amount so the attorney offered to purchase all the property for $2800. The client sold the property to the attorney for $3550. The attorney did not pay fair market value for the property and later sold the property for $30,000. Eighteen-Month Suspension. 85 DHC 7.

The attorney entered into a contract with a client to purchase property of the client which proved ultimately to be unfair to the client. Six-Month Suspension, stayed three years upon conditions. 89 DHC 41.

The attorney had a client sign an agreement prospectively limiting the attorney's malpractice liability to the client, at a time when the client was not represented by independent counsel and without advising her to obtain such counsel. One-Year Suspension, stayed for three years upon conditions. 90 DHC 23.

Attorney purchased house from 81-year-old client for less than fair market value without fully disclosing risks of transaction and without advising client to seek independent counsel. One-Year Suspension, stayed for three years and order to reconvey property to client. 92 DHC 8.

Among other things, attorney borrowed money from client funds on deposit in his trust account without evidencing these transactions by promissory notes or other documentation. One-Year Suspension, stayed for three years upon conditions. 93 DHC 20.

Attorney borrowed $10,000 of insurance proceeds from a disabled widow without securing the loan, without providing for the payment of interest and

without advising the widow to consult independent counsel. Two-Year Suspension, one year stayed upon condition. 93 DHC 35.

ETHICS OPINION NOTES

CPR 11. An attorney may contract to receive an interest in real property as a contingent fee for legal representation in an action to clear title to the subject property.

CPR 135. It is not improper for a legal aid society to request clients to donate unused trust funds to the society.

CPR 157. An attorney handling a personal injury case may advance the cost of the client's medical examination if such is actually an expense of litigation for which the client remains ultimately liable.

CPR 241. An attorney may practice law and sell insurance but must keep the law practice and the insurance business separate in all respects. The attorney should not sell insurance to clients for whom he has provided legal services involving estate planning.

CPR 291. An attorney who has procured a judgment for a client that has not been collected by the ninth year may purchase the judgment if the client does wish to renew it, but this practice is not encouraged.

CPR 295. An attorney who refers a client-creditor to a collection agency may accept payment only from the client for legal services rendered to the client.

CPR 346. An attorney may represent a defendant employee of a city and accept payment of his fee from the city even though the employee may cross-claim against city.

CPR 364. An attorney may not purchase a judgment even though the client needs money immediately.

RPC 11. Full disclosure and clients' consent are necessary only when married lawyers personally participate as counsel.

RPC 24. An attorney may not purchase his client's property at an execution sale on his own account.

RPC 76. A lawyer may advance his client's fine.

RPC 80. A lawyer may not lend money to a client who is represented in pending or contemplated litigation except to finance costs of litigation.

RPC 124. An attorney may not agree to bear the costs of federal class action litigation. *But see In re S.E. Hotel Properties Ltd. Partnership*, 151 F.R.D. 597 (W.D.N.C. 1993).

RPC 134. An attorney may not accept an assignment of her client's judgment while representing the client on appeal of the judgment.

RPC 167. A lawyer may accept compensation from a potentially adverse insurance carrier for representing a minor in the court approval of a personal injury settlement provided the lawyer is able to represent the minor's interests without regard to who is actually paying for his services.

RPC 173. A lawyer who represents a client on a criminal charge may not lend the client the money necessary to post bond.

RPC 186. A lawyer who represents a client in a pending domestic action may take a promissory note secured by a deed of trust as payment for the lawyer's fee even though the deed of trust is on real property that is or may be the subject of the domestic action.

RPC 187. A lawyer may not ask a client for authorization to instruct the clerk of court to forward the client's support payments to the lawyer in order to satisfy the client's legal fees.

RPC 238. A lawyer is subject to the Rules of Professional Conduct with respect to the provision of a law-related service, such as financial planning, if the law related service is provided in circumstances that are not distinct from the lawyer's provision of legal services to clients.

98 Formal Ethics Opinion 14. Opinion rules that a lawyer may participate in the solicitation of funds from third parties to pay the legal fees of a client provided there is disclosure to contributors and the funds are administered honestly.

98 Formal Ethics Opinion 17. Opinion rules that a lawyer may not comply with an insurance carrier's billing requirements and guidelines if they interfere with the lawyer's ability to exercise his or her independent professional judgment in the representation of the insured.

2001 Formal Ethics Opinion 7. Opinion prohibits a lawyer from advancing the cost of a rental car to a client even though the car will be used, on occasion, to transport the client to medical examinations.

2001 Formal Ethics Opinion 9. Opinion rules that, although a lawyer may recommend the purchase a financial product to a legal client, the lawyer may not receive a commission for its sale.

RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter, or whose present or former firm has formerly represented a client in a matter, shall not thereafter:

(1) use confidential information protected from disclosure by Rule 1.6 to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known; or

(2) reveal confidential information protected from disclosure by Rule 1.6 except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Comment

[1] The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind, on behalf of a new client, a contract drafted on behalf of the former client. So also, a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

[2] The scope of a "matter" for purposes of this rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Lawyers Moving Between Firms

[3] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers, to some degree, limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[4] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek *per se* rules of disqualifica-

tion. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

[5] The other rubric formerly used for dealing with disqualification is the appearance of impropriety. This rubric has a twofold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

Confidentiality

[6] Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

[7] Application of paragraph (b) depends on a situation's particular facts. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[8] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer, while with one firm, acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[9] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. *See* Rules 1.6 and 1.9.

Adverse Positions

[10] The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs (b) and (c) concerning confidentiality have been met.

[11] Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Whether information is "generally known" depends in part upon how the information was obtained and in part upon the former client's reasonable expectations. The mere fact that information is accessible through the public record or has become known to some other persons, does not necessarily deprive the information of its confidential nature. If the information is known or readily available to a relevant sector of the public, such as the parties involved in the matter, then the information is probably considered "generally known." See Restatement (Third) of The Law Governing Lawyers, 111 cmt. d (Proposed Final Draft No. 1, 1996).

[12] Disqualification from subsequent representation is for the protection of former clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role on behalf of the new client.

[13] With regard to an opposing party raising a question of conflict of interest, see comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Amended October 7, 1999

Editor's Note: Rule 1.9 is substantially similar to Model Rule 1.9. Rule 1.9(a) is essentially the same as Rule 5.1(d) of the superseded (1985) Rules of Professional Conduct. Rule 1.9(b) corresponds to Rule 5.11(b) of the superseded (1985) Rules of Professional Conduct and Rule 1.9(c) has no counterpart in the superseded Rules.

CASE NOTES

Conflict of Interest Not Shown. - There was no conflict of interest involved where the attorney for the plaintiff in an action to impress a trust had represented a defendant in a divorce action against her former husband, her co-defendant in this action. In this case the former client had consented to the attorney's representation of the current client, her foster mother, who knew of the prior representation. *Saintsing v. Taylor,* 57 N.C. App. 467, 291 S.E.2d 880, *cert. denied*, 306 N.C. 558, 294 S.E.2d 224 (1982).

Refusal to Disqualify Counsel. - In a derivative action in which the defendant waited 22 months before moving to disqualify the plaintiffs' counsel on the ground of prior representation of the defendant by the attorney who referred the derivative action to the plaintiffs' counsel, the trial court did not abuse its discretion in refusing to disqualify counsel. *Lowder v. All Star Mills Inc.*, 60 N.C. App. 275, 300 S.E.2d 230, *aff'd in part, rev'd in part*, 309 N.C. 695, 309 S.E.2d 193 (1983).

Law firm was disqualified from representing plaintiff computer company in copyright case against another company which hired three of plaintiff's engineers where the law firm had previously represented one of the engineers. *Robert Woodhead, Inc. v. Datawatch Corp.*, 934 F. Supp. 181 (E.D.N.C. 1995).

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

Attorney assisted former in-house counsel to Firestone Tire & Rubber Company to engage in conflict of interest by accepting assistance of the former in-house counsel in preparing complex products liability action against Firestone. Attorney also improperly divided settlement proceeds with the former in-house counsel. Disbarred. 96 DHC 16.

ETHICS OPINION NOTES

CPR 93. A law firm may not continue to represent a husband charged with his wife's murder after the public defender who had represented a codefendant who had agreed to testify against the husband in the same case joins the firm.

CPR 119. It is improper for a judgement creditor's attorney or his partner or his lay employee to serve as a referee in supplemental proceedings.

CPR 140. It is improper for an attorney who formerly represented a creditor to later represent the debtor in the same action.

CPR 147. An attorney cannot defend an action brought by a former client when confidential information obtained during the prior representation would be relevant to the defense of the current action.

CPR 159. It is proper for an attorney to prepare a will for a woman and later represent her husband in a domestic action so long as the prior representation is not substantially related to the present action.

CPR 169. An attorney may represent the defendant in a lawsuit after having been first approached by the plaintiff if no attorney-client relationship was

formed.

CPR 195. An attorney may not act as a private prosecutor against a former client who sought his advice concerning the domestic problems which culminated in the subject homicide.

CPR 243. An attorney may certify title to the State for purposes of condemnation and later represent the landowner against the State in a suit for damages if all consent.

CPR 273. An attorney may not represent a neighborhood group in opposition to another group he previously represented concerning the same or substantially related subject matter.

RPC 32. An attorney who represented a husband and wife in certain matters may not later represent the husband in an action for alimony and equitable distribution.

RPC 45. An attorney whose partner represented the adverse party prior to joining the firm is not disqualified unless the partner acquired confidential information material to the current dispute.

RPC 53. A lawyer may sue a municipality although his partner serves as a member of its governing body. (*But see* RPC 160.)

RPC 137. An attorney who formerly represented an estate may not subsequently defend the former personal representative against a claim brought by the estate.

RPC 144. A lawyer having undertaken to represent two clients in the same matter may not thereafter represent one against the other in the event their interests become adverse without the consent of the other.

RPC 168. A lawyer may ask her client for a waiver of objection to a possible future representation presenting a conflict of interest if certain conditions are met.

RPC 229. A lawyer who jointly represented a husband and wife in the preparation and execution of estate planning documents may not prepare a codicil to the will of one spouse without the knowledge of the other spouse if the codicil will affect adversely the interests of the other spouse or each spouse agreed not to change the estate plan without informing the other spouse.

RPC 244. Although a lawyer asks a prospective client to sign a form stating that no client-lawyer relationship will be created by reason of a free consultation with the lawyer, the lawyer may not subsequently disclaim the creation of a client-lawyer relationship and represent the opposing party.

RPC 246. Under certain circumstances, a lawyer may not represent a party whose interests are opposed to the interests of a prospective client if confidential information of the prospective client must be used in the representation.

2000 FEO 2. Opinion rules that a lawyer who represented a husband and wife in a joint Chapter 13 bankruptcy case may continue to represent one of the spouses after the other spouse disappears or becomes unresponsive, unless the lawyer is aware of any fact or circumstance that would make the continued representation of the remaining spouse an actual conflict of interest with the prior representation of the other spouse.

RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9, or 2.2.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, lawyers in the legal department of a corporation or other organization, or lawyers in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public as a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved.

[2] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[3] Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved and on the specific facts of the situation.

[4] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11 (a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the rules generally, including Rules 1.6, 1.7, and 1.9.

[5] Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences and, therefore, to the protections provided in Rules 1.6, 1.9, and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations and, thus, has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.

Principles of Imputed Disqualification

[6] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[7] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[8] The duty of loyalty to a client obliges a lawyer to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation

by the individual lawyer involved, but does not necessarily entail abstention of other lawyers through imputed disqualification. If a lawyer has left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of Rule 1.9(b) and Rule 1.10(b) concerning confidentiality have been met.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 1.10 is identical to Model Rule 1.10 and substantially similar to Rule 5.11(a), (c), and (d) of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

Cited in *Smith v. Beaufort County Hosp. Ass'n*, 141 N.C. App. 203, 540 S.E.2d 775 (2000), cert denied, 353 N.C. 381, 547 S.E.2d 435 (2001).

ETHICS OPINION NOTES

CPR 93. A law firm may not continue to represent a husband charged with his wife's murder after the public defender who had represented a codefendant who had agreed to testify against the husband in the same case joins the firm.

CPR 96. When different attorneys in the same firm are employed to represent conflicting interests in related cases (estate in wrongful death case and criminal defendant in homicide case), both must withdraw.

CPR 158. An attorney whose partner represented the wife in domestic litigation which resulted in parties holding real property as co-tenants cannot subsequently represent the husband in a partition proceeding.

CPR 274. Attorneys who merely share office space are not automatically disqualified.

RPC 45. An attorney whose partner represented the adverse party prior to joining the firm is not disqualified unless the partner acquired confidential information material to the current dispute.

RPC 49. Attorneys who own stock in a real estate company may refer clients to the company if such would be in the clients' best interest and there is full disclosure, but the attorneys and other members of their law firm may not close transactions brokered by the real estate firm.

RPC 55. A member of the Attorney General's staff may prosecute appeals of adverse Medicaid decisions against the Department of Human Resources, which is represented by another member of the Attorney General's staff.

RPC 65. The public defender's office should be considered as a single law firm and staff attorneys may not represent co-defendants with conflicting interests unless both consent and can be adequately represented.

RPC 73. Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants if a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.

Where an attorney advises a governing body, such as a county commission, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.

RPC 248. A lawyer who owns stock in a mortgage brokerage corporation may not act as the settlement agent for a loan brokered by the corporation nor may the other lawyers in the firm certify title or act as settlement agent for the closing.

99 Formal Ethics Opinion 3. Opinion rules that lawyers in different field offices of Legal Services of North Carolina may represent clients with materially adverse interests provided confidential client information is not shared by the lawyers with the different field offices.

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 agency consents after consultation. 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 promptly given to the appropriate government agency 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 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 attorney 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 agency.

(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.

Comment

[1] This rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another. A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this rule.

[2] Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

[3] When the client is an agency of one government, that agency should be treated as a private client for purposes of this rule if the lawyer thereafter repre-

sents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

[4] Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

[5] Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

[6] Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[7] Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[8] Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 1.11 is identical to Model Rule 1.11. Rule 1.11 also closely follows Rule 9.1 of the superseded (1985) Rules of Professional Conduct. However, Rule 1.11 permits members of a law firm which employs a former government lawyer to represent a party adverse to the lawyer's former employer, without the consent of the government agency, provided the former government lawyer is "screened" from any involvement with the case and does not receive any fee therefrom. Under superseded Rule 9.1, no member of a disqualified lawyer's firm may participate unless the adverse government party consents.

CASE NOTES

No *Per Se* Disqualification. - Government employment as a district attorney by an attorney formerly in private practice does not create a per se disqualification of all the other government attorneys on his staff from prosecuting or appearing at any time against his former clients of the attorney who left private practice. *State v. Reid*, 104 N.C. App. 334, 410 S.E.2d 67 (1991), *cert. granted*, 331 N.C. 121, 414 S.E.2d 765 (1992), *rev'd on other grounds,* 334 N.C. 551, 434 S.E.2d 193 (1993).

Stated in *State v. Reid*, 334 N.C. 551, 434 S.E.2d 193 (1993).

ETHICS OPINION NOTES

CPR 208. A former U.S. attorney may represent criminal defendants and civil plaintiffs against the United States so long as he did not participate in substantially related matters while with the government.

CPR 245. A former assistant district attorney may not act as private prosecutor in a case he was handling before he left the district attorney's office.

CPR 306. A former district attorney who prepared bills of indictment and requests for extradition in a criminal case may not privately prosecute that case.

CPR 341. Members of a former assistant district attorney's current law firm may not represent a criminal defendant with respect to whom the former assistant district attorney sought indictment, unless the district attorney consents. (*See*, *however*, Rule 1.11(a) of the Revised Rules of Professional Conduct.)

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 consent after consultation.

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

(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 multi-member arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] This rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge, who was a member of a multi-member court and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also, the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges *pro tempore*, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 1.12 is identical to Model Rule 1.12 and Rule 9.2 of the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

CPR 113. An attorney may not represent either party in a domestic case after having signed a consent judgment in the matter as a judge.

RPC 138. A partner of a lawyer who represents a party to an arbitration should not act as an arbitrator.

RULE 1.13 ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refused to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign or withdraw in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the con-

stituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents.

[2] Officers, directors, employees, and shareholders are the constituents of the corporate organizational client. The duties defined in this rule apply equally to unincorporated associations. "Other constituents" as used in this comment means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

[3] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[4] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point, it may be useful or essential to obtain an independent legal opinion.

[5] In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that, under certain conditions, highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other rules. In particular, this rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3, or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

[7] The duty defined in this rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purposes of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This rule does not limit that authority. *See* 0.2 Scope.

Clarifying the Lawyer's Role

[8] There are times when the organization's interest may be or may become adverse to those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[9] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[10] Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[11] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[12] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 1.13 is identical to Model Rule 1.13. Rule 1.13 generally corresponds to Rule 5.10 of the superseded (1985) Rules of Professional Conduct. Unlike the superseded rule, Rule 1.13 contains additional guidance for a lawyer who learns of improper conduct by a constituent of the organization that is inconsistent with the best interests of the organization.

ETHICS OPINION NOTES

CPR 154. Because the town attorney owes allegiance to the town and not to particular officials of the town, he must disclose to any inquiring member of the town's board of commissioners the subject of a town business meeting involving town officials and other interested persons despite contrary instructions from the mayor.

CPR 185. A staff attorney for a member-owned corporation may provide legal advice to members and nonmembers as long as their interests are not in conflict with those of the corporation.

CPR 227. The retained attorney for a religious organization cannot represent citizens who want wills leaving property to the organization.

CPR 228. A retained attorney for a religious organization cannot represent employees of the organization in drawing wills.

CPR 235. An attorney may not offer to draw wills free for church members who agree to contribute a certain amount to the church.

CPR 271. An attorney who drafted a partnership agreement cannot later represent some of the partners against the partnership.

RPC 97. Counsel for a condominium association may represent the associa-

tion against a unit owner.

97 Formal Ethics Opinion 7. After a corporation files a Chapter 7 bankruptcy petition and at the request of the bankruptcy trustee, a lawyer who previously represented the corporation may continue to represent the corporation's bankruptcy estate and the bankruptcy trustee in a civil action provided the lawyer understands that the trustee is responsible for making decisions about the representation and the representation is not adverse to a former client of the lawyer.

RULE 1.14 CLIENT UNDER A DISABILITY

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

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

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 mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent, the law recognizes intermediate degrees of competence. 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. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. 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] 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. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

[4] 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).

Disclosure of the Client's Condition

[5] Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 1.14 is identical to Model Rule 1.14. There is no corresponding rule in the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

CPR 314. An attorney who believes his or her client is not competent to make a will may not prepare or preside over the execution of a will for that client.

RPC 157. A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection if reasonably necessary to protect the client's interest.

RPC 163. A lawyer may seek the appointment of an independent guardian ad litem for a child whose guardian has an obvious conflict of interest in fulfilling his fiduciary duties to the child.

98 Formal Ethics Opinion 16. Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

98 Formal Ethics Opinion 18. Opinion rules that a lawyer representing a minor owes the duty of confidentiality to the minor and may only disclose confidential information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation.

RULE 1.15 PRESERVING THE PROPERTY OF OTHERS

This rule has four subparts, Rule 1.15-1, Definitions; Rule 1.15-2, General Rules; Rule 1.15-3, Records and Accountings; and Rule 1.15-4, Interest on Lawyers' Trust Accounts. The first three subparts set forth the requirements for preserving client property, including the requirements for preserving client property in a lawyer's trust account. The comment for all three subparts as well as the annotations appear after the text for Rule 1.15-3.

RULE 1.15-1 DEFINITIONS

For purposes of this Rule 1.15, the following definitions apply:

(a) "Bank" denotes a bank, savings and loan association, or credit union chartered under North Carolina or federal law.

(b) "Client" denotes a person, firm, or other entity for whom a lawyer performs, or is engaged to perform, any legal services.

(c) "Dedicated trust account" denotes a trust account that is maintained for the sole benefit of a single client or with respect to a single transaction or series of integrated transactions.

(d) "Entrusted property" denotes trust funds, fiduciary funds and other property belonging to someone other than the lawyer which is in the lawyer's possession or control in connection with the performance of legal services or professional fiduciary services.

(e) "Fiduciary account" denotes an account, designated as such, maintained by a lawyer solely for the deposit of fiduciary funds or other entrusted property of a particular person or entity.

(f) "Fiduciary funds" denotes funds belonging to someone other than the lawyer that are received by or placed under the control of the lawyer in connection with the performance of professional fiduciary services.

(g) "Funds" denotes any form of money, including cash, payment instruments such as checks, money orders, or sales drafts, and receipts from electronic fund transfers.

(h) "General trust account" denotes any trust account other than a dedicated trust account.

(i) "Instrument" denotes an instrument under the Uniform Commercial Code, a payment item or advice accepted for credit by a bank, or a requisition or order for the electronic transfer of funds.

(j) "Legal services" denotes services rendered by a lawyer in a client-lawyer relationship.

(k) "Professional fiduciary services" denotes compensated services (other than legal services) rendered by a lawyer as a trustee, guardian, personal representative of an estate, attorney-in-fact, or escrow agent, or in any other fiduciary role customary to the practice of law.

(l) "Trust account" denotes an account, designated as such, maintained by a lawyer for the deposit of trust funds.

(m) "Trust funds" denotes funds belonging to someone other than the lawyer that are received by or placed under the control of the lawyer in connection with

the performance of legal services.

History Note: Statutory Authority G.S. 84-23
Adopted July 24, 1997
Amended May 4, 2000

RULE 1.15-2 GENERAL RULES

(a) *Entrusted Property*. All entrusted property shall be identified, held, and maintained separate from the property of the lawyer, and shall be deposited, disbursed, and distributed only in accordance with this Rule 1.15.

(b) *Deposit of Trust Funds*. All trust funds received by or placed under the control of a lawyer shall be promptly deposited in either a general trust account or a dedicated trust account of the lawyer.

(c) *Deposit of Fiduciary Funds*. All fiduciary funds received by or placed under the control of a lawyer shall be promptly deposited in a fiduciary account or a general trust account of the lawyer.

(d) *Safekeeping of Other Entrusted Property*. A lawyer may also hold entrusted property other than fiduciary funds (such as securities) in a fiduciary account. All entrusted property received by a lawyer that is not deposited in a trust account or fiduciary account (such as a stock certificate) shall be promptly identified, labeled as property of the person or entity for whom it is to be held, and placed in a safe deposit box or other suitable place of safekeeping. The lawyer shall disclose the location of the property to the client or other person for whom it is held. Any safe deposit box or other place of safekeeping shall be located in this state, unless the lawyer has been otherwise authorized in writing by the client or other person for whom it is held.

(e) *Location of Accounts*. All trust accounts shall be maintained at a bank in North Carolina except that, with the written consent of the client, a dedicated trust account may be maintained at a bank outside of North Carolina or in a financial institution other than a bank in or outside of North Carolina. A lawyer may maintain a fiduciary account at any bank or other financial institution in or outside of North Carolina selected by the lawyer in the exercise of the lawyer's fiduciary responsibility.

(f) *Segregation of Lawyer's Funds*. No funds belonging to a lawyer shall be deposited in a trust account or fiduciary account of the lawyer except:

(1) funds sufficient to open or maintain an account, pay any bank service charges, or pay any tax levied on the account; or

(2) funds belonging in part to a client or other third party and in part currently or conditionally to the lawyer.

(g) *Mixed Funds Deposited Intact*. When funds belonging to the lawyer are received in combination with funds belonging to the client or other persons, all of the funds shall be deposited intact. The amounts currently or conditionally belonging to the lawyer shall be identified on the deposit slip or other record. After the deposit has been finally credited to the account, the lawyer may withdraw the amounts to which the lawyer is or becomes entitled. If the lawyer's entitlement is disputed, the disputed amounts shall remain in the trust account or fiduciary account until the dispute is resolved.

(h) *Instruments Payable to Lawyer*. An instrument drawn on a trust account or fiduciary account for the payment of the lawyer's fees or expenses shall be made payable to the lawyer and shall indicate the client balance on which instrument is drawn.

(i) *No Bearer Instruments*. No instrument shall be drawn on a trust account or fiduciary account made payable to cash or bearer.

(j) *No Personal Benefit*. A lawyer shall not use or pledge any entrusted property to obtain credit or other personal benefit for the lawyer or any person other than the legal or beneficial owner of that property.

(k) *Bank Directive*. Every lawyer maintaining a trust account or fiduciary account at a bank shall file with the bank a written directive requiring the bank to report to the executive director of the North Carolina State Bar when an instrument drawn on the account is presented for payment against insufficient funds. No trust account or fiduciary account shall be maintained in a bank that does not agree to make such reports.

(l) *Notification of Receipt*. A lawyer shall promptly notify his or her client of the receipt of any entrusted property belonging in whole or in part to the client.

(m) *Delivery of Client Property*. A lawyer shall promptly pay or deliver to the client, or to third persons as directed by the client, any entrusted property belonging to the client and to which the client is currently entitled.

(n) *Property Received as Security*. Any entrusted property or document of title delivered to a lawyer as security for the payment of a fee or other obligation to the lawyer shall be held in trust in accordance with this Rule 1.15 and shall be clearly identified as property held as security and not as a completed transfer of beneficial ownership to the lawyer. This provision does not apply to property received by a lawyer on account of fees or other amounts owed to the lawyer at the time of receipt; however, such transfers are subject to the rules governing legal fees or business transactions between a lawyer and client.

(o) *Duty to Report Misappropriation*. A lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the North Carolina State Bar.

(p) *Interest on Deposited Funds*. Except as authorized by Rule 1.15-4, any interest earned on a trust account or fiduciary account, less any amounts deducted for bank service charges and taxes, shall belong to the client or other person or entity entitled to the corresponding principal amount. Under no circumstances shall the lawyer be entitled to any interest earned on funds deposited in a trust account or fiduciary account.

(q) *Abandoned Property*. If entrusted property is unclaimed, the lawyer shall make due inquiry of his or her personnel, records and other sources of information in an effort to determine the identity and location of the owner of the property. If that effort is successful, the entrusted property shall be promptly transferred to the person or entity to whom it belongs. If the effort is unsuccessful and the provisions of G.S. 116B-18 are satisfied, the property shall be deemed abandoned, and the lawyer shall comply with the requirements of Chapter 116B of the General Statutes concerning the escheat of abandoned property.

History Note: Statutory Authority G.S. 84-23
Adopted July 24, 1997
Amended May 4, 2000

RULE 1.15-3 RECORDS AND ACCOUNTINGS

(a) *Minimum Records for Accounts at Banks*. The minimum records required for general trust accounts, dedicated trust accounts and fiduciary accounts maintained at a bank shall consist of the following:

(1) all bank receipts or deposit slips listing the source and date of receipt of all funds deposited in the account, and, in the case of a general trust account, also the name of the client or other person to whom the funds belong;

(2) all canceled checks or other instruments drawn on the account, or printed digital images thereof furnished by the bank, showing the amount, date, and recipient of the disbursement, and, in the case of a general trust account, the client balance against which each instrument is drawn, provided, that:

(i) digital images must be legible reproductions of the front and back of the original instruments with no more than six instruments per page and no images smaller than 1-3/16 x 3 inches; and

(ii) the bank must maintain, for at least six years, the capacity to reproduce electronically additional or enlarged images of the original instruments upon request within a reasonable time;

(3) all instructions or authorizations to transfer, disburse, or withdraw funds from the trust account;

(4) all bank statements and other documents received from the bank with respect to the trust account, including, but not limited to notices of return or dishonor of any instrument drawn on the account against insufficient funds;

(5) in the case of a general trust account, a ledger containing a record of receipts and disbursements for each person or entity from whom and for whom funds are received and showing the current balance of funds held in the trust account for each such person or entity; and

(6) any other records required by law to be maintained for the trust account.

(b) *Minimum Records for Accounts at Other Financial Institutions*. The minimum records required for dedicated trust accounts and fiduciary accounts at financial institutions other than a bank shall consist of the following:

(1) all depository receipts or deposit slips listing the source and date of receipt of all property deposited in the account;

(2) a copy of all checks or other instruments drawn on the account, or

printed digital images thereof furnished by the depository, showing the amount, date, and recipient of the disbursement, provided, that the images satisfy the requirements set forth in Rule 1.15-3(a)(2);

(3) all instructions or authorizations to transfer, disburse, or withdraw funds from the account;

(4) all statements and other documents received from the depository with respect to the account, including, but not limited to notices of return or dishonor of any instrument drawn on the account for insufficient funds; and

(5) any other records required by law to be maintained for the account.

(c) *Quarterly Reconciliations of General Trust Accounts.* At least quarterly, the individual client balances shown on the ledger of a general trust account must be totaled and reconciled with the current bank balance for the trust account as a whole.

(d) *Accountings for Trust Funds.* The lawyer shall render to the client a written accounting of the receipts and disbursements of all trust funds (i) upon the complete disbursement of the trust funds, (ii) at such other times as may be reasonably requested by the client, and (iii) at least annually if the funds are retained for a period of more than one year.

(e) *Accountings for Fiduciary Property.* Inventories and accountings of fiduciary funds and other entrusted property received in connection with professional fiduciary services shall be rendered to judicial officials or other persons as required by law. If an annual or more frequent accounting is not required by law, a written accounting of all transactions concerning the fiduciary funds and other entrusted property shall be rendered to the beneficial owners, or their representatives, at least annually and upon the termination of the lawyer's professional fiduciary services.

(f) *Minimum Record Keeping Period.* A lawyer shall maintain, in accordance with this Rule 1.15, complete and accurate records of all entrusted property received by the lawyer, which records shall be maintained for a period of at least six (6) years from the last transaction to which the records pertain.

(g) *Audit by State Bar.* The financial records required by this Rule 1.15 shall be subject to audit for cause and to random audit by the North Carolina State Bar; and such records shall be produced for inspection and copying upon request by the State Bar.

Comment

[1] The purpose of a lawyer's trust account or fiduciary account is to segregate the funds belonging to others from those belonging to the lawyer. Money received by a lawyer while providing legal services or otherwise serving as a fiduciary should never be used for personal purposes. Failure to place the funds of others in a trust or fiduciary account can subject the funds to claims of the lawyer's creditors or place the funds in the lawyer's estate in the event of the lawyer's death or disability.

Property Subject to these Rules

[2] Any property belonging to a client or other person or entity that is received by or placed under the control of a lawyer in connection with the lawyer's furnishing of legal services or professional fiduciary services must be handled and maintained in accordance with this Rule 1.15. The minimum records to be maintained for accounts in banks differ from the minimum records to be maintained for accounts in other financial institutions (where permitted), to accommodate brokerage accounts and other accounts with differing reporting practices.

Client Property

[3] Every lawyer who receives funds belonging to a client must maintain a trust account. The general rule is that every receipt of money from a client or for a client, which will be used or delivered on the client's behalf, is held in trust and should be placed in the trust account. All client money received by a lawyer, except that to which the lawyer is immediately entitled, must be deposited in a trust account, including funds for payment of future fees and expenses. Funds delivered to the lawyer by the client for payment of future fees or expenses should never be used by the lawyer for personal purposes or subjected to the potential claims of the lawyer's creditors.

[4] This rule does not prohibit a lawyer who receives an instrument belonging wholly to a client or a third party from delivering the instrument to the appropriate recipient without first depositing the instrument in the lawyer's trust account.

Property from Professional Fiduciary Service

[5] The phrase "professional fiduciary service," as used in this rule, is service by a lawyer in any one of the various fiduciary roles undertaken by a lawyer that is not, of itself, the practice of law, but is frequently undertaken in conjunction with the practice of law. This includes service as a trustee, guardian, personal representative of an estate, attorney-in-fact, and escrow agent, as well as service in other fiduciary roles "customary to the practice of law."

[6] Property held by a lawyer performing a professional fiduciary service must also be segregated from the lawyer's personal property, properly labeled, and maintained in accordance with the applicable provisions of this rule.

[7] When property is entrusted to a lawyer in connection with a lawyer's representation of a client, this rule applies whether or not the lawyer is compensated for the representation. However, the rule does not apply to property received in connection with a lawyer's uncompensated service as a fiduciary such as a trustee or personal representative of an estate. (Of course, the lawyer's conduct may be governed by the law applicable to fiduciary obligations in general, including a fiduciary's obligation to keep the principal's funds or property separate from the fiduciary's personal funds or property, to avoid self-dealing, and to account for the funds or property accurately and promptly).

[8] Compensation distinguishes professional fiduciary service from a fiduciary role that a lawyer undertakes as a family responsibility, as a courtesy to friends, or for charitable, religious or civic purposes. As used in this rule, "compensated services" means services for which the lawyer obtains or expects to obtain money or any other valuable consideration. The term does not refer to or include reimbursement for actual out-of-pocket expenses.

Property Excluded from Coverage of Rules

[9] This rule also does not apply when a lawyer is handling money for a business or for a religious, civic, or charitable organization as an officer, employee, or other official regardless of whether the lawyer is compensated for this service. Handling funds while serving in one of these roles does not constitute "professional fiduciary service," and such service is not "customary to the practice of law."

Burden of Proof

[10] When a lawyer is entrusted with property belonging to others and does not comply with these rules, the burden of proof is on the lawyer to establish the capacity in which the lawyer holds the funds and to demonstrate why these rules should not apply.

Prepaid Legal Fees

[11] Whether a fee that is prepaid by the client should be placed in the trust account depends upon the fee arrangement with the client. A retainer fee in its truest sense is a payment by the client for the reservation of the exclusive services of the lawyer, which is not used to pay for the legal services provided by the lawyer and, by agreement of the parties, is nonrefundable upon discharge of the lawyer. It is a payment to which the lawyer is immediately entitled and, therefore, should not be placed in the trust account. A "retainer," which is actually a deposit by the client of an advance payment of a fee to be billed on an hourly or some other basis, is not a payment to which the lawyer is immediately entitled. This is really a security deposit and should be placed in the trust account. As the lawyer earns the fee or bills against the deposit, the funds should be withdrawn from the account. Rule 1.16(d) requires the refund to the client of any part of a fee that is not earned by the lawyer at the time that the representation is terminated.

Abandoned Property

[12] Should a lawyer need technical assistance concerning the escheat of property to the State of North Carolina, the lawyer should contact the escheat officer at the Office of the North Carolina State Treasurer in Raleigh, North Carolina.

Responsibility for Records and Accountings

[13] It is the lawyer's responsibility to assure that complete and accurate records of the receipt and disbursement of entrusted property are maintained in accordance with this rule.

[14] The lawyer is responsible for keeping a client, or any other person to whom the lawyer is accountable, advised of the status of entrusted property held by the lawyer. Therefore, it is essential that the lawyer regularly reconcile a general trust account. This means that, at least once a quarter, the lawyer must reconcile the balance shown for the account in the lawyer's records with the current bank balance. The current bank balance is the balance obtained when subtract-

ing outstanding checks and other withdrawals from the bank statement balance and adding outstanding deposits to the bank statement balance. With regard to trust funds held in any trust account, there is also an affirmative duty to produce a written accounting for the client and to deliver it to the client, either at the conclusion of the transaction or periodically if funds are held for an appreciable period. Such accountings must be made at least annually or at more frequent intervals if reasonably requested by the client.

Bank Notice of Overdrafts

[15] A properly maintained trust account should not have any instruments presented against insufficient funds. However, even the best-maintained accounts are subject to inadvertent errors by the bank or the lawyer, which may be easily explained. The reporting requirement should not be burdensome and may help avoid a more serious problem.

History Note: Statutory Authority G.S. 84-23
Adopted July 24, 1997
Amended May 4, 2000

CASE NOTES

Failure to Maintain Records. - The attorney violated the minimum recordkeeping requirements of Rule 10.2 [of the superseded (1985) Rules of Professional Conduct] when he failed to maintain any ledgers or other records showing a running balance of each individual client's funds. The attorney's possession of check stubs, canceled checks, and bank statements failed to meet the minimum requirements. *North Carolina State Bar v. Sheffield*, 73 N.C. App. 349, 326 S.E.2d 320, *cert. denied*, 474 U.S. 981, 106 S. Ct. 385, 88 L. Ed. 2d 338 (1985).

Motive for Commingling Funds Not Pertinent to Issue of Violation. - A lawyer's motive for commingling personal funds with client funds in his trust account is not pertinent to whether defendant violated Code of Professional Responsibility. The Code states that an attorney may keep personal funds in a client trust account for only two limited purposes. If an attorney leaves personal funds in a client trust account for any other purpose, then he has violated the Code. *North Carolina State Bar v. Speckman*, 87 N.C. App. 116, 360 S.E.2d 129 (1987).

Disbursement of Judgment to Plaintiff and Attorney. - Nothing improper in clerk's disbursement of judgment funds to plaintiffs with their attorney also named as payee on the check, endorsed by plaintiffs and deposited in the trust account of plaintiffs' attorney. *Poore v. Swan Quarter Farms, Inc.*, 119 N.C. App. 546, 459 S.E.2d 52 (1995).

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

The attorney endorsed a client's medical payment draft without the client's authority, knowledge or consent and deposited the funds in his personal account. The attorney secretly converted a client's funds, failed to notify his client of his receipt of the funds, failed to account for the funds and failed to promptly pay the client the funds in his possession which belonged to the client. Disbarred. 84 DHC 4.

Among other things, the attorney, while involved in a series of real estate transactions which required him to deposit funds in a trust account, allowed the trust account balance to fall below the amount necessary to fund all client obligations. The attorney also used the funds of some clients to satisfy the obligations of other clients, commingled client funds by depositing his personal funds into the trust account, and used clients' trust funds to satisfy his personal obligations. Disbarred. 84 DHC 5.

The attorney neglected several client matters, commingled business and personal funds of his clients in a trust account, and failed to maintain complete records of funds of clients in his possession. Three-Year Suspension, stayed three years upon conditions. 91 DHC 5.

Attorney wrote checks to himself totalling $13,000 from an estate for commissions without the approval of the clerk and without performing the normal duties of a personal representative. Disbarred. 93 DHC 2.

Attorney took $1,500 from the proceeds of the sale of decedent's house as fee and costs for handling the estate. Attorney failed to deposit $1500 in trust account, failed to administer the estate, and failed to communicate with decedent's daughter who had retained him. Five-Year Suspension, stayed for one year upon conditions. 93 DHC 7.

Attorney failed to pay to his clients or the IOLTA program of the State Bar the interest earned on client funds on deposit in his trust account for a period of ten years. Reprimand. 93 DHC 14.

Attorney borrowed trust account funds from clients but failed to record the loans on the clients' trust account ledger cards and also made entries on clients' ledger cards indicating that monies had been received and fees paid when no monies had been received at the time of the entries. One-Year Suspension, stayed for three years upon conditions. 93 DHC 20.

Attorney failed to monitor clients' funds on deposit in his trust account which resulted in the misappropriation of client funds. Attorney's secretary signed attorney's name or her name to trust account checks and the attorney and his secretary received the benefit of clients' funds. Attorney did not adequately supervise the secretary with respect to the handling of client funds and with respect to the handling of the attorney's trust and business account records. Disbarred. 94 DHC 4.

Attorney's legal assistant had control and authority over attorney's trust, office, and personal bank accounts. Legal assistant stole large amount of client money from attorney's trust account and used it for her and attorney's benefit. Attorney did not monitor his trust and office account records. He also did not supervise legal assistant's handling of client funds in trust account. Disbarred. 95 DHC 17.

ETHICS OPINION NOTES

CPR 358. An attorney may not use the "float" in his trust account to cover checks written against funds represented by a deposited but uncollected negotiable instrument. Disbursements may be made in advance of actual collection if the bank provisionally credits the trust account upon deposit of the instrument. (*See also* RPC 191.)

CPR 375. An attorney's fee may be the interest earned on escrowed funds if the client agrees.

RPC 4. A public defender who retains funds for an incarcerated defendant as a favor must deposit the funds in a trust account.

RPC 37. A law firm which has received money representing the refund of an appeal bond to a client owing substantial fees to the firm may not apply the appeal bond refund to the fees unless an agreement with the client would authorize the firm to do so.

RPC 44. A closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

RPC 47. An attorney who receives from his or her client a small sum of money which is to be used to pay the cost of recording a deed must deposit that money in a trust account.

RPC 48. Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

RPC 51. Where a lawyer receives a lump sum payment in advance which is inclusive of the costs of litigation, the portion representing the costs must be deposited in the trust account.

RPC 66. An attorney serving as an escrow agent may not disburse in a manner not contemplated by the escrow agreement unless all parties agree.

RPC 96. Attorneys practicing in North Carolina who are affiliated with an interstate law firm may not permit trust funds belonging to their clients to be deposited in a trust account maintained outside North Carolina without written consent.

RPC 69. A lawyer must obey the client's instruction not to pay medical providers from the proceeds of settlement in the absence of a valid physician's lien.

RPC 75. A lawyer may not pay his or her fee or the fee of a physician from funds held in trust for a client without the client's authority.

RPC 78. A closing attorney cannot make conditional delivery of trust account checks to real estate agent before depositing loan proceeds against which checks are to be drawn.

RPC 86. Opinion discusses disbursement against uncollected funds, accounting for earnest money paid outside closing, and representation of the seller. (*See also* RPC 191.)

RPC 89. Trust funds must be held at least five years after the last occurrence of certain prescribed events before they may be deemed abandoned.

RPC 125. An attorney may not pay a medical care provider from the proceeds of a settlement negotiated prior to the filing of suit over his client's objection unless the funds are subject to a valid lien.

RPC 149. An attorney may not donate a client's funds to a charity without the client's consent.

RPC 150. An attorney cannot permit a bank to link her trust and business accounts for the purpose of determining interest earned or charges assessed if such an arrangement causes the attorney to use client funds from the trust account to offset service charges assessed on the business account.

RPC 158. A sum of money paid to a lawyer in advance to secure payment of a fee which is yet to be earned and to which the lawyer is not entitled must be deposited in the lawyer's trust account.

RPC 191. A lawyer may make disbursements from his or her trust account in reliance upon the deposit of funds provisionally credited to the account if the funds are deposited in the form of instruments as specified in the Good Funds Settlement Act (Chap. 45A of N.C. Gen. Stat.).

RPC 209. Opinion provides guidelines for the disposal of closed client files.

RPC 226. When a law firm receives funds that are not identified as client funds, the firm must investigate the ownership of the funds and, if it is reasonable to conclude the funds do not belong to a client or a third party, the firm may conclude that the funds belong to the firm.

RPC 234. An inactive client file may be stored in an electronic format provided original documents with legal significance are preserved and the documents in the electronic file can be reproduced on paper.

RPC 247. Opinion provides guidelines for receipt of payment of earned and unearned fees by electronic transfers.

97 Formal Ethics Opinion 9. Provided steps are taken to safeguard the client funds on deposit in a trust account, a lawyer may accept fees paid by credit card although the bank's agreement to process such charges authorizes the bank to debit the lawyer's trust account in the event a credit card charge is disputed by a client.

98 Formal Ethics Opinion 11. Opinion rules that the fiduciary relationship that arises when a lawyer serves as an escrow agent demands that the lawyer be impartial to both the obligor and the obligee and, therefore, the lawyer may not act as advocate for either party against the other. Once the fiduciary duties of the escrow agent terminate, the lawyer may take a position adverse to the obligor or the obligee provided the lawyer is not otherwise disqualified.

98 Formal Ethics Opinion 14. Opinion rules that a lawyer may participate in the solicitation of funds from third parties to pay the legal fees of a client provided there is disclosure to contributors and the funds are administered honestly.

98 Formal Ethics Opinion 15. Opinion rules that whether the year 2000 computer problem is being adequately addressed by a depository bank should be considered when selecting a depository bank for a trust account.

2000 FEO 4. Opinion rules that a lawyer may sign a statement acknowledging a finance company's interest in a client's recovery subject to certain conditions.

2001 Formal Ethics Opinion 3. Opinion rules that a lawyer may settle a tort claim by making disbursements from a trust account in reliance upon the deposit of funds provisionally credited to the account if the deposited finds are in the form of a financial instrument that is specified in the Good Funds Settlement Act, G.S. Chap. 45A.

2001 Formal Ethics Opinion 11. Opinion rules that when a client authorizes a lawyer to represent to a medical provider that it will be paid upon the settlement of a personal injury claim, the lawyer may subsequently withhold settlement proceeds from the client and maintain the funds in her trust account, although there is not a medical lien against the funds, until a dispute between the client and the medical provider over the disbursement of the funds is resolved.

2001 Formal Ethics Opinion 14. Opinion rules that retaining a CD-ROM with digital images of trust account checks that is provided by the depository bank satisfies record-keeping requirements for trust accounts.

RULE 1.15-4 INTEREST ON LAWYERS' TRUST ACCOUNTS

(a) Pursuant to a plan promulgated by the North Carolina State Bar and approved by the North Carolina Supreme Court, a lawyer may elect to create or maintain an interest-bearing trust account for those funds of clients which, in the lawyer's good-faith judgment, are nominal in amount or are expected to be held for a short period of time. Funds deposited in a permitted interest-bearing trust account under the plan must be available for withdrawal upon request and without delay. The account shall be maintained in a bank. The North Carolina State Bar shall furnish to each lawyer or firm that elects to participate in the Interest on Lawyers' Trust Account (IOLTA) Plan, a suitable plaque or scroll indicating participation in the program, which plaque or scroll shall be exhibited in the office of the participating lawyer or firm.

(b) Lawyers or law firms electing to deposit client funds in a general trust account under the plan shall direct the depository institution:

(1) to remit interest or dividends, as the case may be (less any deduction for bank service charges, fees of the depository institution, and taxes collected with respect to the deposited funds) at least quarterly to the North Carolina State Bar;

(2) to transmit with each remittance to the North Carolina State Bar a statement showing the name of the lawyer or law firm maintaining the account with respect to which the remittance is sent and the rate of interest applied in computing the remittance; and

(3) to transmit to the depository lawyer or law firm at the same time a report showing the amount remitted to the North Carolina State Bar and the rate of interest applied in computing the remittance.

(c) The North Carolina State Bar shall periodically deliver to each nonparticipating lawyer a form whereby the lawyer may elect not to participate in the IOLTA plan. If a lawyer does not so elect within the time provided, the lawyer shall be deemed to have opted to participate in the plan and shall provide to the North Carolina State Bar such information as is required to participate in IOLTA.

(d) A lawyer or law firm participating in the IOLTA plan may terminate participation at any time by notifying the North Carolina State Bar or the IOLTA Board of Trustees. Participation will be terminated as soon as practicable after receipt of written notification from a participating lawyer or firm.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Amended August 24, 2000

Editor's Note: Rule 1.15-3 has no counterpart in the Model Rules. Rule 1.15-3 is identical to Rule 10.3 of the superseded (1985) Rules of Professional Conduct.

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

Attorney failed to pay to his clients or the IOLTA program of the State Bar the interest earned on client funds on deposit in his trust account for a period of ten years. Reprimand. 93 DHC 14.

ETHICS OPINION NOTES

RPC 150. An attorney cannot permit a bank to link her trust and business accounts for the purpose of determining interest earned or charges assessed if such an arrangement causes the attorney to use client funds from the trust account to offset service charges assessed on the business account.

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of law or the Rules of Professional Conduct;

(2) in representing a client before a tribunal, the lawyer reasonably believes

that the client is bringing the legal action, conducting the defense, or asserting a position for the purpose of harassing or maliciously injuring any person;

(3) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(4) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client or if:

(1) the client knowingly and freely assents to the termination of the representation;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client insists upon pursuing an objective that the lawyer considers repugnant, imprudent, or contrary to the advice and judgment of the lawyer;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation has been rendered unreasonably difficult by the client;

(6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; or

(7) other good cause for withdrawal exists.

(c) When permission for withdrawal from representation of a client is required by the rules of a tribunal, a lawyer shall not withdraw from the representation of a client in a proceeding before that tribunal without the permission of the tribunal.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion.

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

[4] A client has the right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

[6] If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. *See* Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Forfeiture by the client of a substantial financial investment in the representation may have such effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client Upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

[10] Whether or not a lawyer for an organization may, under certain unusual circumstances, have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these rules.

[11] The lawyer may never retain papers to secure a fee. Generally, anything in the file which would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and canceled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. The lawyer's personal notes and incomplete work product need not be released.

[12] A lawyer who represented an indigent on an appeal which has been concluded and who obtained a trial transcript furnished by the state for use in preparing the appeal, must turn over the transcript to the former client upon request, the transcript being property to which the former client is entitled.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 1.16 is similar to Model Rule 1.16, except the Model Rule permits a lawyer to retain client papers to the extent permitted by law. By contrast, Rule 1.16 requires the lawyer to deliver all papers to the client upon termination of the representation. Rule 1.16 is similar to Rule 2.8 of the superseded (1985) Rules of Professional Conduct. Rule 1.16, however, explicitly permits a lawyer to withdraw from the representation of a client, without cause and without the consent of the client, subject to the authority of the court to require continued representation, provided the withdrawal can be accomplished without material prejudice to the client. The superseded rule permits withdrawal only for cause.

CASE NOTES

Inadequate Notice of Withdrawal. - An attorney did not withdraw from representation when he sent his client a letter stating that he believed he could not handle the client's case and that the client should visit the office for further discussion. *North Carolina State Bar v. Sheffield*, 73 N.C. App. 349, 326 S.E.2d 320, *cert. denied*, 474 U.S. 981, 106 S. Ct. 385, 88 L. Ed. 2d. 338 (1985).

Duty of Attorney to Withdraw. - Where an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon the court, he must withdraw from representation of the client, seeking leave of the court, if necessary. The right of a client to effective counsel in any case (civil or criminal) does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation or presentation of false evidence. *In re Palmer*, 296 N.C. 638, 252 S.E.2d 784 (1979).

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu head-

ing "Disciplinary Orders."

The attorney was employed and paid in advance by an incarcerated client to pursue post-conviction relief. When the attorney failed to act on the client's behalf, the client discharged the attorney and demanded a refund. The attorney refused to refund the client any portion of the fee and refused to answer the State Bar's request for explanation. Two-Year Suspension. 82 DHC 10, 11.

Attorney refused to withdraw from case or return client's file when directed to do so by client. Attorney failed to respond to discovery requests and did not appear at disciplinary hearing. One-Year Suspension. 88 DHC 7.

The attorney filed pleadings which were not well grounded in fact or law and falsely certified to the court that he had served the pleadings on opposing counsel. The client later discharged the attorney, who refused to withdraw, refused to return the client's file, and insisted on charging a contingent fee, rather than the reasonable value of his services. Two-Year Suspension, with reinstatement conditioned on the attorney passing the bar examination. 90 DHC 22.

Attorney required client to sign a release before turning over the client's file to her. One-Year Suspension, stayed three years upon conditions. 90 DHC 23.

Among other things, the attorney failed to refund unearned fees in two cases. Six-Month Suspension and an order of restitution. 91 DHC 24.

ETHICS OPINION NOTES

CPR 3. A client is entitled to his file upon withdrawal of his attorney.

CPR 24. Withdrawing partners and remaining partners should send clients a common announcement of the firm's dissolution so that the client may elect whom he wishes to handle his legal business.

CPR 61. It is improper for a senior member of a law firm who is employed to represent a client to refer a case to a junior partner or associate without the client's consent.

CPR 186. It is permissible for an attorney to withdraw after giving notice of appeal when the client agrees that an appeal would be fruitless and the client assumes responsibility for retaining another attorney. The Rules of Court determine whether the tribunal's permission is required.

CPR 269. An attorney whose motion to withdraw from representation of a corporation is denied must continue to represent the corporation.

CPR 315. An attorney must give an indigent client the transcript provided by the state after disposition of the appeal.

CPR 322. After completion of custody litigation, an attorney must release a "home study" report to a client unless such is precluded by statute or court order.

RPC 8. An attorney employed by an insurer to represent an uninsured motorist may not withdraw after settlement between insurer and the claimant until the court gives permission and the attorney takes steps to minimize prejudice to his client.

RPC 48. Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

RPC 58. Another member of a lawyer's firm may substitute for the lawyer in defending a criminal case if there is no prejudice to the client and the client and the court consent.

RPC 79. A lawyer who advances the cost of obtaining medical records before deciding whether to accept a case may not condition the release of the records to the client upon reimbursement of the cost.

RPC 106. Opinion discusses circumstances under which a refund of a prepaid fee is required.

RPC 153. In cases of multiple representation, a lawyer who has been discharged by one client must deliver to that client, as part of that client's file, information entrusted to the lawyer by the other client.

RPC 157. A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection if reasonably necessary to protect the client's interest.

RPC 158 (Third Revision). Any portion of a sum of money paid by a client in advance to secure payment of a fee that is unearned at the time the lawyer is discharged must be refunded to the client.

RPC 169. A lawyer is not required to provide a former client with copies of title notes and may charge a former client for copies of documents from the client's file under certain circumstances.

RPC 178. Opinion examines the obligation to deliver the file to the client upon the termination of the representation when a lawyer represents multiple clients in a single matter.

RPC 223. When a lawyer's reasonable attempts to locate a client are unsuccessful, the client's disappearance constitutes a constructive discharge of the lawyer requiring the lawyer's withdrawal from the representation.

RPC 227. A former residential real estate client is not entitled to the lawyer's title notes or abstracts regardless of whether such information is stored in the client's file. However, a lawyer formerly associated with a firm may be entitled to examine the title notes made by the lawyer to provide further representation to the same client.

RPC 234. An inactive client file may be stored in an electronic format provided original documents with legal significance are preserved and the documents in the electronic file can be reproduced on paper.

RPC 245. A lawyer in possession of the legal file relating to the prior representation of co-parties in an action must provide the co-party the lawyer does not represent with access to the file and a reasonable opportunity to copy the contents of the file.

98 Formal Ethics Opinion 9. Opinion rules that a lawyer may charge a client the actual cost of retrieving a closed client file from storage, subject to certain conditions, provided the lawyer does not withhold the file to extract payment.

RULE 1.17 SALE OF A LAW PRACTICE

A lawyer or a law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

(a) Upon transferring the law practice to the purchaser, the seller ceases to engage in the private practice of law in North Carolina;

(b) The practice is sold as an entirety to a single purchaser, which is another lawyer or law firm licensed to practice law in North Carolina. Without violating this provision, the seller may agree to transfer matters in one legal field to one purchaser, while transferring matters in another legal field to another purchaser, provided that such purchasers concentrate in those legal fields;

(c) Written notice is sent to each of the seller's clients regarding:

(l) the proposed sale, including the identity of the purchaser;

(2) the terms of any proposed change in the fee arrangement authorized by paragraph (f);

(3) the client's right to retain other counsel and to take possession of the client's files prior to the sale or at any time thereafter; and

(4) the fact that the client's consent to the transfer of the client's files and legal representation to the purchaser will be presumed if the client does not take any action or does not otherwise object within thirty (30) days of receipt of the notice;

(d) If the seller or purchaser identifies a conflict of interest that prohibits the purchaser from representing the client, the seller's notice to the client shall advise the client to retain substitute counsel to assume the client's representation and to arrange to have the substitute counsel contact the seller;

(e) If a client cannot be given notice, the files and the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary for the court to decide whether to issue the order. In the event the court fails to grant a substitution of counsel in a matter, that matter shall not be included in the sale and the sale otherwise shall be unaffected;

(f) The fees charged clients shall not be increased by reason of the sale. The purchaser may, however, refuse to undertake the representation unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations; and

(g) The seller and purchaser may agree that the purchaser does not have to pay the entire sales price for the seller's law practice in one lump sum. The seller and purchaser may enter into reasonable arrangements to finance the purchaser's acquisition of the seller's law practice without violating Rules 1.5(e) and 5.4(a). The seller, however, shall have no say regarding the purchaser's conduct of the law practice.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not

commodities that can be purchased and sold at will. Pursuant to this rule, when a lawyer or an entire firm ceases to practice and another lawyer or firm takes over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. *See* Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice be sold is satisfied if the seller, in good faith, makes the entire practice available for sale to the purchaser. The fact that a number of the seller's clients decide not to be represented by the purchaser but take their matters elsewhere, therefore, does not result in a violation. Neither does a return to private practice as a result of an unanticipated change in circumstances result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity which provides legal services to the poor, or as in-house counsel to a business.

[4] The rule permits a sale attendant upon retirement from the private practice of law in North Carolina. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state.

Single Purchaser

[5] The rule requires a single purchaser unless all matters in particular legal fields are transferred to purchasers who concentrate in those fields. The prohibition against piecemeal sale of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchaser is required to undertake all client matters in the practice, subject to client consent. If, however, the purchaser is unable to undertake all client matters because of a conflict of interest in a specific matter respecting which the purchaser is not permitted by Rule 1.7 or another rule to represent the client, the requirement that there be a single purchaser is nevertheless satisfied.

Client Confidences, Consent, and Notice

[6] Written notice of the proposed sale must be sent to all clients who are currently represented by the seller and to all former clients whose files will be transferred to the purchaser. Although it is not required by this rule, the placement of a notice of the proposed sale in a local newspaper of general circulation would supplement the effort to provide notice to clients as required by paragraph (c) of the rule.

[7] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

[8] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The rule provides that before such information can be disclosed by the seller to the purchaser, the client must be sent written notice of the contemplated sale, including the identity of the purchaser and any proposed change in the terms of future representation, and must be told that the decision to consent or make other arrangements must be made within thirty days. If nothing is heard from the client within that time, consent to the sale is presumed.

[9] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice. The notice to clients must advise clients that they have a right to retain a lawyer other than the purchaser. In addition, the notice must inform clients that their right to counsel of their choice continues after the sale even though they consent to the transfer of the representation to the purchaser.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser unless the client consents after consultation. The purchaser may, however, advise the client that the purchaser will not undertake the representation unless the client consents to pay the higher fees the purchaser usually charges. To prevent client financing of the sale, the higher fee the purchaser may charge must not exceed the fees charged by the purchaser for substantially similar service rendered prior to the initiation of the purchase negotiations.

[11] The purchaser may not intentionally fragment the practice which is the subject of the sale by charging significantly different fees in substantially similar matters. Doing so would make it possible for the purchaser to avoid the obligation to take over the entire practice by charging arbitrarily higher fees for less lucrative matters, thereby increasing the likelihood that those clients would not consent to the new representation.

Other Applicable Ethical Standards

[12] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (*see* Rule 1.1); the obligation to avoid disqualifying conflicts and to secure client consent after consultation for those conflicts which can be agreed to (*see* Rule 1.7); and the obligation to protect information relating to the representation (*see* Rules 1.6 and 1.9).

[13] If approval of the substitution of the purchasing attorney for the selling attorney is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale. *See* Rule 1.16.

Applicability of the Rule

[14] This rule applies to the sale of a law practice by representatives of a deceased, disabled, or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[15] Admission to, or retirement from, a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice do not constitute a sale or purchase governed by the rule.

[16] This rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 1.17 is similar to Model Rule 1.17. Model Rule 1.17, however, provides that consent to the transfer of the client's matter to the purchaser of the law practice will be presumed 90 days after receipt of notice whereas Rule 1.17 requires only 30 days notice. Rule 1.17 also permits the transfer of matters in different practice areas to different purchasers and requires notice to the client of any conflict of interest. There is no counterpart to Rule 1.17 in the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

98 Formal Ethics Opinion 6. Opinion rules that the requirements set forth in Rule 1.17 relative to the sale of a law practice to a lawyer who is a stranger to the firm do not apply to the sale of a law practice to lawyers who are current employees of the firm.

RULE 1.18 SEXUAL RELATIONS WITH CLIENTS PROHIBITED

(a) A lawyer shall not have sexual relations with a current client of the lawyer.

(b) Paragraph (a) shall not apply if a consensual sexual relationship existed

between the lawyer and the client before the legal representation commenced.

(c) A lawyer shall not require or demand sexual relations with a client incident to or as a condition of any professional representation.

(d) For purposes of this rule, "sexual relations" means:

(1) Sexual intercourse; or

(2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.

(e) For purposes of this rule, "lawyer" means any lawyer who assists in the representation of the client but does not include other lawyers in a firm who provide no such assistance.

Comment

[1] Rule 1.7, the general rule on conflict of interest, has always prohibited a lawyer from representing a client when the lawyer's ability to competently represent the client may be impaired by the lawyer's other personal or professional commitments. Under the general rule on conflicts and the rule on prohibited transactions (Rule 1.8), relationships with clients, whether personal or financial, that affect a lawyer's ability to exercise his or her independent professional judgment on behalf of a client are closely scrutinized. The rules on conflict of interest have always prohibited the representation of a client if a sexual relationship with the client presents a significant danger to the lawyer's ability to represent the client adequately. The present rule clarifies that a sexual relationship with a client is damaging to the client-lawyer relationship and creates an impermissible conflict of interest which cannot be ameliorated by the consent of the client.

Exploitation of the Lawyer's Fiduciary Position

[2] The relationship between a lawyer and client is a fiduciary relationship in which the lawyer occupies the highest position of trust and confidence. The relationship is also inherently unequal. The client comes to a lawyer with a problem and puts his or her faith in the lawyer's special knowledge, skills, and ability to solve the client's problem. The same factors that led the client to place his or her trust and reliance in the lawyer also have the potential to place the lawyer in a position of dominance and the client in a position of vulnerability.

[3] A sexual relationship between a lawyer and a client may involve unfair exploitation of the lawyer's fiduciary position. Because of the dependence that so often characterizes the attorney-client relationship, there is a significant possibility that a sexual relationship with a client resulted from the exploitation of the lawyer's dominant position and influence. Moreover, if a lawyer permits the otherwise benign and even recommended client reliance and trust to become the catalyst for a sexual relationship with a client, the lawyer violates one of the most basic ethical obligations; i.e., not to use the trust of the client to the client's disadvantage. This same principle underlies the rules prohibiting the use of client confidences to the disadvantage of the client and the rules that seek to ensure that lawyers do not take financial advantage of their clients. *See* Rules 1.6 and 1.8.

Impairment of the Ability to Represent the Client Competently

[4] A lawyer must maintain his or her ability to represent a client dispassionately and without impairment to the exercise of independent professional judgment on behalf of the client. The existence of a sexual relationship between lawyer and client, under the circumstances proscribed by this rule, presents a significant danger that the lawyer's ability to represent the client competently may be adversely affected because of the lawyer's emotional involvement. This emotional involvement has the potential to undercut the objective detachment that is demanded for adequate representation. A sexual relationship also creates the risk that the lawyer will be subject to a conflict of interest. For example, a lawyer who is sexually involved with his or her client risks becoming an adverse witness to his or her own client in a divorce action where there are issues of adultery and child custody to resolve. Finally, a blurred line between the professional and personal relationship may make it difficult to predict to what extent client confidences will be protected by the attorney-client privilege in the law of evidence since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship.

No Prejudice to Client

[5] The prohibition upon representing a client with whom a sexual relationship develops applies regardless of the absence of a showing of prejudice to the client and regardless of whether the relationship is consensual.

Prior Consensual Relationship

[6] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are not present when the sexual relationship exists prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should be confident that his or her ability to represent the client competently will not be impaired.

No Imputed Disqualification

[7] The other lawyers in a firm are not disqualified from representing a client with whom the lawyer has become intimate. The potential impairment of the lawyer's ability to exercise independent professional judgment on behalf of the client with whom he or she is having a sexual relationship is specific to that lawyer's representation of the client and is unlikely to affect the ability of other members of the firm to competently and dispassionately represent the client.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 1.18 has no counterpart in either the Model Rules or the superseded (1985) Rules of Professional Conduct. The text of Rule 1.18 is derived from similar rules in other states. The comment to Rule 1.18 draws heavily from the text of ABA Formal Opinion 92-364, "Sexual Relations with Clients," adopted by the ABA Standing Committee on Ethics and Professional Responsibility on July 6, 1992.

DISCIPLINARY HEARING NOTES

Attorney engaged in unwanted touching of client in violation of superseded Rule 1.2(b) and (d), prohibited criminal conduct and conduct prejudicial to the administration of justice. Three-Year Suspension, six months active and thirty months stayed upon certain conditions. 94 DHC 1.

Attorney made unwanted sexual advances to several female clients and thereby engaged in conflicts of interest and conduct prejudicial to the administration of justice in violation of superseded Rules 5.1 and 1.2, respectively. Disbarred. 95 DHC 13.

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent, professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but also to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations such as cost or effects on other people are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting

recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 2.1 is identical to Model Rule 2.1. Rule 2.1 has no counterpart in the superseded (1985) Rules of Professional Conduct.

RULE 2.2 INTERMEDIARY

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer adequately discloses to each client the implication of the common representation, including the advantages and risks involved and the effect on the attorney-client privileges and confidentiality, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter, and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests or if any of the conditions stated in paragraph (a) are no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

Comment

[1] A lawyer acts as intermediary under this rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.

[2] The rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role, the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association.

[3] A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate, or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication, or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

[4] In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails, the result can be additional cost, embarrassment, and recrimination. In some situations, the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

[5] The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

[6] A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. *See* Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[7] Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation

[8] In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances. The lawyer should explain to the clients the effect of the common representation upon the lawyer's duty of confidentiality and the attorney-client privilege. The lawyer should also disclose that the lawyer must withdraw from the representation of both clients in the event that their interests prove to be in irreconcilable conflict.

[9] Paragraph (b) is an application of the principle expressed in Rule 1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

Withdrawal

[10] Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 2.2 closely follows Model Rule 2.2. Rule 2.2 has no counterpart in the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

RPC 210. Opinion examines the circumstances in which it is acceptable for a lawyer to represent the buyer, seller, and the lender in the closing of a residential real estate transaction.

97 Formal Ethics Opinion 8. Opinion examines the circumstances in which it is acceptable for the lawyer who regularly represents a real estate developer to represent the buyer and the developer in the closing of a residential real estate transaction.

RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client so requests or the client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Comment

Definition

[1] An evaluation may be performed at the client's direction for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.

[3] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer or by special counsel employed by the government, is not an evaluation as that term is used in this rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to Third Person

[4] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied, as a matter of professional judgment, that making the evaluation is compatible with other functions undertaken on behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[5] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily, a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If, after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 2.3 closely follows Model Rule 2.3. Rule 2.3 has no counterpart in the superseded (1985) Rules of Professional Conduct.

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has not only a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or if the lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification, or reversal of existing law.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 3.1 is identical to Model Rule 3.1 and similar to Rule 7.2(a)(1) and (2) of the superseded (1985) Rules of Professional Conduct.

DISCIPLINARY HEARING NOTES

The attorney filed pleadings which were not well grounded in fact or law and falsely certified to the court that he had served the pleadings on opposing counsel. The client later discharged the attorney, who refused to withdraw, refused to return the client's file, and insisted on charging a contingent fee, rather than the reasonable value of his services. Two-Year Suspension, with reinstatement conditioned on the attorney passing the bar examination. 90 DHC 22.

ETHICS OPINION NOTES

CPR 122. An attorney representing the defendant in divorce action, when advised by the client that parties have not been separated a year, must file an answer denying the allegation of separation even though the client does not wish to contest the divorce.

CPR 321. It is improper for an attorney to file motions and pleadings for the mere purpose of delay.

RULE 3.2 EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or

repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer, acting in good faith, would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 3.2 is identical to Model Rule 3.2. Rule 3.2 has no counterpart in the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

CPR 321. It is improper for an attorney to file motions and pleadings for the mere purpose of delay.

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, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

[2] 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).

Misleading Legal Argument

[3] 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 which 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.

False Evidence

[4] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. A lawyer who receives information clearly establishing that a person other than the client has perpetrated fraud upon a tribunal, shall promptly reveal the fraud to the tribunal.

[5] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Perjury by a Criminal Defendant

[6] Whether an advocate for a criminally accused has a duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, the confrontation with the client does not take place until the trial itself, or no other counsel is available.

[7] The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

[8] Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

[9] The other resolution of the dilemma is that the lawyer may reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify, and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation not only in professional ethics, but also under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. *See* Rule 1.2(d).

Remedial Measures

[10] If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate may make disclosure to the court. In the event of such disclosure, it is for the court then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication if the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and, as such, a waiver of the right to further representation.

Constitutional Requirements

[11] The definition of the lawyer's ethical duty when serving as defense counsel in a criminal case may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. These provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these rules is subordinate to such a constitutional requirement.

Duration of Obligation

[12] A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to Be False

[13] Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. 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. In criminal cases, however, a lawyer may be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matter that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an *ex parte* proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an *ex parte* proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 3.3 is identical to Model Rule 3.3. Comment [10] to Rule 3.3, however, clarifies that the lawyer may, but is not required to disclose client perjury, whereas comment [10] to Model Rule 3.3 implies that disclosure is required. Rule 3.3 generally corresponds to Rule 7.2 of the superseded (1985) Rules of Professional Conduct. The superseded rule requires a lawyer who learns of a client's perjury, to withdraw from the litigation if the client refuses to rectify the fraud, but does not permit disclosure of client perjury. In a significant departure from the superseded (1985) Rules, Rule 3.3 requires a lawyer in an *ex parte* proceeding to inform the court of all material facts known to the lawyer, even those adverse to the client's position.

LEGAL PERIODICALS

For article on the criminal defendant who proposes or commits perjury, see 17 N.C. Cent. L.J. 157 (1988).

CASE NOTES

Preparation of Witness. - It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner he can. Such preparation is the mark of a good trial lawyer, and is to be commended because it promotes more efficient administration of justice and saves court time. Nothing improper occurs so long as the attorney prepares the witness to give the witness' testimony at trial and not the testimony that the attorney has placed in the witness' mouth or false or perjured testimony. *State v. McCormick*, 298 N.C. 788, 259 S.E.2d 880 (1979).

Client Perjury. - Where an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon the court he must withdraw from representation of the client, seeking leave of the court, if necessary. The right of a client to effective counsel in any case (civil or criminal) does not include the right to compel counsel knowingly to assist or participate in the commission of perjury or the creation or presentation of false evidence. *In re Palmer*, 296 N.C. 638, 252 S.E.2d 784 (1979).

Concealment of Material Facts. - Intentionally encouraging the concealment of material facts relevant to the identity of the driver in a driving under the influence prosecution is prejudicial to the administration of justice. Such conduct raises serious doubts as to the attorney's desire to bring about a just result in such a prosecution and adversely reflects on the attorney's fitness to practice law. *North Carolina State Bar v. Graves*, 50 N.C. App. 450, 274 S.E.2d 396 (1981).

Failure to Inform Court of Opposing Party's Address. - An attorney clearly engaged in conduct involving fraud, dishonesty, deceit and misrepresentation when, in a divorce action, she failed to inform the court of a letter which contained the opposing party's return address, while at the same time presenting to the court an affidavit she had drafted in which her client swore that her husband's whereabouts were unknown and could not with due diligence be ascertained. *North Carolina State Bar v. Wilson*, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

Quoted in *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 535 S.E.2d 55 (2000).

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

The attorney knowingly used perjured testimony in an attempt to receive a set-off for federal estate taxes due; failed to keep adequate records and accounts for an incompetent client; perpetrated a fraud upon a Florida court by false testimony; and failed to give a complete and timely accounting to his incompetent client's personal representative. Disbarred. 81 DHC 2.

The attorney filed pleadings which were not well grounded in fact or law and falsely certified to the court that he had served the pleadings on opposing counsel. The client later discharged the attorney, who refused to withdraw, refused to return the client's file, and insisted on charging a contingent fee, rather than the reasonable value of his services. Two-Year Suspension, with reinstatement conditioned on the attorney passing the bar examination. 90 DHC 22.

The attorney misrepresented to an administrative law judge and a state agency that he had been advised by the former chief administrative law judge to take certain actions on behalf of his client when, in fact, the attorney had not discussed the client's case with the former judge. Censure. 92 DHC 3.

ETHICS OPINION NOTES

CPR 92. An attorney who knows that criminal clients gave arresting officers fictitious names should call upon the clients to disclose their true identities to the court and, if they refuse, seek to withdraw.

CPR 122. An attorney representing the defendant in divorce action, when advised by the client that parties have not been separated a year, must file an answer denying the allegation of separation even though the client does not wish to contest the divorce.

CPR 284. An attorney may seek alimony for a wife although he has evidence of the wife's adultery so long as he does not have to offer perjured testimony or other false evidence.

RPC 33. If an attorney's client testifies falsely regarding a material matter, such as his or her name or criminal record, the attorney must call upon the client to correct the testimony. If the client refuses, the attorney must seek to withdraw in accordance with the rules of the tribunal.

RPC 203. Dismissal of an action alone is not sufficient to rectify the perjury of a client in a deposition and the lawyer must demand that the client inform the opposing party of the falsity of the deposition testimony or, if the client refuses, withdraw from the representation.

98 Formal Ethics Opinion 1. Opinion rules that a lawyer representing a client in a social security disability hearing is not required to inform the administrative law judge of material adverse facts known to the lawyer.

98 Formal Ethics Opinion 5. Opinion rules that a defense lawyer may remain silent while the prosecutor presents an inaccurate driving record to the court provided the lawyer and client did not criminally or fraudulently misrepresent the driving record to the prosecutor or the court, and further provided, that on application for a limited driving privilege, there is no misrepresentation to the court about the client's prior driving record.

98 Formal Ethics Opinion 20. Opinion rules that, subject to a statute prohibiting the withholding of the information, a lawyer's duty to disclose confidential client information to a bankruptcy court ends when the case is closed although the debtor's duty to report new property continues for 180 days after the date of filing the petition.

99 FEO 16. Opinion rules that a lawyer may not participate in the presentation of a consent judgment to a court if the lawyer knows that the consent judgment is based upon false information.

2001 Formal Ethics Opinion 1. Opinion rules that, in a petition to a court for an award of an attorney's fee, a lawyer must disclose that the client paid a discounted hourly rate for legal services as a result of the client's membership in a prepaid or group legal services plan.

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, counsel or assist a witness to hide or leave the jurisdiction for the purpose of being unavailable as a witness, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey or advise a client to disobey a rule or ruling of a tribunal except a lawyer acting in good faith may take appropriate steps to test the validity of such a rule or ruling;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, ask an irrelevant question that is intended to degrade a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person, other than a client, to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or a managerial employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses, including lost income, or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Paragraph (c) permits a lawyer to take steps in good faith and within the framework of the law to test the validity of rules; however, the lawyer is not justified in consciously violating such rules and the lawyer should be diligent in the effort to guard against the unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that the lawyer believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless the lawyer believes that the statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing the witness; and a lawyer should not, by subterfuge, put before a jury matters which it cannot properly consider.

[5] In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, and as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact and is prohibited by paragraph (e). However, a lawyer may argue, on an analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

[6] Paragraph (f) permits a lawyer to advise managerial employees of a client to refrain from giving information to another party because the statements of employees with managerial responsibility may be imputed to the client. *See also* Rule 4.2.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 3.4 is substantially similar to Model Rule 3.4. Rule 3.4 generally corresponds to provisions of Rules 7.2(a)(7), 7.6 and 7.9 of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

Interjection of Personal Opinion. - Counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. *State v. Locklear*, 294 N.C. 210, 241 S.E.2d 65 (1978).

Interjection of Unsupported Knowledge and Belief. - Counsel may not, by agreement or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. *State v. Locklear,* 294 N.C. 210, 241 S.E.2d 65 (1978).

Preparation of Witness. - It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner he can. Such preparation is the mark of a good trial lawyer, and is to be commended because it promotes more efficient administration of justice and saves court time. Nothing improper occurs so long as the attorney prepares the witness to give the witness' testimony at trial and not the testimony that the attorney has placed in the witness' mouth or false or perjured testimony. *State v. McCormick*, 298 N.C. 788, 259 S.E.2d 880 (1979).

Informing a potential witness to plead the U.S. Const., Amend. V or to stay away from court unless subpoenaed is not unethical. Certainly no rule prevents an attorney from informing a potential witness of his legal rights. *North Carolina State Bar v. Graves*, 50 N.C. App. 450, 274 S.E.2d 396 (1981).

Ethical transgressions by trial counsel do not always constitute legal error. *State v. Sanders*, 303 N.C. 608, 281 S.E.2d 7, *cert. denied*, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d. 392 (1981).

Argument Containing Personal Belief. - The defendant contended on appeal that the prosecutor's argument to the jury contained the prosecutor's personal belief as to the defendant's guilt in violation of the Code. The court held that the statements could be interpreted in several ways, but that even if the prosecutor's argument had contained such a statement, the violation did not entitle the defendant to a new trial. *State v. Sanders*, 303 N.C. 608, 281 S.E.2d 7, *cert. denied*, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

Argument That Testifying Officers Could Be Prosecuted If They Lied. - A prosecutor who, in closing, made arguments based on matters outside the record by suggesting that the officers who testified against the defendant could be prosecuted for perjury and fired from their jobs, and lose their pensions if they lied, placed the jurors in the moral dilemma of either convicting the defendant or, in the alternative, causing the officers to suffer the grievous penalties suggested by the prosecutor. The argument was, therefore, improper and the defendant was entitled to a new trial. *State v. Potter*, 69 N.C. App. 199, 316 S.E.2d 359, *disc. rev. denied*, 312 N.C. 624, 323 S.E.2d 925 (1984).

Failure to Inform Court of Opposing Party's Address. - An attorney clearly engaged in conduct involving fraud, dishonesty, deceit and misrepresentation when, in a divorce action, she failed to inform the court of a letter which contained the opposing party's return address, while at the same time presenting to the court an affidavit she had drafted in which her client swore that her husband's whereabouts were unknown and could not with due diligence be ascertained. *North Carolina State Bar v. Wilson,* 74 N.C. App. 777, 330 S.E.2d 280 (1985).

Interference with Prosecuting Witness. - Immediately prior to trial, the defense attorney negotiated an agreement between the prosecuting witness and the accused which called for his client to pay for damages to the witness' car and the witness' hospital bills in return for a promise not to press charges. He also told the witness she could leave the courthouse because her testimony would not be needed. The defendant attorney's efforts on behalf of his client went far beyond representing the client "zealously within the bounds of the law" and constituted a direct attempt to interfere with a State's witness who was under subpoena to testify in a named case. *State v. Rogers*, 68 N.C. App. 358, 315 S.E.2d 492, *cert. denied*, 311 N.C. 767, 319 S.E.2d 284 (1984), *appeal dismissed*, 469 U.S. 1101, 105 S. Ct. 769, 83 L. Ed. 2d 766 (1985).

Prosecutor's questioning of capital murder defendant's mother about locks placed on the outside of defendant's bedroom door was highly prejudicial and of no probative value; however, such error was harmless where the question of defendant's guilt was strong, the trial court properly sustained defendant's objections to the questions, and the mother testified that she was not afraid of her son. *State v. Payne,* 328 N.C. 377, 402 S.E.2d 582 (1991).

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

The attorney advised a potential State's witness that his client would not testify against him if he did not testify against his client and also counseled the witness that he could plead the U.S. Const., Amend. V. Public Censure. 79 DHC 10.

The attorney knowingly used perjured testimony in an attempt to receive a set-off for federal estate taxes due; failed to keep adequate records and accounts for an incompetent client; perpetrated a fraud upon a Florida court by false testimony; and failed to give a complete and timely accounting to his incompetent client's personal representative. Disbarred. 81 DHC 2.

ETHICS OPINION NOTES

CPR 2. An attorney generally does not need the consent of the adverse party to talk to witnesses.

CPR 284. An attorney may seek alimony for a wife although he has evidence of the wife's adultery so long as he does not have to offer perjured testimony or other false evidence.

CPR 340. An attorney may represent a client with a malpractice claim even though the client has entered a contingent fee contract with a medical consultant for case evaluation, preparation and expert witness location, so long as the consultant does not present evidence and the compensation of the expert witness provided by the consultant is not contingent upon the outcome of the litigation.

RPC 225. The lawyer for a defendant in criminal and civil actions arising out of the same event may seek the cooperation of a crime victim on a plea agreement provided the settlement of the victim's civil claim against the defendant is not contingent upon the content of the testimony of the victim or the outcome of the case.

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) A lawyer shall not:

(1) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(2) communicate *ex parte* with a juror or prospective juror except as permitted by law;

(3) communicate *ex parte* with a judge or other official except:

(i) in the course of official proceedings;

(ii) in writing, if a copy of the writing is furnished simultaneously to the opposing party;

(iii) orally, upon adequate notice to opposing party; or

(iv) as otherwise permitted by law;

(4) engage in conduct intended to disrupt a tribunal, including:

(i) failing to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving opposing counsel timely notice of the intent not to comply;

(ii) engaging in undignified or discourteous conduct that is degrading to a tribunal; or

(iii) intentionally or habitually violating any established rule of procedure or evidence; or

(5) after discharge of the jury, ask questions of or make comments to a juror that are calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service.

(b) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a venire man or a juror.

(c) A lawyer shall reveal promptly to the court improper conduct by a venire man or a juror, or by another toward a venire man, a juror, or a member of his or her family of which the lawyer has knowledge.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the North Carolina Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of provisions. This rule also prohibits gifts of substantial value to judges or other officials of a tribunal and stating or implying an ability to influence improperly a public official.

[2] To safeguard the impartiality that is essential to the judicial process, venire men and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with venire men prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with a venire man or a juror about the case. After the trial, communication by a lawyer with a juror is permitted so long as the lawyer refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, the lawyer could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

[3] Vexatious or harassing investigations of venire men or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on the lawyer's behalf who conducts an investigation of venire men or jurors should act with circumspection and restraint.

[4] Communications with, or investigations of, members of families of venire men or jurors by a lawyer or by anyone on the lawyer's behalf are subject to the restrictions imposed upon the lawyer with respect to the lawyer's communications with, or investigations of, venire men and jurors.

[5] Because of the duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venire man, a juror, or a member of the family of either should make a prompt report to the court regarding such conduct.

[6] The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal.

[7] All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if unrepresented. Ordinarily, an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel or, if there is none, to the opposing party. A lawyer should not condone or lend himself or herself to private importunities by another with a judge or hearing officer on behalf of the lawyer or the client.

[8] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A

lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 3.5 generally follows Model Rule 3.5, except that Rule 3.5 imposes additional restrictions concerning *ex parte* communications with judges and communications with a juror's family members. Provisions in Rule 3.5 correspond to provisions of Rules 7.6, 7.8, and 7.10 of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

The trial judge did not abuse his discretion in removing a juror and substituting an alternate juror when the original juror contacted defense counsel at his home during the weekend recess and persisted in discussing matters of a personal nature, including counsel's marital status. Although there was no evidence that any matter which related to the trial of the defendant was discussed during the conversation, the exercise of discretion by the trial judge served to safeguard the trial of the defendant from even the appearance of impropriety. *State v. Price,* 301 N.C. 437, 272 S.E.2d 103 (1980).

Ethical transgressions by trial counsel do not always constitute legal error. *State v. Sanders*, 303 N.C. 608, 281 S.E.2d 7, *cert. denied*, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d. 392 (1981).

Argument That Testifying Officers Could Be Prosecuted If They Lied. - A prosecutor who, in closing, made arguments based on matters outside the record by suggesting that the officers who testified against the defendant could be prosecuted for perjury and fired from their jobs, and lose their pensions if they lied, placed the jurors in the moral dilemma of either convicting the defendant or, in the alternative, causing the officers to suffer the grievous penalties suggested by the prosecutor. The argument was, therefore, improper and the defendant was entitled to a new trial. *State v. Potter*, 69 N.C. App. 199, 316 S.E.2d 359, *disc. rev. denied,* 312 N.C. 624, 323 S.E.2d 925 (1984).

The intentional act of soliciting someone to disrupt a criminal trial by an attorney representing a defendant was not a felony, but would support an order of disbarment. *In re Paul*, 84 N.C. App. 491, 353 S.E.2d 254, *cert. denied*, 319 N.C. 673, 356 S.E.2d 779 (1987), *cert. denied*, 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

Quoted in *State v. Bunch,* 104 N.C. App. 106, 408 S.E.2d 191 (1991).

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

Attorney illegally contacted a juror to discuss a case. Three-Year Suspension. 78 DHC 5.

ETHICS OPINION NOTES

CPR 16. A lawyer or group of lawyers may contribute to a judge's campaign in a reasonable amount.

CPR 183. An attorney who represents a judge may not appear before the judge. (*But see* 97 FEO 1.)

CPR 225. It is permissible for an attorney to appear before his brother judge if the lawyer for the adverse party and his client consent.

CPR 226. Although an attorney may not appear before his brother judge without the consent of the parties, his partners and associates may.

CPR 283. The fact that a law firm's secretary is the spouse of a magistrate does not disqualify members of the law firm from practicing criminal law before the magistrate.

CPR 318. The fact that an attorney's spouse is a judge's secretary does not disqualify the attorney from practicing before the judge.

CPR 337. After a jury trial, an attorney may communicate with jurors as to why they decided issues as they did and their opinions of the attorney's performance, unless such is prohibited by court rule.

RPC 122. A member of the attorney general's staff may not consult *ex parte* with a trial court judge if it is likely that that attorney or another attorney working in the same division of the attorney general's office will represent the state in the appeal of the case.

RPC 214. A lawyer may not send a jury questionnaire directly to prospective members of the jury but, if the questionnaire is sent out by the court, such communications are not prohibited.

RPC 237. A lawyer may not communicate with the judge before whom a proceeding is pending to request an *ex parte* order unless opposing counsel is given adequate notice or unless authorized by law.

97 Formal Ethics Opinion 1. A lawyer may appear in court before a judge the lawyer represents in a personal matter provided there is disclosure of the representation and all parties and lawyers agree that the relationship between the lawyer and the judge is immaterial to the trial of the matter.

97 Formal Ethics Opinion 3. A lawyer may engage in an *ex parte* communication with a judge regarding a scheduling or administrative matter only if necessitated by the administration of justice or exigent circumstances and diligent efforts to notify opposing counsel have failed.

97 Formal Ethics Opinion 5. A lawyer must provide the opposing counsel with a copy of a proposed order at the same time that the lawyer submits the proposed order to the judge in an *ex parte* communication.

98 Formal Ethics Opinion 12. Opinion sets forth the disclosures a lawyer must make to the judge prior to engaging in an ex parte communication.

98 Formal Ethics Opinion 13. Opinion restricts informal written communications with a judge or judicial official relative to a pending matter.

98 Formal Ethics Opinion 20. Opinion rules that, subject to a statute prohibiting the withholding of the information, a lawyer's duty to disclose confidential client information to a bankruptcy court ends when the case is closed although the debtor's duty to report new property continues for 180 days after the date of filing the petition.

RULE 3.6 TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that the statement will materially prejudice an adjudicative proceeding in the matter.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, or reputation of a party, suspect in a criminal investigation, or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense, or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or

(5) information the lawyer knows, or reasonably should know, is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial.

(c) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim, or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved when there is reason to believe that there exists the likelihood of substantial harm

to an individual or to the public interest; and

(7) in a criminal case:

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time, and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(d) The foregoing provisions of Rule 3.6 do not preclude a lawyer from replying to charges of misconduct publicly made against the lawyer or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(e) A lawyer shall exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under this rule.

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case, and their associates.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 3.6 is similar to Model Rule 3.6. Notably, Model Rule 3.6 specifically permits a lawyer to make an extrajudicial statement to protect a client from the prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. Rule 3.6 is silent on this matter. Rule 3.6 corresponds to Rule 7.7 of the superseded (1985) Rules of Professional Conduct. In addition to organizational changes, however, Rule 3.6 contains a more liberal "material prejudice" standard for evaluating when an extrajudicial statement is prohibited.

CASE NOTES

Cited in *Sherrill v. Amerada Hess Corp.*, 130 N.C. App. 711, 504 S.E.2d 802 (1998).

ETHICS OPINION NOTES

CPR 4. The rule restricting pretrial publicity does not apply when the case is on appeal.

98 Formal Ethics Opinion 4. Opinion examines the restrictions on a lawyer's public comments about a pending civil proceeding in which the lawyer is participating.

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 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 or 1.9. 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. 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 disqualifies the firm also.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 3.7 is identical to Model Rule 3.7. Rule 3.7 is also similar to Rule 5.2 of the superseded (1985) Rules of Professional Conduct, except Rule 3.7 limits the disqualification of a testifying lawyer to litigation in which the lawyer is a "necessary" witness. Unlike the superseded rule, Rule 3.7 also permits another lawyer in the testifying lawyer's firm to represent the client at trial although the testifying lawyer is disqualified.

CASE NOTES

Counsel Is Not Incompetent to Testify. - The weight of authority in this country is that while it is a breach of professional ethics for a party's attorney to testify about other than formal matters without withdrawing from the litigation, he is not incompetent to testify. The testimony is admissible if otherwise competent. *Town of Mebane v. Iowa Mut. Ins. Co.,* 28 N.C. App. 27, 220 S.E.2d 623 (1975).

But Is Discouraged from Doing So. - The Supreme Court of North Carolina has historically discouraged the practice of attorneys testifying on behalf of clients, and although it has been allowed, in most instances the lawyer acting as a witness for his client had previously surrendered his right to participate in the litigation. *Town of Mebane v. Iowa Mut. Ins. Co.*, 28 N.C. App. 27, 220 S.E.2d 623 (1975).

Exceptions Where Counsel May Testify for Client. - While the Disciplinary Rules set forth in the Code of Professional Conduct (now replaced by the Rules of Professional Conduct) do not control the admissibility of evidence or the competency of witnesses, they do govern the ethics and conduct of attorneys licensed to practice law in the State. It should be the policy of the courts to give effect to

these rules which specifically address the question of when an attorney may be a witness for a party he represents. Both the Code of Professional Conduct and the common practice recognized by the North Carolina Supreme Court provide for exceptions where attorneys may testify on their clients' behalf. *Town of Mebane v. Iowa Mut. Ins. Co.*, 28 N.C. App. 27, 220 S.E.2d 623 (1975).

Testimony for Client Before Administrative Board. - There is no compelling reason to extend existing law by holding that evidence presented by an attorney who testifies while representing a client before a local administrative board may not be considered by such local administrative board. However, attorneys are strongly discouraged from serving as both witnesses and advocates, even before local administrative boards, unless compelling circumstances exist. *Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment*, 44 N.C. App. 539, 261 S.E.2d 520, *cert. denied*, 299 N.C. 737, 267 S.E.2d 663 (1980).

Discretion of Trial Judge. - Whether to allow defense counsel to testify on a collateral matter, impeachment of a witness, is in the discretion of the trial judge. *State v. Elam*, 56 N.C. App. 590, 289 S.E.2d 857, *cert. denied*, 305 N.C. 461, 292 S.E.2d 577 (1982).

Request by Defendant for Withdrawal of Plaintiff's Counsel. - Defendant's request that counsel for plaintiff be precluded from testifying at trial or that his law firm be disqualified from further representation of plaintiff would be denied, where plaintiff had not yet determined who its witnesses would be. If plaintiff subsequently determined that counsel should be called as a witness at trial, then the court, at the appropriate time, could order his withdrawal, as well as that of his law firm. *FDIC v. Kerr,* 111 F.R.D. 476 (W.D.N.C. 1986).

This rule only applies to lawyers, not their employees. *Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 363 S.E.2d 643, *cert. denied*, 322 N.C. 113, 367 S.E.2d 917 (1988).

Preference for Other Witnesses. - If other witnesses are available who can provide the information sought, it is not error not to permit an attorney for a party to testify. *State v. Daniels*, 337 N.C. 243, 446 S.E.2d 298 (1994).

Testimony Not Prejudicial. - Defendant could show no prejudice from defense counsel's testimony during a voir dire hearing on a collateral matter regarding the attorney's handling of evidence. *State v. Parker*, 119 N.C. App. 328, 459 S.E.2d 9 (1995).

Applied in *SuperGuide Corp. v. DirecTV Enters., Inc.*, 141 F. Supp. 2d 616 (W.D.N.C. 2001).

Stated in *Spivey v. United States,* 912 F.2d 80 (4th Cir. 1990); *H.B.S. Contractors v. Cumberland County Bd. of Educ.*, 122 N.C. App. 49, 468 S.E.2d 517 (1996).

Cited in *Central Carolina Nissan, Inc. v. Sturgis*, 98 N.C. App. 253, 390 S.E.2d 730 (1990); *State ex rel. Long v. American Sec. Life Assurance Co.*, 109 N.C. App. 530, 428 S.E.2d 200 (1993); *Berkeley Fed. Sav. & Loan Ass'n v. Terra Del Sol, Inc.,* 111 N.C. App. 692, 433 S.E.2d 449 (1993); *Beam v. Kerlee*, 120 N.C. App. 203, 461 S.E.2d 911 (1995).

ETHICS OPINION NOTES

CPR 18. An attorney may testify on behalf of his former client after he has withdrawn, even if he is to be reimbursed for expenses advanced while he was employed from any recovery.

CPR 93. A law firm may not continue to represent a husband charged with his wife's murder after the public defender who had represented a codefendant who had agreed to testify against the husband in the same case joins the firm.

CPR 162. An attorney may testify as to the value of his services, but may not testify as to his client's emotional condition.

CPR 212. An attorney who is sued may have his partner represent him and may testify in his own behalf without his partner's having to withdraw.

CPR 350. An attorney may continue to serve as administrator C.T.A. even though his secretary may testify as a witness.

RPC 19. An attorney may represent a client even though his secretary must be called as a witness.

RPC 142. A lawyer may not represent an estate in litigation against a claimant where the lawyer's testimony may be necessary to resolve the validity of the claim.

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) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for, obtaining counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights such as the right to a preliminary hearing;

(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 mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6;

(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client, or participate in the application for the issuance of a search warrant to a lawyer for the seizure of information of a past or present client in connection with an investigation of someone other than the lawyer, unless:

(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

(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.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

[2] The prosecutor represents the sovereign and, therefore, should use restraint in the discretionary exercise of government powers, such as in the selection of cases to prosecute. During trial, the prosecutor is not only an advocate, but he or she also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all. In our system of criminal justice, the accused is to be given the benefit of all reasonable doubt. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence known to him or her that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.

[3] Paragraph (c) does not apply to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

[4] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial hardship to an individual or to the public interest.

[5] Paragraph (f) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings, and search warrants for client information, to those situations in which there is a genuine need to intrude into the client-lawyer relationship. The provision applies only when someone other than

the lawyer is the target of a criminal investigation.

[6] Paragraph (g) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Amended October 17, 2001

Editor's Note: Rule 3.8 is substantially similar to Model Rule 3.8. Rule 3.8 is similar to Rule 7.3 of the superseded (1985) Rules of Professional Conduct, except that Rule 3.8 restricts the circumstances in which a prosecutor may subpoena a lawyer.

LEGAL PERIODICALS

For Comment, "Grand Jury Subpoenas to Defense Attorneys Representing Targets: An Ethical/Legal Tug of War," see 9 Campbell L. Rev. 347 (1987).

For article, "Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger," *see* 65 N.C.L. Rev. 693 (1987).

ETHICS OPINION NOTES

RPC 197. A prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.

RPC 204. It is prejudicial to the administration of justice for a prosecutor to offer special treatment to individuals charged with traffic offenses or minor crimes in exchange for a direct charitable contribution to the local school system.

RPC 243. It is prejudicial to the administration of justice for a prosecutor to threaten to use his discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant.

RULE 3.9 RESERVED

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Statements of Fact

[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 4.1 is similar to Model Rule 4.1, although the Model Rule also requires disclosure when necessary to avoid assisting a criminal or fraudulent act by a client. Rule 4.1 has no counterpart in the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

RPC 182. A lawyer must disclose to an adverse party with whom the lawyer is negotiating a settlement that the lawyer's client died.

RPC 236. A lawyer may not issue a subpoena containing misrepresentations as to the pendency of an action, the date or location of a hearing, or a lawyer's authority to obtain documentary evidence.

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) During the representation of a client, a lawyer 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 by law to do so. It is not a violation of this rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy.

(b) Notwithstanding section (a) above, in representing a client who has a dispute with a government agency or body, a lawyer may communicate about the subject of the representation with the elected officials who have authority over such government agency or body even if the lawyer knows that the government agency or body is represented by another lawyer in the matter, but such communications may only occur under the following circumstances:

(1) in writing, if a copy of the writing is promptly delivered to opposing counsel;

(2) orally, upon adequate notice to opposing counsel; or

(3) in the course of official proceedings.

Comment

[1] This rule does not prohibit a lawyer who does not have a client relative to a particular matter from consulting with a person or entity who, though represented concerning the matter, seeks another opinion as to his or her legal situation. A lawyer from whom such an opinion is sought should, but is not required to, inform the first lawyer of his or her participation and advice.

[2] This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, a lawyer having an independent justification or legal authorization for communicating with a represented person is permitted to do so.

[3] This rule does not prohibit a lawyer from lobbying elected officials on behalf of a client where the government body upon which the elected official serves is not an opposing party in the particular matter. Communications authorized by law include the right of a party to a controversy with a government agency or body to speak with government officials about the matter. Even when the government agency or body is represented by a lawyer with regard to a particular matter, a lawyer may communicate with the elected government officials who have authority over that agency under the circumstances set forth in paragraph (b).

[4] Parties to a matter may communicate directly with each other. The purpose of this rule is to prohibit a lawyer, or the lawyer's agents, from undermining an opponent's client-lawyer relationship through direct contact with a client in the absence of opposing counsel. Nothing herein is intended to discourage good-faith efforts by individual parties to resolve their differences. Nor does the rule prohibit a lawyer from encouraging a client to communicate with the opposing party with a view toward the resolution of their dispute.

[5] After a lawyer for another person or entity has been notified that an organization is represented by counsel in a particular matter, this rule would prohibit communications by the lawyer concerning the matter with persons having managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an employee or agent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication would be sufficient for purposes of

this rule.

[6] This rule also applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by counsel concerning the matter to which the communication relates.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 4.2(a) is similar to Model Rule 4.2 and Rule 7.4(1) of the superseded (1985) Rules of Professional Conduct. Rule 4.2(a), unlike its counterparts in the Model Rules and superseded (1985) Rules, includes a provision permitting a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good faith attempt to resolve the controversy. Rule 4.2(b), setting forth guidelines for communications with represented government officials, has no counterpart in either the Model Rules or the superseded (1985) Rules.

CASE NOTES

This rule does not prevent a person in custody from making inculpatory statements upon waiver of the right to counsel. *State v. Romero*, 56 N.C. App. 48, 286 S.E.2d 903, *disc. rev. denied*, 306 N.C. 391, 294 S.E.2d 218 (1982).

Interview of Plaintiff 's Physician by Defense Attorneys. - Defense attorneys may not interview a plaintiff 's treating physician privately without the plaintiff 's express consent. Defendant must use the statutorily recognized methods of discovery set out in § 1A-1, Rule 26 of the Rules of Civil Procedure. *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990).

Applied in *State v. Thompson*, 332 N.C. 204, 420 S.E.2d 395 (1992).

Quoted in *McCallum v. CSX Transp.*, Inc., 149 F.R.D. 104 (M.D.N.C. 1993).

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

During an authorized visit with an adverse party whom attorney knew was represented by another attorney, the attorney exceeded his authority by discussing an aspect of the matter which he did not have the specific permission of opposing counsel to discuss. Private Reprimand. 79 DHC 23.

ETHICS OPINION NOTES

CPR 2. An attorney generally does not need the consent of the adverse party to talk to witnesses.

CPR 138. An attorney representing a party may not send copies of motions to another party he knows has counsel.

RPC 15. An attorney may interview a person with adverse interest who is unrepresented and make a demand or propose a settlement.

RPC 30. A district attorney may not communicate or cause another to communicate with a represented defendant without the defense lawyer's consent.

RPC 39. An attorney may not communicate settlement demands directly to an insurance company which has employed counsel to represent its insured unless that lawyer consents.

RPC 61. A defense attorney may interview a child who is the prosecuting witness in a molestation case without the knowledge or consent of the district attorney.

RPC 67. An attorney generally may interview a rank and file employee of an adverse corporate party without the knowledge or consent of the corporate party or its counsel.

RPC 81. A lawyer may interview an unrepresented former employee of an adverse corporate party without the permission of the corporation's lawyer.

RPC 87. A lawyer wishing to interview a witness who is not a party, but who is represented by counsel, must obtain the consent of the witness' lawyer.

RPC 93. Opinion concerns several situations in which an attorney who represents a criminal defendant wishes to interview other individuals who are represented by attorneys who will not agree to permit the attorney to interview their clients.

RPC 110. An attorney employed by an insurer to defend in the name of the defendant pursuant to underinsured motorist coverage may not communicate with that individual without the consent of another attorney employed to represent that individual by her liability insurer.

RPC 128. A lawyer may not communicate with an adverse corporate party's house counsel, who appears in the case as a corporate manager, without the consent of the corporation's independent counsel.

RPC 132. A lawyer for a party adverse to the government may freely communicate with government officials concerning the matter until notified that the government is represented in the matter.

RPC 162. A lawyer may not communicate with the opposing party's nonparty treating physician about the physician's treatment of the opposing party unless the opposing party consents.

RPC 180. A lawyer may not passively listen while the opposing party's nonparty treating physician comments on his or her treatment of the opposing party unless the opposing party consents.

RPC 184. The lawyer for opposing party may communicate directly with the pathologist who performed an autopsy on plaintiff's decedent without the consent of the personal representative of the decedent's estate.

RPC 193. The attorney for the plaintiffs in a personal injury action arising out of a motor vehicle accident may interview the unrepresented defendant even though the uninsured motorist insurer, which had elected to defend the claim in the name of the defendant, is represented by an attorney in the matter.

RPC 202. An attorney may communicate in writing with the members of an elected body which is represented by a lawyer in a matter if the purpose of the communication is to request that the matter be placed on the public meeting agenda of the elected body and a copy of the written communication is given to the attorney for the elected body.

RPC 219. A lawyer may communicate with a custodian of public records, pursuant to the North Carolina Public Records Act, for the purpose of making a request to examine public records related to the representation although the custodian is an adverse party whose lawyer does not consent to the communication.

RPC 224. Employer's lawyer may not engage in direct communications with the treating physician for an employee with a workers' compensation claim.

RPC 233. A deputy attorney general attorney who represents the state on the appeal of a death sentence should send to the defense lawyer a copy of a letter the deputy attorney general received from the defendant.

RPC 249. A lawyer may not communicate with a child who is represented by a guardian ad litem and an attorney advocate unless the lawyer obtains the consent of the attorney advocate.

97 Formal Ethics Opinion 2. A lawyer may interview an unrepresented former employee of an adverse represented organization about the subject of the representation unless the former employee participated substantially in the legal representation of the organization in the matter.

97 Formal Ethics Opinion 10. A prosecutor may instruct a law enforcement officer to send an undercover officer into the prison cell of a represented criminal defendant to observe the defendant's communications with other inmates in the cell.

99 FEO 10. Opinion rules that a government lawyer working on a fraud investigation may instruct an investigator to interview employees of the target organization provided the investigator does not interview an employee who participates in the legal representation of the organization or an officer or manager of the organization who has the authority to speak for and bind the organization.

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) give advice to the person, other than the advice to secure counsel, if the interests of such person are, or have a reasonable possibility of being, in conflict with the interests of the client; and

(b) 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.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with

legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 4.3 is similar to Model Rule 4.3 and substantially similar to Rule 7.4(2) and (3) of the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

CPR 296. The attorney for the plaintiff in a domestic case may not make available to the defendant a form waiving the right to answer and other rights, nor may he allow his client to provide such a form to the defendant. (*But see* RPC 165)

RPC 15. An attorney may interview a person with adverse interest who is unrepresented and make a demand or propose a settlement.

RPC 61. A defense attorney may interview a child who is the prosecuting witness in a molestation case without the knowledge or consent of the district attorney.

RPC 165. An attorney may provide a confession of judgment or consent order to an unrepresented adverse party for execution by that party so long as the lawyer does not undertake to advise the adverse party or feign disinterestedness.

RPC 189. The district attorney's staff may not give legal advice about pleas to an unrepresented person charged with a traffic infraction.

RPC 193. The attorney for the plaintiffs in a personal injury action arising out of a motor vehicle accident may interview the unrepresented defendant even though the uninsured motorist insurer, which had elected to defend the claim in the name of the defendant, is represented by an attorney in the matter.

RPC 194. In a letter to an unrepresented prospective defendant in a personal injury action, the plaintiff 's lawyer may not give legal advice nor may he create the impression that he is concerned about or protecting the interests of the unrepresented prospective defendant.

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 4.4 is identical to Model Rule 4.4. Rule 4.4 has no counterpart in the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

RPC 181. A lawyer may not seek to disqualify another lawyer from representing the opposing party by instructing a client to consult with the other lawyer about the subject matter of the representation when the client has no intention of retaining the other lawyer.

RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A partner or supervisory lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders the conduct involved; or

(2) the lawyer has direct supervisory authority over the other lawyer and knows of the conduct at a time when its consequences can be avoided, but fails to take reasonable action to avoid the consequences.

Comment

[1] Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation, lawyers having supervisory authority in the law department of an enterprise or government agency, and lawyers who have intermediate managerial responsibilities in a firm.

[2] The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. *See* Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the rules.

[3] Paragraph (c)(1) expresses a general principle of responsibility for acts of another. *See also* Rule 8.4(a).

[4] Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor, as well as the subordinate, have a duty to correct the resulting misapprehension.

[5] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction or knowledge of the violation.

[6] Apart from this rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate, or subordinate. Moreover, this rule is not intended to establish a standard for vicarious criminal or civil liability for the acts of another lawyer. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these rules.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 5.1 is substantially similar to Model Rule 5.1. Rule 5.1 has no counterpart in the superseded (1985) Rules of Professional Conduct.

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the know-ledge required to render

conduct a violation of the rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 5.2 is identical to Model Rule 5.2. Rule 5.2 has no counterpart in the superseded (1985) Rules of Professional Conduct.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders the conduct involved; or

(2) the lawyer has direct supervisory authority over the nonlawyer and knows of the conduct at a time when its consequences can be avoided, but fails to take reasonable action to avoid the consequences.

Comment

[1] Lawyers generally employ nonlawyers in their practice including secretaries, investigators, law student interns, and paraprofessionals. Such nonlawyers, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such nonlawyers 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] A lawyer who discovers that a nonlawyer has wrongfully misappropriated money from the lawyer's trust account must inform the North Carolina State Bar pursuant to Rule 1.15-2(l).

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 5.3 is substantially similar to Model Rule 5.3 and Rule 3.3 of the superseded (1985) Rules of Professional Conduct.

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

Attorney failed to monitor clients' funds in his trust account which resulted in misappropriation of funds. Attorney's secretary signed attorney's name or her name to trust account checks and the attorney and his secretary received the benefit of the funds. Attorney did not adequately supervise the secretary with respect to handling client funds and with respect to handling attorney's trust and office account records. Disbarred. 94 DHC 4.

Attorney's legal assistant had control and authority over attorney's trust, office, and personal bank accounts. Legal assistant stole large amount of client money from attorney's trust account and used it for her and attorney's benefit. Attorney did not monitor his trust and office account records. He also did not supervise legal assistant's handling of client funds in trust account. Disbarred. 95 DHC 17.

ETHICS OPINION NOTES

CPR 163. An attorney may use a secretarial agency so long as reasonable care is used to protect confidentiality.

CPR 182. A layman may be employed to interview and represent social security claimants if the clients consent after disclosure of the layman's nonprofessional status.

CPR 253. A paralegal employed by a law firm may have a business card with the firm's identification.

CPR 262. A law firm's office manager may have a business card with the firm's identification.

CPR 334. An attorney's secretary may also work for private investigator. The attorney must take care that client confidences are not compromised.

RPC 29. An attorney may not rely upon title information from an abstract firm unless he supervised the nonlawyer who did the work.

RPC 70. A legal assistant may communicate and negotiate with a claims adjuster if directly supervised by the attorney for whom he or she works.

RPC 74. A firm which employs a paralegal is not disqualified from representing an interest adverse to that of a party represented by the firm for which the paralegal previously worked if the paralegal is screened from participation in the case.

RPC 102. A lawyer may not permit the employment of court reporting services to be influenced by the possibility that the lawyer's employees might receive premiums, prizes or other personal benefits.

RPC 139. An attorney, having undertaken to represent adoptive parents, may sign and file adoption petition prepared by social services organization under her direct supervision.

RPC 152. District attorney is responsible for plea negotiating practices of lay assistant under her supervision of which she has knowledge.

RPC 176. A lawyer who employs a paralegal is not disqualified from representing a party whose interests are adverse to that of a party represented by a lawyer for whom the paralegal previously worked.

RPC 183. A lawyer may not permit a legal assistant to examine or represent a witness at a deposition.

RPC 216. A lawyer may use the services of a nonlawyer independent contractor to search a title provided the nonlawyer is properly supervised by the lawyer.

RPC 238. A lawyer is subject to the Rules of Professional Conduct with respect to the provision of a law-related service, such as financial planning, if the law-related service is provided in circumstances that are not distinct from the lawyer's provision of legal services to clients.

99 Formal Ethics Opinion 6. Opinion examines the ownership of a title insurance agency by lawyers in North and South Carolina as well as the supervision of an independent paralegal.

99 FEO 13. Opinion rules that competent practice requires the presence of the closing lawyer at a residential real estate closing conference to explain the documents being executed, answer questions, and advocate for the client or clients. A nonlawyer may oversee the execution of the documents outside the presence of the lawyer provided the closing lawyer provides adequate supervision and is present at the closing conference to complete the transaction.

2000 Formal Ethics Opinion 10. Opinion rules that a lawyer may have a nonlawyer employee deliver a message to a court holding calendar call, if the lawyer is unable to attend due to a scheduling conflict with another court or for another legitimate reason.

2001 Formal Ethics Opinion 4. Opinion rules that competent legal representation of a borrower requires the presence of the lawyer at the closing of a residential real estate refinancing. A non-lawyer may oversee the execution of documents outside the presence of the lawyer provided the lawyer adequately supervises the non-lawyer and is present at the closing conference to complete the

transaction.

2001 Formal Ethics Opinion 8. Opinion rules that competent practice requires the physical presence of the lawyer at a residential real estate closing conference.

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money over a reasonable period of time after the lawyer's death to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased or disabled lawyer or a lawyer who has disappeared may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer or a disbarred lawyer may pay to the estate of the deceased lawyer or to the disbarred lawyer that proportion of the total compensation which fairly represents the ser-vices rendered by the deceased lawyer or the disbarred lawyer; and

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, engages, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with, or in the form of, a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or

(2) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] Although a nonlawyer may serve as a director or officer of a professional corporation organized to practice law if permitted by law, such a nonlawyer director or officer may not have the authority to direct or control the conduct of the lawyers who practice with the firm.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Amended June 7, 2001

Editor's Note: Rule 5.4 is substantially similar to Model Rule 5.4. Rule 5.4 expands upon the prohibitions in Rule 3.2 of the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

CPR 239. A law firm may set up a profit-sharing plan for firm members and lay employees.

CPR 289. It is improper for an attorney to agree to share a legal fee with a paralegal.

CPR 343. A succeeding attorney may share fees with a disbarred lawyer for services rendered prior to disbarment.

RPC 38. Attorneys in North Carolina may use an attorney placement service which places independent attorneys with other attorneys or firms on a temporary contract basis for a placement fee.

RPC 104. Associate attorneys may be leased back to their firms.

RPC 147. An attorney may not pay a percentage of fees to a paralegal as a bonus.

98 Formal Ethics Opinion 17. Opinion rules that a lawyer may not comply with an insurance carrier's billing requirements and guidelines if they interfere with the lawyer's ability to exercise his or her independent professional judgment in the representation of the insured.

2000 FEO 9. Opinion explores the situations in which a lawyer who is also a CPA may provide legal services and accounting services from the same office.

2001 Formal Ethics Opinion 2. Opinion rules that there is no prohibition on a law firm entering into a contract with a management firm to administer the firm provided the lawyers in the firm can fulfill their ethical duties including the duty to exercise independent professional judgment, the duty to protect and safe keep client property, and the duty to maintain client confidences.

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

(b) A lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(c) A lawyer or law firm shall not employ a disbarred or suspended lawyer as a law clerk or legal assistant if that individual was associated with such lawyer or law firm at any time on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

(d) A lawyer or law firm employing a disbarred or suspended lawyer as a law clerk or legal assistant shall not represent any client represented by the disbarred or suspended lawyer or by any lawyer with whom the disbarred or suspended lawyer practiced during the period on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

Comment

[1] The definition of the practice of law is established by G.S. §84-2.1. Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them so long as the lawyer supervises the delegated work and retains responsibility for their work. *See* Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

[2] In the absence of statutory prohibitions or specific conditions placed on a disbarred or suspended attorney in the order revoking or suspending the license, such individual may be hired to perform the services of a law clerk or legal assistant by a law firm with which he or she was not affiliated at the time of or after the acts resulting in discipline. Such employment is, however, subject to certain restrictions. A licensed attorney in the firm must take full responsibility for, and employ independent judgment in, adopting any research, investigative results, briefs, pleadings, or other documents or instruments drafted by such individual. The individual may not directly advise clients or communicate in person or in writing in such a way as to imply that he or she is acting as an attorney or in any way in which he or she seems to assume responsibility for a client's legal matters. The disbarred or suspended attorney should have no communications or dealings with, or on behalf of, clients represented by such disbarred or suspended attorneys or by any individual or group of individuals with whom he or she practiced during the period on or after the date of the acts which resulted in discipline through and including the effective date of the discipline. Further, the employing attorney or law firm should perform no services for clients represented by the disbarred or suspended attorney during such period. Care should be taken to ensure that clients fully understand that the disbarred or suspended attorney is not acting as an attorney, but merely as a law clerk or lay employee. Under some circumstances, as where the individual may be known to clients or in the community, it may be necessary to make an affirmative statement or disclosure con-

cerning the disbarred or suspended attorney's status with the law firm. Additionally, a disbarred or suspended attorney should be paid on some fixed basis, such as a straight salary or hourly rate, rather than on the basis of fees generated or received in connection with particular matters on which he or she works. Under these circumstances, a law firm employing a disbarred or suspended attorney would not be acting unethically and would not be assisting a nonlawyer in the unauthorized practice of law.

[3] An attorney or law firm should not employ a disbarred or suspended attorney who was associated with such attorney or firm at any time on or after the date of the acts which resulted in the disbarment or suspension through and including the time of the disbarment or suspension. Such employment would show disrespect for the court or body which disbarred or suspended the attorney. Such employment would also be likely to be prejudicial to the administration of justice and would create an appearance of impropriety. It would also be practically impossible for the disciplined lawyer to confine himself or herself to activities not involving the actual practice of law if he or she were employed in his or her former office setting and obliged to deal with the same staff and clientele.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 5.5 is similar to Model Rule 5.5, except that Rule 5.5 contains additional requirements regarding the employment of disbarred lawyers. Rule 5.5 is substantially similar to Rule 3.1 of the superseded (1985) Rules of Professional Conduct.

LEGAL PERIODICALS

For note on the unauthorized practice of law by corporations, *see* 65 N.C.L. Rev. 1422 (1987).

CASE NOTES

A licensed attorney who is a full-time employee of an insurance company may not ethically represent one of the company's insureds as counsel of record in an action brought by a third party for a claim covered by the terms of the insurance policy or appear as counsel of record for the insured in the prosecution of a subrogation claim for property damage. *Gardner v. North Carolina State Bar,* 316 N.C. 285, 341 S.E.2d 517 (1986).

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

Among other things, attorney engaged in the unauthorized practice of law when he performed legal work for residents of Florida and Maryland at a time when he was not licensed to practice in Florida or Maryland and was an inactive member of the Delaware Bar. Disbarred. 93 DHC 33.

ETHICS OPINION NOTES

CPR 19. House counsel for an insurance company may not represent an insured in prosecuting a subrogation claim.

CPR 325. House counsel of a savings and loan association may not represent a subsidiary of the savings and loan association acting as trustee for a deed of trust in foreclosure.

CPR 326. House counsel for an insurance company may not represent the insured in defense of a third party claim or in prosecution of a subrogation claim.

RPC 9. House counsel for a mortgage bank which originates loans but has no proprietary interest of its own may not represent borrowers or lenders in closing loans originated by his employer.

RPC 40. For the purposes of a real estate transaction, an attorney may, with proper notice to the borrower, represent only the lender, and the lender may prepare the closing documents. *See also* RPC 41.

RPC 114. Attorneys may give legal advice and drafting assistance to persons wishing to proceed *pro se* without appearing as counsel of record.

RPC 139. A lawyer may not sign an adoption petition prepared by an adoption agency as an accommodation to that agency without undertaking professional responsibility for the adoption proceeding.

RPC 151. Although a corporate insurer acting through its employees cannot practice law and appear on behalf of others, a lawyer who is a full-time employee of an insurance company may represent the company in an action where the company is a named party.

RPC 216. A lawyer may use the services of a nonlawyer independent contractor to search a title provided the nonlawyer is properly supervised by the lawyer.

98 Formal Ethics Opinion 7. Opinion rules that a law firm may employ a disbarred lawyer as a paralegal provided the firm accepts no new clients who were clients of the disbarred lawyer's former firm during the period of misconduct; however, a disbarred lawyer may not work as a paralegal at a firm where he was employed as a lawyer during the period of misconduct.

98 Formal Ethics Opinion 8. Opinion rules that a lawyer may not participate in a closing or sign a preliminary title opinion if, after reasonable inquiry, the lawyer believes that the title abstract or opinion was prepared by a nonlawyer without supervision by a licensed North Carolina lawyer.

99 Formal Ethics Opinion 6. Opinion examines the ownership of a title insurance agency by lawyers in North and South Carolina as well as the supervision of an independent paralegal.

99 FEO 13. Opinion rules that competent practice requires the presence of the closing lawyer at a residential real estate closing conference to explain the documents being executed, answer questions, and advocate for the client or clients. A nonlawyer may oversee the execution of the documents outside the presence of the lawyer provided the closing lawyer provides adequate supervision and is present at the closing conference to complete the transaction.

2000 FEO 9. Opinion explores the situations in which a lawyer who is also a CPA may provide legal services and accounting services from the same office.

2000 Formal Ethics Opinion 10. Opinion rules that a lawyer may have a nonlawyer employee deliver a message to a court holding calendar call, if the lawyer is unable to attend due to a scheduling conflict with another court or for another legitimate reason.

RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

(a) A lawyer shall not be a party to, or participate in, a partnership or employment agreement with another lawyer or law firm that restricts the right of a lawyer to practice after termination of the relationship created by the agreement except as a condition to payment of retirement benefits.

(b) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his or her right to practice law.

Comment

[1] An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy, but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 5.6 is substantially similar to Model Rule 5.6 and Rule 2.7 of the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

RPC 13. A retirement agreement may require a lawyer to accept inactive status as a member of the State Bar as a condition of payment of retirement benefits.

RPC 179. A lawyer may not offer or enter into a settlement agreement that contains a provision barring the lawyer who represents the settling party from representing other claimants against the opposing party.

2001 Formal Ethics Opinion 10. Opinion prohibits a lawyer from entering into an employment agreement with a law firm that includes a provision reducing the amount of deferred compensation the lawyer will receive if the lawyer

leaves the firm before retirement to engage in the private practice of law within a 50-mile radius of the firm's offices.

RULE 6.1 RESERVED

RULE 6.2 RESERVED

RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer, or member of a legal ser-vices organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established written policies in this respect can enhance the credibility of such assurances.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 6.3 is identical to Model Rule 6.3. Rule 6.3 has no counterpart in the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

CPR 68. An attorney may serve on the board of a legal aid society and represent a client against a party represented by a legal aid lawyer.

RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer, or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Comment

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. *See also* Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 6.4 is identical to Model Rule 6.4. Rule 6.4 has no counterpart in the superseded (1985) Rules of Professional Conduct.

RULE 6.5 ACTION AS A PUBLIC OFFICIAL

A lawyer who holds public office shall not:

(a) use his or her public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or herself or for a client under circumstances where the lawyer knows, or it is obvious, that such action is not in the public interest;

(b) use his or her public position to influence, or attempt to influence, a tribunal to act in favor of himself or herself or his or her client; or

(c) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

Comment

[1] Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part time, should not engage in activities in which the lawyer's personal or professional interests are or foreseeably may be in conflict with his or her official duties.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 6.5 has no counterpart in the Model Rules. Rule 6.5 is identical to Rule 8.1 of the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

CPR 177. An attorney on the county board of health may not represent a client before such board, but he may resign and represent the client if he acquired no relevant confidential information while on the board.

CPR 189. An attorney member of the city council with control over the police department may not represent a criminal defendant when a police officer is a prosecuting witness.

CPR 231. An attorney-legislator may represent a criminal defendant when a State highway patrolman is the prosecuting witness.

CPR 233. An attorney member of the city council with control over the police department may not represent a criminal defendant when a police officer is a prosecuting witness even if he withdraws from consideration of the budget.

CPR 263. An emergency judge may not practice law.

CPR 290. An attorney who serves as a member of a county or municipal governing board, or State or federal legislative body, or any entity thereunder, or committee thereof, shall not hear or consider any matter coming before that governing body or entity in which that member or his firm has any direct or indirect interest.

Pursuant to such prohibition, it shall be unethical for that member to attempt to influence in any way, publicly or privately, the actions or decisions of the governing body or entity or its staff with respect to any matter on which his partner or associate is appearing.

If an attorney or his employee serves as a member of a county or municipal governing board, or State or federal legislative body of any entity thereunder, or committee thereof, it shall be unethical for his partner, associate or employer to represent such governing body or entity.

It is not unethical as such for an attorney whose spouse or relative is on any county or municipal governing board, or State or federal legislative body, or any entity thereunder, or committee thereof, to appear before or represent that governing body or entity. However, it is unethical for an attorney to use his relationship to a member of any governing board to gain (or retain) employment or obtain favorable decisions. (*But see* RPC 130)

CPR 327. An attorney who serves on per diem basis as a hearing examiner for a public agency may not participate in hearings on behalf of clients before other examiners. His partners and associates may not appear before him, but may appear before other hearing examiners. If the attorney-examiner is appointed to the full board he may not appear before the board under any conditions. His

partners should abide by CPR 290.

CPR 335. An attorney-magistrate may privately practice law. He may not appear in any criminal case, in any civil case originating in the small claims court in his county, or in any case with which he had any connection as a magistrate.

CPR 360. An attorney may counsel a quasi-judicial board and also act as a hearing examiner rendering decisions appealable to the same board during the same time span, but may not act in both capacities in the same case.

RPC 63. An attorney may represent the school board while serving as a county commissioner with certain restrictions.

RPC 73. Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants where a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.

Where an attorney advises a governing body, such as a county commission, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.

RPC 95. An assistant district attorney may prosecute cases while serving on the school board.

RPC 105. A public defender may represent criminal defendants while serving on the school board.

RPC 130. An attorney may accept employment on behalf of a governing board upon which his or her partner sits if such is otherwise lawful.

RPC 160. A lawyer whose associate is a member of a public hospital's board of trustees may not sue the hospital on behalf of a client.

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

Editor's note: At the time of publication of this Handbook, subparagraph(b) of Rule 7.1 was pending approval from the North Carolina Supreme Court. Approval in March 2002 is anticipated. To confirm the status of the proposed amendment, call the ethics department of the State Bar or go to the State Bar's web page at www.ncstatebar.org.

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(3) compares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated.

(b) A communication by a lawyer that contains a dramatization depicting a fictional situation is misleading unless it complies with paragraph (a) above and contains a conspicuous written or oral statement, at the beginning and the end of the communication, explaining that the communication contains a dramatization and does not depict actual events or real persons.

Comment

[1] This rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 7.1 is identical to Model Rule 7.1 and Rule 2.1 of the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

CPR 253. A paralegal employed by a law firm may have a business card with the firm's identification.

CPR 262. A law firm's office manager may have a business card with the firm's identification.

RPC 5. An attorney holding a Juris Doctor degree may not on that basis refer to himself or herself as a "Doctor."

RPC 135. An attorney may not participate in a private lawyer referral service which advertises that its participants are "the best."

RPC 161. A television commercial for legal services which fails to mention that bankruptcy is the debt relief described in the commercial and describes results obtained for others is misleading.

RPC 164. Television commercials for an attorney's services that depict fictional clients and cases are misleading and prohibited.

RPC 217. A local or remote call forwarding telephone number may not be included in an advertisement for legal services disseminated in a community where the law firm has neither an office nor a lawyer present in the community unless an explanation is included in the advertisement.

RPC 239. A lawyer may display truthful information about the lawyer's legal services on a World Wide Web site accessed via the Internet.

RPC 241. A lawyer may participate in a directory of lawyers on the Internet if the information about the lawyer in the directory is truthful.

97 Formal Ethics Opinion 6. The omission of the lawyer's address from a targeted direct mail letter is a material misrepresentation.

2000 FEO 1. Opinion rules that, in the absence of a full explanation, advertising a lawyer's or a law firm's record in obtaining favorable verdicts is misleading and prohibited.

2000 FEO 3. Opinion rules that a lawyer may respond to an inquiry posted on a web page message board provided there are certain disclosures.

2000 FEO 6. Opinion rules that a television advertisement for legal services that implies that an insurance company will settle a claim more quickly because the advertised lawyer represents the claimant is misleading.

2000 FEO 9. Opinion explores the situations in which a lawyer who is also a CPA my provide legal services and accounting services from the same office.

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or other written or recorded communication.

(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) Any communication made pursuant to this rule other than that of a lawyer referral service as described in subsection (e) shall include the name of at least one lawyer or law firm responsible for its content.

(d) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable cost of advertisements or communications permitted by this rule; or

(2) pay for a law practice in accordance with Rule 1.17.

(e) A lawyer may participate in a lawyer referral service subject to the following conditions:

(1) the lawyer is professionally responsible for its operation including the use of a false, deceptive, or misleading name by the referral service;

(2) the referral service is not operated for a profit;

(3) the lawyer may pay to the lawyer referral service only a reasonable sum which represents a proportionate share of the referral service's administrative and advertising costs;

(4) the lawyer does not directly or indirectly receive anything of value other than legal fees earned from representation of clients referred by the service;

(5) employees of the referral service do not initiate contact with prospec-

tive clients and do not engage in live telephone or in-person solicitation of clients;

(6) the referral service does not collect any sums from clients or potential clients for use of the service; and

(7) all advertisements by the lawyer referral service shall:

(i) state that a list of all participating lawyers will be mailed free of charge to members of the public upon request and state where such information may be obtained; and

(ii) explain the method by which the needs of the prospective client are matched with the qualifications of the recommended lawyer.

Comment

[1] To assist the public in obtaining legal services, lawyers are permitted to make known their services not only through reputation, but also through organized information campaigns in the form of advertising. Nevertheless, lawyers should be aware that advertising may entail practices that are misleading, overreaching, deceptive, coercive, intimidating, or vexatious.

[2] This rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number, the kinds of services the lawyer will undertake, the basis on which the lawyer's fees are determined including prices for specific services and payment and credit arrangements, a lawyer's foreign language ability, names of references and, with their consent, names of clients regularly represented, and other information that might invite the attention of those seeking legal assistance.

[3] Neither this rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

[4] Paragraph (b) requires that a record of the content and use of advertising be kept to facilitate enforcement of this rule. It does not require that advertising be subject to review prior to dissemination.

Paying Others to Recommend a Lawyer

[5] A lawyer is allowed to pay for advertising permitted by this rule and for the purchase of a law practice in accordance with the provisions of Rule 1.17, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Paragraph (d) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this rule.

[6] A lawyer may participate in a lawyer referral service that is not operated for a profit and pay the usual fees charged by such programs. Any lawyer who participates in a referral service is professionally responsible for the operation of the service in accordance with these rules regardless of the lawyer's knowledge, or lack of knowledge, of the activities of the service. The service may not charge potential clients a fee and employees of the service may not engage in telephone or in-person solicitation of clients. The term "referral" implies that some attempt is made to match the needs of the prospective client with the qualifications of the recommended lawyer. To avoid misrepresentation, paragraph (e)(7)(ii) requires that every advertisement for the service must include an explanation of the method by which a prospective client is matched with the lawyer to whom he or she is referred.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 7.2 is similar to Model Rule 7.2. Unlike the Model Rule, Rule 7.2 includes specific regulations governing participation in a lawyer referral service. Rule 7.2 is substantially similar to Rule 2.2 of the superseded (1985) Rules of Professional Conduct. However, some of the requirements for participation in a lawyer referral service are modified.

LEGAL PERIODICALS

For note discussing commercial speech and disciplinary rules preventing attorney advertising and solicitation, see 65 N.C.L. Rev. 170 (1986).

For note discussing the liberalization of attorney commercial speech rights, in light of *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985), see 21 Wake Forest L. Rev. 1019 (1986).

For note on attorney solicitation by targeted, direct-mail advertisements, see 24 Wake Forest L. Rev. 481 (1989).

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

Attorney engaged in in-person solicitation by participating in a lawyer referral service whose employees engaged in in-person and live telephone solicitation. Attorney also gave value to a person for recommending his services by paying the referral service $100 for each client referred who he agreed to represent. Reprimand. 93 DHC 13.

ETHICS OPINION NOTES

CPR 14. A lawyer may not perform title examinations and legal work for a developer for free or for a substantially reduced fee as consideration for the developer's promise to recommend the lawyer to prospective purchasers and their lenders.

CPR 39. A lawyer may participate in a call-in radio program and answer legal questions.

CPR 40. It is unethical for lawyers to offer free legal services to employees of a savings and loan association to get title work.

CPR 58. An attorney may write and publish pamphlets of a legal nature and offer them for sale to the public.

CPR 116. An attorney may write legal articles for publication in business journals and be identified.

CPR 336. An attorney may advertise that he or she is also in the securities business and the insurance business.

CPR 359. Attorneys may share the cost of advertising by means of a private lawyer referral service under certain conditions.

RPC 10. Attorney may affiliate with a private lawyer referral service administered by a for-profit business corporation so long as the corporation does not profit from the referrals. (*But see* Rule 7.2(e)(2).)

RPC 94. A private lawyer referral service must have more than one participating lawyer and all participants must share in the cost of operating the referral service. (*But see* Rule 7.2 (e)(2).)

RPC 115. A lawyer may sponsor truthful legal information which is provided by telephone to members of the public.

RPC 135. An attorney may not participate in a private lawyer referral service unless all advertisements of the service state that a list of all participating lawyers will be mailed free of charge to members of the public upon request and indicate that the service is not operated or endorsed by any public agency or any disinterested organization. (*But see* Rule 7.2(e)(2).)

RPC 161. A television commercial for legal services which fails to mention that bankruptcy is the debt relief described in the commercial and describes results obtained for others is misleading.

RPC 239. A lawyer may display truthful information about the lawyer's legal services on a World Wide Web site accessed via the Internet.

RPC 241. A lawyer may participate in a directory of lawyers on the Internet if the information about the lawyer in the directory is truthful.

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not, by in-person or live telephone contact, solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, harassment, compulsion, intimidation, or threats.

(c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal serv-

ices in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words, "This is an advertisement for legal services," on the outside envelope and at the beginning of the body of the written communication in print as large or larger than the lawyer's or law firm's name and at the beginning and ending of any recorded communication.

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal services plan subject to the following:

(1) Definition. A prepaid legal services plan or a group legal services plan ("a plan") is any arrangement by which a person, firm, or corporation, not otherwise authorized to engage in the practice of law, in exchange for any valuable consideration, offers to provide or arranges the provision of legal services that are paid for in advance of the need for the service ("covered services"). In addition to covered services, a plan may provide specified legal services at fees that are less than what a non-member of the plan would normally pay. The legal services offered by a plan must be provided by a licensed lawyer who is not an employee, director, or owner of the plan. A plan does not include the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee.

(2) Conditions for Participation.

(A) The plan must be operated by an organization that is not owned or directed by the lawyer;

(B) The plan must be registered with the North Carolina State Bar and comply with all applicable rules regarding such plans;

(C)The lawyer must notify the State Bar in writing before participating in a plan and must notify the State Bar no later than 30 days after the lawyer discontinues participation in the plan;

(D) After reasonable investigation, the lawyer must have a good faith belief that the plan is being operated in compliance with the Revised Rules of Professional Conduct and other pertinent rules of the State Bar;

(E) All advertisements by the plan representing that it is registered with the State Bar shall also explain that registration does not constitute approval by the State Bar; and

(F) Notwithstanding the prohibitions in paragraph (a), the plan may use in-person or telephone contact to solicit memberships or subscriptions provided:

(i) The solicited person is not known to need legal services in a particular matter covered by the plan; and

(ii) The contact does not involve coercion, duress, or harassment and the communication with the solicited person is not false, deceptive or misleading.

Comment

[1] There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person or live telephone solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person or telephone persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written and recorded communications to transmit information from lawyer to prospective client, rather than direct in-person or live telephone contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 7.1. The contents of direct in-person or live telephone conversations between a lawyer to a prospective client can be disputed and are not subject to third-party scrutiny. Consequently, they are much more likely to approach, and occasionally cross, the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior family or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations.

[5] Even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, harassment, compulsion, intimidation, or threats within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1), is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 and Rule 7.3 (c) the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of, and details concerning, the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to, and serve the same purpose as, advertising permitted under Rule 7.2.

[7] Paragraph (c) of this rule requires that all direct mail solicitations of prospective clients must be mailed in an envelope on which the statement, "This is an advertisement for legal services," appears. Postcards may not be used for direct mail solicitations. The advertising disclosure statement must also appear at the beginning of the enclosed letter in print at least as large as the print used for the letterhead. The requirement that certain communications be marked, "This is an advertisement for legal services," does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this rule.

[8] Paragraph (d) of this rule would permit an attorney to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization referred to in paragraph (d) must not be owned by or directed, whether as manager or otherwise, by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2, and 7.3(b). *See* Rule 8.4(a).

History Note: Statutory Authority G.S. 84-23
Adopted July 24, 1997
Amended February 5, 2002

Editor's Note: Rule 7.3 is essentially the same as Model Rule 7.3 and identical to Rule 2.4 of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

U.S. Const., Amend. I prohibits states from categorically prohibiting attorneys from soliciting legal business for pecuniary gain by sending truthful letters to potential clients known to face particular legal problems. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988).

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

Attorney attempted to solicit fee-generating professional employment through in-person contacts with persons who had influence with the potential client in violation of superseded Rules 1.2(a) and 2.4(a). Six-Month Suspension, stayed two years on certain conditions. 96 DHC 3.

ETHICS OPINION NOTES

CPR 52. It is proper to notify former clients of changes in the law that could affect their wills.

CPR 104. Attorneys may request lenders and title insurance companies to place them on approved lists.

CPR 191. It is improper for an attorney to belong to a "Tip Club" in which members agree to refer business to each other.

CPR 258. In response to a request, an attorney may submit a bid for legal work to the FHA.

CPR 352. It is not improper for an attorney to inform a client with a personal injury claim that the spouse may also have a claim and that the attorney is willing to handle the claim.

RPC 6. An attorney may not solicit employment by corporations. (Decided prior to 1989 amendment to superseded Rule 2.4 permitting targeted direct mail advertising.)

RPC 20. An attorney may not use an intermediary to arrange meetings between prospective business clients and the attorney for the purpose of soliciting legal business, nor may an attorney make "cold calls" upon prospective business clients.

RPC 36. A law firm may hold a seminar concerning automobile accident claims for members of the public who are randomly selected for invitation or who receive invitations through bulk mailing. (Decided prior to 1989 amendment to superseded Rule 2.4 permitting targeted direct mail advertising.)

RPC 57. A lawyer may agree to be on a list of attorneys approved to handle all of a lender's title work.

RPC 71. An attorney may not accept legal employment by a prepaid legal service plan owned by the attorney's wife or another member of the attorney's immediate family, if the plan will market its ser-vices by in-person solicitation.

RPC 98. The opinion construes the term "professional relationship" and explores the circumstances under which solicitation of persons or organizations with whom a lawyer has had business and professional dealings is permissible. Targeted print advertising is also discussed.

RPC 115. A lawyer may sponsor truthful legal information which is provided by telephone to members of the public.

RPC 146. A law firm may invite existing clients to a social function hosted by the law firm prior to a bid letting for contracts and may host a social function for nonclients who attend the bid letting as long as the law firm does not solicit employment from the nonclients.

RPC 161. The recorded message which is heard when a television viewer dials a telephone number broadcast during a television advertisement for legal services must include the statement "this is an advertisement for legal services" at the beginning and ending of the recorded message.

RPC 200. The lawyers remaining with a firm may contact by phone or in person clients whose legal matters were handled exclusively by a lawyer who has left the firm.

RPC 242. A lawyer may send a letter describing his services to the incorporators of a new business provided the words "This is an advertisement for legal services" are included in the communication.

97 Formal Ethics Opinion 6. The omission of the lawyer's address from a targeted direct mail letter is a material misrepresentation.

2000 FEO 3. Opinion rules that a lawyer may respond to an inquiry posted on a web page message board provided there are certain disclosures.

RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer may not communicate that the lawyer is a certified specialist or certified in a field of practice except as provided in this rule.

(c) A lawyer may communicate that the lawyer is certified as a specialist or certified in a field of practice when the communication states the name of the certifying organization and is not false or misleading, and

(1) the certification is granted by the North Carolina State Bar;

(2) the certification is granted by an organization which has been approved by the North Carolina State Bar; or

(3) the certification is granted by an organization which has been approved by the American Bar Association under procedures and criteria which have been approved by the American Bar Association and which have been endorsed by the North Carolina State Bar.

Comment

[1] The use of the word "specialize" in any of its variant forms connotes to the public a particular expertise often subject to recognition by the state. Indeed, the North Carolina State Bar has instituted programs providing for official certification of specialists in certain areas of practice. Certification procedures imply that an objective entity has recognized a lawyer's higher degree of specialized ability than is suggested by general licensure to practice law. Those objective entities should apply standards of competence, experience, and knowledge to insure that a lawyer's recognition as a specialist is meaningful and reliable. To avoid misrepresentation and deception, a lawyer may not communicate that the lawyer has been recognized or certified as a specialist in a particular field of law, except as provided by this rule. The rule requires that any representation of specialty may be made only if the certifying organization is the North Carolina State Bar, an organization approved by the North Carolina State Bar, or an organization approved by the American Bar Association under procedures approved by the North Carolina State Bar. To insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization or agency must be included in any communication regarding the certification.

[2] A lawyer may, however, describe his or her practice without using the term "specialize" in any manner which is truthful and not misleading. This rule specifically permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. The lawyer may, for instance, indicate a "concentration" or an "interest" or a "limitation."

[3] Recognition of expertise in patent matters is a matter of long-established policy of the Patent and Trademark Office. A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 7.4 is similar to Model Rule 7.4, except Model Rule 7.4 specifically allows a lawyer to state that he or she is a specialist in patent practice and admiralty law. Rule 7.4 does not allow these or other designations as a specialist unless the lawyer is certified as a specialist by the State Bar or an organization approved by the State Bar or the ABA. Rule 7.4 is similar to Rule 2.5 of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

U.S. Const., Amend. I prohibits states from categorically prohibiting lawyers from advertising their certification as specialists by bona fide private organizations. Lesser restrictions are available to eliminate any potential confusion caused by such advertisements. *Peel v. Attorney Registration & Disciplinary Comm'n,* 496

U.S. 91, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990).

ETHICS OPINION NOTES

RPC 43. An attorney who is certified as a specialist by the Board of Legal Specialization may so indicate in an advertisement in any way that is not false, deceptive or misleading.

RULE 7.5 FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1. A trade name may not be used by a lawyer in private practice if it implies a connection with a government agency or with a public or charitable legal services organization or is false or misleading in violation of Rule 7.1. Every trade name used by a law firm shall be registered with the North Carolina State Bar and, upon a determination by the council that such name is potentially misleading, a remedial disclaimer or an appropriate identification of the firm's composition or connection may be required. For purposes of this paragraph, the use of the name of a deceased or retired former member of a firm shall not render the firm name a trade name nor shall the use of such designations as "Law Offices of John Doe," "Smith and Associates," "Jones Law Firm," and the like.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) A law firm maintaining offices only in North Carolina may not list any person not licensed to practice law in North Carolina as a lawyer affiliated with the firm unless the listing properly identifies the jurisdiction in which the lawyer is licensed and states that the lawyer is not licensed in North Carolina.

(d) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm, whether or not the lawyer is precluded from practicing law.

(e) Lawyers may state or imply that they practice in a partnership or other professional organization only when that is the fact.

(f) No lawyer may practice in a partnership or other professional organization in which any lawyer not licensed to practice law in North Carolina owns an interest as a partner, shareholder, member, or other similar designation unless law offices are maintained in North Carolina and in a state where such other lawyer is licensed, and a certificate of registration authorizing said professional relationship is first obtained from the secretary of the North Carolina State Bar.

Comment

[1] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity, or by a trade name such as the "ABC Legal Clinic." Use of trade names in law practice is acceptable so long as they are not misleading and are otherwise in conformance with the rules and regulations of the State Bar. It may be observed that any firm name including the name of a deceased or retired partner is, strictly speaking, a trade name. The use of such names, as well as such names as "Law Offices of John Doe" and "Smith and Associates" to designate law firms, has proven a useful means of identification and are permissible. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm. It is also misleading to use a designation such as "Smith and Associates" for a solo practice. The name of a retired partner may be used in the name of a law firm only if the partner has ceased the practice of law.

[2] It is unlawful for a person trained as an attorney to practice North Carolina law without a North Carolina law license. It is, therefore, misleading for such a person to be listed in the firm letterhead as having any continuing affiliation with the firm unless the law firm actively maintains a law office in a jurisdiction where the lawyer is licensed. If law offices are maintained in another jurisdiction, the law firm is an interstate law firm and must register with the North Carolina State Bar as required by 27 N.C.A.C. 1E, Section .0200.

[3] This rule does not prohibit the employment by a law firm of a lawyer who is licensed to practice in another jurisdiction, but not in North Carolina, provided the lawyer's practice is limited to areas that do not require a North Carolina law license such as immigration law, federal tort claims, military law, and the like. The lawyer's name may be included in the firm letterhead, provided all communications by such lawyer on behalf of the firm indicate the jurisdiction in which the lawyer is licensed as well as the fact that the lawyer is not licensed in North Carolina.

[4] Nothing in these rules shall be construed to confer the right to practice North Carolina law upon any lawyer not licensed to practice law in North Carolina.

[5] With regard to paragraph (e), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 7.5 expands upon the restrictions imposed in Model Rule 7.5. Rule 7.5 is essentially the same as Rule 2.3 of the superseded (1985) Rules of Professional Conduct.

ETHICS OPINION NOTES

CPR 22. Where father and son practice as Doe and Doe, son may, upon father's election to a judgeship, identify himself on his letterhead as Richard Doe, attorney at law-successor to Doe & Doe.

CPR 69. A lawyer may be a partner in more than one law firm.

CPR 111. A law firm which has a member taking temporary leave to work for the State may continue using the absent member's name in the firm name and on its letterhead.

CPR 117. A law firm in City X forming a partnership with Attorney in City Y may not use different names in the two cities.

CPR 197. It is permissible to cross out a partner's name when he becomes a judge without replacing the stationery on hand.

CPR 211. An attorney licensed in both North Carolina and South Carolina who has an office only in South Carolina and a partner licensed only in South Carolina may practice in North Carolina. His firm should use the same name in North Carolina as it uses in South Carolina and its letterhead should show the jurisdictional limitations of its lawyers.

CPR 213. A law firm may share offices with a common reception area with an accounting firm as long as separate telephones are maintained.

CPR 234. A law firm may operate a legal clinic.

CPR 238. An agreement between a North Carolina lawyer and a lawyer licensed in another state to list each other on their letterhead and to refer cases to each other is improper in the absence of a bona fide partnership.

CPR 248. The use of A and B as a firm name is improper when Attorney A employs Attorney B as an associate.

CPR 256. North Carolina firm may not use the name of an out-of-state firm from which it receives referrals where there is no bona fide interstate partnership.

CPR 265. Attorneys who share offices but are not partners may not answer phone as A, B, and C attorneys, but may answer "law offices." If there is a true partnership, partners must use stationery with the firm letterhead.

CPR 274. It is possible for attorneys to share offices and still represent conflicting interests if they maintain separate telephones and have different secretaries.

CPR 307. An attorney who is also a real estate broker may so indicate on his letterhead. He may operate both businesses from same office.

CPR 330. Letterhead of attorneys in realty business may also show the designation, "attorney at law."

CPR 371. An attorney who is unlicensed in North Carolina and who limits his practice to federal tax law may not become a partner of law firm nor be listed on the firm's letterhead. He may be employed and paid a salary. (*But see* Rule 7.5(c).)

RPC 5. An attorney holding a Juris Doctor degree may not on that basis hold himself out as "Doctor."

RPC 25. It is improper to list an unlicensed attorney on letterhead as "of counsel" or "consulting attorney."

RPC 31. A law firm may not list on its letterhead a "corresponding" attorney in another location.

RPC 34. An attorney licensed in North Carolina and another state who is semi-retired from a law firm in the other state can be "of counsel" to the North Carolina firm so long as he has a close, though not necessarily daily, association

with North Carolina firm.

RPC 85. An "of counsel" relationship may exist between lawyers practicing in different towns if the professional relationship is close, regular and personal and the designation is not otherwise false or misleading.

RPC 126. Nonlawyers may be listed as such on the letterhead of lawyers.

RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment

[1] The duty imposed by this rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted and, in any event, may be relevant in a subsequent admission application. The duty imposed by this rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware. It should also be noted that G.S. Sect. 84-28(b)(3) defines failure to answer a formal inquiry of the North Carolina State Bar as misconduct for which discipline is appropriate.

[2] This rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of the North Carolina Constitution. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 8.1 is identical to Model Rule 8.1 and Rule 1.1 of the superseded (1985) Rules of Professional Conduct.

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

The attorney was convicted in federal court of conspiracy to willfully misapply for his own use monies, funds and credits of a financial institution with intent to injure and defraud. Two-Year Suspension. 80 DHC 1.

The attorney took the LSAT and exchanged answers with another person to credit the other person with the attorney's high LSAT score. One-Year Suspension. 83 DHC 1.

Among other things, the attorney made false statements to the State Bar's Grievance Committee during a reciprocal disciplinary hearing. Disbarred. 91 DHC 13.

Attorney failed to respond to the State Bar regarding a grievance filed against him. Sixty-Day Suspension, stayed for thirty days. 93 DHC 6.

Among other things, attorney failed to respond to 12th Judicial District Bar's Grievance Committee regarding four grievances filed against him and misrepresented to committee chairperson that he had responded in two grievances. Five-Year Suspension, one year stayed upon certain conditions. 93 DHC 22 and 94 DHC 2.

Among other things, attorney knowingly made false statements of material fact on his application for admission to the State Bar. Disbarred. 93 DHC 33.

Assistant U.S. Attorney lied to defense counsel about timing of indictment in criminal case and then denied misconduct to the State Bar Grievance Committee. Reprimand. 96 DHC 9.

RULE 8.2 JUDGES AND OTHER ADJUDICATORY OFFICERS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. A lawyer should come to the defense of a member of the judiciary who the lawyer knows is being unjustly attacked.

[4] While a lawyer as a citizen has a right to criticize such officials publicly, the lawyer should be certain of the merit of the complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 8.2 is identical to Model Rule 8.2 and substantially similar to Rule 8.2 of the superseded (1985) Rules of Professional Conduct.

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the North Carolina State Bar or the court having jurisdiction over the matter.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the North Carolina Judicial Standards Commission or other appropriate authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6.

(d) A lawyer who has been disciplined in any state or federal court for a violation of the Rules of Professional Conduct in effect in such state or federal court will inform the secretary of such action in writing no later than 30 days after entry of the order of discipline.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] Although the North Carolina State Bar is always an appropriate place to report a violation of the Rules of Professional Conduct, the courts of North Carolina have concurrent jurisdiction over the conduct of the lawyers who appear

before them. Therefore, a lawyer's duty to report may be satisfied by reporting to the presiding judge the misconduct of any lawyer who is representing a client before the court. The court's authority to impose discipline on a lawyer found to have engaged in misconduct extends beyond the usual sanctions imposed in an order entered pursuant to Rule 11 of the North Carolina Rules of Civil Procedure.

[3] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[4] If a lawyer were obliged to report every violation of the rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[5] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

[6] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek treatment through such program. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. For this reason, Rule 1.6(b) includes in the definition of confidential information any information regarding a lawyer or judge seeking assistance that is received by a lawyer acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court. Because such information is protected from disclosure by Rule 1.6, a lawyer is exempt from the reporting requirements of paragraphs (a) and (b) with respect to such information. On the other hand, a lawyer who receives such information would nevertheless be required to comply with the Rule 8.3 reporting provisions to report misconduct if the impaired lawyer or judge indicates an intent to engage in illegal activity; for example, conversion of client funds to his or her use.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 8.3 is substantially similar to Model Rule 8.3 and Rule 1.3 of the superseded (1985) Rules of Professional Conduct.

CASE NOTES

Knowledge of a Clear Violation. - An allegation that an attorney and a district court judge knew that the plaintiff's attorney failed to perfect an appeal did not support an inference that defendants had "knowledge of a clear violation of DR1-102" which should have been reported to the State Bar, since there are many legitimate reasons why an appeal may not be perfected. *Williams v. Council of North Carolina State Bar,* 46 N.C. App. 824, 266 S.E.2d 391, *cert. denied*, 301 N.C. 106 (1980).

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

The attorney had unprivileged knowledge that his law partner had misappropriated client funds, but failed to report the misconduct to the Bar or other appropriate authority. Reprimand. 89 DHC 5.

ETHICS OPINION NOTES

CPR 342. An attorney is not obligated to report violations of the law committed by nonlawyers.

RPC 17. An attorney who acquires knowledge of apparent misconduct must report the matter to the State Bar.

RPC 84. An attorney may not condition settlement of a civil dispute on an agreement not to report lawyer misconduct.

RPC 127. An attorney must report information to the State Bar concerning another attorney's disbursement of conditionally delivered settlement proceeds without satisfying all conditions precedent if the disbursement was made in knowing disregard of such conditions and if such information is not confidential.

RPC 243. Opinion analyzes whether conduct "raises a substantial question" as to a lawyer's honesty, trustworthiness, or fitness so as to require reporting to the State Bar.

2001 Formal Ethics Opinion 5. Opinion rules that disclosures made during a LAP support group meeting are confidential and not reportable to the State Bar under Rule 8.3.

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3.

Comment

[1] Many kinds of illegal conduct reflect adversely on a lawyer's fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation. A lawyer's dishonesty, fraud, deceit, or misrepresentation is not mitigated by virtue of the fact that the victim may be the lawyer's partner or law firm. A lawyer who steals funds, for instance, is guilty of the most serious disciplinary violation regardless of whether the victim is the lawyer's employer, partner, law firm, client, or a third party.

[2] The purpose of professional discipline for misconduct is not punishment, but to protect the public, the courts, and the legal profession. Lawyer discipline affects only the lawyer's license to practice law. It does not result in incarceration. For this reason, to establish a violation of paragraph (b), the burden of proof is the same as for any other violation of the Rules of Professional Conduct: it must be shown by clear, cogent, and convincing evidence that the lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Conviction of a crime is conclusive evidence that the lawyer committed a criminal act although, to establish a violation of paragraph (b), it must be shown that the criminal act reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. If it is established by clear, cogent, and convincing evidence that a lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, the lawyer may be disciplined for a violation of paragraph (b) although the lawyer is never prosecuted or is acquitted or pardoned for the underlying criminal act.

[3] A showing of actual prejudice to the administration of justice is not required to establish a violation of paragraph (d). Rather, it must only be shown that the act had a reasonable likelihood of prejudicing the administration of justice. For example, in *State Bar v. DuMont*, 52 N.C. App. 1, 277 S.E.2d 827 (1981), *modified on other grounds*, 304 N.C. 627, 286 S.E.2d 89 (1982), the

defendant was disciplined for advising a witness to give false testimony in a deposition even though the witness corrected his statement prior to trial. The phrase "conduct prejudicial to the administration of justice" in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings. In *State Bar v. Jerry Wilson*, 82 DHC 1, for example, a lawyer was disciplined for conduct prejudicial to the administration of justice after forging another individual's name to a guarantee agreement, inducing his wife to notarize the forged agreement, and using the agreement to obtain funds.

[4] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent, and officer, director, or manager of a corporation or other organization.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 8.4 is similar to Model Rule 8.4 and Rule 1.2 of the superseded (1985) Rules of Professional Conduct, except that Rule 8.4 defines as misconduct an activity that intentionally prejudices or damages a client during the course of a professional relationship. Neither the Model Rules nor the superseded (1985) Rules contain this provision.

CASE NOTES

Concealment of Material Facts. - Intentionally encouraging the concealment of material facts relevant to the identity of the driver in a driving under the influence prosecution is prejudicial to the administration of justice. Such conduct raises serious doubts as to the attorney's desire to bring about a just result in such a prosecution and adversely reflects on the attorney's fitness to practice law. *North Carolina State Bar v. Graves*, 50 N.C. App. 450, 274 S.E.2d 396 (1981).

Misrepresentation as to Opposing Party's Whereabouts. - An attorney clearly engaged in conduct which involved fraud, dishonesty, deceit and misrepresentation when, in a divorce action, she failed to inform the court of a letter which contained the opposing party's return address, while at the same time presenting to the court an affidavit she had drafted in which her client swore that her husband's whereabouts were unknown and could not with due diligence be ascertained. *North Carolina State Bar v. Wilson*, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

Conversion of Client's Check. - An attorney's act of forging a client's endorsement on an insurance check received by the attorney and converting the check to personal use constituted conduct involving moral turpitude. *North Carolina State Bar v. Whitted*, 82 N.C. App. 531, 347 S.E.2d 60 (1986), *aff'd*, 319 N.C. 398, 354 S.E.2d 501 (1987).

Letter to Attorney Representing Former Clients. - Findings by Disciplinary Hearing Commission did not support the Commission's conclusion that the defendant-attorney had engaged in conduct prejudicial to the administration of justice by writing a letter to the attorney representing the defendant-attorney's former clients where the Commission's order did not state whether the letter constituted a threat, the nature of the threat, if any, and how the conduct was prejudicial to the administration of justice. *North Carolina State Bar v. Beaman*, 100 N.C. App. 677, 398 S.E.2d 68 (1990).

Misappropriation of Funds. - The attorney misappropriated client funds in violation of Rule 1.2(b) of the (Superseded) 1985 Rules of Professional Conduct. It was no defense that the attorney intended at all times to return the funds and in fact did so. Evidence sufficient to support a charge of embezzlement also constitutes conduct involving dishonesty in violation of Rule 1.2(c) of the 1985 Rules of Professional Conduct. *North Carolina State Bar v. Mulligan*, 101 N.C. App. 524, 400 S.E.2d 123 (1991).

Lending Money to Clients. - The State Bar's hearing committee's finding adequately supported its conclusion that the defendant violated Rules 2.1 and 5.3(B) of Professional Responsibility where the undisputed facts were that: (1) the defendant kept $ 20,000.00 in his trust account for several years which came from his brother's company, and (2) he loaned this money to three clients to pay for one client's surgery; another client's rent and payments on a car note; and a third client's surgical, medical and travel expenses. *North Carolina State Bar v. Harris,* 137 N.C. App. 207, 527 S.E.2d 728 (2000).

Cited in *North Carolina State Bar v. Nelson*, 107 N.C. App. 543, 421 S.E.2d 163 (1992).

Conviction of Crime. - Conviction of a crime is not a necessary element in a disciplinary proceeding. *North Carolina State Bar v. Rush*, 121 N.C. App. 488, 466 S.E.2d 340 (1996).

DISCIPLINARY HEARING NOTES

Editor's note: The Disciplinary Hearing Notes are no longer updated in the Lawyer's Handbook. Instead, all disciplinary cases are summarized in a searchable database found at our website (www.ncstatebar.org) under the menu heading "Disciplinary Orders."

The attorney used false statements in reports to banks to influence them to grant him loans. Two-Year Suspension. 77 DHC 9.

The attorney was convicted of conspiracy to manufacture, distribute and possess amphetamines. Disbarred. 77 DHC 11.

The attorney was found guilty of receiving stolen goods. Disbarred. 78 DHC 4.

The attorney pled guilty to the crime of embracery arising from an illegal contact with a juror in a pending case. Three-Year Suspension. 78 DHC 5.

The attorney was convicted in federal court of conspiracy willfully to misapply for his own use monies, funds and credits of a financial institution with intent to injure and defraud. Two-Year Suspension. 80 DHC 1.

The attorney agreed to undertake the task of obtaining access to his client's landlocked real property. The attorney failed to initiate any legal action on behalf of his client but delivered to the client a document which purported to be an Order of the Superior Court dismissing a petition for a cartway. The document, purportedly signed by a judge, and bearing the seal and signature of an assistant clerk, was totally fraudulent. One-Year Suspension. 81 DHC 1.

Among other things, the attorney knowingly used perjured testimony in an attempt to receive a set-off for federal estate taxes due and perpetrated a fraud upon a Florida court by false testimony. Disbarred. 81 DHC 2.

The attorney signed someone else's name to a guaranty agreement and falsely represented that the signature was authentic to obtain funds for his personal benefit. The attorney also instructed his wife, whose notary certificate had been revoked, to falsely witness and represent the signature to induce a bank to make funds available to the attorney. One-Year Suspension. 82 DHC 1.

The attorney failed to file an appeal on his client's behalf and later, in a letter to the State Bar concerning the matter, made false statements concerning the trial and his neglect in failing to file the record on appeal. Ninety-Day Suspension. 82 DHC 3.

The attorney failed to perfect an appeal for his client and instead filed a paper writing which purported to dismiss his client's appeal without the client's knowledge or consent and against the client's well-known wishes. Public Censure. 82 DHC 12.

The attorney took the LSAT and exchanged answers with another person to credit the other person with the attorney's high LSAT score. One-Year Suspension. 83 DHC 1.

The attorney endorsed a client's medical payment draft without the client's authorization, knowledge or consent, deposited the funds in his personal account and converted the funds. Disbarred. 84 DHC 4.

The attorney, while involved in a series of real estate transactions which required the defendant to deposit funds in a trust account, allowed the trust account balance to fall below the amount necessary to preserve the identity of his client's funds. The attorney used funds of one client to satisfy the obligations of another client and used clients' trust funds to satisfy his personal obligations. Disbarred. 84 DHC 5.

The attorney was appointed by the court to represent an indigent criminal defendant. After the case was concluded, he sought and accepted payment from the State without disclosing to the court that he had been previously paid by the client's father. Public Censure. 84 DHC 8.

Through a bank error, the attorney was left with $14,000 in his trust account following a loan closing. The attorney made no attempt to correct the error and used $10,660 for personal obligations. After realizing the seriousness of his actions, attorney took out a personal loan and repaid the funds to the rightful owner. One-Year Suspension. 84 DHC 11.

The attorney was convicted of conspiracy to conduct his judgeship through a pattern of racketeering activity by accepting bribes and of facilitating an inter-

state phone call with the intent to carry on the unlawful activity of gambling. Disbarred. 85 DHC 4.

The attorney attempted to coerce a favorable settlement in a civil case by threatening to expose the adverse party's alleged criminal conduct in an unrelated matter. Public Censure. 86 DHC 6.

The attorney attempted to induce a witness who had testified against the attorney in a prior disciplinary hearing to sign a false statement recanting his testimony in the prior hearing. Disbarred. 89 DHC 15.

The attorney prepared a codicil to her father's will when she knew or should have known that he lacked mental capacity to execute the codicil, thereby engaging in conduct prejudicial to the administration of justice and which adversely reflected upon her fitness to practice law, in violation of former DR1-102(A)(5) and DR1-102(A)(6). Public Reprimand. 89 DHC 21.

The attorney advised a defendant in a drug case, who was already represented by another attorney, that if the defendant hired him, the defendant would serve no active time. The attorney suggested that he could bring about the deal owing to his friendship with the trial judge and an SBI official. The attorney also attempted *ex parte* communications with the judge about his client's sentencing and asked a law enforcement officer to state falsely that the defendant had rendered substantial assistance to the sheriff's department. Disbarred. 89 DHC 30.

The attorney asked another attorney to sign a title opinion and other closing documents indicating that a prior loan owed by the first attorney would be paid off, then failed to pay off the loan. The attorney also obtained credit at a bank based upon a deposit of a $10,000 check which the attorney knew or should have known was worthless. Two-Year Suspension, stayed for three years on certain conditions, including restitution to banks. 90 DHC 20.

The attorney misappropriated funds belonging to an estate. Although the embezzlement was motivated in part by the attorney's addiction to cocaine, the attorney's drug use did not prevent him from recognizing the nature of his conduct and therefore did not mitigate his misconduct. Disbarred. 90 DHC 21.

The attorney made false statements to the State Bar's Grievance Committee during a reciprocal disciplinary hearing, lied to the State Bar's investigator regarding those false statements, and was untruthful during the disciplinary hearing. Disbarred. 91 DHC 13.

Among other things, the attorney made false statements to the State Bar's Grievance Committee during a reciprocal disciplinary hearing. Disbarred. 91 DHC 13.

The attorney charged an illegal rate of interest on a loan and lied to the debtor's attorney regarding balances owed on the loan. Two-Year Suspension. 91 DHC 20.

Among other things, the attorney failed to file income tax returns between 1985 and 1987. Five-Year Suspension, stayed on certain conditions. 91 DHC 22.

The attorney failed to file state income tax returns in 1988 and 1989. Five-Year Suspension, stayed on certain conditions. 91 DHC 23.

The attorney misrepresented to an administrative law judge and a state agency that he had been advised by the former chief administrative law judge to take certain actions on behalf of his client when, in fact, the attorney had not discussed that client's case with the former judge. Censure. 92 DHC 3.

Among other things, the attorney submitted false information on a fee petition in two social security cases. One-Year Suspension, stayed on certain conditions. 92 DHC 5.

The attorney represented the seller in commercial real estate transaction while he was also general partner of the buyer. The attorney also improperly directed a $165,000 credit to the buyer and a corresponding debit to the seller at the closing of the transaction without the seller's consent and paid himself $150,000 in attorneys' fees from funds held in escrow, in violation of the escrow agreement. Three-Year Suspension. 92 DHC 16.

An assistant district attorney engaged in conduct prejudicial to the administration of justice by failing to reveal certain aspects of a plea agreement to the court. Admonition. 92 DHC 18.

The attorney improperly retained interest earned on client funds and also retained at least $4,671.23 in overpayments on title insurance premiums collected from various clients. Three-Year Suspension, stayed 30 months. 92 DHC 19.

Attorney failed to respond to the State Bar regarding a grievance filed against him. Sixty-Day Suspension, stayed for thirty days. 93 DHC 6.

Attorney wrote checks to himself totalling $13,000 from an estate for commissions without approval of the clerk and without performing the normal duties of a personal representative. Disbarred. 93 DHC 2.

Among other things, attorney falsely indicated on clients' ledger cards that monies had been received and fees paid on their behalf. One-Year Suspension, stayed for three years upon certain conditions. 93 DHC 20.

Among other things, attorney failed to respond to 12th Judicial District Bar's Grievance Committee regarding four grievances filed against him and misrepresented to committee chairperson that he had responded in two grievances. Five-Year Suspension, one year stayed upon certain conditions. 93 DHC 22 and 94 DHC 2.

Attorney forged two attorneys' names to title opinions, temporarily misappropriated client funds, misappropriated fees belonging to her former law firm, made material misrepresentations on a resume given to her former law firm, and attempted to persuade a witness to change prior truthful statements the witness had given the State Bar. Disbarred. 93 DHC 29.

Attorney engaged in a check writing scheme involving writing checks from his trust account, business account, and personal account to cover worthless checks and removed funds from his trust account without the client's consent. Three-Year Suspension, stayed 33 months upon certain conditions. 93 DHC 31.

Among other things, attorney knowingly made false statements of material fact on his application for admission to the State Bar. Disbarred. 93 DHC 33.

Attorney engaged in unwanted touching of client. Three-year suspension, six months active and thirty months stayed upon certain conditions. 94 DHC 1.

Attorney made unwanted sexual advances to several female clients and thereby engaged in conflicts of interest and conduct prejudicial to the administration of justice. Disbarred. 95 DHC 13.

Attorney attempted to solicit fee-generating professional employment through in-person contacts with persons who had influence with the potential client in violation of superseded Rules 1.2(a) and 2.4(a). Six-Month Suspension, stayed two years on certain conditions. 96 DHC 3.

Assistant U.S. Attorney lied to defense counsel about timing of indictment in criminal case and then denied misconduct to the State Bar Grievance Committee. Reprimand. 96 DHC 9.

Attorney told client that attorney could use influence with prosecutor to get murder charge pending against client dismissed on payment of $10,000 fee, concealing fact that District Attorney had already decided to dismiss charge for lack of evidence. After client discovered deception and demanded return of fee, attorney threatened to reveal confidential communications of client. Attorney engaged in criminal and fraudulent conduct, implied ability to influence government official and collected excessive fee. Disbarred. 97 DHC 12.

ETHICS OPINION NOTES

CPR 110. An attorney may not advise a client to seek Dominican divorce knowing that the client will return immediately to North Carolina and continue residence.

CPR 168. An attorney may file personal bankruptcy.

CPR 188. An attorney may not draw deeds or other legal instruments based on land surveys made by unregistered land surveyors.

CPR 342. An attorney should not close a loan where the transaction is conditioned by the lender upon the placement of title insurance with a particular company.

CPR 369. An attorney may close a loan if the lender merely suggests rather than requires the placement of title insurance with a particular company.

RPC 127. An attorney may not deliberately release settlement proceeds which were conditionally delivered without satisfying all conditions precedent.

RPC 136. An attorney may notarize documents which are to be used in legal proceedings in which the attorney appears.

RPC 143. A lawyer who represents or has represented a member of the city council may represent another client before the council provided the lawyer does not attempt improperly to influence the council.

RPC 152. The prosecutor and the defense attorney must see that all material terms of a negotiated plea are disclosed in response to direct questions when the plea is entered in open court.

RPC 159. An attorney may not participate in the resolution of a civil dispute involving allegations against a psychotherapist of sexual involvement with a

patient if the settlement is conditioned upon the agreement of the complaining party not to report the misconduct to the appropriate licensing board.

RPC 162. A lawyer may not communicate with the opposing party's non-party treating physician about the physician's treatment of the opposing party unless the opposing party consents.

RPC 171. A lawyer may tape record a conversation with an opposing lawyer without disclosure to the opposing lawyer.

RPC 180. A lawyer may not passively listen while the opposing party's non-party treating physician comments on his or her treatment of the opposing party unless the opposing party consents to the communication.

RPC 192. A lawyer may not listen to an illegal tape recording made by his client nor may he use the information on the illegal tape recording to advance his client's case.

RPC 197. A prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.

RPC 204. It is prejudicial to the administration of justice for a prosecutor to offer special treatment to individuals charged with traffic offenses or minor crimes in exchange for a direct charitable contribution to the local school system.

RPC 221. Absent a court order or law requiring delivery of physical evidence of a crime to the authorities, a lawyer for a criminal defendant may take possession of evidence that is not contraband to examine, test, or inspect the evidence. The lawyer must return inculpatory physical evidence that is not contraband to the source and advise the source of the legal consequences pertaining to the possession or destruction of the evidence.

RPC 236. A lawyer may not issue a subpoena containing misrepresentations as to the pendency of an action, the date or location of a hearing, or a lawyer's authority to obtain documentary evidence.

RPC 243. It is prejudicial to the administration of justice for a prosecutor to threaten to use his discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant.

98 Formal Ethics Opinion 2. Opinion rules that a lawyer may explain the effect of service of process to a client but may not advise a client to evade service of process.

98 Formal Ethics Opinion 19. Opinion provides guidelines for a lawyer representing a client with a civil claim that also constitutes a crime.

99 Formal Ethics Opinion 2. Opinion rules that a defense lawyer may suggest that the records custodian of plaintiff's medical record deliver the medical record to the lawyer's office in lieu of an appearance at a noticed deposition provided the plaintiff's lawyer consents.

2000 FEO 8. Opinion rules that a lawyer acting as a notary must follow the law when acknowledging a signature on a document.

2001 Formal Ethics Opinion 12. Opinion rules that a closing lawyer may not counsel or assist a client to affix excess excise tax stamps on an instrument for registration with the register of deeds.

RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW.

(a) *Disciplinary Authority*. A lawyer admitted to practice in North Carolina is subject to the disciplinary authority of North Carolina regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both North Carolina and another jurisdiction where the lawyer is admitted for the same conduct.

(b) *Choice of Law*. In any exercise of the disciplinary authority of North Carolina, the Rules of Professional Conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice, either generally or for purposes of that proceeding, the rules to be applied shall be the rules of the jurisdiction in which the court sits unless the rules of the court provide otherwise; and

(2) for any other conduct:

(i) if the lawyer is licensed to practice only in North Carolina, the rules to be applied shall be the rules of North Carolina, and

(ii) if the lawyer is licensed to practice in North Carolina and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Comment

Disciplinary Authority

[1] Paragraph (a) restates long-standing law.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in North Carolina and one or more other jurisdictions with differing rules, or may be admitted to practice before a particular court with rules that differ from those of North Carolina or other jurisdictions in which the lawyer is licensed to practice. In the past, decisions have not developed clear or consistent guidance as to which rules apply in such circumstances.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession as well as the bodies having authority to regulate the profession. Accordingly, it takes the approach of (i) providing that any particular conduct of an attorney shall be subject to only one set of rules of professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

[4] Paragraph (b) provides that, as to a lawyer's conduct relating to a proceeding in a court before which the lawyer is admitted to practice, either generally or *pro hac vice*, the lawyer shall be subject only to the rules of professional conduct of that court. As to all other conduct, paragraph (b) provides that a lawyer licensed to practice only in North Carolina shall be subject to the Rules of Professional Conduct of the North Carolina State Bar, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she, as an individual not his or her firm, principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.

[5] If North Carolina and another admitting jurisdiction were to proceed against a lawyer for the same conduct, the two jurisdictions should, applying this rule, identify the same governing ethics rules.

[6] The choice of law provision is not intended to apply to transnational practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.

History Note: Statutory Authority G.S. 84-23

Adopted July 24, 1997

Editor's Note: Rule 8.5 is identical to Model Rule 8.5. Rule 8.5 has no counterpart in the superseded (1985) Rules of Professional Conduct.

Correlation Table 1: Revised Rules of Professional Conduct and Superseded N.C. Rules of Professional Conduct (1985)

Revised Rules of Professional Conduct	Superseded N.C. Rules of Professional Conduct (1985)
Rule 1.1	Rule 6(a)
Rule 1.2(a)(1)	Rule 7.1(c)(1)
(a)(2)	(a)(1)
(a)(3)	(b)(1)
(b)	*
(c)	(b)(3)
(d)	(a)(4)
(e)	(c)(2)
Rule 1.3	Rule 6(b)(3)
Rule 1.4	Rule 6(b)(1) - (2)
Rule 1.5(a) - (b)	Rule 2.6(a) - (b)
(c)	*
(d) - (f)	(c) - (e)
Rule 1.6(a) - (b)	Rule 4(a)
(c)	(b)
(d)(1) - (4)	(c)(1) - (4)
(d)(5)	*
(d)(6) - (7)	(c)(5) - (6)
Rule 1.7	Rule 5.1(a) - (c)
Rule 1.8(a)	Rule 5.4(a)
(b)	(c)
(c)	Rule 5.5
(d)	Rule 5.4(b)
(e)	Rule 5.3(b)
(f)	Rule 5.6
(g)	Rule 5.7
(h)	Rule 5.8
(i)	Rule 5.9
(j)	Rule 5.3(a)
Rule 1.9(a)	Rule 5.1(d)
(b)	Rule 5.11(b)
(c)	*
Rule 1.10(a)	Rule 5.11(a)
(b) - (c)	(c) - (d)
Rule 1.11	Rule 9.1
Rule 1.12	Rule 9.2
Rule 1.13(a)	Rule 5.10
(b) - (e)	*
Rule 1.14	*
Rule 1.15-1	Rule 10.1
Rule 1.15-2	Rule 10.2
Rule 1.15-3	Rule 10.3
Rule 1.16(a)(1)	Rule 2.8(b)(2)
(a)(2)	(b)(1)
(a)(3) - (4)	(b)(3) - (4)

Revised Rules of Professional Conduct (cont.)	Superseded N.C. Rules of Professional Conduct (1985) (cont.)
Rule 1.16(b)(1)	Rule 2.8(c)(5)
(b)(2)	(c)(1)(G); (c)(1)(B)
(b)(3)	(c)(1)(E)
(b)(4)	(c)(1)(F)
(b)(5)	(c)(1)(D)
(b)(6)	(c)(1)(A)
(b)(7)	(c)(6)
(c) - (d)	(a)(1) - (3)
Rule 1.17	*
Rule 1.18	*
Rule 2.1	*
Rule 2.2	*
Rule 2.3	*
Rule 3.1	Rule 7.2(a)(1) - (2)
Rule 3.2	*
Rule 3.3(a)(1)	Rule 7.2(a)(4)
(a)(2)	*See* 7.2(a)(8)
(a)(3)	Rule 7.6(b)(1)
(a)(4)	Rule 7.2(a)(5) - (6); *see also* 7.2(b)
(b) - (d)	*
Rule 3.4(a)	Rule 7.2(a)(7)
(b)	Rule 7.9(a) - (c)
(c)	Rule 7.6(a)
(d)	*
(e)	Rule 7.6(c)(1) - (4)
(f)	Rule 7.9(d)
Rule 3.5(a)(1)	*See* Rule 7.10(a); Rule 7.8
(a)(2)	Rule 7.8(a) - (b)
(a)(3)	Rule 7.10(b)
(a)(4)	Rule 7.6(c)(5) - (8)
(a)(5)	Rule 7.8(d)
(b) - (c)	Rule 7.8(f) - (g)
Rule 3.6	Rule 7.7
Rule 3.7(a)	Rule 5.2(a)
(b)	*
Rule 3.8(a) - (e)	Rule 7.3
(f) - (g)	*
Rule 4.1	*
Rule 4.2(a)	Rule 7.4(1)
(b)	*
Rule 4.3	Rule 7.4(2) - (3)
Rule 4.4	*
Rule 5.1	*
Rule 5.2	*
Rule 5.3	Rule 3.3

Revised Rules of Professional Conduct (cont.)	Superseded N.C. Rules of Professional Conduct (1985)
Rule 5.4(a)(1)	Rule 3.2(a)
(a)(2)	*
(a)(3) - (4)	Rule 3.2(b) - (c)
Rule 5.4(b) - (d)	*
Rule 5.5(a)	Rule 3.1(b)
(b)	(a)
(c) - (d)	(c) - (d)
Rule 5.6	Rule 2.7
Rule 6.1 Reserved	
Rule 6.2 Reserved	
Rule 6.3	*
Rule 6.4	*
Rule 6.5	Rule 8.1
Rule 7.1	Rule 2.1
Rule 7.2(a) - (b)	Rule 2.2(a) - (b)
(c)	(e)
(d)(1)	(c)
(d)(2)	*
(e)(1)	(d)
(e)(2)	(c)(3)
(e)(3)	(c)(1) - (2)
(e)(4)	*See* (c)(3)
(e)(5)	(c)(4)
(e)(6)	*
(e)(7)(i)	(c)(5)(B)
(e)(7)(ii)	*
Rule 7.3	Rule 2.4
Rule 7.4(a)	*
(b) - (c)	Rule 2.5(a) - (b)
Rule 7.5	Rule 2.3
Rule 8.1	Rule 1.1
Rule 8.2	Rule 8.2
Rule 8.3	Rule 1.3
Rule 8.4(a) - (f)	Rule 1.2
(g)	*
Rule 8.5	*

Correlation Table 2: Superseded N.C. Rules of Professional Conduct, Revised Rules of Professional Conduct, and Superseded Code of Professional Responsibility

Superseded N.C. Rules of Professional Conduct (1985)	Revised Rules of Professional Conduct	Superseded Code of Professional Responsibility (Disciplinary Rules)
Rule 1.1	Rule 8.1	DR1-101
Rule 1.2	Rule 8.4(a) - (f)	DR1-102
Rule 1.3	Rule 8.3	DR1-103
Rule 2.1	Rule 7.1	DR2-101
Rule 2.2(a) - (b)	Rule 7.2(a) - (b)	DR2-103
(c)	(d)(1)	*
(c)(1)	(e)(3)	*
(c)(2)	(e)(3)	*
(c)(3)	(e)(2); *see* (e)(4)	*
(c)(4)	(e)(5)	*
(c)(5)(A)	*	*
(c)(5)(B)	(e)(7)(i)	*
(c)(5)(C)	*	*
(d)	(e)(1)	*
(e)	(c)	*
Rule 2.3	Rule 7.5	DR2-102
Rule 2.4	Rule 7.3	DR2-103(A)
Rule 2.5(a)	Rule 7.4(b)	DR2-105
(b)(1) - (3)	(c)(1) - (3)	*
Rule 2.6(a) - (b)	Rule 1.5(a) - (b)	DR2-106
(c)	(d)(1) - (2)	*
(d) - (e)	(e) - (f)	DR2-107
Rule 2.7	Rule 5.6	*
Rule 2.8(a)(1)	Rule 1.16(c)	DR2-110
(a)(2) - (3)	(d)	*
(b)(1)	(a)(2)	*
(b)(2)	(a)(1)	*
(b)(3) - (4)	(a)(3) - (4)	*
(c)(1)(A)	(b)(6)	*
(c)(1)(B)	(b)(2)	*
(c)(1)(C)	(b)(3)	*
(c)(1)(D)	(b)(5)	*
(c)(1)(E)	(b)(3)	*
(c)(1)(F)	(b)(4)	*
(c)(1)(G)	(b)(2)	*
(c)(2) - (4)	*	*
(c)(5)	(b)(1)	*
(c)(6)	(b)(7)	*
Rule 3.1(a)	Rule 5.5(b)	DR3-101
(b)	(a)	*
(c) - (d)	(c) - (d)	*
Rule 3.2(a)	Rule 5.4(a)(1)	DR3-102
(b)	Rule 5.4(a)(3)	*
(c)	(a)(4)	*
Rule 3.3	Rule 5.3	*

Superseded N.C. Rules of Professional Conduct (1985)	Revised Rules of Professional Conduct	Superseded Code of Professional Responsibility (Disciplinary Rules)
Rule 4(a)	Rule 1.6(a) - (b)	DR4-101
(b)(1) - (3)	(c)(1) - (3)	*
(c)(1) - (4)	(d)(1) - (4)	*
(c)(5) - (6)	(d)(6) - (7)	*
Rule 5.1(a) - (c)	Rule 1.7	DR5-101(A)
*	*	DR5-105
(d)	Rule 1.9(a)	*
Rule 5.2(a)	Rule 3.7(a)	DR5-101(B)
(b) - (c)	*	DR5-102
Rule 5.3(a)	Rule 1.8(j)	DR5-103
(b)	(e)	*
Rule 5.4(a)	Rule 1.8(a)	DR5-104
(b)	(d)	*
(c)	(b)	*
Rule 5.5	Rule 1.8(c)	*
Rule 5.6	Rule 1.8(f)	DR5-107
Rule 5.7	Rule 1.8(g)	DR5-106
Rule 5.8	Rule 1.8(h)	DR6-102
Rule 5.9	Rule 1.8(i)	*
Rule 5.10	Rule 1.13(a)	*
Rule 5.11(a)	Rule 1.10(a)	*
(b)	Rule 1.9(b)	*
(c)	Rule 1.10(b)	*
(d)	(c)	*
Rule 6(a)(1) - (2)	Rule 1.1(a) - (b)	DR6-101
(b)(1)	Rule 1.4(a)	*
(b)(2)	(b)	*
(b)(3)	Rule 1.3	*
Rule 7.1(a)(1)	Rule 1.2(a)	DR7-101
(a)(2) - (3)	*	*
(a)(4)	(d)	*
(b)(1)	(a)(3)	*
(b)(2)	*	*
(b)(3)	(c)	*
(c)(1)	(a)(1)	*
(c)(2)	(e)	*
Rule 7.2(a)(1) - (2)	Rule 3.1; *see* 1.16(a)(2)	DR2-109
*	*	DR7-102
(a)(3)	*	*
(a)(4)	Rule 3.3(a)(1)	*
(a)(5)	(a)(4)	*
(a)(6)	Rule 3.3(a)(4)	*
(a)(7)	Rule 3.4(a)	*
(a)(8) - (9)	*See* Rule 3.3(a)(2)	*
(b)	Rule 3.3(a)(4)	*
Rule 7.3	Rule 3.8(a) - (e)	DR7-103
Rule 7.4(1)	Rule 4.2(a)	DR7-104
(2) - (3)	Rule 4.3(1) - (2)	*
Rule 7.5	*	DR7-105
Rule 7.6(a)	Rule 3.4(c)	DR7-106
(b)(1)	Rule 3.3(a)(3)	*
(b)(2)	*	*
(c)(1) - (4)	Rule 3.4(e)	*
(c)(5)	Rule 3.5(a)(4)(i)	*

Superseded N.C. Rules of Professional Conduct (1985)	Revised Rules of Professional Conduct	Superseded Code of Professional Responsibility (Disciplinary Rules)
(c)(6)	(a)(4)(ii)	*
(c)(7)	(a)(4)(iii)	*
(c)(8)	(a)(4)	*
Rule 7.7	Rule 3.6	DR7-107
Rule 7.8(a) - (b)	Rule 3.5(a)(2)	DR7-108
(c)	*	*
(d)	(a)(5)	*
(e)	*	*
(f)	Rule 3.5(b)	*
(g)	(c)	*
Rule 7.9(a) - (c)	Rule 3.4(b)	DR7-109
(d)	(f)	*
Rule 7.10(a)	*See* Rule 3.5(a)(1)	DR7-110
(b)	(a)(3)	*
Rule 8.1	Rule 6.5	DR8-101
Rule 8.2	Rule 8.2	DR8-102
Rule 9.1	Rule 1.11	DR9-101
Rule 9.2	Rule 1.12	DR9-101
Rule 10.1	Rule 1.15-1	DR9-102
Rule 10.2	Rule 1.15-2	DR9-102
Rule 10.3	Rule 1.15-3	*

Ethics Opinions

Editor's Note

Immediately following this note are 252 ethics opinions, or "RPCs," promulgated under the now-superseded (1985) Rules of Professional Conduct (effective from January 1, 1986, until July 24, 1997). The ethics opinions adopted under the Revised Rules of Professional Conduct (effective July 24, 1997) follow the RPCs and are designated as "Formal Ethics Opinions." Each RPC bears the identifying number assigned to it at the time of its initial publication in the State Bar's quarterly publication. The Formal Ethics Opinions, on the other hand, are identified by the year of initial publication in the State Bar *Journal* and are numbered serially. After the designation for each opinion is the date upon which the Council of the North Carolina State Bar adopted the opinion, a topical headnote, a short summary of the opinion, and the full text of the opinion itself. Please note that the head note and the summary are unofficial and provided only as research aids. Editor's notes are provided for some opinions. These notes provide information on the genesis of the opinion or references to related opinions and rules.

Although the RPCs were adopted under the superseded (1985) Rules of Professional Conduct, they still provide guidance on issues of professional conduct except to the extent that a particular opinion is overruled by a subsequent opinion or by a provision of the Revised Rules of Professional Conduct. A researcher should check the text of the Revised Rules as well as the index that follows the opinions to be sure that all subsequent history is considered. During the year following the publication of the *Handbook*, a researcher should also check all intervening editions of the State Bar *Journal* or the State Bar website, www.ncstatebar.org, for more recently adopted ethics opinions.

RPC 1

January 17, 1986

Bail-Bondsman Investigator

Opinion rules that a lawyer may not employ a bail-bondsman as regular part-time investigator.

Inquiry:

Attorney A is a licensed attorney in private practice in North Carolina. Attorney A would like to hire B as a part-time private investigator. B currently works both as a licensed private investigator and a licensed bail-bondsman. Attorney A wishes to enter into a contractual arrangement by which he would pay B a set monthly fee for private investigation services.

Attorney A has never received a client as a result of B's bail-bond business. He has asked B to write bonds for 4 or 5 clients, and B has done so on all but one of those occasions. Attorney A has no other connection with B's bail-bond business and does not anticipate any change in that situation.

B wishes to retain his bail-bond license and to continue to work part-time as a bail-bondsman. If Attorney A retains B on a regular basis as a part-time investigator, B's bail-bond business would remain entirely separate and independent of Attorney A's legal practice except that Attorney A would probably, on occasion, request that B write a bail-bond for one of Attorney A's clients. Attorney A would have nothing else to do with B's bail-bond business and would observe strictly the prohibition of an attorney's owning or operating a bail-bond business.

May Attorney A ethically enter into a contractual relationship with B for regular part-time private investigation services under the conditions set out above? If so, may Attorney A list him on his letterhead as a licensed private investigator on Attorney A's staff?

Opinion

No. The proposed contractual relationship gives an appearance of impropriety.

RPC 2

January 17, 1986

Contingent Fees in Child-Support Cases

Opinion rules that a lawyer may charge a contingent fee to recover child support payments.

Inquiry:

A and B were formerly married and are the parents of C. A has custody of C pursuant to court order. B is required by court order to make specific child support payments, but B is currently in arrears in his child support payments in a definite sum.

May Lawyer L ethically represent A in a child support enforcement action against B upon a fee contract specifying an agreed percentage of such monies collected?

Opinion:

Lawyer L's proposal for a fee arrangement with A contemplates a contingent fee payable upon collection of specific amounts of past due child support payments. Rule 2.6(a) prohibits an illegal fee arrangement or collection of an illegal or clearly excessive fee. Numerous factors are to be considered in determining whether a fee is excessive. Contingent fees are only explicitly prohibited in criminal cases. Rule 2.6(c). Contingent fees also appear to be prohibited in North Carolina, as a result of a decision of the North Carolina Court of Appeals, if the contract makes the fee contingent upon procuring a divorce or upon the amount of alimony and/or property awarded in a divorce case. *Thompson v. Thompson*, 70 N.C. App. 147, 319 S.E.2d 315 (1984), *rev. on other grounds*, 313 N.C. 313, 328 S.E.2d 288 (1985).

Many jurisdictions, like North Carolina, hold contingent fee arrangements in domestic relations actions void as against public policy where the fee is contingent upon procuring a divorce or the amount of alimony or child support payments, or property settlement in lieu thereof, to be awarded. *See* Speiser, Attorneys' Fees §2:6 (1973). However, most jurisdictions which have considered the issue of contingent fees for attorney efforts to collect specific amounts of past due support payments owed pursuant to contract or prior court order have concluded that such arrangements do not violate the public policy prohibiting contingent fee contracts in divorce actions based upon the amount of alimony or child support to be awarded or on a property settlement in lieu thereof. Bar organizations reaching these conclusions include Florida (*See* Lawyers' Manual on Professional Conduct 801:2501), the Birmingham Bar Association (*See* Lawyers' Manual on Professional Conduct (801:1103), and New York County Bar Organization (*See* Lawyers' Manual on Professional Conduct 280).

A lawyer is not necessarily prohibited from entering into a contingent fee arrangement for collection of liquidated amounts of past due support. However, the lawyer must always keep in mind the prohibition against entering into an agreement for, charging, or collecting an excessive fee and the factors listed in Rule 2.6(b). If, for example, collection of the past due child support appears to be relatively simple and assured because of known assets or garnishment procedures available to lawyer L's client, a contingent fee may be inappropriate as resulting in an excessive fee in view of the time and labor involved, novelty and difficulty or lack thereof of the questions involved, skill necessary to perform the legal service properly, likelihood or lack thereof that acceptance of the employment will preclude other employment by the attorney, fee normally charged for similar circumstances, and other factors. The attorney may need to charge a significantly smaller percentage than in cases, such as personal injury actions, where any recovery at all or the amount likely to be recovered may be highly speculative. Where a client is currently unable to pay an attorney for services in collecting child support or alimony payments, which have been reduced to a sum certain and are currently in arrears, an attorney may wish to enter into an agreement by which the client simply defers pay-

ment until a later date with an interest charge where the procedures involved are neither novel nor unduly difficult and where known assets or attachment or garnishment procedures are apparently available for collection on the past due support payments. Alternatively, a contingent fee contract might provide for a substantially smaller percentage of the amount collected than in other types of contingency cases.

Lawyer L is not automatically prohibited from entering into a contingent fee arrangement with A in a child support enforcement action against B in the action for collection of specific past due child support payments, but may wish to consider whether a contingent fee arrangement will result in or may result in an excessive fee, at least if the agreement is for the usual percentage in cases handled on a contingent fee basis where success or the amount to be obtained may be far more speculative.

RPC 3

April 18, 1986

Lawyer as Trustee

Opinion rules that lawyer may act as Trustee after having represented the seller.

Inquiry:

Attorney A is the Trustee under a Purchase Money Deed of Trust securing a Purchase Money Note representing part of the purchase price of a tract of land sold by Seller to Buyer. Attorney A represented Seller in the negotiations concerning the Note and Deed of Trust prior to closing. Attorney B represented Buyer throughout these negotiations and continues to do so. Attorney A was named as Trustee in the Purchase Money Deed of Trust, which was duly recorded.

Subsequently, Seller instructed Attorney A to commence foreclosure proceedings as Trustee, which Attorney A did. Attorney A instructed Seller to retain separate counsel. Seller is now represented by Attorney C. Buyer was served with notice of the foreclosure proceeding, and a hearing was duly held before the Clerk of Superior Court. As Trustee, Attorney A took no active role at the hearing. Attorney C presented the evidence on behalf of the Seller while Attorney B, representing Buyer, contested the foreclosure, disputing that default existed and arguing for a different interpretation of the documents.

At the foreclosure hearing, Attorney B filed a Motion to have Attorney A disqualified and removed as Trustee, citing Attorney A's prior representation of Seller at closing, his continued representation of Seller thereafter, his participation in negotiation of the documents now in dispute, a general appearance of impropriety, and an alleged duty of the Trustee to determine the existence of default in an impartial manner.

Does Attorney A, as Trustee, in fact have a duty to investigate the facts supporting the alleged existence of default, or make any determination of default in such capacity, other than his ministerial duties involving commencement of the proceeding, service on the appropriate parties, and conducting the public sale as so ordered by the Court? Under these circumstances, must Attorney A resign as Trustee from a contested foreclosure hearing by reason of his prior representation of Seller at closing, his participation in the negotiation of the documents in dispute, his subsequent continual representation of the Seller on other unrelated matters, or a general appearance of impropriety by reason of his prior representation of Seller?

Opinion:

Precise definition of the duties of the Trustee require a legal interpretation, not within the realm of the Ethics Committee or the North Carolina State Bar. Prior opinions considering the situation of the attorney who represented one of the parties to a transaction and who is also Trustee have required the attorney either to resign as Trustee if he wishes to represent his client in a contested foreclosure proceeding or related proceedings or to continue serving as Trustee without representing any party once the foreclosure proceeding becomes contested, in the foreclosure proceeding itself or in related proceedings. *See* CPRs 305, 297, 220, 201, 166, 137, and 94. These CPRs have recognized that the Trustee owes a duty of impartiality to both parties which is inconsistent with representing one of the parties in a contested proceeding. However, no prior opinion has held that the Trustee may not serve as Trustee because of prior representation of one of the parties where he does not continue to represent either party in the contested foreclosure or related proceedings. Generally, when an attorney is required to withdraw from representation or from a fiduciary role, it is either because of concerns of confidences of the client under Rule 4 and its predecessors or because of conflicts of interest under Rule 5.1 or its predecessors where the attorney would be put in the position of inconsistent roles or obligations at the same time or in the same proceeding. Since neither of those circumstances exist, and the rules do not appear to be directly relevant by their terms or with regard to their purposes, Attorney A is not ethically prohibited from continuing to serve as Trustee in a contested foreclosure matter, despite his prior representation of Seller, where he does not currently represent Seller in the foreclosure or related proceedings. This opinion does not attempt to interpret statutory or case law as to the duties of the Trustee or any legal restrictions upon his eligibility to serve as Trustee.

RPC 4

April 18, 1986

Handling of Client Money by Public Defender

Opinion rules that money belonging to an incarcerated client may be handled by the Public Defender as a favor and must be deposited into a trust account.

Inquiry:

Attorney A works in the office of a Public Defender in one of the Judicial Districts in North Carolina. The Public Defender's office does not maintain bank accounts or trust accounts of any kind. From time to time, clients in jail request that lawyers in the Public Defender's Office "do them a favor" such as getting a check cashed, sending a money order, or cashing a money order. Attorney A is sometimes asked by a client in jail to cash a check payable to and endorsed by the client and return the proceeds to the client. Attorney A is sometimes asked also by a client in jail to take a sum of money provided by the client to purchase a money order payable to a relative of the client. Attorney A may also be asked by a client in jail to have a relative or friend of the client send a money order payable to the attorney and then to pay the proceeds of the money order to the client.

May Attorney A perform any of these services for a client in jail? If so, what accounting procedures are necessary? Would a trust account be required?

Opinion:

Nothing in the Rules of Professional Conduct prohibits an attorney from performing a favor for his clients such as cashing a money order, purchasing a money order, or cashing a check for him. Rule 10.1(c) requires an attorney to deposit all money or funds received from a client or from a third party to be delivered to a client into a trust account and then make all disbursements as appropriate, from that trust account.

RPC 5

April 18, 1986

The Lawyer as "Doctor"

Opinion rules that attorney holding a Juris Doctor degree may not on that basis refer to himself as holding a Doctorate or use the term "Doctor" to refer to himself.

Inquiry:

Attorney X is licensed to practice law in the State of North Carolina and holds a Juris Doctor degree from an accredited university. May Attorney X ethically hold himself out as having a Doctorate, using the term "Doctor" in oral communication, referring to himself as Dr. X, and signing his name Dr. X?

Opinion:

Under the new North Carolina Rules of Professional Conduct, it is impermissible under Rule 1.2(c) to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation and impermissible under Rule 2.1 to make a false or misleading communication about the lawyer or the lawyer's services. Other jurisdictions which have considered this question have ruled both ways. Since it does not appear to be normal practice to refer to a Juris Doctor degree as simply a Doctorate or to refer to an attorney holding a Juris Doctor degree as "Doctor," the use of those terms without explanation could be misleading and therefore is inappropriate.

RPC 6

April 18, 1986

Solicitation of Corporate Clients

Opinion rules that lawyers may not solicit corporate clients.

Inquiry:

Attorney A would like to be able to contact an officer of a corporation, the managing or general partner of a partnership, or an executive officer of some other form of business entity or institution, the entity or institution being a prospective client, in person, by telephone or by mail, for purposes of informing the prospective client of the types of law practice in which the law firm of which the contacting lawyer is a member, engages. Attorney A would furnish information in verbal and printed form as to the professional personnel of the firm, their educational backgrounds, fields of practice and biographical data. Attorney A would also inform the prospective client of the fees and charges made by the law firm for legal services and express a desire on the part of the law firm to be considered for employment by the prospective client in connection with any legal matters requiring consultation or representation. It is assumed that Attorney A has no family or prior professional relationship with the officer, director or partner of the prospective client who is contacted, and no prior relationship with the client. A significant motive for the contact would be pecuniary gain, specifically obtaining representation of the prospective client. It is assumed that there would be no fraud, deceit or misrepresentation in connection with the contact or any communications made pursuant thereto. It is also assumed that Attorney A would not be aware of any specific matter of suit or proceeding by or against the prospective client and therefore would not be making the contact with view to obtaining representation in a particular matter; however, Attorney A would be contacting an entity which he knows or believes routinely employs counsel in the ordinary course of its business to perform a variety of legal services.

May Attorney A as an individual or on behalf of a law firm make the contacts or communications as proposed? If so, would he be able to do so under circumstances in which he is aware of a specific matter or suit or proceeding by or against the prospective client and makes the contact with a view to obtaining representation in that matter? Does it make any difference if he makes the contact with the view to obtaining representation in connection with specific types or kinds of matters of a specialized nature rather than a general representation?

Opinion:

No, Attorney A may not make such contacts under any of the circumstances outlined in the Inquiry. Rule 2.4 prohibits an attorney from soliciting employment from a prospective client with whom he has no prior relationship, whether by mail, in person, or otherwise, if a significant motive is the lawyer's pecuniary gain. There is an exception for general mailings or circulars distributed on a broad basis as such distributions are more in the nature of advertising. However, the contacts proposed by Attorney A are all ones to specific entities rather than general distribution of material. Rule 2.4 forbids the conduct proposed by Attorney A under any of the circumstances described.

RPC 7

July 25, 1986

Employment of Collection Agency

Opinion rules that a lawyer may employ a collection agency to collect past due fees under certain circumstances.

Inquiry:

A collection agency has approached several lawyers about collecting the lawyer's uncollectible and/or past due accounts for legal services. May an attorney licensed and practicing in North Carolina ethically turn over past due and/or delinquent accounts for legal services to be collected by a collection agency either on a straight fee basis and/or a percentage of any amount collected?

Opinion:

Yes. However, there are limits on the circumstances under which a lawyer personally may undertake to collect a delinquent client account. Additional limits are imposed by the lawyer's employment of another to undertake that effort on his behalf. Accordingly, a lawyer may employ the services of an agency to collect a delinquent account only so long as -

1. The fee agreement out of which the account arose was permitted by law and by the Canons and Rules of Professional Conduct. Rule 2.6(a), (b), (c), and (d), North Carolina Rules of Professional Conduct (NCRPC).

2. The lawyer, at the time of making the fee agreement out of which the account arose, did not believe, and had no reason to believe, that he was undertaking to represent a client who was unable to afford his services. Cannon II; Preamble, Paragraph Five, NCRPC; Rule 7.1, comment, NCRPC.

3. The legal services, giving rise to the fee out of which the account arose, have been completed so that the lawyer has no further responsibilities as the client's attorney. *See* Rule 5.1(b) and Rule 5.1, comment, Paragraph Five, NCRPC.

4. There is no genuine dispute between the lawyer and the client about the existence, amount, or delinquent status of the indebtedness. *See* Rule 2.6, comment, Paragraph Three, NCRPC.

5. The lawyer does not believe, and has no reason to believe, that the agency which he employs will use any illegal means, such as those prohibited by North Carolina General Statutes Sections 66-49.43 through 49.47, in its effort to collect the account. Rule 1.2, NCRPC; Preamble, Paragraph Four, NCRPC.

If these criteria are met, a lawyer may employ an agency to collect a delinquent client account, and he or she may agree to compensate the agency by any appropriate means, including compensation on the basis of a percentage of the amount collected.

It is true that the North Carolina Rules of Professional Conduct generally prohibit the sharing of legal fees with a nonlawyer. Rule 3.2, NCRPC. This general prohibition arises out of the requirement that a lawyer "assist in preventing the unauthorized practice of law." Canon III, NCRPC The purpose of the Rule is to further one of the principles underlying the Canon by "protect[ing] the lawyer's professional independence of judgment." Comment, Rule 3.2, NCRPC. The delinquent status of the account pre-supposes (as is made explicit in criterion (3), above) that the legal services have been completed and no further professional judgment is required of the lawyer on behalf of the client. Once services have been completed, and the fee has over-ripened into a delinquent account, the reason for the prohibition of Rule 3.2 no longer exists.

This opinion represents a change. Prior opinions, rendered under the Code of Professional Responsibility, CPRs 339, 71, and 1, prohibited the collection of delinquent client accounts by an agency. Those opinions were based on Ethical Consideration 2-23 which advised that lawyers "should avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject." Like other Ethical Considerations under the Code, however, E.C. 2-23 was "aspirational" and, unlike the Disciplinary Rules, not "mandatory." Preliminary Statement, Code of Professional Responsibility. The Code, including its Ethical Considerations, has been superseded by the Rules of Professional Conduct (Approved by the Supreme Court of North Carolina on October 7, 1985). The reasoning underlying E.C. 2-23 was sound before its repeal and remains sound today. A lawyer, however, was not required then, and is not required now, to heed its advice. Accordingly, CPRs 339, 71, and 1 are hereby expressly overruled.

This opinion is in accord with the conclusions of a majority of the Bar governing bodies in other states which have considered the issue in recent years. *See* Georgia Opinion 49 (July 26, 1985); Iowa Opinion 83-21 (July 18, 1983); Arizona Opinion 82-2 (January 30, 1982); Florida Opinion 81-3(M) (1981); Maryland Opinion 82-84 (December 7, 1981); *but see* West Virginia Opinion 80-1 (January 16, 1981).

RPC 8

January 16, 1987

Editor's Note: This opinion was originally published as RPC 8 (Revised).

Representation of Uninsured Motorist

Opinion rules that a lawyer employed by an insurer to represent an uninsured motorist must not withdraw after settlement until he obtains permission of the tribunal and takes steps to minimize prejudice to his client.

Inquiry:

A was injured while sitting in a parked automobile struck by an automobile being driven by B and owned by C, who was a passenger. There was no insurance coverage on the vehicle being operated by B. A had uninsured motorist coverage with X insurance company. A brought an action against B and C, and X company employed attorney W to defend against A's action. Eventually, A and X company settled as between them, with X company taking an uninsured motorist release. X company wished to pursue its subrogation claim against B and C. The action was not dismissed and remains on the calendar.

X company has suggested that it employ A's original counsel to pursue the action on behalf of X company. Attorney W raised the question about his obligation to defend the action for B and C since he appears as attorney of record. X company does not appear as a party to the action in any of the pleadings. X company has suggested that Attorney W file a motion to withdraw as counsel and that he advise B and C that they can employ separate counsel at their own expense or go forth without representation. At no time has anyone advised B or C that such an action might be forthcoming. B and C were merely advised that X company would pay the expenses of Attorney W in the action brought by X company's insured against them as uninsured motorists.

May Attorney W ethically withdraw as suggested, giving B and C the advice they can employ their own counsel or go forth without representation? If not, what is his obligation?

Opinion:

A lawyer undertaking to represent individuals at the request of and at the expense of an insurance company should have had full discussion and understanding with the individual client concerning the fee and arrangements and the conditions upon the lawyer's representation of the client. *See* comment to Rule 2.6; Rule 5.6. Under no circumstances may Attorney W withdraw without complying with any rules of the tribunal and without taking reasonable steps to avoid foreseeable prejudice to B and C. *See* Rule 2.8 (a). Under these circumstances, Attorney W will have to discuss the situation with B and C to clarify their understanding of the basis upon which Attorney W agreed to represent them and to determine what prejudice might result from his withdrawal. Depending on the circumstances, including the potential prejudice to the clients and the terms of the agreement between Attorney W and the clients, Attorney W may ethically be required to continue representing B and C in order to insure that they do not suffer undue prejudice and in order to fulfill any obligations created by his representations to B and C concerning his appearing on their behalf.

RPC 9

July 25, 1986

Representation of Lenders and Borrowers by Corporate House Counsel

Opinion states that house counsel for a mortgage bank may not represent other lenders and borrowers while serving as house counsel.

Inquiry:

X Corp. is a mortgage bank whose primary business is the origination of first mortgage loans. X Corp. receives an origination fee and has no proprietary interest in the note and deed of trust. X Corp. desires to employ Attorney A to represent the actual lender/investors who do not have proprietary interests in the transactions, with the know-ledge and consent of said lenders/investors. Attorney A would also perform in-house legal services unrelated to such transactions on behalf of X Corp. as house counsel for X Corp.

May Attorney A ethically represent the borrowers in closing loans originated by X Corp. as well as representing the lender/investors who have proprietary interests? May the borrowers be charged a fee? It is understood that Attorney A may not represent any of the parties regarding any dispute arising out of the contemplated closing transactions and that Attorney A's representation would be limited to legal services performed in closing the loans.

In the alternative, may Attorney A ethically share space with X if A maintains independence and assures client confidentiality? May Attorney A receive a retainer from X in such a situation?

Opinion:

If Attorney A is employed as house counsel for X Corp., which merely originates the mortgage loans and does not have any propriety interests of its own, Attorney A may not ethically be employed as house counsel for X Corp. and, in that capacity, represent either the lenders or the borrowers in closing loans originated by X Corp. Where Attorney A is paid as and acts as house counsel for a corporation which has no proprietary interest in the transaction, his representation of the lenders, investors, or borrowers in that capacity may constitute the unauthorized practice of law by the corporation which employs him. Attorney A would be acting in violation of Rule 3.1 (a) in aiding a person, in this case X Corp., in the unauthorized practice of law. Additionally, for the lenders, the investors, or borrowers to pay a fee to X Corp. for this service performed by Attorney A would constitute the division of legal fees by Attorney A with a nonlawyer, specifically X Corp., in violation of Rule 3.2.

If Attorney A maintains his independence and simply represents lenders, investors, and/or borrowers in response to referrals from X Corp., he may do so ethically provided that full disclosure is made as to any regular relationship between Attorney A and X Corp. Under these circumstances, Attorney A may receive a retainer from X Corp. for legal ser-vices performed by Attorney A on behalf of X Corp. Attorney A may do so even though he shares office space with X Corp. if he does in fact maintain his practice independently and if, as previously indicated, all clients referred by X Corp. consent to the representation after full disclosure of any relationship between Attorney A and X Corp.

It is noted that in no event may a lender require a borrower to employ a particular attorney. CPRs 108 and 240.

RPC 10

October 24, 1986

Editor's Note: See Rule 7.2(e) of the Revised Rules for additional considerations.

Private Lawyer Referral Service

Opinion rules that a lawyer may affiliate with a private referral service under certain conditions.

Inquiry:

May a group of lawyers enter into an agreement with a corporation operated for profit under which the corporation (a) as agent for the participating attorneys, advertises the availability of legal services through a private lawyer referral service; (b) makes referrals of persons who respond to the advertisement to the participating lawyers; and (c) is paid a fixed annual fee as compensation for its services as advertising and referral agent of the participating lawyers?

Opinion:

Yes, if the conditions set forth in Rule 2.2 of the Rules of Professional Conduct are satisfied:

1. The compensation payable to the corporate agent of the participating lawyers for administrative services shall be reasonable in amount.

2. Advertisements placed through the corporate agent must be paid from the fees paid to the corporate agent by participating attorneys. The corporate agent may not expend its own funds to advertise its own lawyer referral service. It may advertise only as the agent of participating attorneys.

3. The corporate agent may not profit from its referral of prospective clients to participating attorneys. Payment of fixed fees in advance of performing the services described in the inquiry do not violate this condition provided such fees and the compensation they represent are reasonable in amount. Such fees payable to the corporate agent do not materially differ from the compensation paid to the employees and agents of the nonprofit lawyer referral service approved in CPR 359.

4. The corporate agent and its employees may not initiate contact with prospective clients.

5. All advertisements shall comply with the requirements of Rule 2.2(c)(5) and Rule 2.1.

Any lawyer participating in the arrangement shall be professionally responsible for its operation. Under no circumstances may a lawyer affiliate with a referral service which offers legal advice or otherwise engages in the unauthorized practice of law.

RPC 11

October 24, 1986

Married Lawyers in Different Firms

Opinion rules that when married lawyers are employed in different firms and those firms represent adverse parties, neither firm is disqualified.

Inquiry:

Firm One employs Lawyer A as an associate. Lawyer A is married to Lawyer B who is a partner in firm Two. Lawyer A was formerly an associate in Firm Two. Both Firm One and Firm Two have more than one office. However, Lawyer A and Lawyer B practice in offices of their respective firms in the same city, where they reside.

Where Firm One and Firm Two represent adverse or potentially adverse interests in a matter, but neither Lawyer A nor Lawyer B participates actively in the matter, is either firm disqualified from that representation? What inquiry must be made, if any, if the facts do not make the potential involvement of the other spouse's firm immediately apparent? Is client disclosure and consent required for accepting representation? Is it necessary for the firm to insulate or "build a Chinese Wall around" the spouse attorney where actual or potential adverse representation is apparent?

Where Firm One and Firm Two represent adverse or potentially adverse interests in a matter, may either Lawyer A or Lawyer B participate in the representation? If so, what disclosure or client consent is required? Does it matter whether the fact of adverse representation is revealed only after substantial involvement or attention to the matter by either or both firms?

Opinion:

Rule 5.9 of the Rules of Professional Conduct prohibits a lawyer who is related to another lawyer as parent, child, sibling, or spouse from representing a client in a representation adverse to a person whom the lawyer knows is represented by the spouse or other relative unless the client consents after full disclosure concerning the relationship. The Rule specifically provides that it does not disqualify other lawyers in the firm. Thus, Firm One and Firm Two may represent adverse or potentially adverse interests. The Rule does not appear to require client disclosure and consent where the spouse partner or associate is not actively involved in the representation. Nor is there necessarily any need for any special inquiry if the spouse partner or associate is not involved in the case. Nor does there appear to be any reason to "build a Chinese Wall around" the spouse attorney simply because a firm in which his spouse is a partner or associate is actively involved in representing an adverse or potentially adverse interest. Should the spouse attorney acquire any "confidential information" within the meaning of Rule 4, he or she is required to observe the confidential nature of that information, even in communicating with his or her spouse.

Rule 5.9 implicitly permits one spouse to participate in matters even though his or her spouse is a partner or associate in a firm representing an adverse interest where the other spouse does not appear to be participating actively. However, client disclosure and consent may be required if there is any reason to believe that the spouse lawyer's own interest may be involved. (*See* Rule 5.1(b)). This will depend on the circumstances in view of the case, the size of the firms, effect upon the income of the two spouses, and other relevant matters. For example, since Lawyer B is a partner in Firm Two and presumably received income based upon a percentage of Firm Two's profits, Lawyer A's personal interest under Rule 5.1(b) could be involved, as a result of the effect on family income, in a case in which Firm Two, but not necessarily Lawyer B, represents an adverse party. Consideration of the type of fee, the amount of money involved, the financial relationship between firm income and Lawyer B's income, and other matters may be relevant here. Under any circumstances, the representation by either firm, or even by either of the spouses, may be undertaken if the client consents after full disclosure of the relationship and possible consequences or effects on the representation, if any, in view of the firm and the particular lawyer involved. *See* Rule 5.9; *see* Rule 5.1. Whenever either spouse is involved in representation in a matter in which the other spouse's firm also represents one of the parties, great care should be taken to ensure that no problems are created as a result of the relationship and the representation, such as may happen even by a message left at the attorney's home by the client. *See* ABA Formal Opinion 340 (September 3, 1975).

RPC 12

October 24, 1986

Revealing Confidential Information to Correct a Mistake

Opinion rules that a lawyer may reveal confidential information to correct a mistake if disclosure is impliedly authorized by the client.

Inquiry:

In 1984 Lawyer L was asked by a mobile home sales organization to prepare two deeds. One deed was for conveyance of certain real estate from a husband and wife to the mobile home sales organization. The second deed was to convey the same property from the mobile home sales organization to a financial corporation. Since then, a representative of the mobile home sales organization informed Lawyer L that the deeds should, in fact, have been a deed of trust to secure the mobile home sales organization, which would have assigned it and the note secured thereby to the financing corporation. Lawyer L has written the mobile home sales organization advising its representative that the property should be put back in the names of the original grantors and a proper deed of trust from them should be put on the record. To date, the mobile home sales organization has not, as far as Lawyer L is aware, attempted to get the instruments changed from deeds to a deed of trust. Lawyer L has not contacted the original land owners.

What duty does Lawyer L owe the original land owners concerning advising them of the status of their title? Since the mobile home sales organization has not responded to Lawyer L's recommendations to straighten out the title problems, what duty does Lawyer L owe that organization?

Opinion:

Lawyer L was employed by the mobile home sales organization, and the information he received from the mobile home sales organization was given to him in his capacity as the organization's attorney. The statements by the mobile home sales organization representative indicating that the deeds were not the documents which should have been drawn up and executed are "confidential information" within the meaning of Rule 4(a). Rule 4(b) prohibits the lawyer from revealing confidential information except as permitted by Rule 4(c). In this situation it would appear that Lawyer L is, in the absence of specific instructions to the contrary, impliedly authorized to disclose the nature of the problem to the original land owners and suggest corrective action under Rule 4(c)(1). If, however, the mobile home sales organization has forbidden disclosure, Lawyer L is obligated to maintain confidentiality. Since it is apparent that suffering the mistake to continue uncorrected would ultimately cause inconvenience, expense, and perhaps injustice, Lawyer L should call upon his client pursuant to Rule 7.2 (b)(l) to rectify the situation and, if the client refuses to do so, Lawyer L should discontinue the representation. It would also appear that Lawyer L might properly contact the original land owners and advise them pursuant to Rule 7.4 (b) that they may wish to secure the advice of independent counsel in regard to the transaction.

RPC 13

October 24, 1986

Retirement Agreements

Opinion rules that a retirement agreement may require a lawyer to accept inactive status as a condition of payment of retirement benefits.

Inquiry #1:

Attorneys A, B, and C are partners in Law Firm ABC. Partner A desires to retire early at age 60. Partners B and C are willing for A to retire early and to pay A for his interest in the partnership. However, B and C desire to be assured that A will not continue to represent some of the firm's better clients, who are close friends of A. B and C have agreed to pay A for his interest in the partnership if he will voluntarily surrender his license to practice law in North Carolina, thereby preventing him from continuing to represent his friends who are also firm clients.

If A voluntarily surrenders his license, may the remaining partners continue to use the name Law Firm ABC?

Opinion #1:

Yes. A law firm may continue to include in the firm name that of a retired attorney who practiced with the firm up to the time of his retirement. Nothing about the continued use of the name Law Firm ABC, after A's retirement, violates Rule 2.3(a), Rule 2.1, or Rule 2.2.

Inquiry #2:

If Law Firm ABC continues to use the same firm name after A's retirement, and if Law Firm ABC lists A's name individually on their letterhead where individual firm members and associates are listed, is the Firm required to indicate by A's name that he is retired?

Opinion #2:

Yes. To list A's name individually, where individual firm partners and associates are listed, without some indication that he is retired, could be misleading in violation of Rule 2.3(a) and Rule 2.1.

Inquiry #3:

After A's retirement, may the remaining partners pay to A over a period of years an amount of money, or percentage, based either on the gross fees received by the firm from A's former clients or from all firm clients?

Opinion #3:

Yes. Rule 2.7(a) forbids a lawyer to be a party to or participate in an agreement with another lawyer restricting the right of a lawyer to practice law after termination of the relationship "except as a condition to payment of retirement benefits." Once Attorney A retires, a reasonable agreement, assuming there are no legal or constitutional questions about the validity of the agreement, may provide for restriction of Attorney A's right to practice as a condition to payment of retirement benefits. A percentage of fees paid to a retired attorney, either based on specific clients or on all clients, in view of his contribution to the development of the firm as an ongoing practice, is thus implicitly authorized by Rule 2.7(a). Attorney A, in giving up his right to practice law, would in fact be placed upon inactive status under G.S. §84-16, and Rule 3.2 is not in any way applicable since inactive attorneys are not considered nonlawyers.

RPC 14

October 24, 1986

County Attorney as Guardian Ad Litem

Opinion rules that county attorney who occasionally advises the Department of Social Services may not act as guardian ad litem in child abuse cases.

Inquiry:

Attorney C is county attorney for County X. As county attorney, C represents the interests of the county at the direction of the five -member Board of Commissioners, who employ him at their pleasure. Occasionally, Attorney C is asked informal questions by County X's Department of Social Services' director. Attorney C is not attorney of record for the Department of Social Services. Nor does he participate as its attorney in any proceedings officially involving the Department of Social Services. However, County X, of course, does provide funding for the operation of the Department of Social Services.

Attorney C considered becoming an appointed Guardian Ad Litem in cases involving abused and neglected children. In some of these cases, the interests of the Department of Social Services may appear to conflict with those of the abused or neglected children. May Attorney C ethically serve as Guardian Ad Litem for abused and neglected children while serving as county attorney for County X?

Opinion:

No. Although Attorney C does not provide extensive legal services for the Department of Social Services, he does advise them from time to time in his capacity as county attorney. Therefore, he does have a conflict of interest preventing him from serving as Guardian Ad Litem in any proceeding in which the Department of Social Services is or may be involved. *See* Rule 5.1; *see also* CPR 171. Nor can he obtain valid, informed consent from the two clients involved. Thus, the representation is barred.

RPC 15

October 24, 1986

Communication with Unrepresented Party

Opinion rules that attorney may interview person with an adverse interest who is unrepresented and make a demand or propose a settlement.

Inquiry:

Attorney A represents Client X, who was seriously injured in an automobile accident. To Attorney A, it appears that proposed defendant Y is clearly liable for the accident. Defendant Y is insured by Z insurance company for the minimum limits of $25,000.00. The injuries appear to be such as to justify a verdict or judgment at or above the $25,000.00 insurance limit. Negotiations have gone on between Attorney A and representatives of Company Z and have reached a standstill such that Attorney A feels he may be required to file suit against Defendant Y unless Company Z is forthcoming in paying their entire limits of liability. Investigation reveals that proposed Defendant Y has a modest estate although, given the exemption statutes in force, it may be questionable as to whether pursuing proposed Defendant Y individually would be fruitful.

May Attorney A ethically contact proposed Defendant Y and take a statement from him? Additionally, may Attorney A ethically suggest that Defendant Y demand or strongly urge Company Z to settle as long as the settlement is at or within policy limits, as it would appear to be in Y's interest to do so? May Attorney A alternatively suggest that proposed defendant Y contact an attorney and indicate that that attorney may give Y advice to demand that company Z pay their policy limits?

Opinion:

Rule 7.4 forbids a lawyer representing a client to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter. However, there is no prohibition generally on communicating directly with an adverse party who is not represented by counsel. Thus, since it appears that proposed Defendant Y is not currently represented by counsel, Attorney A may communicate with him concerning proposed Defendant Y's statement about the automobile accident. Additionally, Rule 7.4(b) prohibits a lawyer from giving advice to a person not represented by a lawyer, other than advising that person to secure counsel, where the interests of the person have a reasonable possibility of being in conflict with the interests of the lawyer's client. Clearly, the interests of proposed Defendant Y have a possibility of being in conflict with the interests of Attorney A's Client X. Attorney A should not advise proposed Defendant Y to demand that insurance company Z settle the claim for the limits of the policy. However, he may certainly advise proposed Defendant Y to consult an attorney in connection with the claim and certainly may communicate with proposed Defendant Y, as an adverse party not represented by counsel, that his client's position is that Y is totally at fault and may make a demand or propose a settlement.

RPC 16

October 24, 1986

Files of a Deceased Lawyer

Opinion rules that a lawyer appointed conservator of a deceased lawyer's files should comply with the instructions of the court and seek to preserve valuable documents and confidential information.

Inquiry:

Attorney A represents Client W, the widow of Attorney Y. Attorney Y practiced law in the area for approximately twenty-five years, during which time he accumulated numerous files. Attorney A has been appointed conservator of Attorney Y's files by the senior resident Superior Court Judge. As conservator, and counsel for Client W, Attorney A contacted each of Attorney Y's clients who had active files in his office at the time of Attorney Y's death. Most of those clients have picked up their files.

Attorney Y was associated with one other lawyer at the time of his death. Shortly after Y's death, that other lawyer opened up his own practice in a separate building.

Client W is planning to sell the office building where Y's practice was located and needs to do something with the numerous files that were accumulated over the years. Specifically, is the estate authorized to file these files in another attorney's office or in the Clerk's Office if such accommodations can be arranged? If those accommodations cannot be arranged, must the estate store these files indefinitely? Can the estate attempt to notify the clients involved by legal advertisement in the paper and then physically destroy all files not picked up in a reasonable period of time? Attorney A is concerned about problems of client confidentiality if files are turned over to another law firm. Attorney A is also concerned about the loss of valuable documents if files are shredded and

destroyed.

What may Attorney A ethically do to handle the problem of Y's files?

Opinion:

The Bar cannot speak as to what the estate may or may not do as the estate is not an attorney bound by the Rules of Professional Conduct. Nor is Attorney Y's widow subject to the Rules. Nor can the Bar speak to any legal questions of the client's rights to their files.

Attorney A, as counsel for W and as conservator of Y's files, should seek to advise W reasonably according to any potential obligations she may have and should seek direction and approval from the court which appointed him conservator. There appear to be few ethics opinions dealing with ultimate disposition of the files of a deceased lawyer, particularly inactive files. On the other hand, many jurisdictions have dealt with the question of what an attorney or firm may do with their own files which become inactive and have recognized that even an attorney in active practice is not required to retain entire files indefinitely. Generally, opinions have suggested that an attorney concerned with his own files may notify clients that inactive files may be destroyed within a reasonable period of time if the client does not pick up the file or direct that it be transferred to another attorney. In destroying files, opinions have generally suggested that attorneys should not destroy items which actually belong to the client, information useful in the assertion or defense of a client's position in a matter for which the statute of limitations has not expired, or information which the client may need, does not already have, and which is not readily available otherwise. Generally, attorneys should also retain accounts or records of their receipts or disbursements and an index or identification of destroyed files. In determining what should be destroyed, the files should be screened and determinations made according to the nature and contents of those files. *See* ABA Informal Opinion 1384 (March 14, 1977); Kentucky Bar Association Opinion E-300 (January 11, 1985); New York City Bar Association Opinion 82-15 (February 6, 1985); Maryland Opinion 85-77, 801 ABA/BNA Lawyer's Manual on Professional Conduct at 4359.

As an attorney, Attorney A is not in the same position as he would be with regard to the disposition of his own files, but should have due regard to the considerations involved in disposition of files of an attorney. Thus, Attorney A should take note of confidential information as governed by Rule 4 of the Rules of Professional Conduct and should avoid simply transferring a case to another attorney, without the client's instruction or consent, for handling by that other attorney. Storage in a reasonable location, whether in another attorney's office or elsewhere, would certainly be appropriate. Otherwise, Attorney A should comply with the direction of the court which appointed him conservator and follow his personal conscience and sense of professional responsibility in making every effort to see that files are dealt with appropriately.

RPC 17

October 24, 1986

Reporting Unethical Conduct

Opinion rules that a lawyer who acquires knowledge of apparent misconduct must report this matter to the State Bar.

Inquiry #1:

Attorney A conducted a title search on a tract of property for a client, the vendee. Attorney A discovered an outstanding lien of $5000 on the land in question. The client's payments to the vendor covered most of the lien. However, the attorney still needed $1000 from the vendor to clear up the title. The vendor asked if he could bring the remaining $1000 to Attorney A within a week. The vendor had been a good client of Attorney A in other matters, and Attorney A agreed to the vendor's request. In the meantime, Attorney A closed the deal, writing up a general warranty deed, with the $1000 outstanding. In addition, because the vendee purchased the land through a bank loan and used the land as security on that loan, the vendee had to sign an affidavit stating that there were no prior encumbrances. This he did presumably relying on his lawyer's advice.

If Lawyer L becomes aware of the situation described above, is he under any duty to report Attorney A's conduct to the North Carolina State Bar? Does it affect the response if Attorney A agrees to put the $1000 into an interest-bearing escrow account in the vendee's name?

Opinion #1:

On the basis of the facts stated, there appears to be reason to believe that Attorney A may have violated Rule 1.2(b), Rule 7.1(a)(3) and possibly Rule 5.1. If Lawyer L has knowledge that Attorney A has committed these violations, Lawyer L must report the apparent misconduct to the State Bar under Rule 1.3(a). Whether Attorney A agrees to deposit the $1000 into an escrow account in the vendee's name does not affect whether the violation has occurred and whether Lawyer L has knowledge that it occurred, but would be more relevant to any legal claims the vendee would have against Attorney A and possibly in consideration as to actual discipline to be imposed by the State Bar if it found the facts as believed by Lawyer L and found them to establish unethical conduct by Attorney A.

Inquiry #2:

The same vendor, as in the circumstances above, has been accused of working privately in partnership with a loan officer at the bank involved in the transaction described above and of obtaining a large loan from that bank for the stated purpose of construction work on the property. According to third parties, the vendor, who is the construction company president, drew on the loans when there was no construction actually going on.

Additionally, the vendor allowed additional liens to build up on the property to pay for construction work which did actually occur. Although the company is contractually obligated to clear up the subsequent liens, the company in fact no longer exists. The former owner-president has indicated that he will not honor the contract and pay off the liens. He has also refused to pay liquidated damages for which the contract provides even though he was over a year late finishing up the project.

At the time the vendor sold the property and signed the construction contract, his company had been officially suspended by the Secretary of State of North Carolina for failure to pay license fees. The loan officer mentioned above has left the bank and cannot be located.

At what point, if any, must the investigating attorney, Lawyer L, report the activities of the vendor to the State Attorney General? What degree of certainty regarding the truth of the allegations is necessary before any steps are taken to report this case to the Attorney General?

Opinion #2:

The Rules of Professional Conduct do not speak to whether an attorney must report possible illegal conduct to law enforcement officers and public officials. These matters are left to the judgment of the attorney in question with due regard to any laws which may be relevant and to his professional judgment and conscience.

RPC 18

January 16, 1987

Representation of Corporation in Derivative Action

Opinion rules that a law firm may not simultaneously represent shareholders in a derivative action and the corporation's landlord on a claim for back rent.

Inquiry:

Two minority shareholders and an attorney from Law Firm B went to the principal place of business of a corporation to review corporate records. Law Firm A, on behalf of the corporation and its president, brought suit against the two minority shareholders for trespass and invasion of privacy. It is undisputed that one of the two minority shareholders was an officer and director of the corporation at the time of the inspection. Prior to answering the Complaint filed by Law Firm A, the two minority shareholders were elected as officers and directors of the corporation by a unanimous vote at the annual meeting of shareholders and directors. In addition, at that meeting the minority shareholders moved that the corporation sue its president for mismanagement, but that motion was defeated by a majority vote of the directors, who were controlled by the president. Law Firm B filed a counterclaim against the corporation and its president, praying for independent relief for the minority shareholders and derivative relief for the corporation. Thereafter, the president called a special meeting of the shareholders and directors to vote on a salary increase for himself and to consider disposition of a claim for back rent from the landlord of the corporate premises. The two minority shareholders and directors voted against a salary increase on the ground that the president admitted owing

in excess of $50,000 to the corporation for unauthorized loans. Additionally, at that special meeting the minority shareholders were told for the first time of the landlord's claim for back rent. Subsequently, the landlord retained Law Firm B to file an action against the corporation for the rent arrearage. Full disclosure was made to the landlord and the minority shareholders, and all desired continued representation by Law Firm B. Since the filing of the Reply to the counterclaim, the Court has ordered that all the other directors and officers of the corporation be brought in as additional party defendants. Law Firm A has entered an appearance for a number of the other directors and officers.

May Law Firm B ethically represent both the landlord and the minority shareholders under the facts stated?

Opinion:

No. Law Firm B may not ethically continue to represent both the minority shareholders on behalf of the corporation in the derivative action and also continue to represent the landlord in the landlord's action for back rent. Law firm B is effectively representing the corporation in the derivative action and, at the same time, representing the landlord in that claim against the corporation. Rule 5.10 and the comment clearly establish that Law Firm B's obligation is to the corporation in the derivative action, not simply to the minority shareholders who employed it to bring the derivative action.

While informed consent in the ordinary situation will permit representation of multiple parties with conflicting interests, it will not override the conflict unless the attorney in question reasonably believes representation of the other client, in each instance, will not be adversely affected. *See* Rule 5.1(a), (b). Since Law Firm B is effectively acting on behalf of the corporation in the derivative action, and since the issue of back rent claimed by the landlord appears to be entangled with the issues involved in the claims and counterclaims in the suit between the minority shareholders on the one hand in the derivative action and between the corporation and its president on the other hand, there is serious doubt as to the effectiveness of the consent of the minority shareholders to permit representation of the otherwise conflicting interests, and it does not appear that representation of both clients may reasonably be undertaken without a threat to the interest of one of the other clients and to the sanctity of confidential communications protected by Rule 4. Which, if any, party Law Firm B may continue to represent will depend upon the availability of informed consent from any of the parties, the relevance of confidential information, within the meaning of Rule 4, received by Law Firm B in its current representation of the minority shareholders and effectively of the corporation in the derivative action and in its representation of the landlord, and on the Court's judgment in the exercise of its inherent authority. *See Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d. 279 (1978), *cert. denied and appeal dismissed*, 296 NC 740, 254 S.E.2d 181 (1979); G.S. §55-55.

RPC 19

January 16, 1987

Editor's Note: See Rule 3.7 of the Revised Rules for additional guidance.

The Lawyer and His Secretary as Witnesses

Opinion rules that a lawyer may represent grantees of deeds he drafted even though his secretary may be called as a witness.

Inquiry:

Over a 10-year period, Attorney A drafted eight deeds under the provisions of which X, a widow, conveyed to Y and Z, husband and wife and unrelated neighbors, various tracts or parcels of land. Six of the eight instruments were notarized by a secretary employed by Attorney A's firm. On two of the six occasions, Attorney A went with his secretary, the notary, to the home of the grantor to explain the instruments.

In each instance, the grantees, or one of the grantees, initially came to Attorney A to have him draft the deed. The grantee paid Attorney A for drafting each of the deeds. Attorney A never represented the grantor in any other legal matter and did not purport to represent the grantor with regard to these deeds except that he did undertake to go over some of the provisions of two of the deeds.

The grantor is now deceased. Three of her grandchildren have instituted a suit seeking to set aside all eight deeds on the grounds of lack of mental capacity on the part of the grantor and undue influence exerted upon the grantor by the grantees. Approximately 50 witnesses have been interviewed and will testify to facts tending to refute the allegations made by the plaintiffs. Y and Z desire that Attorney A represent them with regard plaintiff's suit. Attorney A has explained to Y and Z that he would not be able to accept employment on their behalf and then voluntarily testify on their behalf as a witness. Attorney A believes that there are many other witnesses who can ably and better testify on behalf of Y and Z to the issues of the grantor's mental capacity and to refute the undue influence allegations. Attorney A has also explained to Y and Z that it is his opinion that his secretary, who notarized six of these instruments, could testify if he represented Y and Z. Attorney A recognizes some possibility that he might be called as a witness by plaintiffs, but he believes this possibility to be very unlikely.

May Attorney A ethically accept employment by Y and Z to defend them and represent their interests in the proceeding to set aside the deeds on the grounds of the grantor's alleged lack of mental capacity and alleged undue influence exerted upon the grantor by the grantees, given the fact that Attorney A drafted the deeds, was present when two of them were executed, and that a secretary from his firm notarized six of the deeds and would probably need to be called as a witness by Y and Z as to the condition of the grantor at the time of execution of those six deeds? Could Attorney A, if he undertook this employment on behalf of Y and Z, ethically represent them and call a secretary from his law firm as a witness on behalf of Y and Z and permit her to testify as to the mental capacity of the grantor and also permit her to testify that Attorney A was present and explained the content of the instruments to the grantor on two occasions? Would it be proper for Attorney A to accept the employment by Y and Z if the secretary (notary) employed by his firm was not called as a witness by his clients, but with the knowledge that he would probably be called as a witness on behalf of plaintiffs?

Opinion:

Yes. Attorney A may ethically represent Y and Z in the proceeding instituted by the grantor's grandchildren to set aside the eight deeds in question, under the anticipated circumstances. While Rule 5.2 prohibits a lawyer from accepting employment in most instances if he knows or if it is obvious that either he or another lawyer in his firm ought to be called as a witness for either side, neither Rule 5.2 nor any other Rule speaks to prohibiting representation when an employee in the firm will probably be called as a witness. The comment indicates that the underlying justification for Rule 5.2 relates to the conflict between the dual roles of advocate and witness, a conflict which does not exist for this secretary since she does not appear and participate as advocate. The prohibition on accepting employment only applies if the lawyer "knows or it is obvious that he or a lawyer in his firm ought to be called as a witness...." Rule 5.2(a). In this instance, it appears highly unlikely that Attorney A would be called as a witness since there are numerous other witnesses who can testify to the issues of mental capacity and undue influence, or lack thereof, on behalf of Y and Z. In addition, Attorney A believes that it is highly unlikely that plaintiffs would call him as a witness, a belief which appears to be reasonable under the circumstances. Of course, if Attorney A accepts the employment and it subsequently develops that he will or should be called as a witness on either side, he would then have to govern his conduct by Rule 5.2(b) or (c).

RPC 20

January 16, 1987

Solicitation of Business Clients

Opinion rules that a lawyer may not use an intermediary to solicit business clients, may not make "cold calls" upon prospective business clients and may not make statements in legitimate communications which are prohibited by Rule 2.1.

Inquiry #1:

May an attorney or law firm in North Carolina call someone at a bank or an accounting firm and specifically suggest that the institution set up a meeting between the attorney or the law firm and a company with which that attorney or law firm has had no prior relationship, for the purposes of soliciting the business of the company for the attorney or law firm?

Opinion #1:

No. Rule 2.4(a) specifically prohibits a lawyer from soliciting professional employment from a prospective client where there has been no family or prior professional relationship if a significant motive for the lawyer's doing so is his pecuniary gain. That the attorney or law firm approaches the prospective client's bank or accounting firm first does not insulate the solicitation from the prohibition of Rule 2.4(a).

Inquiry #2:

May an attorney or law firm in North Carolina utilize the technique of "cold calls" in attempting to cause a company to employ that attorney or law firm?

Opinion #2:

No. "Cold calls" made in an attempt to cause a company to employ the attorney or law firm directly violate Rule 2.4(a).

Inquiry #3:

When an attorney or law firm is talking to a potential client, having caused the meeting by one of the above-described methods, and when the potential client is already represented by another attorney or law firm, may the attorney or law firm state or suggest any of the following:

a. That the law firm presently representing the company is inadequate in size or quality to perform services for the company?

b. That the law firm presently representing the company does not have adequate expertise in certain areas that the company may need?

c. That the interviewing law firm would charge less than the present law firm?

Opinion #3:

If an attorney or representatives of a law firm are talking to a potential client after setting up a meeting in one of the above described methods, the attorney or law firm, of course, is engaging in a prohibited solicitation. Assuming that an attorney or law firm were speaking to a potential client under circumstances not necessarily in violation of the Rules of Professional Conduct, such as where the potential client sought out the attorney or law firm, the statements which may ethically be made are restricted by Rule 2.1. In particular, the attorney or law firm discussing possible representation with a potential client already represented by a different attorney or firm is prohibited from making statements which compare that lawyer's services with those of other lawyers unless the comparison can be factually substantiated. Rule 2.1(c). It may be very difficult to substantiate the type of statements listed above as a small firm may be able to provide services by concentration of their time upon the needs of the particular client and may be able to develop expertise as needed. If the interviewing law firm would in fact charge less than the present law firm, it would not be unethical to say so provided that the interviewing law firm has sufficient knowledge to say so.

RPC 21

April 17, 1987

Sending Demand Letter on Behalf of Unidentified Client

Opinion rules that a lawyer may send a demand letter to the adverse party without identifying the client by name.

Inquiry:

Attorney A is a staff attorney in a federally funded legal services program established for the purpose of providing legal services to migrant farmworkers. Attorney A is representing a migrant farmworker with minimum wage claims pursuant to the Fair Labor Standards Act and a claim for liquidated damages pursuant to the Migrant and Seasonal Agricultural Worker Protection Act. It is the independent judgment of Attorney A that the disclosure of the identity of his client in the initial demand letter to the employer-adverse party could reasonably be expected to subject the client to the possibility of physical or economic retaliation. Attorney A is fully prepared to disclose the identity of his client to the adverse party if a realistic possibility of settlement of the claim seems likely during subsequent communication with the adverse party or his counsel. Would it be ethical for Attorney A to write an initial demand letter to the employer-adverse party inviting settlement discussions without disclosing the name of the client?

Opinion:

Yes. Nothing in the Rules of Professional Conduct prohibits negotiating on behalf of an undisclosed principal. In the subject situation, the identity of the client would be "confidential information" subject to the protection of Rule 4 of the Rules of Professional Conduct because its disclosure likely would be detrimental to the client. Attorney A would have an obligation not to disclose the client's identity until authorized to do so by the client or until otherwise permitted to do so by the Rule. No other provision of the Rules of Professional Conduct would be offended or compromised by the conduct proposed, assuming that the client actually exists and has authorized the communication made on his or her behalf.

RPC 22

April 17, 1987

Representation of Administratrix in Official and Individual Capacities

Opinion rules that in the absence of consent from the heirs, a lawyer may not represent the administratrix officially and personally where her interests in the two roles are in conflict.

Inquiry:

Intestate person I died in North Carolina in 1984, leaving as statutory heirs his second wife B and two minor children, M and N, from a previous marriage in Virginia which ended in divorce in 1979. Wife B, represented by Attorney X, qualified as Administratrix in North Carolina, survived a challenge for removal for cause by Creditor 1, and continues as Administratrix in the open estate.

Among other claims on the estate, Creditor 1, a secured and unsecured lender, has brought suit on a refusal to pay a claim based on deeds of trust and notes signed by both I and B as well as on unsecured credit extensions. Creditor 2, the ex-wife of I, has filed suit for breach of contract based on the failure of I to provide college tuition or a life insurance policy to provide college tuition, pursuant to a separation agreement executed by I in Virginia. The guardian ad litem for M and N is a party plaintiff in Creditor 2's suit. Both creditors' suits name the Administratrix in both her official capacity and personally as parties defendant because of the refusal of the Administratrix to refer the claims, seeking costs from her in both capacities under GS Section 28A-19-18.

Attorney X has answered Creditor l's suit for the Administratrix B, both in her official capacity and individually. X has not yet answered the suit of Creditor 2.

May X ethically continue to represent B against Creditor 1's claims in both capacities? May X ethically represent B in both her capacities in the suit by Creditor 2, even if B consents, but M and N do not consent through their guardian ad litem?

Opinion:

No, Attorney X may not ethically represent Administratrix B in both her individual and official capacities in the suits brought by Creditor 1 and Creditor 2. Rule 5.1 prohibits a lawyer from undertaking to represent and from continuing to represent clients with adverse interests unless the representation will not be adversely affected and the clients consent after full disclosure. In both suits, the interests of the estate are involved, which includes the interests of the two minor children. In both suits, the interests of Administratrix B as an individual are also involved and may be adverse to the interests of the estate. Without the consent of the heirs, including the minor children, Attorney B cannot represent the Administratrix in both her official and individual capacities where there are conflicts between her interests in the two roles.

RPC 23

April 17, 1987

Disclosure of Information Concerning Real Estate Transactions to the IRS

Opinion rules that a lawyer may disclose information to the IRS concerning a real estate transaction which would otherwise be protected if required to do so by law, and further that notice of such required disclosure, should be given to the client and other affected parties.

Inquiry:

Lawyer L frequently handles real estate transactions for his clients. Lawyer

L has reviewed new federal tax law requirements. He believes that, as of January 1, 1987, he is required to file Form 1099 with the Internal Revenue Service for each real estate transfer in which he acts as the closing agent. That form would require that he provide the Internal Revenue Service with the sales price and tax identification numbers for the parties to the real estate transaction.

Lawyer L is concerned that he may be violating client confidences by disclosing the information required by Form 1099 to the Internal Revenue Service. If he must disclose this information, is he required to advise the parties to the transaction that the returns are being filed? Is it necessary to secure the permission of the clients in order to disclose that information?

Opinion:

Rule 4(c)(3) permits a lawyer to disclose confidential information if he is required by law to do so. Whenever Lawyer L is required by tax law provisions to provide certain information to the Internal Revenue Service, he may ethically do so. Since it is a legal requirement, the consent of the client, as such, is not required. Rule 6(b)(l) requires a lawyer to keep a client reasonably informed of the status of any matter and to comply promptly with requests for information. The comment thereto indicates that a lawyer is required to "fulfill reasonable client expectations for information...." Therefore, Lawyer L and other attorneys similarly situated should inform their clients, and other affected persons as reasonable and appropriate, when the lawyer must provide information to the Internal Revenue Service.

RPC 24

October 23, 1987

Editor's Note: This opinion was originally published as RPC 24 (Revised). For additional guidance, see Rule 1.8(a) of the Revised Rules.

Purchase of Client's Property at Execution Sale

Opinion rules that a lawyer may not purchase his client's property at an execution sale on his own account because of conflict of interest.

Inquiry:

Attorney A represents a client whose real or personal property is being sold by the sheriff at an execution sale. The client has instructed the attorney that, regardless of the amount of equity in the property, the client does not wish to bid on its own behalf, instead hoping that someone else will bid at the execution sale to produce partial or full payment of the outstanding judgment.

Attorney A attends the execution sale, simply to report the results to the client. At the sale it becomes apparent that there will be no bidders. Accordingly, the client will be forced to pay the expenses of the sale and the property will be returned to the judgment debtor. In such a case, Attorney A feels it would benefit the client for Attorney A to bid at the sale if he personally and individually might be interested in purchasing the property. Attorney A believes this would save the client from incurring the expenses of sale and might also produce proceeds which could be used by the client partially or wholly to satisfy the outstanding judgment.

May Attorney A ethically bid on real or personal property of his client being sold at execution sale under the circumstances set out above?

Opinion:

No, however it would be appropriate if Attorney A entered his bid with the informed consent of his client having first formed a reasonable belief that his personal interest would not adversely effect the representation and that the transaction would be fair to his client. *See* Rules 5.1(b) and 5.4(a).

RPC 25

October 23, 1987

Listing of Unlicensed Attorney on Letterhead

Opinion rules that a North Carolina firm may not list a lawyer licensed elsewhere, but not in North Carolina, as "of counsel" or as a "consulting attorney."

Inquiry:

Law Firm LMN would like to establish a formal relationship with Professor P. Professor P is on the faculty of a law school located in North Carolina. P is a nationally recognized expert in the areas of intellectual property and entertainment law. P is licensed to practice law only in the State of Illinois and does not have imminent plans to become licensed in North Carolina.

Law Firm LMN would like to list Professor P on their letterhead as being "of counsel." If he may not be listed of counsel, then Law Firm LMN would like to list P as a "consulting attorney" in the area of entertainment law.

May Law Firm LMN ethically list P on its letterhead either as being "of counsel" or a "consulting attorney?"

Opinion:

No. To list Professor P on Law Firm LMN's letterhead would be misleading, since P is not an attorney in North Carolina and since he does not maintain an office and practice in any other jurisdiction in which he is licensed. *See* Rule 2.3. Special expertise in a subject does not authorize a nonlicensed lawyer to be listed on a letterhead. To list a person trained as an attorney and licensed elsewhere, but not in North Carolina, under a designation which would attempt to indicate his legal expertise would inevitably be misleading and imply that he is an attorney in North Carolina.

RPC 26

October 23, 1987

Editor's Note: See Rule 7.3 of the Revised Rules and RPC 242. This opinion was decided prior to 1989 amendment to superseded (1985) Rule 2.4 permitting targeted direct mail advertising.

Sending Letters Soliciting Employment to Community Newcomers

Opinion rules that a law firm may not send letters recommending the services of the firm to persons or corporations that have indicated interest in locating in the community to the local Chamber of Commerce

Inquiry:

City C's Chamber of Commerce periodically makes available to its members a list of persons who have requested information from the Chamber concerning the business environment in City C and the county in which it is located. That list typically contains over 25 persons or corporations.

Law Firm F has been mailing a form letter to persons on that list. Using word processing, each letter has been addressed directly to the person or corporation whose name appears on the Chamber list as having made an inquiry.

The letter in question basically thanks the individual or corporation for his or its interest in the city and speaks favorably of the city's environment, attitude and circumstances for newcomers. The letter also indicates that Firm F has served the business community in City C for more than 50 years. It includes an indication of the types of legal services that Firm F provides. It also suggests that if the individual corporation decides to become a part of City C's business community, the addressee's decision may involve business and personal transactions in which legal advice will be needed. The letter then indicates that the members of Firm F would be pleased to assist the addressee with these and other legal needs.

May Firm F ethically send letters of the type described above to individuals or corporations whose names appear on the list of the Chamber of Commerce as having made inquiries about City C, with the individual person's or corporation's name as addressee?

Opinion:

No. Rule 2.4(b) prohibits lawyers from soliciting professional employment from prospective clients by any written form of communication, where a significant motive is the lawyer's financial gain, when there is no family or prior professional relationship. A limited, narrowly-construed exception authorizes written solicitations distributed generally to persons not known to need a particular kind of legal service. The letters here are not distributed generally within the meaning of the exception in Rule 2.4(b).

RPC 27

July 24, 1987

Representing Parties Adverse to Former and Current Clients

Opinion rules that a lawyer may represent clients in a medical malpractice action even though one of the potential defendants or a witness and agent for the defendant is a former client in an unrelated matter. Opinion further rules that the lawyer cannot undertake to represent the clients in the medical malpractice matter when he is currently counsel in a divorce proceeding for a potential defendant or an agent and witness for the hospital defendant.

Inquiry:

Lawyer A is contacted concerning a possible medical malpractice action. With the consent of the prospective clients, Lawyer A consults with Lawyer B, of a different law firm, about associating in the case. Lawyers A and B sign a contract to represent the clients in the medical malpractice case.

Subsequently, Lawyer A learns through investigation of the case that X and Y may be involved in the case as agents of the hospital. X and Y may be named in the complaint as defendants or may simply be involved as non-party agents of the defendant hospital.

Lawyer A represented X in a child custody and support action. Lawyer A's last contact with X was in 1983. Lawyer A has drawn a separation agreement for Y and has filed a divorce complaint on Y's behalf. The divorce action is still pending and could be put on the calendar and resolved at any time. Y has paid lawyer A only 1/8 of the fee due to lawyer A for filing the divorce action.

If lawyer A fully disclosed to the plaintiffs in the medical malpractice matter his involvement concerning X and Y, and if the plaintiffs in the medical malpractice matter give their consent for Lawyer A to continue representing them, and if the divorce action for Y is finalized prior to any medical malpractice suit being filed, may Lawyer A ethically continue to represent the plaintiffs in the medical malpractice matter as counsel? Would it make any difference if X and Y give informed consent to Lawyer A's representation of the medical malpractice clients even if it should involve a lawsuit involving X and Y as possible defendants?

If only the hospital is sued, and X and Y are not named as party defendants in the medical malpractice action and would thereby be involved as witnesses as the agents of the hospital defendant, could Lawyer A ethically represent the plaintiffs in the medical malpractice action as counsel with Lawyer B?

Opinion:

Lawyer A does not currently represent X and has had no contact with X since 1983. The medical malpractice action is certainly not the same matter and does not appear in any way to be substantially related to the child custody and support action in which Lawyer A previously represented X. *See* Rule 5.1(d). On the facts given, it does not appear likely that any confidential information obtained in Lawyer A's prior representation of X would be violated if Lawyer A now represented the medical malpractice clients.

It appears that Lawyer A currently represents Y. So long as Lawyer A is representing Y, he cannot undertake adverse representation or representation which is likely to be directly adverse to him unless he has consent of Y and the clients in the medical malpractice case and unless he reasonably believes the other representation would not adversely affect Y's interests. Rule 5.1(a). Even if Y is only a witness and agent of the hospital in the medical malpractice matter, the inquiry suggests that Y's motives and/or actions might be in question. He would be a witness subject to cross-examination. It is difficult to see how the loyalty of the lawyer to his client and the full and frank communication which a client should feel free to give to his lawyer can be maintained if the lawyer is simultaneously representing plaintiffs against Y's principal in a malpractice action in which Y would be involved as a witness. *See* Rule 4 and comment thereto; Rule 5.1(b) and comment to Rule 5.1. Under these circumstances, it does not appear that Lawyer A should undertake to represent the clients in the medical malpractice matter so long as he is representing Y in Y's divorce action.

RPC 28

July 24, 1987

Representation of Estates of Pilot and Passenger

Opinion rules that a law firm may ethically represent the estates of both a husband and a wife in an action arising out of a private airplane crash in which both spouses were killed, where the law firm is convinced that the husband/pilot was not negligent in any way and that it would be frivolous for the wife's estate to assert a claim against the husband's estate.

Inquiry:

Law firm has been contacted about representing the estates of a husband and wife who were killed in a private airplane crash. Law firm has carefully investigated the collision, and each member of the firm believes that the sole cause of the collision was a serious defect in the plane. Law firm has advised the executor for the wife that there is no evidence that the husband/pilot was negligent and that the law firm believes that making the husband's estate a party to the action brought by the wife's estate would be frivolous and a violation of Rule 11 of the Rules of Civil Procedure.

Law firm has further advised the executor for the wife's estate that it is the usual and typical defense on the part of the defendant automatically to join the pilot as a third party. Law firm believes the facts clearly show there was no negligence on the husband's part. May law firm ethically represent the estate of the husband as well as that of the wife, even though there probably will be a joinder by the original defendant of the husband's estate?

Opinion:

Yes, provided that informed consent is obtained from both parties. *See* Rule 5.1(b). This opinion recognizes that law firm has made a judgment that the representation of neither client will be adversely affected, pursuant to Rule 5.1(b)(l). Law firm has a continuing obligation under Rule 5.1(c) to evaluate the potentially conflicting interests. If a conflict does develop, law firm could be required to withdraw from representation of both clients. Rule 5.1(d) and Rule 4(b).

RPC 29

October 23, 1987

Editor's Note: This opinion was originally published as RPC 29 (Revised). For subsequent history, see RPC 216.

Purchase and Use of Title Abstracts

Opinion rules that an attorney may not rely upon title information from a nonlawyer assistant without direct supervision by said attorney.

Inquiry:

Attorney picks up a circular for a title or abstract firm, which states that the firm offers title examination services to attorneys for a flat fee of seventy dollars ($70.00) per tract plus copy costs.

Thereafter, attorney speaks with an employee of the firm who states that she can do a title search on a parcel of real property as above stated. She further states that she will telephone with any problems and that she will send a title summary and copies of the relevant documents. She states that she will not render an opinion on the title.

Attorney then gives her a deed book reference for a tract of land and requests a title examination. Thereafter, attorney received a mailing from the firm which includes the following:

1. Summary page indicating an abbreviated property description, the mortgages or deeds of trust, the tax listing information and judgments;
2. "Link" sheet for one descendant's estate;
3. "Link" sheet for the deeds represented to be in the chain of title with a copy of each deed;
4. City ad valorem tax printout signed by a City employee; and
5. Computer printout of the "out" conveyances for two (2) of the parties in the chain of title from the Register of Deeds. (The "out" conveyances for the owners prior to 1982 were listed on the link sheet by the firm's employee because the Registry does not have conveyances prior to such time on the computer.)

Attorney was not telephoned regarding examination or examination process. The firm does not employ an attorney. The work was performed by a nonlicensed person. Attorney did not train or supervise the firm and was not requested to do so. Attorney has no knowledge regarding the firm's financial standing or liability insurance.

May attorney ethically rely upon the firm's "Abstract" or "Title Search" in rendering title opinions to clients, lenders or title insurance companies?

If so, what duty, if any, does attorney owe to investigate, evaluate, train and/or supervise firm's employees?

Opinion:

An attorney is responsible under Rule 3.3(a) to ensure that his firm has procedures which will reasonably assure that the conduct of any nonlawyer either employed or retained by that firm "is compatible with the professional obliga-

tions of the lawyer..." Further, an attorney may not ethically handle any "legal matter without preparation adequate under the circumstances." Rule 6(a)(2). For an attorney to rely on an abstract or title search by a nonlawyer not supervised by the attorney or the firm does not constitute adequate preparation under the circumstances for rendering of a title opinion or drafting a deed in reliance on the information disclosed by this title abstract or search. An attorney is required to supervise and evaluate the nonlawyer assistant. An attorney relying on nonlawyer assistants, whether employed by his firm or contracted with, must make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the lawyer's professional obligations, including his ethical obligations as required by Rule 3.3(a).

RPC 30

April 14, 1995

Communication with Represented Criminal Defendant

Opinion rules that District Attorney may not communicate or cause another to communicate with represented defendant without the defense lawyer's consent.

Inquiry:

A criminal defendant, represented by an attorney, initiates personal contact with the district attorney who is prosecuting the charges against him. The criminal defendant tells the district attorney that the attorney representing him is not counsel of his choice, was selected by someone else, and is not representing his interests. The criminal defendant further says that the attorney is advising him to keep quiet and that he (the criminal defendant) believes the attorney is a "watchdog" for other conspirators in the criminal enterprise of which the criminal defendant has been a part. The criminal defendant expresses a willingness and desire to cooperate with the State but says that he will do so only if the State agrees that his attorney not be told he is cooperating.

May the district attorney engage in a period of communication with, and accept the cooperation of, the criminal defendant, without revealing the communication and cooperation to the criminal defendant's attorney? What should the district attorney do in response to the criminal defendant's contact?

Opinion:

No, the district attorney may not engage in such discourse with the criminal defendant. The Rules of Professional Conduct prohibit communication and cooperation between the district attorney and a criminal defendant whom the district attorney knows to be represented by counsel. Rule 7.4(a) provides that a lawyer "shall not....(c)ommunicate or cause another to communicate about the subject of the representation with a party 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 by law to do so."

However, the district attorney need not, and indeed, should not turn a deaf ear to the criminal defendant's complaint. The Rule does not prohibit confidential discussions with a person seeking another opinion on his legal situation. Rule 7.4, comment. And, in dealing with "a person who is not represented," a lawyer always is permitted to advise the person to secure counsel. Rule 7.4(b). Furthermore a district attorney has a special duty to "(m)ake reasonable efforts to assure that the accused has been advised of the right to and the procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel." Rule 7.3(b).

Thus, confronted with the contact described above, the district attorney should inform the criminal defendant that he has the absolute right to an attorney who will represent only his interests, that he may discharge the attorney who is representing other interests, that the Court will appoint an attorney to represent his interests if he cannot afford to employ one, and that the district attorney will assist in having him brought before the Court so that the discharge and appointment may be accomplished.

The situation is different where the criminal defendant's complaint to the district attorney is that he has no lawyer but that an attorney is claiming to represent him. In that circumstance, ethical considerations do not prohibit communications between the district attorney and the criminal defendant, since Rule 7.4(a) applies only where the district attorney knows the party to be represented by counsel. Even there, however, the district attorney still has a special duty under Rule 7.3(b), to assist the criminal defendant on gaining access to counsel.

In addition, in either situation, the district attorney may have a duty to inform the North Carolina State Bar of the misconduct of the criminal defendant's attorney. Rule 1.3 requires a lawyer to report misconduct when he or she has "knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The criminal defendant's allegations, as described in the inquiry, are of misconduct in the extreme, involving possible violations of Rule 1.2(c) (dishonesty and fraud), Rule 1.2(d) (prejudice to the administration of justice), Rule 5.1 (conflicts of interest), Rule 5.6 (fees from third parties), Rule 6(b)(3) (nondiligent-representation), and Rule 7.1(a)(2) (prejudice or damage to client). The Rule does not require a lawyer to report "every violation" of the Rules of Professional Conduct, but only those "that a self-regulating profession must vigorously endeavor to prevent." Rule 1.3, comment. Here, the allegations clearly raise "a substantial question" about the attorney's fitness within the meaning of Rule 1.3. If the quality of the allegations and information are sufficient to imbue the district attorney with "knowledge" of violations, rather than a mere suspicion of them, then he must report the attorney to the State Bar.

RPC 31

July 24, 1987

Letterhead Listing of "Corresponding" Attorney

Opinion rules that a law firm in North Carolina may not list on its letterhead a "corresponding" attorney in another location.

Inquiry:

May an attorney licensed in North Carolina show on his letterhead a "Corresponding French Lawyer" or other relationship with an attorney who is not associated in a partnership or professional association and is not of counsel to the firm?

Opinion:

No. Rule 2.3(c) prohibits a North Carolina law firm with offices only in North Carolina from listing a person not licensed in this state "as an attorney affiliated with the firm." A relationship such as a "corresponding attorney" is a form of association or affiliation or could be construed as such by the public. This opinion overrules CPR 347.

RPC 32

January 13, 1989

Editor's Note: This opinion was originally published as RPC 32 (Revised).

Representation of Domestic Client After Representing Both Spouses in Other Matters

Opinion rules that an attorney who represented a husband and wife in certain matters may not represent the husband against the wife in a domestic action involving alimony and equitable distribution. Opinion further rules that an attorney associated with the firm which represented the husband and wife during marriage, but who did not himself represent the husband and wife during that time, may represent the wife in an action involving equitable distribution and alimony if he did not gain any confidential information from or on behalf of the husband.

Inquiry #1:

Lawyer A is a senior partner with the Firm of A, B, and C. Husband and wife employed the services of Lawyer A over a period of approximately 15 years. Lawyer A, during the course of representing husband and wife, prepared wills for husband and wife, was the attorney for the estate of wife's mother, represented their son in connection with several traffic citations, represented the husband and wife in connection with the purchase of three parcels of real property, and advised the husband and wife as to whether they should file a joint bankruptcy petition. The husband and wife did not file a bankruptcy petition.

After the aforementioned services were rendered by Lawyer A on behalf of the husband and wife, the husband and wife separated. Therefore, the husband employed Lawyer A for the purpose of filing a complaint seeking divorce based upon one year's separation. The wife hired Lawyer D who had previously been employed with the Law Firm of A, B, and C to represent her in the domestic action. Lawyer D had never performed any legal services on behalf of husband and wife during his employment with the Firm of A, B, and C. Lawyer D filed

an answer and counterclaim seeking an award of temporary and permanent alimony, sequestration of the marital residence and an equitable distribution of the marital property accumulated during the parties' marriage. Lawyer D also filed a motion requesting that Lawyer A withdraw from the case. May Lawyer A ethically continue to represent the husband after the wife contests his continued representation of the husband?

Opinion #1:

No. Lawyer A previously represented both the wife and the husband in connection with numerous matters, including preparation of wills, administration of the wife's mother's estate, purchase of three parcels of real property, and advice as to whether they should file a joint bankruptcy petition. These matters all require or involve communication concerning property, income, and matters relevant to the spouses' financial circumstances so that Lawyer A will necessarily have received confidential information relevant to the pending proceedings. Lawyer A is required by Rule 4 neither to reveal confidential information of this client, nor to use confidential information of his client to the disadvantage of that client or for the advantage of a third person. Confidential information includes not only material protected by the attorney-client privilege, but other information gained in the professional relationship which the client either requests that the lawyer not reveal or the disclosure of which could be detrimental to the client. Under these circumstances, given the wife's objection to Lawyer A's representation of the husband, Lawyer A may not continue representing the husband in the domestic action which includes a claim for alimony and a request for equitable distribution of marital property.

Inquiry #2:

May Lawyer D continue to represent the wife, in light of the fact that he was previously employed with the Firm of A, B, and C during the period of time Lawyer A rendered the legal services described above to both the husband and wife?

Opinion #2:

Yes, unless Lawyer D acquired confidential information of the husband during the period of time that he was with Law Firm A, B, and C. The inquiry states that Lawyer D never represented the husband. If Lawyer D was not aware of any confidential information communicated by the husband or by the wife on behalf of both her and the husband, he would not be prohibited from representing the wife once he is disassociated from Law Firm A, B and C. *See* Rule 5.1 and comment thereto.

RPC 33

January 15, 1988

Editor's Note: This opinion was originally published as RPC 33 (Revised). See Rule 3.3 of the Revised Rules for additional considerations.

Disclosure of Client's Alias and Criminal Record

Opinion rules that an attorney who learns through a privileged communication of his client's alias and prior criminal record may not permit his client to testify under a false name or deny his prior record under oath. If the client does so, the attorney would be required to request the client to disclose the true name or record and, if the client refused, to withdraw pursuant to the rules of the tribunal.

Inquiry:

Attorney A represents Defendant D in a criminal proceeding. In a confidential communication with D, Attorney A discovers that D has been charged under an alias. If D's real identity were known, it would reveal a prior criminal record which could have an impact on sentencing and possibly result in other charges. In this particular case, it would be in the best interest of D to testify in his own behalf.

Does Attorney A have an affirmative duty to disclose the alias? May he have D sworn under the alias? When the district attorney asks the defendant if he has a prior criminal record, must Attorney A withdraw if D denies any record? If asked by the judge to disclose D's prior record, which cannot be accomplished without revealing the alias, must Attorney A withdraw?

Opinion:

Prior to any trial court proceedings, Attorney A has no affirmative duty to disclose the Defendant's true name or his criminal record. Indeed, at that point in his representation, Attorney A's duty to his client prohibits his disclosing this confidential information. Rule 4.

In the trial court, however, Attorney A also has a duty to the tribunal. He may not participate in the presentation of perjured testimony, Rule 7.2(a) (4), (5), (6) and (8), nor in the perpetration of a fraud upon the tribunal. Rule 7.2(b) (1). Obviously, trial court events may give rise to a conflict between this duty to deal honestly with the court, and the duty to deal confidentially with the client. Counsel may not sit idly by while a defendant testifies falsely. Rule 7.2(b) (1). And in response to a specific and direct question to counsel by the court, counsel may not misrepresent the defendant's criminal record but is under no ethical obligation to respond.

Prior to trial, Attorney A must anticipate these possible trial events. He must request the Defendant to agree that he will testify truthfully about all matters, including his name and criminal record, if he testifies at all. If the Defendant refuses this request, Attorney A must terminate his representation. If he has formally entered the case, he must undertake to withdraw, prior to trial, in accord with the rules of the tribunal. *See* Rule 7.2 and comment.

If the Defendant agrees to these requests but, during the trial, testifies falsely with respect to a material matter, including his name and criminal record, Attorney A must call upon the Defendant to correct the false testimony. If the Defendant refuses, Attorney A must undertake to withdraw from the case in accord with the rules of the tribunal. *See* Rule 7.2(b) (1) and comment.

RPC 34

January 15, 1988

Use of the Designation "Of Counsel"

Opinion rules that an attorney may be designated as "of counsel" to a North Carolina law firm so long as the attorney is licensed in North Carolina and will have a close, in-house association with the firm which does not involve conflicts of Interest.

Inquiry:

Lawyer A is a member of the North Carolina Bar and has been a member for about 15 years. Lawyer A is also a member of the Texas Bar and is a partner in Texas Law Firm Y in Houston, Texas. During the years that Lawyer A has lived and worked in Texas, he has maintained a second home in North Carolina and has maintained a personal and professional relationship with Law Firm X. His family moves to North Carolina for the summer and he makes frequent trips to North Carolina throughout the year.

Lawyer A will semi-retire from the Texas practice and will be dividing his time between Texas and North Carolina. He will maintain a permanent office with Law Firm X and will be in the office for a few days each month and in contact with other attorneys and staff of Law Firm X on a frequent basis. It is anticipated that eventually Lawyer A will retire to North Carolina.

May Lawyer A become "of counsel" to Law Firm X?

Opinion:

Yes. Nothing in the Rules of Professional Conduct specifically speaks to use of the designation "of counsel." A firm may designate as "of counsel" another attorney who is licensed in North Carolina, and who will have a close, in-house association free and clear from problems of conflict, without violation of Rule 2.3. CPRs 82 and 155 were decided under the Code of Professional Responsibility and were based on provisions not included in the Rules of Professional Conduct. To the extent CPRs 82 and 155 required daily contact or association, they are overruled.

RPC 35

January 15, 1988

Contingent Fees for the Collection of "Med-Pay"

Opinion rules that a lawyer generally may not charge a contingent fee to collect "med-pay."

Inquiry:

May a lawyer ethically enter into a contingent fee contract to collect amounts due under provisions of a liability insurance contract which provide for the payment of the insured's medical expenses up to a certain amount without regard to fault if there is no dispute as to the validity of the medical bills?

Opinion:

Contingent fees, like all legal fees, must be reasonable. Rule 2.6(a). Generally it is considered reasonable for lawyers to charge and collect higher fees than would otherwise be permitted in cases where recovery is uncertain and the lawyer's right to be paid is actually contingent upon there being some recovery. Thus, in such situations, a lawyer is justified, within reason, in computing a fee by applying a relatively high percentage rate to any amounts recovered for the client.

There is generally no justification for extraordinarily high fees where there is no risk of nonpayment. In order for such contingent fees to be reasonable and therefore permissible, there must exist at the time the agreement is made some real uncertainty as to whether there will be a recovery.

In most situations where claims are made under the medical payments provisions of liability insurance policies, there is no significant risk that the insurance company will refuse payment. There are no questions of fault to be determined and there is seldom any dispute regarding the validity of medical expenses. The element of risk which is necessary to justify the typically elevated contingent fee is not present. Such a fee would therefore be unreasonable to the extent that it bears no relation to the cost to the attorney of providing the service or the value of the service to the client. The same analysis would apply to other types of claims with respect to which liability is clear and there is no real dispute as to the amount due the claimant, such as claims for health insurance benefits and life insurance proceeds.

It is not unethical for the attorney to make some reasonable charge for services rendered in regard to the collection of such claims.

RPC 36

April 15, 1988

Editor's Note: This opinion was decided prior to the 1989 amendment to superseded (1985) Rule 2.4 permitting targeted direct mail advertising.

Seminars Produced by Law Firms for Prospective Clients

Opinion rules that a law firm may hold a seminar concerning automobile accident claims for members of the public who are randomly selected for invitation.

Inquiry:

Lawyer A desires to invite members of the public to a periodically held seminar with refreshments at his office where the public would be given demonstrations and/or information with respect to what to do in case of an automobile accident. Can Lawyer A hold such seminars? If so, can he have his staff mail invitations to the general public either by using names from the phone book or by bulk occupant mailing? Could the attorney ethically invite members of the general public to these seminars by randomly selecting people through the telephone book and having staff, employees or an outside phone service call them with an invitation to attend such seminars or demonstrations?

Opinion:

Yes, Lawyer A may hold such seminars. However, he cannot, personally or through any staff, employees or outside agency, telephone persons to invite them to such seminars or demonstrations. Rule 2.4(b). Since the goal of such seminars or demonstrations would be to invite an employment relationship, soliciting persons to come to the seminar demonstration would be equivalent to soliciting professional employment from those persons. He could invite such persons by mailing invitations to persons selected randomly from the telephone directory or by bulk occupant mailing. He could not preselect the people by any means which would target persons specifically likely to need such legal services. Rule 2.4(b)

RPC 37

April 15, 1988

Application of Trust Funds to Client's Fee Obligation

Opinion rules that a law firm which has received money representing the refund of an appeal bond to a client owing substantial fees to the firm may apply the appeal bond refund to the fees if an agreement with the client would authorize the firm to do so.

Inquiry:

Several years ago, law firm ABC represented client P in connection with the defense of a lawsuit filed against P. The trial resulted in an adverse verdict for client P, and P instructed the firm to perfect an appeal to the North Carolina Court of Appeals. The Court of Appeals affirmed the Superior Court judgment, and P has since paid the judgment.

After the appeal was affirmed by the Court of Appeals, client P still owed law firm ABC substantial fees. Those fees have not been paid and are unlikely to be satisfied. At a later date, the Office of the Clerk of Superior Court informed law firm ABC that the Clerk's Office was holding a check, which was the return of the appeal bond posted by client P. The money for the appeal bond was brought to law firm ABC's office by P at the time of the notice of appeal and was then deposited with the Clerk's Office by attorneys with firm ABC. Currently, law firm ABC is holding the refunded appeal bond money in its trust account.

May law firm ABC ethically apply the funds from the refund of the appeal bond to the fees still owed to the law firm, which are substantially in excess of the amount of the refund?

Opinion:

No, unless the agreement or understanding with the client concerning payment of fees and handling of money on behalf of the client authorizes the firm to take its fees or a portion of the fees owing to it from funds held for the client. The firm is required to hold all property or funds owing to its client in a designated trust account, separate from the firm's own funds. *See* Rules 10.1(a),(c). Funds may be disbursed from that trust account only to the client or in accordance with the client's instructions. *See* Rule 10.2(E). If a lawyer or firm reached an understanding with a client which would allow it to apply such funds as the refund of an appeal bond to the fees owing from the client to the firm, then disbursement of the refunded appeal bond funds could be made consistent with Rule 10.2(E) to the firm for payment of unsatisfied fee obligation.

RPC 38

April 15, 1988

Temporary Placement of Attorneys

Opinion rules that attorneys in North Carolina may use attorney placement services which place independent contracting attorneys with other attorneys or firms needing assistance on a temporary basis for a placement fee.

Inquiry:

Attorneys Placement Service, or APS, contracts with independent licensed attorneys willing to provide legal services on an hourly basis for placement of those attorneys with other attorneys, law firms, or corporate counsel needing some assistance temporarily because of lack of time, lack of expertise in a particular area, or other reasons. APS views its role as one of a placement consultant hired by both the employing attorney or firm and the independent attorneys who are placed. APS charges a placement fee which is paid directly by the employing attorneys or firms prior to paying the contracting attorney. The contracting attorney has entered into the arrangement to be paid at a rate equal to the amount paid by the employing attorney minus the placement fee, which is included in the agreement with the employing attorney as being deducted from the total amount paid by the employing attorney.

The attorneys placed by APS are not employed by APS. They are free to accept or decline any temporary position in which APS otherwise is able to place them. APS makes an effort to determine whether there could be a conflict of interest prior to placing any contracting attorney. However, APS also expects the employing attorneys or firms and the contracting attorneys to be sensitive to a possible conflict of interest and to handle any potential conflicts in an ethical manner.

May licensed attorneys in North Carolina ethically contract with APS as either employing attorneys wishing to have other attorneys placed with them on a temporary basis or as contracting attorneys seeking temporary placement with other attorneys or firms?

Opinion:

Yes. This arrangement does not appear to be structured in any way so as to impinge upon the lawyers' ability to exercise their independent judgment in performing legal ser-vices. The contracting attorneys, as well as the employing attorneys or firms, would need to be very careful to avoid any potential conflicts of interest under Rule 5.1 and to preserve confidential information appro-

priately under Rule 4 in the same way as is necessary whenever an attorney or firm representing a client contracts with another attorney to assist in performance of legal services and representation of the client. Assuming that the contractual arrangements specify what the employing attorney or firm is paying, the rate to be paid to the contracting attorney, and the placement fee to be paid to APS, the arrangement would not violate either Rule 2.6(d) or Rule 3.2.

RPC 39

July 15, 1988

Communication with Adverse Party's Insurer

Opinion rules that an attorney may not communicate settlement demands directly to an insurance company which has employed counsel to represent its insured unless that lawyer consents.

Inquiry:

Lawyer A is insured against professional malpractice by Insurance Company. Plaintiff sues Lawyer A for malpractice. Insurance Company provides Lawyer B to defend Lawyer A. May Plaintiff's counsel communicate settlement demands to Lawyer B with a copy to Insurance Company?

Opinion:

No, unless Lawyer B consents. Rule 7.4(a) prohibits a lawyer from communicating regarding the subject of representation with a party 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 by law to do so. For the purpose of this rule, an insurance company which provides counsel for its insured in the defense of a third party's liability claim is itself a party represented by counsel and may, therefore, not be contacted directly by the third party's lawyer unless the lawyer for the insured and insurer consents.

RPC 40

April 17, 1989

Editor's Note: This opinion was originally published as RPC 40 (Revised).

Lender Preparation of Closing Documents

Opinion rules that for the purposes of a real estate transaction, an attorney may, with proper notice to the borrower, represent only the lender, and that the lender may prepare the closing documents.

Inquiry:

Lender A wishes to retain Attorney B to examine the title, render a title opinion, obtain title insurance, record documents and disburse funds at a real estate closing. Lender A will prepare all the necessary documents and states that it will hold Attorney B harmless for all errors in the closing documents. The borrower will be charged a document preparation fee by Lender A and will be notified that Attorney B represents only Lender A.

1. Does Lender A engage in the unauthorized practice of law by preparing the closing documents and charging a fee for this service?
2. Does Attorney B have a duty to notify the borrower of any problems Attorney B detects during the title search?
3. May Lender A waive Attorney B's liability for errors in the closing documents on behalf of itself and the borrower?

Opinion:

1. Lender A has a "primary" interest in the closing documents. Therefore, under the rule of *State v. Pledger*, 257 N.C. 634, 127 S.E.2d. 337 (1962), Lender A may draft these documents without engaging in the unauthorized practice of law.
2. If Attorney B clearly explains to the borrower that he represents only Lender A and makes that disclosure far enough in advance of the closing that the borrower can procure his own counsel if he wishes, Attorney B will have no duty to notify the borrower of potential defects in the title. CPR 100. It is suggested that any such notice be written.
3. Lender A may not "waive" Attorney B's liability for errors in the closing documents without the borrower's permission to do so. However, if Attorney B does not draft or review the documents and does not represent the borrower in any respect, it does not appear that Attorney B could be held responsible for errors in the closing documents.

RPC 41

January 13, 1989

Lender Preparation of Closing Documents

Opinion rules that for the purposes of a real estate transaction, an attorney may, with proper notice to the borrower, represent only the lender, and that the lender may prepare the closing documents.

Inquiry:

ABC Co. is a title company which has contracted with a lending institution to provide title insurance and coordinate residential loan closings. ABC Co. wishes to enlist Attorney B as part of a "network" of approved attorneys who will perform closings subject to ABC Co.'s instructions.

All closing documents will be prepared by the lender and forwarded to Attorney B, who will meet with the parties, explain the documents and supervise their execution. Attorney B will then return the documents to ABC Co.

May Attorney B agree to handle closings in this manner?

Opinion:

Yes. The lender has a primary interest in the closing documents pursuant to *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962). Thus, the lender may draft the closing documents and Attorney B will not be assisting the unauthorized practice of law by conducting the closing under these circumstances.

If Attorney B intends only to represent the lender at the closing, he must clearly notify the borrower in time to permit the borrower to obtain other counsel.

RPC 42

July 15, 1988

Representation of Interests Adverse to Former Client

Opinion rules that an attorney may represent a wife in a divorce proceeding against a husband whom the attorney previously represented in a custody proceeding against the husband's first wife.

Inquiry:

Attorney A represented Husband in a custody proceeding against Wife No. 1. At the time Husband was married to Wife No. 2. After the conclusion of the custody proceeding, Wife No. 2 asks Attorney A to represent her in obtaining a divorce from Husband.

May Attorney A represent Wife No. 2 against Husband? Would the answer change if Husband and Wife No. 2 had not been married at the time of the first action between Husband and Wife No. 1?

Opinion:

The prior custody proceeding between Husband and Wife No. 1 does not appear to be substantially related to the contemplated divorce action between Husband and Wife No. 2 and therefore Attorney A may represent Wife No. 2. Attorney A may not divulge any confidences or secrets of Husband which Attorney learned during his prior representation, however. If Attorney A cannot adequately represent Wife No. 2 without revealing these confidences or secrets, Attorney A must decline to represent Wife No. 2, or, if he has already taken the case, must withdraw. *See* Rules 5.1(c) and (d).

Husband's marital status at the time of his action against Wife No. 1 would not, without more, affect the answer to Attorney A's inquiry.

RPC 43

July 15, 1988

Advertisement of Board Certification of Specialty

Opinion rules that an attorney who has been certified as a specialist by the Board of Legal Specialization may so indicate in an advertisement in any way that is not false, deceptive or misleading.

Inquiry:

Attorney A has been certified as a legal specialist in bankruptcy law by the North Carolina State Bar Board of Legal Specialization. The Board's standards list various official designations which board certified specialists may use in advertising. May Attorney A use any variation of these official designations?

Opinion:

Yes. So long as the variations are not false, misleading or deceptive, use of such variations does not violate the Rules of Professional Conduct. The United States Supreme Court held that use of nonmisleading variations of official designations for specialists is protected by the First Amendment in *In re RMJ,* 455 U.S. 191, 205 (1981).

RPC 44

July 15, 1988

Attorney's Obligation to Follow Closing Instructions

Opinion rules that a closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

Inquiry:

Attorney closes loans for a number of real estate clients. After all documents are signed, but before recording, Attorney gives the real estate agent the commission check and the check for the sellers' proceeds. Attorney then records the necessary documents.

Attorney has been given closing instructions from the lender which require recording before disbursement. Attorney has actually signed a statement to the lender that he will follow the lender's instructions. Attorney is on the approved attorneys' list for a number of title insurance companies who have issued insured closing letters to lenders whose loans attorney closes. The insured closing letter ensures that the attorney will comply with the lender's closing instructions. If a defect in title is discovered by attorney in his title update after disbursement, then the title insurance is liable for that defect. That, in turn, puts attorney's professional liability policy at risk.

Both the realtor and seller have demanded that he disburse funds immediately rather than waiting until later in the day after going to the courthouse to update the title record. The realtor has further stated that the attorney would lose his business unless the funds are disbursed immediately because such is the prevailing practice in the community.

May attorney ethically ignore the lender's closing instruction as well as his commitment to the lender to follow those instructions? Has attorney violated any ethical requirements in disregarding the potential liability that would be imposed upon the title insurance company and/or his professional liability carrier if a defect is discovered after disbursement?

Opinion:

No. The attorney may not ethically ignore the lender's instruction that recordation must precede disbursement. CPR 100 made it clear that any attorney involved in the closing of an ordinary residential real property transaction represents both the borrower and the lender in the absence of clear notice to all concerned that such is not the case. Rule 10.2(E) requires a lawyer holding client funds in trust to deliver those funds to interested third persons as directed by the client. In the situation described in the inquiry, it is clear that the attorney, having received funds in trust from his client, the lender, is obliged to disburse those funds at a time which is consistent with the lender's instructions. Moreover, it is fair to say that any lawyer receiving client funds with the present knowledge that he or she does not intend to comply with the instructions for the handling of those funds, would violate Rule 1.2(c) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

It should also be noted that the disbursement of loan proceeds before the title is updated and the Deed and Deed of Trust are recorded could be prejudicial, not only to the lender as a client of the attorney, but also to other interested parties in the transaction to whom the lawyer may owe fiduciary duties, such as the title insurer and his own liability insurance carrier. Such conduct, at least insofar as the client is concerned, could be viewed as prejudicial to the client and thus a violation of Rule 7.1(a)(3).

RPC 45

July 15, 1988

Partner Represented Adverse Parties Prior to Joining Firm

Opinion rules that attorney whose partner represented the adverse party prior to joining the firm is not disqualified unless the partner acquired confidential information material to the current dispute.

Inquiry:

A represents H in a domestic dispute with W. In 1977, A's current partner B, while working for another firm, drafted a will for W. In 1980, B, after joining A's firm, assisted in the settlement of an estate in which W was interested and drafted a timber deed for H and W. A has never previously represented H or W nor any member of their family. A has not received any confidential information regarding W's financial circumstances. B did not bring any files related to the matter he handled for H and W with him when he joined A's firm.

May A continue representing H over W's objection?

Opinion:

Yes, assuming that B acquired no confidential information incident to his representation of W prior to joining A's firm which would be material to the current domestic case (Rule 5.11(b)), and, further, that the matters handled by B for W after joining A's firm are not substantially related to the current domestic dispute. Rule 5.1(d).

RPC 46

October 28, 1988

Foreclosure and Bankruptcy

Opinion rules that an attorney acting as trustee in a foreclosure proceeding may not, while serving in that capacity, file a motion to have an automatic stay lifted in the debtor's bankruptcy proceeding.

Inquiry:

If foreclosure proceedings have been instituted against a debtor who later files for bankruptcy, may Attorney A, who serves as trustee in the foreclosure, file a motion in the bankruptcy court to set aside the automatic stay, if the debtor has not contested the noteholder's right to foreclose?

Would the answer to the foregoing inquiry change if, at the time the debtor filed for bankruptcy, any of the following were true: 1) the hearing before the clerk of court in the foreclosure proceeding had not yet been held; 2) the hearing had been held but the 10-day appeal period had not yet run; 3) the 10-day appeal period had expired.

Finally, may Attorney A charge fees for his services pursuant to N.C. Gen. Stat.§ 6-21.2?

Opinion:

CPR 166 provides that an attorney who serves as trustee may represent neither the lender not the borrower in a "role of advocacy" in the foreclosure proceeding. So long as the attorney remains trustee, the attorney owes a fiduciary duty to both the borrower and lender. This duty would be violated if the attorney assumed the role of an advocate.

CPR 305 held that the filing of a motion to set aside the automatic bankruptcy stay places the attorney in an adversarial position. Consequently, Attorney A may not properly file such a motion while serving as trustee in the foreclosure. The answer to this inquiry remains the same, regardless of the stage to which the foreclosure had progressed when the debtor filed for bankruptcy.

Finally, the question whether Attorney A may collect legal fees pursuant to N.C. Gen. Stat. §6.21.2 appears to be moot in view of the above ruling.

RPC 47

October 28, 1988

Trust Accounting for Small Sums

Opinion rules that an attorney who receives from his or her client a small sum of money which is to be used to pay the cost of recording a deed must deposit that money in a trust account.

Inquiry:

Attorney A is employed to draft a deed for Client B who wishes to give a parcel of real property to a relative. It is contemplated that Attorney A will, in addition to drawing the deed, preside over its execution and see that it is properly recorded. Client B is expected to pay a relatively small legal fee along with the cost of recordation at the time the deed is executed. For reasons of cost and convenience, Attorney A would like to ask his client for a single check representing the fee and the cost of recordation and would prefer to deposit that check in his general office account. From that account a single check would be written to the Register of Deeds for the cost of recordation.

Would the procedure described above violate the Rules of Professional Conduct? If so, is there any professionally responsible way of handling such transactions which would not involve an intermediate deposit in the trust account and the necessity of writing multiple checks?

Opinion:

Rules 10.1(a) and (c) quite clearly require a lawyer to deposit into his or her trust account all funds received as a fiduciary. This obligation is not in any way diminished when the sum involved is small. Strict segregation of client funds from the personal funds of the lawyer is always necessary to preclude confusion as to the identity of the funds and to ensure that trust funds are not subject to the claims of the lawyer's creditors or to those of his or her estate.

It should be noted that Rule 10.1(c) further provides that funds received from the client by the lawyer as reimbursement for expenses properly advanced by the lawyer on behalf of the client need not be deposited in the lawyer's trust account. A lawyer handling such transactions could therefore advance funds from his or her general account to pay the cost of recordation and could accept from the client a single check for the legal fee and the advanced expenses and the check could then be deposited directly and finally into the lawyer's general office account.

RPC 48

October 28, 1988

Law Firm Dissolution

Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

Inquiry:

What are the ethical responsibilities of lawyers involved in a firm dissolution?

Opinion:

The dissolution of a law firm involves four potential areas of ethical concern for the principals involved: (a) the continuity of service to clients; (b) the right of clients to counsel of their choice; (c) the obligation of the principals to deal honestly with each other; (d) the involvement of clients in the disputes of the principals; and (e) the protection of the property of clients entrusted to the firm.

A. The Continuity of Service to Clients

Canon VII of the North Carolina Rules of Professional Conduct requires that an attorney represent his or her client zealously. This Canon, and the Rules adopted pursuant to it, require that the attorneys involved in dissolution take care that they continue to fulfill the lawful objectives of their clients.

While the client may have a contractual relationship with the firm, any professional relationships with regard to legal matters are necessarily personal as between the client and at least one identifiable attorney. Any attorney involved in such a professional relationship with a client at the time of dissolution has an obligation to continue the representation, as contemplated by the contract of employment, until the matter is concluded or, until the attorney is required or permitted to withdraw.

B. The Right of Clients to Counsel of Their Choice

The attorneys also must take care to notify present clients of the change in the relationship among the attorneys. In giving this notice, the right of clients freely to choose counsel must be preserved. Ideally, the attorneys will agree on the notice to be sent, who sends it, to whom it is sent, and when it is sent. CPR 24. In the absence of agreement, any attorneys in the firm who have had significant professional contact with the client may send such a notice. Each attorney in the firm who has an ongoing professional relationship with the client has an obligation to see to it that such a notice is sent. Rule 6(b)(1) and (2).

The attorneys must take particular care in notifying a present client for whom the firm is handling a current matter. In addition to notice of the change, such a client should be informed of the status of the matter, the attorney or attorneys who have been working on the matter, and should be asked to select an attorney or attorneys to continue the matter to conclusion. CPR 24, Rule 6(b)(1) and (2). Ideally, this communication to present clients should be sent, by agreement, over the signatures of those attorneys who have had a professional relationship with the client. Any attorney who has had such contact with the client may communicate the information and make the request.

C. The Obligation of the Principals to Deal Honestly With Each Other

In allocating the firm's personal property, accounts receivable, fees to be received in the future for work in progress, and other assets and liabilities of the firm, the lawyers must deal with each other in compliance with their obligation to refrain from conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 1.2(c).

D. The Involvement of Clients in the Disputes of the Principals

If the dissolution gives rise to disputes among the lawyers about their respective rights to the firm's personal property, accounts receivable, fees to be received in the future for work in progress, or other issues, the attorneys should strive to resolve such disputes amicably without involving the clients in negotiations or litigation. If the attorneys are unable to resolve such disputes by agreement, they should resolve them, where possible, by arbitration.

E. The Protection of the Property of Clients Entrusted to the Firm

A full and complete accounting of all fiduciary property of clients entrusted to the firm should be made to each client, with written request for their return or future disposition. Failure of the client to respond should be taken as a request for the return of said fiduciary property to the client, unless governed by a Court Order or proceeding to the contrary.

RPC 49

January 13, 1989

Real Estate Brokerage Owned by Lawyers

Opinion rules that attorneys that own stock in a real estate company may refer clients to the company if such would be in the client's best interest and there is full disclosure, and that such attorneys may not close transactions brokered by the real estate firm.

Inquiry #1:

A is the president and majority stockholder of XYZ Realty, Inc., a commercial real estate firm. B, C, and D are attorneys who are minority shareholders in XYZ, but who are not involved in management of the company.

May B, C, and D refer their legal clients to XYZ Realty, Inc., provided they disclose their status as shareholders in XYZ?

Opinion #1:

Yes, provided that in addition to disclosing their status as shareholders, Lawyers B, C, and D reasonably believe that dealing with XYZ Realty would be in the best interests of their clients. Rule 5.1 (b) (1) and (2).

Inquiry #2:

May B, C, and D's law firm close a real estate transaction brokered by XYZ Realty, Inc.?

Opinion #2:

No. B, C, and D's personal interest in having their realty firm receive its commission could conflict with client's desire to close only when his or her best interest would be served by so doing. This conflict could materially impair the judgment and loyalty of B, C, and D and other members of their firm. In such situations the risk to the client is so great that no lawyer can reasonably proceed, regardless of whether the client wishes to consent. Rule 5.1 (b) and Rule 5.11 (a).

RPC 50

January 13, 1989

Nonrefundable Retainers

Opinion rules that a lawyer may charge nonrefundable retainers that are reasonable in amount.

Inquiry:

May a law firm draft and use a standard fee agreement to be signed by all clients which includes a clause requiring the client to pay a nonrefundable retainer in an amount to be determined in each case by the supervising attorney? Is it necessary to distinguish between a retainer and an advance payment or deposit of legal fees?

Opinion:

A lawyer may charge and collect a nonrefundable retainer as consideration for the exclusive use of the lawyer's services in regard to a particular matter or

matters. Rule 10.3, comment. Like all legal fees, a retainer must be reasonable in amount. Rule 2.6(a). Because it is an unusual fee arrangement and one likely to be misunderstood, the lawyer should be careful to offer the client an adequate explanation of the agreement prior to its execution.

Retainers and advance payments should be carefully distinguished. In its truest sense, a retainer is money to which an attorney is immediately entitled and should not be placed in the attorney's trust account. A "retainer" which is actually a deposit by the client of an advance payment of a fee to be billed on an hourly basis is not a payment to which the attorney is immediately entitled. It is really a security deposit and should be placed in the trust account. As the attorney earns the fee, the funds should be withdrawn from the account.

RPC 51

January 13, 1989

Trust Accounting for Litigation Costs

Opinion rules that where a lawyer receives a lump sum payment in advance which is inclusive of the costs of litigation, the portion representing the costs must be deposited in the trust account.

Inquiry:

Is it proper for a law firm to contract for a total amount of attorney's fees, all costs inclusive, deposit the entire amount into a general account as fees, and pay all the costs of the action, including filing and process fees out of the general account. Assume that the client has agreed in writing to the above agreement before the receipt of any funds.

Opinion:

No. Under the circumstances described, some of the money collected by the firm as "fees" would actually be an entrustment intended to defray the costs of litigation. Rules 10.1(a) and (c) require that funds received in the fiduciary capacity, however characterized, be directly deposited into a trust account.

RPC 52

January 13, 1989

Editor's Note: See Rule 3.3 of the Revised Rules for additional considerations.

Private Employment of Appointed Counsel

Opinion describes circumstances under which a lawyer who has been appointed to represent an indigent person may accept payment directly from the client.

Inquiry:

May an attorney, after having been appointed to represent an indigent defendant in a criminal case pursuant to G.S. §7A-452, 458, and 459, accept employment by the same defendant in a retained capacity in the same case? If so, under what circumstances?

Opinion:

Rule .0406(f) of the Rules and Regulations of the North Carolina State Bar Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases (27 N.C.A.C. 1D .0406(f)) provides that "[C]ounsel appointed for the representation of indigent defendants shall not accept any compensation other than that awarded by the court." This provision, when read in conjunction with Rule 2.6 of Rules of Professional Conduct prohibiting the collection of an "illegal fee," clearly indicates that an appointed counsel may not accept payment from his or her client for professional services. If during the course of the representation, the client indicates to the attorney a desire and the ability to personally employ the attorney's services, it would be appropriate for the attorney to advise the court of his or her client's desire, seek to be released from responsibility as appointed counsel, and seek to be entered as counsel of record on a retained basis. Because of the tremendous potential for overreaching and to avoid reinforcing the commonly held notion that a privately retained attorney will perform better than appointed counsel, a lawyer who knows or suspects that a client he or she has been appointed to represent is financially capable of employing counsel should never suggest that the client ought to privately employ him or her. Of course if the attorney becomes convinced that the client does have adequate personal resources to retain private counsel, it would be the attorney's duty under Rule 7.2(b)(1) to call upon his client to reveal that circumstance to the tribunal so that the state might be relieved of the burden of supplying counsel and a fraud on the court avoided. Pursuant to the same rule, the lawyer should, in the event his or her client refuses to permit the disclosure of his or her actual financial situation, move to withdraw.

RPC 53

January 13, 1989

Editor's Note: This opinion is overruled by RPC 160.

Implications of Service on City's Governing Body

Opinion rules that a lawyer may sue a municipality although his partner serves as a member of its governing body.

Inquiry:

Under Revised CPR 290 an attorney may appear before the governing body of a municipality even though another attorney from the same firm serves as a member of that body. To avoid an unethical conflict, the member must: (1) disclose the relationship, (2) refrain from consideration or comment on the matter, (3) absent himself from meetings during any discussion of the matter, and (4) withdraw from voting on the matter.

Attorney A represents Contractor, who has a construction contract (awarded through a public bid process) with the City. Attorney B is a member of the governing body of City and a partner in Attorney A's law firm. A dispute arises between City and Contractor concerning performance of, and changes to, the contract, and compensation and damages payable under the contract. At Contractor's request, Attorney A assists Contractor in submitting a claim against the City. When the claim is presented to the governing body of the City for consideration, Attorney B discloses his relationship to Attorney A and takes no part in the consideration, discussion or voting on the matter-all in accordance with Revised CPR 290.

When the governing body of the City votes to deny Contractor's claim, Contractor asks Attorney A to institute a civil action to recover from City the amounts claimed.

Under the same conditions imposed by Revised CPR 290, and assuming appropriate "screening" of Attorney B, may Attorney A continue to represent Contractor in a civil action against City?

Opinion:

Yes. The Rules of Professional Conduct would not prohibit Attorney A from representing the contractor against the City in a civil action. In order to avoid the appearance of impropriety Attorney B should be screened within the law firm from any participation whatsoever in the litigation on behalf of the plaintiff. In addition and for the same reason, Attorney B should be apportioned no part of the fee resulting from the prosecution of the litigation. For the purpose of this opinion, it is assumed that Attorney B complied fully with the requirements of revised CPR 290 when the matter was initially being considered by the City Council and that Attorney B will continue to have no involvement in regard to the defense of the litigation in his official capacity.

Under no circumstances should Attorney A undertake the representation of the contractor in litigation where it is necessary that Attorney B be made a party defendant in either his individual or official capacity. In that situation a direct conflict of interest would be engendered and Rule 5.1(a) would compel the disqualification of Attorney A.

RPC 54

January 13, 1989

Representation of School Board and Criminal Defendant

Opinion rules that a lawyer who represents a criminal defendant whose possession property was seized may not without consent seek the property as a fine or forfeiture on behalf of the local School Board.

Inquiry:

Attorney A represents the County Board of Education. Under the terms of G. S. 115C-452 all fines, forfeitures and penalties collected by the General Court of Justice sitting in the county are ultimately paid to local schools. For that reason, it is Attorney A's responsibility to participate in discussions and proceedings relative to fines and forfeitures involving criminal clients in the district and superior courts.

Attorney A also represents criminal clients who, from time to time, are ordered to pay fines, or whose bonds are called and forfeitures are entered.

Attorney A presently represents a criminal client who has been charged in the local Superior Court with trafficking in drugs. Incident to the criminal investigation, the client's home was searched and a large quantity of cash was seized. The money was turned over to federal authorities and held by those federal authorities until the case was tried. The client has consistently denied knowledge of or interest in the money. The client was found guilty by a jury and gave notice to appeal, which appeal is presently pending. After the trial the money confiscated during the search was turned over to the local sheriff.

May Attorney A, on behalf of the County Board of Education, request that the confiscated money be turned over to the County Board of Education?

Opinion:

No, not without the consent of the criminal client. Since it appears that the criminal client, though currently denying any interest in the fund, could have a claim superior to any known party in the event her conviction is overturned and she is ultimately acquitted, Attorney A would be representing an interest in direct conflict were he to initiate formal or informal proceedings directed toward reducing the money in question to the possession of the local Board of Education. However, since the criminal client has consistently maintained that she has no interest in the fund, it would not be inappropriate for Attorney A to seek her consent to his representation of the Board of Education in pursuit of the fund so long as he fully disclosed to her all material facts relating to the matter.

RPC 55

January 13, 1989

Attorney General's Representation of Adverse Interests

Opinion rules that a member of the Attorney General's staff may prosecute appeals of adverse Medicaid decisions against the Department of Human Resources, which is represented by another member of the Attorney General's staff.

Inquiry:

The N. C. Memorial Hospital is represented by a member of the Attorney General's staff. This attorney is assigned to the administrative section of the Attorney General's office, but is physically located at the hospital. The hospital attorney would like to pursue appeals of denials of Medicaid assistance on behalf of the hospital's patients. These appeals would be brought in the patients' names pursuant to agreements naming the hospital as the patients' attorney in fact.

The Medicaid appeals would be brought against the Department of Human Resources, which is represented by another member of the Attorney General's staff. The DHR attorney is physically located in Raleigh but is assigned to the same section of the Attorney General's office as the hospital attorney. Neither the DHR attorney nor the hospital attorney has access to the other's files.

May the hospital attorney handle the Medicaid appeals? Would the answer be different if the hospital attorney was assigned to a different section within the Attorney General's office?

Opinion:

The hospital attorney may represent the patients in Medicaid appeals, provided that there is no sharing of confidential information between the hospital attorney and the DHR attorney. Rule 5.11 imputes the disqualification of one attorney to other attorneys within the same law "firm." The term "firm" is not clearly defined within the rule. Although the comment suggests that the term should be read broadly, at least in some situations, it would be impractical to apply a broad reading of the term to government attorneys.

RPC 56

April 14, 1989

Representation of Insurer and Insureds

Opinion rules that a lawyer may represent a plaintiff against an insurance company's insured while defending other persons insured by the company in unrelated matters.

Inquiry:

May Attorney A represent Client B if suit will have to be filed against Defendant Z, who is insured by Insurance Company, if Attorney A is currently defending a number of unrelated matters for Insurance Company and its insureds?

Will the answer change if Attorney A is representing Insurance Company, which is named as a defendant in an unrelated lawsuit?

Opinion:

(1) While Attorney A owes some duty of loyalty to Insurance Company in cases in which Attorney A defends insureds of Insurance Company, the insureds, rather than the Insurance Company, are considered to be Attorney A's primary clients. *See* ABA Informal Opinion 822 (1965). Accordingly, Attorney A may represent Client B, even though Client B anticipates filing suit against an insured of Insurance Company and even though Attorney A routinely defends other insureds of Insurance Company.

(2) Where Insurance Company is a named defendant in a case handled by Attorney A, Attorney A should not agree to represent Client B in a suit against an insured of Insurance Company unless Attorney A reasonably believes that the representation will not adversely affect the interest of Insurance Company and both Client B and Insurance Company consent to the multiple representation after full disclosure of all the risks involved. *See* Rule 5.1(a).

RPC 57

October 20, 1989

Participation as an Approved Attorney

Opinion rules that a lawyer may agree to be on a list of attorneys approved to handle all of a lender's title work.

Inquiry:

Out-of-state Lender wishes to make home mortgage loans available to North Carolina borrowers. Lender wishes to require borrowers to use one of three "approved" North Carolina attorneys to do all the title work on closings on Lender's loans. May a North Carolina attorney agree to be one of these three approved attorneys?

Opinion:

An attorney may ethically request lenders and title insurance companies to place him on an approved attorney list. *See* CPR 104. The attorney may not, however, give any special remuneration to the Lender in return for placing his name on the list. No opinion is expressed as to the legality of the limitation of the number of attorneys on the list.

RPC 58

July 14, 1989

Editor's Note: This opinion was originally published as RPC 58 (Revised).

Substitution of Criminal Defense Counsel

Opinion rules that another member of a lawyer's firm may substitute for the lawyer in defending a criminal case if there is no prejudice to the client and the client and the court consent.

Inquiry:

Attorney A frequently acts as court-appointed defense counsel for indigent clients. Is there an ethics opinion which requires the court appointed attorney to appear personally on the client's behalf? Would it be improper for another member of Attorney A's firm to appear on the client's behalf as substitute counsel?

Opinion:

The Rules of Professional Conduct do not prohibit one of Attorney A's partners from appearing on the client's behalf in a matter to which Attorney A has been assigned, so long as the substitution does not prejudice the client, and so long as the substitution is consented to by the client in open court and the substitution is approved and made by the court.

RPC 59

April 14, 1989

Representation of Insurer and Insured in Declaratory Judgment Action

Opinion rules that a lawyer may represent an insurer and its insured as coplaintiffs in a declaratory judgment action.

Inquiry:

This case involves a head-on accident in which the driver (Driver A) at fault was driving a vehicle (Vehicle X) owned by another individual (Owner B). According to Owner B, Driver A took Vehicle X without his permission or consent and without having any reasonable grounds to believe that he could operate the vehicle. In fact, Owner B subsequently reported Vehicle X as being stolen.

Firm F has been retained to represent Owner B in a tort action brought by the occupants of the other vehicle involved in the collision. The defense to the tort action is lack of agency, lack of permissive use, and lack of any reasonable grounds Driver A could have had to believe he could use the vehicle.

The carrier has also requested that Firm F initiate a declaratory judgment action both in its name and in the name of Owner B to determine whether or not the carrier must provide coverage to Driver A.

Can Firm F, as attorney for the owner in the tort claim, file a DJA naming both the liability carrier and owner as plaintiffs?

Opinion:

Yes. In the declaratory judgment action the interests of Owner B and the insurance carrier would not be in conflict.

RPC 60

July 14, 1989

Representation of Police Organization and its Members

Opinion rules that subject to general conflict of interest rules, a lawyer may represent police officers who are referred by a professional organization of which they are members on a case-by-case basis and also represent criminal defendants.

Inquiry #1:

Attorney A is engaged in the general practice of law in North Carolina and occasionally represents criminal defendants. PBA, an organization of police officers, maintains a list of attorneys willing to represent PBA members in civil and criminal matters. Attorneys on the PBA list are not paid a retainer fee, and may accept or reject cases as they arise. The attorneys represent the individual PBA members, although fees are paid by the statewide PBA organization.

If Attorney A places his name on the list of attorneys willing to represent PBA members, will he thereby be precluded from representing criminal defendants in any other matter?

Opinion #1:

Attorney A will not be automatically precluded from representing all criminal defendants simply by placing his name on PBA's list of attorneys willing to handle matters for PBA members. Once Attorney A handles a PBA case, however, he may thereafter be disqualified from representing either a criminal defendant or a PBA member, depending on the particular facts.

For instance, if Attorney A accepts a case on behalf of a PBA member, Rule 5.1(a) would prohibit Attorney A from accepting any suit in which the client's interests are adverse to those of the PBA member, unless (1) Attorney A can reasonably conclude that he can represent the PBA member and the new client and (2) both clients consent to the multiple representation after full disclosure of the risks involved.

Moreover, Rule 5.1(d) forever precludes Attorney A from representing a second client in a matter substantially related to the matter which Attorney A handled for the PBA member, unless the PBA member consents to the later representation.

Inquiry #2:

Will the answer be different if Attorney A simply agrees to handle occasional research projects for the local PBA chapter on matters of general interest, such as employment law?

Opinion #2:

The same general analysis applies if Attorney A agrees to handle research matters for PBA on a case-by-case basis. In the case of research, however, the client appears to be PBA as an organization, rather than an individual PBA member. Thus, Attorney A may not simultaneously do research for PBA and handle a matter for a client whose interests are adverse to PBA.

Inquiry #3:

Will the answer be different if Attorney A serves as state and/or local counsel to the PBA chapter as well as undertaking occasional representation as set out in question I?

Opinion #3:

If Attorney A maintains a continuous relationship with PBA, by serving as its local and/or state counsel, Attorney A may not simultaneously represent any client whose interests are adverse to PBA or its members unless Attorney A (1) reasonably believes that he may adequately represent both clients' interests despite the conflict and (2) both PBA and the other client consent after full disclosure of the conflict and the risks involved.

RPC 61

July 13, 1990

Editor's Note: This opinion was originally published as RPC 61 (Revised).

Defense Counsel's Right to Interview Minor Prosecuting Witness

Opinion rules that a defense attorney may interview a child who is the prosecuting witness in a molestation case without the knowledge or consent of the district attorney.

Inquiry:

Vi, a seven-year-old child, is carried by her mother, Eve, to the Duke Pediatric Unit, where physical evidence of sexual abuse is diagnosed, and where Vi reports to the physician that her stepfather, Mo, is the perpetrator. Mo is arrested for felonious sex crimes against his young stepdaughter, Vi. Attorney X is appointed or retained to represent Mo. Eve, mother of Vi, expresses that she sympathizes with her husband, Mo, now in jail, and refuses to believe Vi's accusations. Eve brings Vi to Attorney X's office. May Attorney X interview Vi and obtain a statement without the knowledge or consent of the district attorney?

Opinion:

Yes. Rule 7.4(a) of the Rules of Professional Conduct only prohibits communication with a person known to be represented by counsel in regard to the matter in question. The prosecuting witness in a criminal case is not represented, for the purposes of the rule, by the district attorney. For that reason, the lawyer for the defendant need not obtain the consent of the district attorney to interview the prosecuting witness. Nor may the district attorney instruct the witness not to communicate with the defense lawyer. Rule 7.9(d). However, it would be unethical under Rule 7.4(a) for any attorney to question or interview Vi without first ascertaining whether a guardian ad litem or attorney had been appointed for Vi and, if so, without obtaining the consent of the guardian ad litem or attorney. The defense attorney must be careful to ensure that the prosecuting witness is not intimidated or induced to believe the attorney is disinterested or representing the interests of the witness. Rule 7.4(c). Reasonable efforts must be made immediately to correct any such misunderstanding if such becomes apparent. This is particularly important when the prosecuting witness is a child.

RPC 62

July 14, 1989

Disclosure of Client Confidences in Defense of Legal Malpractice Claim

Opinion rules that an attorney may disclose client confidences necessary to protect her reputation where a claim alleging malpractice is brought by a former client against the insurance company which employed the attorney to represent the former client.

Inquiry:

Insurance Company A hired law firm N to represent client Z in a lawsuit. This representation of Z was provided under reservation of rights, since

Insurance Company A contended that various claims in the complaint against Z were not covered by its policy. Z also retained private counsel. Eventually, the lawsuit was settled. Thereafter, Z sought to recover damages against Insurance Company A for, inter alia, alleged inadequate representation of Z by law firm N. What confidences of Z, if any, may law firm N reveal to Insurance Company A? Does the answer change if law firm N is still representing Z for the purpose of getting an escrow agreement signed as part of the settlement of the original lawsuit?

Opinion:

Rule 4(c)(5) provides that an attorney may reveal confidential information "to the extent the lawyer reasonably believes necessary...to respond to allegations in any proceeding concerning the lawyer's representation of the client."

The lawsuit between Insurance Company A and Z is a "proceeding concerning the lawyer's representation" of N. It is not necessary that law firm N be a party to the suit. Law firm N may therefore reveal confidences to the extent necessary to clear its name of the charge of inadequate representation, but should take care not to reveal confidences that are not necessary to its defense. The Rule 4(c)(5) exception to the confidentiality rule applies both to current and former clients. Therefore, law firm N may reveal confidences necessary to defend itself, even if it is representing Z in the escrow agreement matter.

RPC 63

July 14, 1989

Representation of School Board While Serving as County Commissioner

Opinion rules that attorney may represent the school board while serving as a county commissioner with certain restrictions.

Inquiry #1:

Lawyer L represents the county board of education as its attorney and has recently been elected as a county commissioner. Can Lawyer L or his associate represent the school board? If so, what limitations would Lawyer L have as county commissioner?

Opinion #1:

Lawyer L may represent the school board, as may his associate. Lawyer L should not personally represent the school board in any matter coming before the board of commissioners. Should a matter in which Lawyer L's associate is representing the school board be presented to the board of commissioners for decision, Lawyer L should take the following actions prescribed by CPR 290: 1) disclose in writing or in an open meeting to the board of commissioners his relationship to the matter involved, 2) refrain from an expression of opinion, public or private, on, or any formal or informal consideration of, the matter involved, including any communication or other form of contact with other members or staff of the board of commissioners concerning that matter, 3) absent himself from all meetings of the board of commissioners during any discussion or hearing of the matter and 4) withdraw from all voting on the matter, with or without the consent of the board of commissioners. The foregoing steps should be taken whenever a matter is presented to the board of commissioners in which Lawyer L or any member of his firm has a direct or indirect interest.

Inquiry #2:

Would service as a county commissioner require Lawyer L to restrict his law practice in other ways?

Opinion #2:

Yes. If the board of commissioners is responsible for hiring, firing, promoting or setting the salaries of the county's law enforcement officers, Lawyer L should not represent criminal defendants in cases in which such persons are prosecuting witnesses. CPR 189, 233. Lawyer L's associate would not be so disqualified. CPR 252.

RPC 64

July 14, 1989

Former Trustee's Representation of Purchaser Against Former Debtor

Opinion rules that a lawyer who served as a trustee may after foreclosure sue the former debtor on behalf of the purchaser.

Inquiry:

Attorney is the named trustee of a deed of trust granted by Debtor to secure a debt to Lender. Attorney commences a foreclosure proceeding and conducts a sale at which Bidder enters the high bid. The amount of the bid is sufficient to produce a surplus after satisfying all liens known to Attorney. At the end of the upset period, Bidder timely tenders the amount of the bid, which Attorney deposits in his trust account and from which Attorney promptly satisfies all known liens and expenses of the foreclosure. Later, Attorney records a special warranty deed to Bidder. In the interim, Debtor has wrongfully caused removal of improvements affixed to the subject property, whereupon Bidder asks Attorney to represent Bidder against Debtor. Under these circumstances, if Attorney deposits the surplus with the Clerk, may Attorney then ethically represent Bidder in a tort claim against Debtor (for replevin or damages from conversion) or in a proceeding pursuant to G.S. §45-21.32 to assert a claim for part of the surplus held by the Clerk?

Opinion:

Yes. Since an attorney serving as trustee pursuant to the terms of a deed of trust does not represent the grantor/debtor as an attorney, such an attorney may, after foreclosing, represent the interests of an entity adverse to the grantor/debtor in a cause of action related to the foreclosure without violating Rule 5.1(d).

RPC 65

July 14, 1989

Representation of Codefendants by the Public Defender

Opinion rules that the Public Defender's office should be considered as a single law firm and that staff attorneys may not represent codefendants with conflicting interests unless both consent and can be adequately represented.

Inquiry:

The Public Defender's Office in County Z consists of the Public Defender and several staff lawyers and secretaries. The Public Defender is responsible for assigning the cases to himself and his staff and he sets their salaries, with the approval of the courts. Occasionally, several staff lawyers will work on a single case and staff lawyers often discuss their cases with the other lawyers in the office either informally or at staff meetings. All members of the staff share the same office space and secretaries.

May attorneys A and B of the Public Defender's staff ethically represent codefendants with conflicting interests?

Opinion:

The Public Defender's office should be considered to be the equivalent of a single law firm since its members share office space and clerical staff and are directed by a single individual. Two staff attorneys within a single public defender's office may not represent codefendants with adverse interests unless 1) the attorneys reasonably believe that they may adequately represent both clients' interests and 2) both clients consent after full disclosure of the risks involved. *See* Rules 5.1(a), 5.11. Determining whether the staff attorneys can "reasonably" conclude that they can adequately represent both codefendants will turn on the particular facts of each case, such as the extent of the conflict between the codefendants and the ability of the attorneys to restrict access to each client's files and confidences.

RPC 66

July 14, 1989

Disposition of Escrowed Funds

Opinion rules that an attorney serving as an escrow agent may not disburse in a manner not contemplated by the escrow agreement unless all parties agree.

Inquiry:

Purchaser entered into a residential construction contract on March 27, 1985 with builder. When the transaction was closed on July 25, 1986, $1000 was placed in escrow with the closing attorney to be held until a list of items was corrected and then disbursed to the builder.

The builder has failed to correct the items although many requests have

been made by the purchaser. From time to time the attorney has urged the builder to resolve the problems with the purchaser but no action has been taken.

The attorney has maintained an escrow account earning interest in the name of the purchaser and the purchaser has now requested that the attorney disburse the escrow account and interest to the purchaser in exchange for an indemnification from the purchaser to the attorney.

After the passage of three years' time on July 25, 1989, and after ninety (90) days' notice to both parties, the attorney would like to transfer the escrow account to the purchaser and assume any civil liability, provided the transfer can be made without violating any ethical standard.

Can the attorney ethically disburse the escrowed funds to the purchaser under such circumstances?

Opinion:

No. Funds received by a lawyer acting as an escrow agent must be maintained in accordance with the trust accounting provisions of Rules 10.1 and 10.2 of the Rules of Professional Conduct. A lawyer/escrow agent stands in a fiduciary relationship with all parties to the escrow and is obligated to treat each as a client with respect to the funds held in trust. Disbursement of escrowed funds is governed in the first instance by the terms of the escrow agreement which should inform the lawyer as to which "client" is entitled to receive payment and when and in what amounts such payment ought to be made. Rule 10.2 (E). If unforeseen circumstances arise for which no provision was made in the escrow agreement, such as those described in the inquiry, the disposition of the escrowed funds must be agreed upon by the parties or made the subject of a legally binding order prior to the lawyer's release of the escrowed funds. The lawyer may not, in concert with only one of the parties to the escrow agreement, determine that the funds will be disbursed to that party without the consent of the other interested party.

RPC 67

July 14, 1989

Interviewing Employee of Adverse Corporate Party

Opinion rules that an attorney generally may interview a rank and file employee of an adverse corporate party without the knowledge or consent of the corporate party or its counsel.

Inquiry:

After a workers' compensation claim has been filed and the employer is represented by counsel, may the claimant's attorney contact a nonmanagerial co-employee of the claimant to discuss the circumstances of the alleged accident without obtaining consent of counsel for the employer?

Opinion:

Yes. Rule 7.4(a) of the Rules of Professional Conduct generally prohibits contact with only those employees of a represented corporate party which have managerial responsibility or who have been authorized to speak for the corporation. Rank and file employees whose personal acts or omissions are not at issue may ordinarily be interviewed without the knowledge or consent of the corporate party or its counsel. *See* CPR 2.

RPC 68

July 14, 1989

Inclusion of Non-Licensed Attorneys in Legal Directory

Opinion rules that a firm with offices only in North Carolina may not properly submit biographical information for publication concerning attorneys in the firm who are not licensed in North Carolina.

Inquiry:

MH Inc. publishes addresses and biographical information concerning attorneys and law firms. Information concerning law firms appears in the MH Inc. publication by geographic location. As to firms with offices in North Carolina and other states, MH Inc. includes information about all attorney members of the firm, including those not licensed in North Carolina. May MH Inc. publish biographical sketches of attorneys who are members of firms which maintain offices only in North Carolina, if the attorneys are not admitted to the North Carolina Bar and confine their practice exclusively to the federal courts?

Opinion:

The Ethics Committee of the North Carolina State Bar has no authority to regulate MH Inc., a non-attorney. At most, the committee can advise what information attorneys may properly submit to MH Inc. for publication. Rule 2.3(c) provides that a law firm maintaining offices in North Carolina may not list the name of an attorney not licensed to practice in the state on its letterhead or in its firm name. The comment to the Rule makes it clear that this prohibition applies to any "firm communication." Therefore, a firm with offices only in North Carolina may not properly submit biographical information to MH Inc. concerning attorneys in the firm who are not licensed in North Carolina.

RPC 69

October 20, 1989

Payment Of Client Funds To Medical Providers

Opinion rules that a lawyer must obey the client's instruction not to pay medical providers from the proceeds of settlement in the absence of a valid physician's lien.

Inquiry:

Attorney A represents Client C in a personal injury action. Client C directs Attorney A to seek the cooperation of various medical providers and to inform them that their fees will be paid from the proceeds of any settlement.

Attorney A writes the medical care providers and requests the medical records of Client C. He also requests a statement of charges from the medical providers. Subsequently, the medical providers send copies of Client C's account to Attorney A.

After settlement of the personal injury claim, Client C instructs Attorney A not to pay the medical providers, but to pay those sums directly to her. Client C claims she has a dispute with the medical providers as to the amount owed.

May Attorney A ethically refuse to pay the subject funds directly to Client C?

Would there be a different response to this question if Client C had never directed Attorney A to inform the medical providers that their fees would be paid following Client C's recovery in the personal injury action?

Opinion:

Rule 10.2(E) of the North Carolina Rules of Professional Conduct provides that, "[A] lawyer shall promptly pay or deliver to the client or to third persons as directed by the client the funds, securities, or properties belonging to the client to which the client is entitled in the possession of the lawyer." A lawyer is generally obliged by this rule to disburse settlement proceeds in accordance with his client's instructions. The only exception to this rule arises when the medical provider has managed to perfect a valid physician's lien. In such a situation the lawyer is relieved of any obligation to pay the subject funds to his or her client, and may pay the physician directly if the claim is liquidated, or retain in his or her trust account any amounts in dispute pending resolution of the controversy.

In those cases where the client has authorized the lawyer to represent to the medical provider that the provider's fees will be paid from the proceeds of settlement and thereafter forbids the lawyer to pay the physician, the lawyer is, as the client's agent and trustee of the client's funds, under an obligation to comply with the client's instructions. If the lawyer is of the opinion that he might thereby be facilitating his client's fraud, it would not be inappropriate for the lawyer to advise the medical provider of the client's change of heart in sufficient time for the medical provider to pursue any remedies it might have in anticipation of the disbursement of the settlement proceeds. *See* Rule 4(c)(4). Should no action be taken by the medical provider within a short specified time, the lawyer would then be obligated to comply with his or her client's instructions. *See also N.C. Baptist Hospitals v. Mitchell*, 323 N.C. 528 (1989).

RPC 70

October 20, 1989

Role of the Legal Assistant

Opinion rules that a legal assistant may communicate and negotiate with a

claims adjuster if directly supervised by the attorney for whom he or she works.

Inquiry:

May an attorney permit his legal assistant to communicate and negotiate with the claims adjuster for the adverse party's insurance carrier?

Opinion:

Yes, so long as the legal assistant is directly supervised by the attorney for whom he or she works. Rule 3.3(b). Under no circumstances should the legal assistant be permitted to exercise independent legal judgment regarding the value of the case, the advisability of making or accepting any offer of settlement or any other related matter.

RPC 71

October 20, 1989

Prepaid Legal Service Plans

Opinion rules, among other things, that an attorney may not accept legal employment by a Prepaid Legal Service Plan owned by the attorney's wife or another member of the attorney's immediate family, if the Plan will market its services by in-person solicitation.

Prepaid Legal Service Plan A markets its services by 1) in-person solicitation, 2) telemarketing, and 3) targeted direct mail advertisements. It plans to hire an attorney to draft the necessary legal documents used by the Plan.

Inquiry #1:

May a lawyer properly provide legal services to Prepaid Legal Service Plan A if the Plan is owned by the lawyer's spouse?

Opinion #1:

Rule 2.4(d), which was recently adopted by the N.C. State Bar and approved by the North Carolina Supreme Court, provides that a lawyer may participate in a prepaid service plan which uses in-person or telephone solicitation to market its services, so long as the lawyer does not own or direct the plan.

Where the plan is owned and operated by the lawyer's spouse, there is a substantial likelihood that the lawyer may exert some control or direction of the plan. Moreover, even if the lawyer exerted no actual control over the Plan, the close connection between the lawyer and the spouse-owner could create an appearance of impropriety. Therefore, the lawyer may not participate in a plan owned and operated by the lawyer's spouse and which uses in-person solicitation and/or telemarketing.

This flat prohibition does not extend to the use of targeted direct mail, however. Rule 2.4 permits attorneys to engage in targeted direct mail solicitation except where such practice involves coercion, duress, harassment, compulsion or threats or where the prospective client has indicated a desire not to be solicited or where the communication includes false, misleading, or deceptive statements. Consequently, the attorney may participate in a plan owned and operated by the attorney's spouse and which employs targeted direct mail, so long as the plan meets the foregoing requirements.

Inquiry #2:

Would the answer be different if the attorney providing the legal services for the Plan is a relative of the owner, but not the owner's spouse?

Opinion #2:

The answer will not change if the plan is owned by any members of the attorney's immediate family, such as a parent, sibling, or child.

Inquiry #3:

Would the answer be different if the Plan was owned by a trust, the beneficiaries of which are the children of the attorney who will be providing legal services for the Plan's participants?

Opinion #3:

If the plan is owned and operated by a trust over which the attorney has no control or influence, the attorney may provide legal services to the plan, even if the nonlawyer employees of the plan promote the plan by in-person solicitation, telemarketing, and targeted direct mail. The attorney may not, however, personally engage in in-person solicitation or telemarketing.

RPC 72

October 20, 1989

Conflicts of Interest

Opinion rules that an attorney hired by the Bureau of Indian Affairs to prosecute criminal charges before a Tribal Court may represent defendants in state or federal court despite the fact that the defendants have been arrested by members of the Tribal Police Force.

Inquiry:

Attorney A has been retained by the Bureau of Indian Affairs, a branch of the federal government, to prosecute misdemeanor criminal charges brought in the Court of Indian Offenses on the Cherokee Indian Reservation. The Court is the judicial arm of the Eastern Band of Cherokee, a recognized Indian tribe still enjoying many of the attributes of its former status as a sovereign nation. Law enforcement on the Cherokee reservation is provided by the Cherokee Indian Police. The tribal police force is funded entirely by the Eastern Band.

Attorney A, as a prosecutor, has no authority to instigate or terminate prosecutions other than for failure of the witnesses to appear or where the complaint fails to allege a criminal violation. Attorney A does not advise or have any authority over the Cherokee Indian Police.

CPR 282, decided on October 15, 1980, held, in part, that an attorney who contracted with the Bureau of Indian Affairs to prosecute criminal actions in a tribal court could not simultaneously represent in federal court criminal defendants who had been arrested by members of the Indian police department on the same reservation where the attorney serves as a part-time prosecutor.

In light of CPR 282, may Attorney A represent criminal defendants in state or federal court who have have been arrested by the Cherokee Indian Police?

Opinion:

Yes. Attorney A is employed by the federal government and the Cherokee Indian Police are employed by the Eastern Band of the Cherokee, a distinct entity. Because Attorney A does not represent the Cherokee Indian Police, no conflict of interest arises when Attorney A cross-examines members of the tribal police pursuant to his representation of criminal defendants.

This situation should be distinguished from the case in which a town attorney who advises members of the town police department, wishes to represent criminal defendants arrested by town police. In such a case, the town attorney represents the town police department and its employees. Consequently, it would create a conflict of interest for the attorney to undertake to represent criminal defendants arrested by town police, since it might become necessary to cross-examine the arresting officer on behalf of the criminal defendant.

To the extent that this opinion is inconsistent with CPR 282, that decision is hereby overruled.

RPC 73

April 13, 1990

Editor's Note: This opinion was originally adopted as RPC 73 (Revised).

Conflicts of Interests Involving Attorneys for and on Governing Bodies

Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants where a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.

Where an attorney advises a governing body, such as a county board of commissioners, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.

Inquiry:

In RPC 63, decided in April 1989, the Ethics Committee discussed potential ethical restrictions imposed upon Lawyer L, who serves as a county commissioner. The Committee held, in part, that Lawyer L should not represent criminal defendants in cases where the county's law enforcement officers are prosecuting witnesses, if the commissioners are responsible for hiring, firing,

promoting, or setting the salaries of the officers. CPRs 189 and 233 were cited in support of this opinion. The Committee held, however, that Lawyer L's associates would not be so disqualified, citing CPR 252.

CPR 252, decided on September 27, 1979, held that the partners and associates of an attorney who served on a governing board such as a city council were not automatically disqualified from representing a party to litigation, civil or criminal, in which a police officer of the governmental unit would be a witness, if the governing board is not directly involved in the hiring, firing or setting of salaries of the police officers of that governmental unit.

In April 1989, the Ethics Committee approved an ethics advisory provided to Attorney B, who serves as town attorney and occasionally advises members of the town police department. The advisory provided that no member of Attorney B's firm could represent criminal defendants if members of the town police would be prosecuting witnesses.

In light of CPR 252 and RPC 63, may members of Attorney B's firm represent criminal defendants in cases in which members of the town police force will be prosecuting witnesses?

Opinion:

No. CPR 252 and RPC 63 hold that an attorney who has some potential influence on the salary or employment prospects of a law enforcement officer ought not be put in the position of cross-examining that officer. The problem created by this situation is the threat that the law enforcement officer might not feel free to testify truthfully and fully in the face of such an opponent. Presumably, the lawyer's partners and associates, who are not members of the governing board, would have no influence on the law enforcement officer's salary or employment and thus, the disqualification need not extend to them.

The decision rendered in April 1989 to Attorney B and his firm addresses a different factual situation and a different ethical problem. In the problem addressed in the advisory, Attorney B is not a member of a governing board with financial power over law enforcement officers, but is the attorney for a governing body. Under the facts presented, Attorney B advises the police department and, in effect, represents the policemen. If Attorney B undertakes to represent criminal defendants arrested by town police, he is, in effect, simultaneously representing clients with adverse interests. It is presumed that the conflict created by this simultaneous representation is so fundamental that it cannot be waived by consent of the clients. Further, this disqualification is extended by Rule 5.11 to the other members of the attorney's firm. Therefore, the attorney's associates may not represent criminal defendants who were arrested by members of the police force.

If, however, Attorney B represents a governing body but does not represent the police department in criminal matters, neither he nor his partners would be disqualified from representing criminal defendants in cases where police officers are prosecuting witnesses.

RPC 74

October 20, 1989

Conflict of Interest Involving a Legal Assistant

Opinion rules that a firm which employs a paralegal is not disqualified from representing an interest adverse to that of a party represented by the firm for which the paralegal previously worked.

Inquiry:

Paralegal P worked for Firm A. While working with Firm A she participated in some degree with the preparation and interviewing of two plaintiff clients. Paralegal P subsequently left Firm A of her own volition.

Firm B hired Paralegal P approximately six months after she left Firm A. Firm B represents a defendant in the case on which Paralegal P had worked while employed with Firm A. Firm B has not allowed Paralegal P to work on the file in any way.

Can Firm B continue to employ Paralegal P or does Paralegal P's previous employment with Firm A create a conflict of interest?

Opinion:

Firm B may continue to employ Paralegal P and continue in the case but should take extreme care to insure that P is totally screened from participation in the case.

RPC 75

October 20, 1989

Disbursement of Client Funds

Opinion rules that a lawyer may not pay his or her fee or the fee of a physician from funds held in trust for a client without the client's authority.

Inquiry:

Last year Lawyer L began representation of Ms. B for injuries she received in an automobile accident. Since that time Ms. B has failed to cooperate in the processing of her claim, has not given any response to numerous letters, has not returned telephone messages, and has not accepted a certified letter. Lawyer L feels that he is no longer in a position to provide representation to Ms. B based on her lack of cooperation.

The question which has arisen deals with a $353.00 balance which is maintained in the trust account on behalf of Ms. B. This represents a portion of the medical payments coverage which was received on behalf of Ms. B. Lawyer L generally obtains medical payments coverage for his clients as a courtesy with no deduction of legal fees. However, Lawyer L has spent a great deal of time on this case and feels that he should be entitled to some fee. Additionally, Ms. B has signed a doctor's lien in favor of Dr. K.

Lawyer L has on several occasions written Ms. B asking her to authorize him to disburse this amount to Dr. K for his outstanding expenses and to himself in payment for legal services performed. There has been no response. May Lawyer L ethically take a reasonable legal fee from this balance and forward the remainder to Ms. B's physician for his services?

Opinion:

No. Rule 10.2(E) of the Rules of Professional Conduct requires a lawyer holding client funds in trust to pay or deliver those funds only as directed by the client. In this case the client has evidently not offered any direction regarding the disbursement of the funds in question and Lawyer L should therefore continue to hold this money in trust. Although there would appear to be a valid physician's lien against some portion of the trust funds, Lawyer L should refrain from disbursing any money to Doctor K until he obtains his client's consent to pay some or all of the amount billed or is required to pay some liquidated amount by a valid court order. Any funds which are the subject of an ongoing dispute should be retained in trust.

RPC 76

October 20, 1989

Advancing a Client's Fine

Opinion rules that a lawyer may advance his client's fine.

Inquiry:

Perry Mason devotes a substantial portion of his practice to the defense of the criminally accused. He is often retained at the last minute to represent individuals who are unable to come to court for waivable offenses. These individuals may reside out of state, be away on business, or just unable to miss a day of school or work. The local district attorney's office often offers favorable plea bargains only on the first court date, and either withdraws or offers a less favorable plea bargain if the case is continued. Consequently, counsel is compelled to waive the client's appearance, accept the favorable offer, and the consequently more favorable judgment.

May an attorney, under this fact situation, advance the fine and court costs on behalf of his client, as long as he expects to seek reimbursement from his client?

Opinion:

Yes. Rule 5.3(b) of the Rules of Professional Conduct, while generally prohibiting the lending of living expenses to a client, does permit a lawyer to advance court costs on the client's behalf from the lawyer's own funds while representing the client in connection with pending litigation so long as the client remains ultimately liable for the expense. Although the advancement of fines is not expressly permitted, there appears to be no principled distinction between such penalties and the other kinds of expenses which may be legitimately advanced such as court costs, expenses of investigation, expenses of medical examination, and the costs of obtaining and presenting evidence. Nor

would the policies which underlie Rule 5.3(b) seem to warrant the prohibition of such a loan. The advancement of fines is unlikely to create a conflict of interest which would compromise the lawyer's professional judgment in a criminal case. It is also unlikely that a lawyer would suggest his willingness to advance a fine in order to solicit a criminal case.

RPC 77

October 20, 1989

Disclosure of Confidential Information to Liability Insurer

Opinion rules that a lawyer may disclose confidential information to his or her liability insurer to defend against a claim but not for the sole purpose of assuring coverage.

Inquiry:

Attorney B has represented Company X for many years in connection with various tax and legal matters. Company X later learned that for several years it has failed to file certain informational returns, which could subject it to significant criminal and civil penalties. Attorney B, as Company X's lawyer, may in turn be liable for any penalties that Company X incurs arising out of its failure to file. Company X does not make any formal claim or demand against Attorney B, however, and does not retain separate counsel to represent its interests against Attorney B.

Attorney B is insured by Insurance Company. The insurance policy with Attorney B provides, in relevant part:

> V. Notice of Claim or Suit
>
> As a condition precedent to coverage afforded by this policy, upon any Insured becoming aware of any act or omission which could reasonably be expected to be the basis of a claim or suit covered hereby, written notice shall be given to the Company or any of its authorized agents as soon as practicable, together with the fullest information obtainable. If claim is made or suit is brought against any Insured, such Insured shall immediately forward to the Company every demand, notice, summons or other process received by that Insured...
>
> The Insured shall cooperate with the Company and at the Company's request make available all records and documents and submit to examination(s) under oath by a representative of the Company.

Attorney B notifies Insurance Company of Company X's potential claim, but fails to identify Company X specifically or provide information whereby Company X could be identified, on the grounds that such information would constitute disclosure of confidential information.

After receiving notification, Insurance Company retains Attorney C to assist Attorney B in remedying Company X's failure to file tax returns and to defend Attorney B against any claims by Company X. Attorney C asks Attorney B for more information about Company X, pursuant to the terms of the insurance policy.

1. May Attorney B disclose the identity of Company X and other relevant background information about Company X, such as the number of its employees and nature of its business to Insurance Company without obtaining Company X's consent?

2. May Attorney B disclose this information to Attorney C without obtaining Company X's consent?

3. If the answer to (1) is no and the answer to (2) is yes, may Attorney C then reveal the information to Insurance Company?

Opinion:

The identity of a client is not normally considered confidential information protected by Rule 4, whereas the fact that Company X has failed to file income tax returns normally would constitute confidential information. In this case, however, because Attorney B has already revealed the failure to file returns, but not the name of the company, disclosure of Company X's identity would effectively disclose Company X's secret for the first time.

Because Company X's identity is a confidence under these circumstances, it may not be revealed, unless one of the exceptions to the confidentiality rule set out in Rule 4(c) is present. Under Rule 4(c)(5), a lawyer may reveal confidences to the extent the lawyer reasonably believes necessary to establish a defense between the lawyer and a client.

While Company X has not yet filed a claim against Attorney B, the comment to Rule 4 indicates that a lawyer need not wait until an action is commenced before responding to a claim or accusation. On the other hand, the comment also makes it clear that any disclosure should be closely tailored to the attorney's need to defend him or herself. It is the opinion of the Ethics Committee that Attorney B may reveal information about Company X to Attorney C who will represent B in the event of a claim by Company X, but that Attorney B should only reveal that which is absolutely required under the policy. B is Attorney C's client to whom he owes primary responsibility. Accordingly C may not reveal information received from B to the insurance company without B's consent.

There is no exception to the lawyer's obligation to preserve client confidences for the purpose of assuring Lawyer B's coverage under his professional liability policy.

The question of what exact information must be revealed and whether it should be revealed to Attorney C or to Insurance Company directly to comply with Insurance Company's policy is a question of law beyond the authority of the Ethics Committee.

RPC 78

October 20, 1989

Conditional Delivery of Trust Account Checks

Opinion rules that a closing attorney cannot make conditional delivery of trust account checks to real estate agent before depositing loan proceeds against which checks were to be drawn.

Inquiry:

Attorney closes loans for a number of real estate clients. After all documents are signed, but before recording, Attorney gives the real estate agent the commission check and the check for the Sellers' proceeds, with specific instructions that real estate agent is to hold both checks in trust until notified that the closing documents have been recorded and all closing proceeds have been deposited in Attorney's trust account. Attorney then records the necessary documents and deposits all closing proceeds in his trust account.

Attorney has been given closing instructions from the lender which require recording before disbursement. Attorney has actually signed a statement to the lender that he will follow the lender's instructions. Attorney is on the approved attorneys' list for a number of title insurance companies who have issued insured closing letters to lenders whose loans Attorney closes. The insured closing letter ensures that Attorney will comply with the lender's closing instructions. Attorney does not deposit any funds, including lender's loan proceeds, until after title update and recording. If a defect in title is discovered by Attorney in his title update after "disbursement," he will not record and will notify the real estate agent to return the checks.

1. May Attorney ethically tender to real estate agent, in trust, the commission and seller's proceeds checks with instructions that the realtor, as agent for attorney, hold such checks until the attorney has recorded the closing documents, deposited the closing proceeds in his trust account, and notified the realtor that he may disburse the checks which real estate agent is holding in trust?

2. Has Attorney violated any ethical requirements in disregarding the potential liability that would be imposed upon the title insurance company and/or his professional liability carrier if a defect is discovered after disbursement?

Opinion:

This is a variation of the inquiry addressed in RPC 44, concerning the obligation of the closing attorney to follow the instructions of his client, the lender, to record documents before disbursing loan proceeds.

1. No. The attorney may not ethically deliver trust account checks to the real estate agent, even if such delivery is made "in trust" or "conditionally," until the attorney has recorded the closing documents and deposited the closing proceeds in his trust account.

Arguably, the conditional delivery of the trust account checks would not violate the lender's instructions, because the Attorney is, in fact, recording before depositing and disbursing the lender's funds. Those funds have not been "disbursed." *See* RPC 44.

However, by delivering to the real estate agent checks drawn on the trust

account when the account has either (i) no funds or (ii) trust funds belonging to others, the Attorney violates Rules 10.1 and 10.2. Under those rules, funds deposited in a trust account are funds received by the Attorney as a fiduciary, which must be held and disbursed only for the benefit of those entitled to them, in accordance with appropriate instructions. Accordingly, Attorney cannot violate or delegate his fiduciary duty by putting into the hands of an unrelated third-party a check, regular on its face, drawn on a trust account containing only the funds of others. Similarly, Attorney cannot ethically deliver checks drawn on an account with insufficient funds, in violation of the law and the implicit requirement imposed by Rule 10.2(F).

2. Because of the answer to question 1, it appears unnecessary to answer question 2. Reference is made to RPC 44. As a general matter, the ultimate liability created under a title insurance policy or professional liability insurance policy will be irrelevant to a determination of the ethical issues, which must be judged independently of legal liability and insurability.

RPC 79

January 12, 1990

Surrender of Medical Records

Opinion rules that a lawyer who advances the cost of obtaining medical records before deciding whether to accept a case may not condition the release of the records to the client upon reimbursement of the cost.

Inquiry:

Firm X does a substantial amount of plaintiff's medical malpractice litigation. When a client comes to Firm X initially, it accepts the case only for review, until it determines whether there is sufficient evidence of negligence, causation and damages to justify bringing an action.

In the process of reviewing these cases, Firm X collects and reviews medical records concerning relevant treatment. In many cases, these medical records are extensive and consist of thousands of pages. Hospitals and physicians who provide these records charge for the cost of copying them. When a person has been hospitalized for an extensive period of time, the cost of obtaining the complete medical records, which may be needed for thorough review, can be hundreds and even thousands of dollars.

In many cases, in accordance with Rule 5.3 of the Rules of Professional Conduct, Firm X has advanced on behalf of the client the cost of obtaining the medical records, while always communicating to the client that he or she remains ultimately liable for this cost.

Firm X declines many of the cases because of a lack of evidence of liability. When Firm X declines a case and has advanced substantial funds on behalf of the client to obtain medical records or to obtain review of these records by physicians or other health care providers, what does Rule 2.8 require in terms of turning over to the client those medical records for which funds have been advanced? If Firm X informs the client that it will provide the medical records when the client reimburses it for the amount advanced, is it in violation of Rule 2.8? The client may, of course, obtain these records personally simply by requesting them from the treating physician or institution and paying the cost.

Opinion:

Law Firm X must turn over unconditionally to its client any material such as copies of medical reports or statements of expert opinion which were obtained on the client's behalf and account if such would be useful to the client in further prosecution of her claim. Rule 2.8(a)(2) of the Rules of Professional Conduct requires that a lawyer who withdraws from employment take reasonable steps to avoid foreseeable prejudice to rights of the client. One means of avoiding such prejudice is, in the language of the rule, "delivering to the client all papers and property to which the client is entitled." Although the rule itself does not define the extent of the client's entitlement, the comment to the rule does indicate that, "anything in the file which would be helpful to successor counsel should be turned over." There follows in the comment a nonexclusive listing of such items. While the comment does not specifically identify information gathered by a law firm incident to its determination whether it will accept a case as material which must be surrendered, there appears to be no logical reason to except such material from the obligation imposed by the rule. Regardless of the decision ultimately made by Firm X as to whether it wishes to prosecute the client's case to its conclusion, it is obvious that an attorney/client relationship exists during the period the case is being evaluated. That being the case, Rule 2.8 concerning withdrawal from representation would govern an attorney's actions in the wake of a decision not to undertake further prosecution of the client's case. If material obtained during the evaluation process on the client's account would be of some value to the client in pursuing her claim, it must, under the terms of the rule, be surrendered unconditionally without regard to whether the cost of its acquisition was advanced by the law firm or the client.

RPC 80

January 12, 1990

Lending Money to a Client

Opinion rules that a lawyer may not lend money to a client who is represented in pending or contemplated litigation except to finance costs of litigation.

Inquiry:

Under what circumstances, if any, may a lawyer lend money to a client for whom the lawyer is handling a personal injury claim?

Opinion:

Rule 5.3(b) of the Rules of Professional Conduct generally prohibits lawyers advancing or guaranteeing financial assistance to a client while representing the client in connection with contemplated or pending litigation. There is one narrow exception to the rule which permits a lawyer to "advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses."

RPC 81

January 12, 1990

Interviewing the Former Employee of an Adverse Corporate Party

Opinion rules that a lawyer may interview an unrepresented former employee of an adverse corporate party without the permission of the corporation's lawyer.

Inquiry:

May a lawyer interview an unrepresented former employee of an adverse corporate party without the permission of the corporation's lawyer?

Opinion:

Yes. Rule 7.4(a) prohibits contact only with the party itself. Where the party in question is corporate, the protection of the rules also extends to persons who have the legal power to bind the corporation or who are responsible for implementing the advice of the corporation's lawyer. This is necessary to prevent improvident settlements and similarly major capitulations of legal position on the part of a momentarily uncounseled, but represented, party and to enable the corporation's lawyer to maintain an effective lawyer-client relationship with members of management. The rule is not meant to protect a corporation whose interests might be impaired by factual information willingly shared by a former employee. A former employee is in no sense the alter ego of the corporation and may be interviewed by any interested party regarding relevant matters.

RPC 82

January 12, 1990

The Lawyer as Trustee

The State Bar has received an increasing number of inquiries related to the role of an attorney serving as trustee under a deed of trust. In an effort to clarify the responsibilities of the lawyer-trustee, the Ethics Committee has reviewed CPRs 94, 107, 166, 201, 218, 220, 297, 303, 305 and RPCs 46 and 3.

The responsibilities and limitations of the lawyer acting as trustee arise primarily from the lawyer's fiduciary relationship in serving as trustee as opposed to any attorney-client relationship. That fiduciary relationship demands that the trustee be impartial to both the trustor and the beneficiary and, therefore, the trustee may not act as advocate for either against the other. On the other hand, once the fiduciary duties of the trustee terminate, the lawyer may take a position adverse to the trustor or beneficiary so long as the lawyer is not otherwise disqualified.

Inquiry #1:

Attorney X is appointed as substitute trustee on a deed of trust. The grantor/borrower defaults and the bank proceeds to foreclose. At the foreclosure sale, the subject tract of land sells for less than the amount owed. The bank wants to sue for the deficiency. Can Attorney X serve as the attorney for the bank in the deficiency proceeding against the grantor/borrower? Can Attorney X serve as attorney for the bank in an action for waste?

Opinion #1:

Yes. It has long been recognized that former service as a trustee does not disqualify a lawyer from assuming a partisan role in regard to foreclosure under a deed of trust. CPR 220. It is therefore not inappropriate for the former trustee to act as an advocate for the lender in a subsequent suit to recover a deficiency or to recover damages for waste.

Inquiry #2:

If foreclosure proceedings have been instituted against a debtor who files for bankruptcy prior to completion of the foreclosure, may Attorney A, who serves as Substitute Trustee in the foreclosure, dismiss the foreclosure proceeding and subsequently file a motion in the Bankruptcy Court to set aside the automatic stay?

Opinion #2:

No. *See* CPR 94. So long as the attorney serves as trustee, he may not represent one party against the other in an adversarial proceeding arising from or connected with the deed of trust.

Inquiry #3:

Corporation X serves as Substitute Trustee in a foreclosure proceeding. Attorney A owns stock in Corporation X. If foreclosure proceedings have been instituted against a debtor who files for bankruptcy prior to completion of the foreclosure, may Attorney A file a motion in Bankruptcy Court to set aside the automatic stay on behalf of Corporation X?

Opinion #3:

Yes, unless Corporation X is controlled by or is the alter ego of Attorney A.

Inquiry #4:

Attorney A serves regularly as Agent as that term is used in Chapter 45 of the North Carolina General Statutes for Attorney B who serves as substitute trustee. Attorney A is basically a paper handler for Attorney B. Attorney A's responsibilities are to determine that service has been achieved before the hearing, to verify the filing of an order after hearing, to post sale notices and to conduct the sale on behalf of the substitute trustee. Attorney A also determines whether any upset bids are filed and files the final report of sale. Attorney A prepares no paperwork, does not deal with any lender and makes no decisions as to the adequacy of service or other matters.

Under these circumstances may Attorney A bid for herself at a foreclosure sale or may someone from her law firm or a family member of Attorney A bid on their own behalf? Secondly, in the event of a bankruptcy filing, may Attorney A move the bankruptcy court to lift the automatic stay and participate as an advocate for the lender in the bankruptcy matter.

Opinion #4:

Attorney A, acting as agent for the substitute trustee, is subject to the same restrictions as the substitute trustee. Therefore, Attorney A may not bid at the foreclosure sale on Attorney A's own behalf and a member of Attorney A's law firm would similarly be restricted from bidding. A family member of A would not necessarily be prohibited from bidding at the foreclosure sale on his or her own behalf but could not bid on behalf of A.

Attorney A also could not file a motion to lift the automatic stay in the bankruptcy proceeding so long as Attorney A continued to act as agent for the substitute trustee and, similarly, Attorney A could not act as advocate for a lender in the bankruptcy proceeding.

Inquiry #5:

Attorney A, acting as trustee, has instituted a foreclosure action. Attorney A knows the property being foreclosed is worth more than the highest bid received at the foreclosure sale. May Attorney A call a friend to upset the bid causing a resale?

Opinion #5:

If Attorney A, by calling his friend, is acting on his own behalf in filing an upset bid, the conduct inquired of is not permitted. If, on the other hand, Attorney A is simply notifying a potential buyer of the situation, then such conduct is not prohibited.

Inquiry #6:

"A" borrowed funds from Federal Land Bank, secured by a deed of trust. "A" subsequently borrows funds from lender secured by a second deed of trust. The lender substitutes a trustee and institutes foreclosure. Prior to completion of foreclosure "N" purchases the note and deed of trust. "N" contends this was done at request of "A". "A" does not pay and "N" substitutes "T" (attorney) as Trustee. "T", the substitute trustee (attorney), at the request of "N" writes a demand letter.

"T" did not represent "N" or "A" when the note was purchased, and did not represent either party in the original loan.

The deed of trust provides for Trustee's fees. The note provides for up to fifteen (15%) percent attorney's fees.

"A" responds by letter that "N" owed him money; that this purchase was to offset the debt due by "N" to "A", and made threats to expose "N" as a drug dealer, among other charges. "T" prepares notice of hearing, after title search, and serves 60 day notice on "A" and U. S. Attorney and Attorney General.

1. May "T" proceed with notice of hearing and Trustee's sale?
2. Must "T" advise "N" to seek counsel at this time?
3. May "T" wait until the foreclosure hearing to ascertain whether a legal dispute arises?
4. If a third substitute trustee must be named, can that person be a spouse or family member of "N"; a spouse or family member of "T"; an employee of either?
5. Can "T" elect to serve as either trustee or attorney?
6. Does "T" represent "N" before the Clerk in seeking foreclosure?
7. Could "T" represent "N" on appeal, if he has not responded?
8. Does "T" represent "N" when the Notice of Hearing is filed or a hearing held?
9. May "T" charge a fee for legal services under note authorizing fees?
10. May "T" charge Trustee's fees if settlement is reached?
11. May both be charged?

Opinion #6:

1. Yes. "T's" duties as trustee obligate him to prepare and serve a Notice of Hearing upon request of the beneficiary and to hold a sale if authorized by the Clerk of Court after hearing. "T" may not, however, assume an adversarial role to trustor or beneficiary if there is a dispute concerning the foreclosure.

2. Under the facts stated, "T" should notify "N" that it appears that the foreclosure will be contested by "A" and, if so, "T" will not be able to represent "N" as attorney.

3. Yes.

4. Whether a third substitute trustee could be a spouse or a family member of "N" or an employee of "N" raises no question concerning legal ethics and therefore is not an appropriate subject for consideration by the Ethics Committee of the North Carolina State Bar. A spouse or family member or employee of "T" could serve as a third substitute trustee but, under such circumstance "T" could not serve as attorney for "N" or "A."

5. Yes.

6. If the foreclosure is disputed "T" would be deemed to represent "N" in seeking foreclosure before the Clerk of Court and therefore could not serve as trustee and attorney for "N".

7. No. So long as "T" continues as trustee, he may not take an adversarial position against either "N" or "A" in any matter arising from the foreclosure.

8. "T" does not represent "N" as an attorney. when the notice of hearing is filed as the filing of that notice is a responsibility of "T" as trustee. At a foreclosure hearing, in the event the foreclosure is disputed, "T", serving as trustee, may not participate in requesting the Clerk to authorize foreclosure.

9. No. So long as "T" serves as trustee, he may not act as attorney for either of the parties to the deed of trust and therefore may not charge either party fees for legal services.

10. The question of whether "T" may charge trustee fees if settlement is reached is a question of law and does not appear to involve legal ethics. This committee is not the appropriate forum for determining questions of law.

11. *See* opinion 10 above.

RPC 83

January 12, 1990

Rendering a Title Opinion Upon Property In Which the Lawyer Has a Beneficial Interest

Opinion rules that the significance of an attorney's personal interest in property determines whether he or she has a conflict of interest sufficient to disqualify him or her from rendering a title opinion concerning that property.

Inquiry:

Attorney A is a member of Law Firm ABC. Attorney A's wife, who is not an attorney, wishes to purchase 2.5 percent of the common stock of Corporation Z. Corporation Z is the general partner of a North Carolina limited partner which is engaged in development and sales of residential real estate.

CPR 254 provides that no member of a law firm may render a title opinion in a sales transaction if a member of the law firm has a beneficial interest in the selling entity.

If Attorney A's wife acquires stock in Corporation Z, will Attorney A be deemed to have acquired a "beneficial interest" in Corporation Z within the meaning of CPR 254, such that no member of Attorney A's firm may render title opinions in transactions in which Corporation Z's limited partner is the seller?

Opinion:

CPR 254 held that an attorney who owns a "beneficial interest" in an entity which was selling property could not certify title to the property sold. The opinion extended the disqualification to the attorney's partners and associates as well. The opinion went on to hold, however, that ownership of shares of a publicly held corporation did not constitute a beneficial interest for purposes of the disqualification rule.

CPR 254 was based on Disciplinary Rule 5-101(a) of the Code of Professional Responsibility. The Code has since been supplanted by the Rules of Professional Conduct. Rule 5.1(b) now governs. Rule 5.1(b) disqualifies a lawyer from acting in the face of a personal conflict of interest when his or her representation might be materially limited, unless 1) the attorney reasonably believes the representation will not be adversely affected and 2) the client consents after full disclosure.

Although CPR 254 appears to disqualify a lawyer with any beneficial interest in the selling entity, the exception for stockholders of publicly held corporations implies that disqualification is really a function of the significance to the attorney of his or her personal interest and the affect of the transaction on that interest. If the attorney or a close relative would realize considerable personal gain from the transaction, it is likely that his judgment would, in the words of Rule 5.1(b), be materially limited. Under such circumstances, a reasonable lawyer probably would be unable to conclude that the conflict could be successfully managed and would be disqualified, regardless of whether the entity requesting the title opinion would consent. By the same token, the judgment of a lawyer whose personal interest is insignificant would probably not be materially limited. In such a case, the lawyer could reasonably believe that the conflict would not adversely affect the representation and could proceed if the client (the entity to whom the opinion is being rendered) consents.

In the facts stated, it appears that Attorney A's wife owns only a small portion of the outstanding stock of Corporation Z, although the dollar value of the stock is not stated. Moreover, it appears that Corporation Z is a partner of the selling entity, but is not itself the owner of the entity selling the land. This being the case, it appears that there is little likelihood that the investment of Attorney A's wife would sway the judgment of Attorney A. Consequently, Attorney A could reasonably believe that his representation of the selling partner would not be adversely affected by his wife's interests. If in addition, he or she actually believes that to be the case and the client consents after full disclosure, there would need be no disqualification of the lawyer or other members of the lawyer's firm. To the extent that it differs from this opinion, CPR 254 is superseded.

RPC 84

January 12, 1990

Settlements and Reports of Lawyer Misconduct

Opinion rules that an attorney may not condition settlement of a civil dispute on an agreement not to report lawyer misconduct.

Inquiry #1:

A has brought a civil malpractice action against her former attorney, B. B hopes to settle the matter out of court. May B ask A, who is represented by C, to refrain from filing a grievance against B with the North Carolina State Bar as a provision of the settlement of the underlying civil malpractice action?

Opinion #1:

No. In order for the North Carolina State Bar to fulfill its responsibility to regulate the legal profession, it is imperative that persons who are aggrieved by apparent lawyer misconduct or who have otherwise become aware of such misconduct feel free to transmit relevant information to the Grievance Committee for investigation. A lawyer who attempts to dissuade a person from reporting his or her alleged misconduct in the course of settlement negotiations or in any other context would be engaging in conduct prejudicial to the administration of justice in violation of Rule 1.2(d) of the Rules of Professional Conduct.

Inquiry #2:

May C in the context of such a settlement also agree not to report B?

Opinion #2:

No. Even though such an agreement might appear to be in the client's best interest, C cannot participate as an accommodation to B. Rule 1.2(a) provides that it is misconduct for a lawyer to assist another lawyer to violate the Rules of Professional Conduct. As was mentioned above, B may not ethically condition settlement upon an agreement that his misconduct not be reported.

Inquiry #3:

If A has already filed a grievance with the North Carolina State Bar before the civil malpractice action is settled, may attorney B request that the grievance be withdrawn as a part of the settlement of the malpractice action? Would the answer be different if A was not represented by independent counsel in the malpractice action?

Opinion #3:

Although a grievance cannot be withdrawn by the complainant, an accused lawyer would be engaging in conduct prejudicial to the administration of justice in violation of Rule 1.2(d) if he or she should, under any circumstances, attempt to persuade a complainant or a material witness not to cooperate with an investigation of alleged misconduct.

RPC 85

January 17, 1991

Editor's Note: This opinion was originally published as RPC 85 (Revised).

Of Counsel Relationships Between Lawyers in Different Towns

Opinion rules that an "of counsel" relationship may exist between lawyers practicing in different towns if the professional relationship is close, regular and personal and the designation is not otherwise false or misleading.

Inquiry:

May an attorney with an office in one town in North Carolina properly serve as "of counsel" to a law firm in another town while maintaining his own practice?

If so, would the answer be different if both towns were in the same county?

Opinion:

An attorney may be designated "of counsel" to a North Carolina law firm when the relationship between the two is a close, regular and personal relationship for the practice of law and this designation is not otherwise false or misleading.

Over the years there has been a proliferation of variants of the term "of counsel," generally where there is a holding out to the world at large about some general and continuous relationship between the lawyers and law firms in question. In RPC 34, it was recognized that the term could be properly applied to a relationship characterized as a "close, in-house association," sug-

gesting, perhaps, that lawyers and firms in different towns should not use the term "of counsel" to describe their relationship. However, the appropriateness of the "of counsel" designation does not turn solely upon the location of the parties' offices, nor does it turn solely on the amount of time spent in those offices. Rather, the "of counsel" designation (or one of its variants) is appropriate when there is a close, regular and personal relationship between the lawyer and the law firm. Thus, relationships that involve only one case or matter, that involve only occasional collaborative efforts among otherwise unrelated lawyers or firms, or that primarily involve only the forwarding of legal business would not satisfy the requirements for the use of the "of counsel" appellation. The critical consideration is the nature of the relationship and the adherence to the rules applicable to conflicts of interest and confidential information. In no event may "of counsel" be used unless the usage is consistent with the rules pertaining to false and misleading communications (Rule 2.1) or firm names and letterheads (Rule 2.3). Any pertinent jurisdictional limitations on the lawyer's entitlement to practice must also be indicated.

RPC 86

April 13, 1990

Editor's Note: See RPC 191 for additional guidance on disbursing against provisional credit.

Disbursements Incident to Real Property Closings

Opinion discusses disbursement against uncollected funds, accounting for earnest money paid outside closing and representation of the seller.

Inquiry #1:

Must the closing attorney collect earnest money held in the trust accounts of real estate agents or other attorneys in the form of certified funds?

Opinion #1:

No. While it is certainly the better practice for the closing attorney to issue trust account checks only against collected funds, CPR 358 recognized that under certain circumstances such checks may be drawn against funds which though uncollected have been provisionally credited to the attorney's trust account by the financial institution in which the trust account is maintained. A closing attorney should disburse against provisionally credited funds only when he or she reasonably believes that the underlying deposited instrument is virtually certain to be honored when presented for collection. In addition, an attorney should take care not to disburse against uncollected funds in situations where the attorney's assets or credit would be insufficient to fund the trust account checks in the event that a provisionally credited item is dishonored.

Inquiry #2:

Must the closing attorney request that all earnest money be entrusted to him or her prior to closing?

Opinion #2:

Again it would appear that the better practice, which would involve the closing attorney's receipt and disbursement of all funds involved in the transaction, is not absolutely compelled by the Rules of Professional Conduct. An attorney does have an absolute obligation under Rule 10.2(E) to follow his client's instructions relative to the money which is entrusted to him or her. If, as was the case in RPC 44, the lender conditions the disbursement of loan proceeds upon some clearly specified event, such as the deposit in the attorney's trust account of all earnest money, the attorney would be obliged to honor that instruction and to insist upon the entrustment prior to proceeding further with the closing. If, however, the closing attorney receives no such instruction, it is conceivable that a closing could be accomplished in which some funds pertaining to the transaction are never received or disbursed by the closing attorney. In such situations the attorney should certainly take care to advise the client that he or she cannot guarantee the appropriate handling of all the money and in particular should identify for the client the risk that the party holding the earnest money might disburse prior to the attorney's updating the title and recording the deed and deed of trust.

Inquiry #3:

And in relation to the above, if the closing attorney does not require that all earnest money come in at closing, is he or she making potentially false certifications on the HUD Settlement Statement if it shows the earnest money as a credit against the payment of commissions or sales proceeds?

Opinion #3:

An attorney must, of course, be scrupulous in documenting his or her handling of trust funds (Rule 10.2(d)). If an attorney does not handle all funds incident to a real estate transaction which he or she is closing, it would certainly be prudent to carefully qualify any statements appearing on the settlement statement relative to the attorney's responsibility for the discharge of certain obligations and the quality of the attorney's knowledge relative to matters set forth only upon information and belief. As a practical matter, the attorney should obtain receipts from any persons or entities to whom payments have been made outside of closing if such are to be reflected upon the closing statement.

Inquiry #4:

Can the closing attorney retained by the buyer charge the seller a fee for doing the closing and handling certain matters for the seller that are not included in deed preparation? For example, after agreeing to handle a closing for Buyer A, the closing attorney pays off the seller's loan and must spend several hours retrieving the "paid and satisfied" note and deed of trust from seller's former bank in order to clear the title and have title insurance issued on behalf of Buyer A. Can the closing attorney charge a "closing fee?" If the answer to this question is yes, what kind of notification to or agreement with seller (and buyer) would be required?

Opinion #4:

In the typical residential transaction, it would not be inappropriate for the closing attorney who has been employed by the buyer to negotiate with the seller for the payment of a fee by the seller for legal services rendered on behalf of the seller incident to the closing. Any such contracts for legal services should be executed only where the provisions of Rule 5.1(a) can be satisfied relative to potential conflicts of interest and must be negotiated well in advance of closing.

RPC 87

April 13, 1990

Interviewing Nonparty Witnesses

Opinion rules that a lawyer wishing to interview a witness who is not a party, but who is represented by counsel, must obtain the consent of the witness' lawyer.

Inquiry:

Attorney A has filed suit against Z in a civil matter. Attorney A wishes to contact X, who is a nonparty, potential witness. X has informed Attorney A that she has an attorney representing her respecting the civil matter about which Attorney A has sued Z. X is willing to discuss the civil matter with Attorney A, however. Once Attorney A learns that X has an attorney, must A obtain permission of X's attorney before discussing the civil matter with X further?

The express language of Rule 7.4 appears to be limited only to **parties** in a matter. The last sentence of the comment to the Rule, however, states that it applies to "**any person**, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." (emphasis added) Since this language is in the comment, rather than the Rule itself, does it represent only an aspirational standard, or is it obligatory?

Opinion:

Once Attorney A learns that X has an attorney, A must obtain the permission of X's attorney before discussing the civil matter with X. This is made clear by that portion of the comment to the Rule which is set forth in the inquiry. In this instance, as in most cases, the comment is intended to explain the Rule.

As a matter of policy, Rule 7.4(a) was designed to reduce the risk that an attorney/client relationship in regard to a particular matter might be subverted by the importunings of counsel representing other persons or entities whose interests in the same matter might be adverse. The attorney/client relationship enjoyed by a potential witness and his or her counsel is no less worthy of protection than that enjoyed by any named party and his or her lawyer.

RPC 88

July 13, 1990

Employment of a Secretary Who is Also a Real Estate Broker

Opinion rules that a lawyer may close a real estate transaction brokered by a real estate firm which employs the attorney's secretary as a part-time real estate broker.

Inquiry:

May Attorney X close a real property transaction brokered by a real estate firm which employs the attorney's secretary as a part-time real estate broker?

Opinion:

Yes. In the situation described in the inquiry, the lawyer would be obliged to consider whether the exercise of his independent, professional judgment on behalf of his clients, the lender and the broker, would be "materially impaired" by his desire to advance his secretary's interests or his desire to encourage future referrals. Rule 5.1(b). If upon analysis it appears that the attorney's judgment might be so compromised, perhaps because the secretary is a valued friend who stands to gain a valuable commission upon the completion of the transaction, the conflict of interest would be disqualifying unless the lawyer reasonably believed that his representation of his clients would not be adversely affected and both clients consented to the lawyer's participation after a full disclosure of all risks involved.

It would, of course, be extremely improper for an attorney in this situation to attempt to encourage referrals from the real estate firm by offering financial incentives to his secretary. Rule 2.2(c).

RPC 89

January 17, 1991

Editor's Note: This opinion was originally published as RPC 89 (Revised).

Escheat of Trust Funds

Opinion rules that trust funds must be held at least five years after the last occurrence of certain prescribed events before they may be deemed abandoned.

Inquiry:

Where a lawyer receives money in trust from a client who subsequently disappears and cannot thereafter be located by the lawyer upon due inquiry, how long must the lawyer retain the deposited funds in his or her trust account before deeming the money abandoned and paying the money into the escheat fund pursuant to the provisions of Rule 10.2(H) of the Rules of Professional Conduct and G.S. §116 (b)-18?

Opinion:

Rule 10.2(H) requires that property held in trust for an owner whose identity is known but who cannot be located must be deemed abandoned and paid to the state treasurer in compliance with the requirements of Chapter 116(b) of the General Statutes if, during the five-year period immediately preceding, the fund's principal has not increased, the owner has not accepted payment of principal or income, the owner has not corresponded in writing and the owner has not otherwise indicated an interest in the account as evidenced by a memorandum or other record on file with the lawyer. If any of the four events enumerated above have occurred during the five-year period immediately preceding, no abandonment will be deemed to have occurred and the client's funds must continue in the lawyer's trust. By the same token, whenever any of the four enumerated events occurs, a new five-year period begins to run during which the lawyer is obligated to maintain the property in trust and after which the property must be deemed abandoned, if none of the four enumerated events has occurred in the meantime. See also G.S. §116B-13.5, concerning voluntary early delivery of funds.

RPC 90

October 17, 1990

Trustee for a Deed of Trust

Opinion rules that a lawyer who has as trustee initiated a foreclosure proceeding may resign as trustee after the foreclosure is contested and act as lender's counsel.

Inquiry #1:

Can a trustee who has initiated a foreclosure proceeding resign after it has become contested and then act as the lender's counsel in the foreclosure?

Opinion #1:

Yes. It has long been recognized that former service as a trustee does not disqualify a lawyer from assuming a partisan role in regard to foreclosure under a deed of trust. CPR 220, RPC 82. This is true whether the attorney resigns as trustee prior to the initiation of foreclosure proceedings or after the initiation of such proceedings when it becomes apparent that the foreclosure will be contested.

Inquiry #2:

Where foreclosure is pending and the borrower files bankruptcy, can the trustee under the deed of trust resign as trustee and thereafter represent the lender in the bankruptcy proceeding and the foreclosure proceeding?

Opinion #2:

Yes. Just as a lawyer may resign as trustee and undertake the representation of the lender in a contested foreclosure proceeding, so also may a lawyer resign as trustee and undertake the representation of the lender in seeking to have an automatic stay lifted in a related bankruptcy proceeding.

Inquiry #3:

Where the lender believes the borrower is in default but no foreclosure proceedings have been instituted, may an attorney serving as trustee in a deed of trust represent the lender in an amicable modification or loan workout agreement? Does such representation of the lender preclude the attorney from thereafter initiating foreclosure proceedings as trustee?

Opinion #3:

No, a lawyer serving as trustee may not simultaneously participate in the negotiation of a loan modification or workout agreement as attorney for the lender. RPC 82. An attorney serving as trustee may, however, draft and preside over the execution of documents evidencing a modification or workout agreement negotiated between the lender and borrower. Under such circumstances, the trustee would not be representing the interests of either and would be engaged in no partisan activity in conflict with the obligation to be impartial. It is possible that a lawyer who resigns as trustee to perform some partisan service for the lender, such as the negotiation of a modification agreement, may thereafter be reappointed as trustee and initiate foreclosure proceedings.

RPC 91

January 17, 1991

Editor's Note: This opinion was originally published as RPC 91 (Revised).

Conflict Between Insured and Insurer

Opinion rules that an attorney employed by the insurer to represent the insured and its own interests may not send the insurer a letter on behalf of the insured demanding settlement within the policy limits.

Inquiry:

Attorney A is retained by an insurance company to defend Dr. B in a malpractice suit brought against Dr. B. The case is very serious with catastrophic injuries to a minor child. The doctor has $2,000,000 of insurance coverage. Dr. B comes to Attorney A and tells him that he is very worried about the case and wants Attorney A to immediately send a demand letter to the insurance company to settle within policy limits. Dr. B tells Attorney A that he read an article in a professional publication that he should do this in the event the jury awards the Plaintiff a judgment in excess of his policy limits. Dr. B could then sue his insurer for bad faith refusal to settle within policy limits. How should Attorney A handle this situation?

Opinion:

Attorney A must not undertake to counsel with Dr. B relative to any bad faith claim and may not send a demand letter on his behalf to the insurance company; however, Attorney A is obligated to inform the insurance company of Dr. B's wishes in regard to the case. Rule 6(b)(l). Rule 7.1(a)(l). Whenever defense counsel is employed by an insurance company to defend an insured against a claim, he or she represents both the insurer and the insured. When the possibility of judgment in excess of the policy limits becomes apparent to defense counsel, he or she must promptly advise both clients of the existence and nature of the conflict. Rule 5.1(a). Where the insured has contractually surrendered control of the defense and authority to settle the claim to the insurer, counsel will generally be obliged to accept his or her instructions in these matters from the insurer. In order to fully protect the insured from exposure in

excess of the policy limits, especially with regard to settlement, defense counsel obtained by the insurer should also advise the insured that he or she cannot fully represent those interests and that it would be appropriate for the insured to consider employing independent counsel to provide such representation.

RPC 92

January 17, 1991

Editor's Note: This opinion was originally published as RPC 92 (Revised).

Representation of Insured and Insurer

Opinion rules that an attorney representing both the insurer and the insured need not surrender to the insured copies of all correspondence concerning the case between herself and the insurer.

Inquiry:

We have been retained by a title insurance company to defend title in connection with a quiet title action which has been commenced against a named insured of the title insurance company. The title insurance policy provides that the title insurance company "will defend your title in any court case that is based on a matter insured against." In addition to the claim seeking to quiet title, the plaintiff has asserted a claim against the insured, personally, seeking to recover punitive damages in connection with the transaction pursuant to which title to the disputed property was transferred to the insured. The title insurance company has advised the insured that the punitive claim involves a potential loss which is not covered by the title insurance policy and has invited the insured to secure independent counsel for the purpose of providing a defense with respect to this claim, and the insured has done so. The title insurance company now has received a settlement offer which is for a sum less than the insured value of the property in dispute. To avoid the potential punitive exposure, the insured, through independent counsel, has demanded that the title insurance company settle the dispute and has put the title insurance company on notice regarding a potential bad faith claim. The insured now has asked us in writing to provide the insured with copies of all correspondence which we have sent to the title insurance company regarding this matter. This correspondence contains our thoughts and impressions regarding the case in general and our assessments regarding the possible outcome of the litigation.

The issue which the insured's request presents is whether we have an obligation to the insured, as a client, to provide the requested information or whether we have an obligation to the title insurance company which is simply discharging its duty to defend title which is in dispute, as a client, not to provide information which the insured may subsequently attempt to use in a manner adverse to the insurance company.

Opinion:

While Rule 6(b)(1) obligates an attorney to keep the client reasonably informed about the status of the case and to comply with reasonable requests for information, there is nothing in the rules that requires defense counsel to furnish to the insured correspondence directed to the insurer during defense counsel's active representation of the insured. The representation of insured and insurer is a dual one, but the attorney's primary allegiance is to the insured, whose best interest must be served at all times. The attorney should keep the insurance company informed as to the wishes of the insured concerning the defense of the case and settlement. The attorney should also keep the insured informed of his or her evaluation of the case as well as the assessment of the insurance company, with appropriate advice to the insured with regard to the employment of independent counsel whenever the attorney cannot fully represent his or her interest. Further, if the attorney reasonably believes that it is in the best interest of the insured to provide him or her with work product directed to the insurer, such information may be disclosed to the insured without violating any ethical duty to the insurer.

RPC 93

July 13, 1990

Interviewing Codefendants in Criminal Cases

Opinion concerns several situations in which an attorney who represents a criminal defendant wishes to interview other individuals who are represented by attorneys who will not agree to permit the attorney to interview their clients. In the first inquiry, Attorney A wishes to interview criminal defendant B, who has been indicted in a separate indictment from Attorney A's client. In the second inquiry, Attorney A wishes to interview criminal defendant B, who has been named as a criminal coconspirator with A's client, but has not yet been joined as a codefendant for trial. In the third inquiry, Attorney A wishes to interview a coconspirator who was named in the same indictment with A's client.

Inquiry #1:

Defendant Smith is charged in a one-count indictment with first degree rape. Pursuant to a plea agreement, Smith enters a plea of guilty to second degree rape. The agreement also calls for Smith to give truthful testimony if called upon to do so. The Government agrees to make known the extent of Smith's cooperation at time of sentencing. In the process of cooperating pursuant to the plea agreement, Smith gives information which tends to implicate Jones in the same offense of first degree rape. Smith has not been sentenced.

Jones is then charged in a separate indictment with first degree rape. Jones' lawyer telephones Smith's lawyer and asks permission to interview Smith. Smith's lawyer refuses. Jones' lawyer nevertheless sends his investigator to interview Smith. After being informed of the identity of the investigator and his employer, and for whom he is working (Jones), Smith consents to the interview. In the process of the interview, Smith gives a statement which completely exonerates Jones on the rape charge by telling a story which conclusively indicates that the victim consented to intercourse.

Jones' lawyer takes the report of interview to the prosecutor and tells him that he may as well go ahead and dismiss the indictment against Jones. Prosecutor telephones Smith's lawyer, who tells him that he forbade the interview. Prosecutor then accuses Jones' lawyer of unethical conduct.

Has Jones' lawyer violated Rule 7.4?

Opinion #1:

Yes. Rule 7.4(a) provides that a lawyer shall not "communicate or cause another to communicate about the subject of the representation with a party the lawyers knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The comment to the Rule indicates that the Rule "covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." In this situation Smith, though not technically a party to the criminal case against Jones, is obviously represented by counsel concerning the matter of the alleged rape. Having been refused authority to interview Smith by Smith's lawyer, Jones' lawyer could not then ethically discuss the case with Smith.

Inquiry #2:

Smith, Jones, and Williams are indicted for conspiracy to traffic in marijuana. Pursuant to State practice, each is indicted in separate indictments. However, the conspiracy counts name Smith, Jones, and Williams as coconspirators. The State has not yet moved to join the indictments for trial. Each defendant retains counsel.

Williams' attorney asks the attorneys for Smith and Jones for permission to interview their clients. They refuse. Later, Williams' attorney learns that Smith and Jones wish to talk to him. Williams' attorney relays this information to the attorneys for Smith and Jones. They still refuse to permit the interviews.

Despite these objections, Williams' attorney and his investigator meet with Smith and Jones. They tell Smith and Jones that they are employed by Williams, that they are working for Williams' best interests in the case, that Smith and Jones do not have to talk, that they are free to call their lawyers if they wish before speaking to him, and that they are free to terminate the interview at any time. Smith and Jones consent to the interview.

Has Williams' attorney violated Rule 7.4 by conducting the interviews of the codefendants in light of refusal by counsel to permit same?

Opinion #2:

Yes, although technically Smith, Jones, and Williams have not yet been made parties to the same criminal cases, they are "parties" known to be represented by counsel in the same matter, a conspiracy to traffic in marijuana. As such, they may not be interviewed concerning the case without their lawyer's consent.

Inquiry #3:

The facts are the same as stated in Inquiry No. 2, except that Smith, Jones,

and Williams are indicted in federal district court for conspiracy to traffic in marijuana. All are indicted in the same indictment.

Has Williams' attorney violated Rule 7.4 by conducting the interviews of the codefendants in light of refusal by counsel to permit same?

Opinion #3:

Yes. Under the facts stated, Smith, Jones, and Williams are all parties to the same action and are each represented by counsel. Williams' attorney may not interview Smith or Jones over the objection of their attorneys. The fact that Smith and Jones appear to be willing to discuss the matter with Williams' attorney does not change the answer. Rule 7.4(a).

RPC 94

July 13, 1990

Private Lawyer Referral Service

Opinion rules that a private lawyer referral service must have more than one participating lawyer and that all participants must share in the cost of operating the referral service.

Inquiry:

Lawyer A wishes to operate a private lawyer referral service. Although Lawyer A is presently the only attorney participating, Lawyer A believes that Lawyer B, who resides and practices in an adjoining county, will also choose to participate. Lawyer A indicates that Lawyer B would be expected to pay a prorated fee for expenses relating to advertising in his county of residence only. Lawyer A will pay all other expenses until other attorneys become participants. Lawyer A further indicates that any attorney who wants to do a newspaper advertisement particular to his or her county or area will be expected to bear those costs alone. Participating attorneys will be expected to share the cost of radio or television advertising in their geographical areas on a prorata basis.

Opinion:

Implicit in the concept of a private lawyer referral service is the participation of more than one attorney. Any advertising of such an enterprise having only one participant would be misleading and in violation of Rule 2.1. For that reason Attorney A may not commence operation of the lawyer referral service until at least one other attorney has agreed to participate.

In order to fully participate in a private lawyer referral service, an affiliated attorney must share not only the cost of advertising but also the cost of operating the referral service. For this reason as well, Lawyer A may not operate a lawyer referral service with an attorney who does not contribute to the cost of operating the referral service and therefore cannot be viewed as a full participant in the service.

RPC 95

April 12, 1991

Editor's Note: This opinion was originally published as RPC 95 (Revised).

Assistant D.A. Serving on the School Board

Opinion rules that an assistant district attorney may prosecute cases while serving on the school board.

Inquiry:

Attorney A is an assistant district attorney and a member of a county board of education. Fines and forfeitures in criminal cases are payable to the county board of education. Attorney A is concerned about his dual roles as prosecutor and board member and the possible conflict that arises during the negotiation of pleas. Accepting pleas to lesser charges, or dismissing charges in exchange for pleas to other charges usually has an effect on the fine imposed; and arguing before the court for a specific bond or forfeiture of that bond in other situations also affects monies going to the school system.

May Attorney A prosecute cases while serving as a member of the school board?

Opinion:

Yes. Although the interest of the school board in realizing maximum revenue from fines and forfeitures might, as a theoretical matter, conflict with the interest of the State of North Carolina in the procurement of just results in criminal cases, as a practical matter any such conflict would be de minimis and would not materially limit Attorney A's representation of the state. Rule 5.1(b).

In making this determination, the committee notes that statistics show that funds realized from the collection of fines and forfeitures constitute only a minute portion of the total funding of public schools in North Carolina. The committee is also advertent to the fact that in many cases county appropriations for school administration are decreased as the collection of fines and forfeitures increases on a dollar-for-dollar basis so that there is no net benefit to the local school board from extraordinary collections of fines or forfeitures.

RPC 96

October 17, 1990

Out-of-State Trust Accounts

Opinion rules that attorneys practicing in North Carolina who are affiliated with an interstate law firm may not permit trust funds belonging to their clients to be deposited in a trust account maintained outside North Carolina without written consent.

Inquiry:

North Carolina lawyers are affiliated with an interstate law firm having its primary office in Washington, DC. All bills issue from the firm's central accounting office in Washington and clients are asked to remit payment directly to that office. Occasionally, clients overpay bills and such overpayments are deposited in the firm's trust account in the District of Columbia where they are handled in accordance with rules and regulations governing the maintenance of attorney trust accounts in that jurisdiction. It is also likely that any fees which are paid in advance of work being done would also be deposited in the Washington trust account. Clients of the North Carolina lawyers whose funds are being deposited in the Washington trust account are not routinely asked to consent to the deposit of their funds in a trust account maintained outside the State of North Carolina.

May North Carolina lawyers permit funds received on behalf of their clients to be deposited in the out-of-state trust account without their clients' knowledge and consent?

Opinion:

No. Rules 10.1(b) and (c) of the Rules of Professional Conduct require that funds received by North Carolina lawyers be deposited in trust accounts maintained at banks in North Carolina, unless the client has otherwise directed in writing. Since the arrangement described in the inquiry contemplates the deposit of such funds in trust accounts maintained outside the state of North Carolina without consultation with and direction from the clients to whom such funds belong, no North Carolina lawyer could ethically participate.

RPC 97

October 17, 1990

Representation of Condominium Association Against a Unit Owner

Opinion rules that counsel for a condominium association may represent the association against a unit owner.

Inquiry:

May an attorney employed as counsel for a nonprofit condominium association ("association of unit owners" pursuant to G.S. §47A-3(1)) bring a lawsuit on behalf of the corporation against a person who is a member of the association by reason of his ownership interest in a condominium unit?

Opinion:

Yes. Rule 5.10 of the Rules of Professional Conduct and its associated comment provide that a lawyer who represents a corporation or similar entity, such as a condominium association, represents the entity itself and not its individual officers or constituents. A lawyer for a condominium association may, without conflict of interest, represent the association in maintaining a legal action against one of its members.

RPC 98

October 17, 1990

Solicitation, Prior Professional Relationships and Advertising

Opinion construes the term "professional relationship" and explores the circumstances under which solicitation of persons or organizations with whom a lawyer has

had business and professional dealings is permissible. Targeted print advertising is also discussed.

Inquiry #1:

Attorney A has joined law firm XYZ. Prior to joining XYZ, Attorney A was a member of law firm TUV. While employed at law firm TUV, Attorney A provided legal advice to Client E and had frequent, direct contact with various executives of Client E. Law firm TUV also represented Client F while Attorney A was a member of TUV, though Attorney A never dealt directly with Client F.

Does Attorney A have a "prior professional relationship" with Client E such that it is proper for Attorney A to contact executives of Client E in person for the purpose of soliciting professional employment?

Opinion #1:

Yes.

Inquiry #2:

Does Attorney A have a "prior professional relationship" with Client F such that it is proper for Attorney A to contact Client F for the purpose of soliciting professional employment?

Opinion #2:

No. For the purposes of Rule 2.4(a), the term "prior professional relationship" contemplates that the subject attorney actually was involved in a personal attorney-client relationship with the prospective client. The mere fact that the subject attorney might have belonged to a firm which included another lawyer or lawyers who may have had such a relationship would not exempt the subject attorney from the rule's prohibition against in-person solicitation.

Inquiry #3:

Attorney A has joined law firm XYZ. Prior to joining law firm XYZ, Attorney A was in-house corporate counsel for Corporation C. Does Attorney A have a "prior professional relationship" with Corporation C such that it is proper for Attorney A to contact in-house counsel or executives of Corporation C for the purpose of soliciting professional employment?

Opinion #3:

Yes, an attorney who has previously served as in-house counsel for a corporation may, on the basis of that prior professional relationship, properly contact the corporation's current in-house counsel or its executives for the purpose of soliciting professional employment.

Inquiry #4:

Attorney B was formerly an attorney with law firm XYZ. Attorney B left his employment with law firm XYZ and is now in-house corporate counsel for Corporation C. Do attorneys practicing with law firm XYZ have a "prior professional relationship" with Attorney B, such that it is proper for an attorney with law firm XYZ to contact Attorney B for the purpose of soliciting professional employment?

Opinion #4:

No. As used in Rule 2.4(a), the term "prior professional relationship" has reference only to a lawyer's professional relationship with a particular client. That a lawyer might have at one time been professionally associated with a lawyer who has become in-house counsel for a prospective corporate client is irrelevant.

Inquiry #5:

Attorney A is a member of law firm XYZ. Attorney A is a member of the Board of Directors of Corporation C. Attorney A has served only as a director of Corporation C; neither Attorney A nor law firm XYZ has been retained to represent Corporation C. P, also is a member of the Board of Directors of Corporation C, is President of MN Bank.

Does Attorney A have a "prior professional relationship" with executives of Corporation C, such that it is proper for Attorney A to contact executives of Corporation C in person for the purpose of soliciting professional employment?

Opinion #5:

No. See the response to inquiry #4 above.

Inquiry #6:

Does Attorney A's association with P as directors of Corporation C constitute a "prior professional relationship," such that it is proper for Attorney A to contact P in person for the purpose of soliciting professional employment?

Opinion #6:

No. See the response to inquiry #4 above.

Inquiry #7:

Attorney A is a member of law firm XYZ. Prior to joining law firm XYZ, Attorney A was in-house counsel for Corporation C. Attorney A was actively involved in professional groups, through which Attorney A worked with other in-house corporate counsel on professional subjects of common interests. As a result of that involvement, Attorney A developed close relationships with other corporate counsel, including Attorney B, who is in-house corporate counsel for Corporation D.

Does Attorney A have a "prior professional relationship" with Attorney B, such that it is proper for Attorney A to contact Attorney B for the purpose of soliciting professional employment by Corporation D?

Opinion #7:

No. See the response to inquiry #4 above.

Inquiry #8:

Law Firm ABC has prepared a summary of changes in North Carolina corporation law. Law firm ABC anticipates that in order to comply with the changes in the law, corporations in North Carolina will need to take certain action that would normally involve the services of attorneys, but law firm ABC does not know what the specific legal needs of various corporations will be. The summary identifies law firm ABC, the location of its office(s) and some or all of its attorneys and states that specific members of the firm are available to provide legal services regarding the matters discussed in the brochure.

Law firm ABC has distributed this summary to its present clients and would like to distribute the summary to corporations that are not present clients. In addition, brokerage firm X, which is not a client of law firm ABC, but which has some of the same clients as law firm ABC, has requested copies of the summary for distribution to its clients. Law firm ABC also plans to hold a seminar to explain the new changes in the law. At the seminar an announcement will be made that members of law firm ABC are available to provide legal services regarding the matters discussed at the seminar, but there will be no request that attendees engage the firm's services. The firm views both the summary and the seminar as educational and general marketing services, not specific solicitations.

May law firm ABC distribute this summary to nonclient corporations without labeling the summary as an "advertisement?"

Opinion #8:

Yes. Rule 2.4(c) requires that a communication be labeled as a legal advertisement only when it is directed to a prospective client known to need legal services in a particular matter. For the purposes of the rule, the term "in a particular matter," has reference to discrete factual incidents directly involving the prospective client of which the communicating lawyer has acquired knowledge. The rule was not intended to apply to communications sent to clients who, because of their mere existence in a complex and ever-changing legal environment, may need legal advice and assistance in maintaining compliance with existing law.

Inquiry #9:

May law firm ABC, without labeling the summary as an "advertisement," give copies of the summary to Brokerage Firm X (as requested by Brokerage Firm X), knowing that Brokerage Firm X plans to distribute the summary to (a) clients and (b) prospective clients of Brokerage Firm X?

Opinion #9:

Yes, assuming that such material is not given to prospective clients who are known by the lawyer or the brokerage firm to need legal services in a particular matter.

Inquiry #10:

May law firm ABC invite nonclient corporations to attend the seminar without labeling the invitation as an "advertisement?"

Opinion #10:

Yes.

RPC 99

April 12, 1991

Editor's Note: This opinion was originally published as RPC 99 (Revised).

Title Insurance Tacking

Opinion rules that a lawyer may tack onto an existing title insurance policy.

Inquiry #1:

In 1986, Lawyer A represented Mr. Jones in his purchase of a house and lot. A performed a full title search and obtained a title insurance policy for Jones and his lender with Title Insurance Company. In 1990, Jones contracts to sell the house and lot to Ms. Smith. Smith retains Lawyer B to represent her in the transaction. B obtains a copy of the policy Title Insurance Company issued on the property.

Lawyer B's title search for Smith consists of updating Lawyer A's search; B searches the title from 1986 to 1990. Title Insurance Company allows B to apply for title insurance based on the update, and holds A liable for any title defects during A's search period that result in a claim against Smith. A never represented Smith. A has no knowledge that A's work is serving as the basis for providing title insurance to Smith. Title company has never informed A that A's liability to title company extends beyond the time A's clients owned the property. Lawyer B has made no attempt to obtain A's permission to use A's base title.

May Lawyer B render a title opinion without having conducted a personal inspection of documents in the chain of title?

Opinion #1:

Yes. A lawyer may ethically render to a title insurance company a limited title opinion based upon a limited examination of the public records for the purpose of obtaining the issuance of a title insurance policy upon real property. The Rules of Professional Conduct do not require personal inspection of all documents in the chain of title so long as the lawyer rendering the opinion fully discloses to his or her client the precise nature of the service being rendered and the full extent thereof. The client should be advised that he or she should rely on the title insurance policy as to matters of title and not upon the attorney's examination of the public records. If the Title Insurance Company is willing to base its underwriting decision upon the fact that it or another title insurance company has previously issued a title insurance policy and Lawyer B's limited title opinion, that does not offend the Rules of Professional Conduct.

Since title insurers frequently omit exceptions in mortgagees' policies that would appear in owners' policies, tacking should be limited to tacking onto owners' policies.

Inquiry #2:

May Lawyer B tack onto Lawyer A's base title without first obtaining Lawyer A's permission?

Opinion #2:

Lawyer B may ethically apply for the issuance of a title insurance policy on the basis of her limited title opinion and the fact that a title insurance policy has previously been issued. In so doing, the Rules of Professional Conduct would not require Lawyer B to obtain Lawyer A's permission. It is a question of law as to whether or not Lawyer A's liability to the title insurance company would continue after the issuance of the new policy. It is beyond the purview of this committee to make that determination. A possible solution to this problem might be for a lawyer to include in her opinion to the title insurer a disclaimer to the effect that the opinion is submitted only with respect to the current transaction and is not to be relied upon in any future transaction.

Inquiry #3:

Must Lawyer B disclose to his or her client that B has updated the title and not performed a full title search? Must the disclosure be in writing? Must the disclosure be made before the client agrees to engage Lawyer B?

Opinion #3:

The disclosures referred to in the first opinion should be made by Lawyer B to the client prior to accepting employment. Rule 6(b)(2). The disclosures need not be in writing.

RPC 100

January 18, 1991

Lawyer Serving on Hospital Ethics Committee

Opinion rules that an attorney serving on a hospital ethics committee is not automatically disqualified from representing interests adverse to the hospital or its staff physicians.

Inquiry:

Attorney A is a member of an advisory ethics committee for a local hospital. The ethics committee functions in an advisory capacity rather than in a decision-making capacity. The functions of the ethics committee can include consultation, education and advice on policy. The committee is not involved in any disciplinary decision-making. Attorney A does not represent the ethics committee as an attorney but merely serves as a member of the committee who happens to be an attorney. Under the circumstances, may Attorney A file a civil action against a doctor who is on the staff of the hospital or the hospital itself? The civil action would not involve facts arising out of any situation which the ethics committee has reviewed or considered. Would the answer be different if the committee was a regular staff committee of the hospital as opposed to an administrative advisory committee?

Opinion:

Attorney A would not be automatically disqualified from representing an interest adverse to that of the hospital or one of its staff doctors by virtue of her service as a member of the hospital's advisory ethics committee. While Attorney A's personal relationship to the hospital could, under some circumstances, materially limit Attorney A's capacity to represent a party in litigation adverse to the hospital, it seems possible under these facts that Attorney A could represent the third party after forming the reasonable belief that her representation of the client would not be adversely affected. The attorney should seek and obtain the consent of the client to the representation upon full disclosure of her relationship with the hospital. Rule 5.1(b)(1)(2). The attorney should also consider the appearance of impropriety that might be raised by representing a client against the hospital. Canon IX.

The answer would be the same if Attorney A served upon a regular administrative committee of the hospital. There would be no automatic disqualification, and resolution of the question would turn upon whether the lawyer might reasonably believe that her representation of the client would not be adversely affected and whether the client wished to consent upon full disclosure.

RPC 101

April 12, 1991

Editor's Note: This opinion was originally published as RPC 101 (Revised). RPC 121 supersedes RPC 101.

Borrower's Lawyer Rendering Opinion to Lender

Opinion rules that the borrower's lawyer may render a legal opinion to the lender.

Inquiry:

Lawyer A represents a borrower in negotiating a loan from a bank. The bank has a policy of requiring that counsel for its borrower render to it (the bank) a legal opinion that the loan in question and the terms of the loan do not violate any laws including, without limitation, any usury laws or similar laws relating to the charging of interest.

May Lawyer A ethically render such an opinion to the bank?

Opinion:

Yes, Lawyer A may ethically render an opinion to the bank. While it appears that the interest of the bank in closing the loan only when it can be assured that the transaction does not in any way offend technical banking regulations might possibly conflict with the borrower's desire to close regardless of any such technicalities, such conflict would not necessarily be disqualifying. In a commercial transaction of this sort where parties are dealing at arms length, a lawyer could reasonably conclude that her representation of neither interest would be adversely affected and, having drawn that conclusion, could proceed after fully disclosing the risks to the bank and to the borrower and obtaining the consent

of both. Rule 5.1(a).

RPC 102

January 18, 1991

Gifts to Employees from Court Reporting Service

Opinion rules that a lawyer may not permit the employment of court reporting services to be influenced by the possibility that the lawyer's employees might receive premiums, prizes or other personal benefits.

Inquiry:

A local court reporting service is offering prizes to legal secretaries who place depositions with that service. The legal secretary with the most dollars billed to his or her firm within a certain period of time wins. May a lawyer permit the employment of court reporting services to be influenced by the possibility that the lawyer's employees might receive premiums, prizes or other personal benefits?

Opinion:

Court reporting services can vary in terms of cost, efficiency and quality. Such factors should be considered by the lawyer and his employees in purchasing such services for the client. It is evident that the judgment of the person selecting the court reporting service could be compromised by the prospect of earning prizes or premiums. This could be detrimental to the client. Rule 3.3(b) requires a lawyer having direct supervisory authority over a nonlawyer to make a reasonable effort to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer. This provision would certainly require the supervising attorney to direct his employee to avoid conflict of interest of this sort. Indeed, a lawyer who became aware of such a practice involving his secretary and took no action to have the practice discontinued would be professionally responsible for the conflict of interest under Rule 3.3(c).

RPC 103

January 18, 1991

Representation of Insured and Insurer

Opinion rules that a lawyer for the insured and the insurer may not enter voluntary dismissal of the insured's counterclaim without the insured's consent.

Inquiry:

Attorney A is retained by an insurance carrier to defend the named insured on a claim arising out of an automobile accident. The insurance carrier, the defendant or both wish to file a counterclaim on behalf of the defendant because liability is questionable on both sides. Attorney A explains to the defendant that a conflict of interest could arise if Attorney A represents the defendant on his counterclaim and the defendant signs an agreement authorizing Attorney A to file a voluntary dismissal with prejudice of the counterclaim in the event the insurance carrier decides to settle the plaintiff's claim before or during trial. Just before or during trial the insurance carrier and Attorney A decide to settle and the defendant changes his mind and wishes to proceed on his counterclaim, withdrawing his consent to have his counterclaim dismissed with prejudice. The plaintiff will not settle unless the defendant dismisses his counterclaim with prejudice.

Can Attorney A proceed to voluntarily dismiss the defendant's counterclaim with prejudice or should he seek to withdraw as counsel, based upon the conflict of interest? If the court refuses to allow Attorney A to withdraw just before or during trial, how should Attorney A proceed?

Opinion:

Attorney A may not dismiss the defendant's counterclaim with prejudice if authority to do so has been revoked. Rules 7.1(a)(1),(2) and (3) and 7.1 (c)(1). Attorney A should seek to withdraw from the representation of both the insured and insurer under the circumstances because of the conflict of interest engendered by his clients' competing desires in regard to the counterclaim. Rule 5.1(b). If the court refuses to grant permission to withdraw, Attorney A would be obligated to zealously defend the case on behalf of the insured and the insurer and to zealously prosecute the insured's counterclaim. Rule 7.1(a)(1) and (2).

RPC 104

October 18, 1991

Editor's Note: This opinion was originally published as RPC 104 (Revised).

Leasing Associates

Opinion rules that associate attorneys may be leased back to their firms.

Inquiry:

Law Firm X desires to enter into an agreement with an employee leasing company for the lease of its associate attorneys. The employee leasing company, which is owned and managed by nonlawyers, would pay the leased attorneys' salaries from its payroll and would pay all employment and withholding taxes. In addition, fringe benefits, such as insurance and retirement benefits would be provided to the associates by the leasing company. Law Firm X would pay to the leasing company a fee calculated to cover the associates' wages, taxes and benefit costs and to provide a profit to the employee leasing company. The employee leasing company would have no control over the performance or duties of the leased associates. The leasing company would not have access to client files. All provisions pertaining to conflicts of interest would apply. The associate attorneys would be supervised and managed by partners of Law Firm X in the same manner as if the associates were not leased. Is such an arrangement ethical?

Opinion:

Yes, the subject arrangement is a "lease back" of the law firm's own employees having the practical effect of transferring only payroll administration and fringe benefit responsibilities to the leasing company. It is an accounting procedure provided by the employee leasing company to relieve the law firm and its partners from the bookkeeping duties arising out of the compensation of the law firm's own associates. For a fee the leasing company would handle payroll, withholding taxes, social security, health benefits and other financial personnel matters. In some instances the arrangement would provide the law firm's associates increased benefits not available to them without the leasing company. As stated in the inquiry, the employee leasing company would have no control over the leased associates. The attorney employees would remain associates of the law firm. Control over the associates would remain within Law Firm X.

The arrangement proposed by Law Firm X for leasing its associates does not constitute sharing legal fees with nonlawyers as prohibited by Rule 3.2. The fee paid to the employee leasing company for its bookkeeping services is not tied to specific legal fees paid to Law Firm X by a client or to the firm's gross legal fees. There is no direct relationship between the payment to the leasing company and legal fees paid to the firm.

The arrangement is not misleading to the public in violation of Rule 2.1, and does not affect the quality of representation afforded to clients by the firm. The committee does not perceive that the ability of leased associates to exercise independent professional judgment on behalf of Law Firm X's clients as required by Canon V would be adversely impacted by the arrangement. Under the arrangement as proposed, the leasing company has no control over the lawyers' independent judgment, and supervisory responsibility for the associates rests exclusively with Law Firm X. Confidences of Law Firm X's clients are to be maintained and all provisions of the Rules of Professional Conduct are to be followed. Essentially, the associates' position with the firm and with its clients remains the same as if the associates were paid directly by the firm.

As a precaution, however, this committee recommends a written lease agreement between the leasing company and the law firm clearly setting forth the scope of the employment relationship and specifically applying the Rules of Professional Conduct to the relationship between the law firm and the leased associates.

This opinion overrules CPR 365.

RPC 105

April 12, 1991

Public Defender Serving on the School Board

Opinion rules that a public defender may represent criminal defendants while serving on the school board.

Inquiry:

Fines and forfeitures in criminal cases are payable to the county board of education. May an attorney who serves on the board of education also represent persons accused of crimes as the public defender?

Opinion:

Yes. Although the interests of the school board in realizing maximum revenue from fines and forfeitures might, as a theoretical matter, conflict with the defendant's interest in minimizing such penalties, as a practical matter any such conflict would be de minimis and would not materially limit the attorney's representation of the defendant. Rule 5.1(b).

In making this determination, the committee notes that statistics show that funds realized from the collection of fines and forfeitures constitute only a minute portion of the total funding of public schools in North Carolina. The committee is also advertent to the fact that in many cases county appropriations for school administration are decreased as the collection of fines and forfeitures increases on a dollar-for-dollar basis so that there is no net benefit to the local school board from extraordinary collections of fines or forfeitures.

RPC 106

July 12, 1991

Editor's Note: This opinion was originally published as RPC 106 (Revised).

Fee Refunding

Opinion discusses circumstances under which a refund of a prepaid fee is required.

Inquiry:

Lawyer A was retained by Clients B and C to represent their son, D, who was charged with two first degree sex offenses. Lawyer A charged and collected a flat fee of $17,500 to represent D through trial in Superior Court on both charges. Several weeks after A was employed, the state elected to take a voluntary dismissal rather than put the child victim on the stand at the probable cause hearing. The grand jury has not yet returned an indictment. B and C evidently regard the matter as concluded and have demanded return of a substantial portion of the fee. Although there was no written fee contract and no specific negotiation between A and B and C regarding whether the fee might under any circumstances be refundable, Lawyer A considers the fee to be nonrefundable.

Must Lawyer A refund any portion of the fee?

Opinion:

It is clear that an attorney may never charge or collect a fee which is clearly excessive. Rule 2.6(a). It is necessary then for Attorney A to consider all of the circumstances associated with the case in retrospect for the purpose of determining whether the fee in question was reasonable. To the extent that the fee charged and collected exceeded a reasonable fee under the circumstances, a refund would be necessary. Rule 2.8(a)(3).

RPC 107

April 12, 1991

Alternative Dispute Resolution

Opinion rules that a lawyer and her client may agree to employ alternative dispute resolution procedures to resolve disputes between themselves.

Inquiry #1:

The Private Adjudication Center is an affiliate of the Duke University School of Law, Durham, North Carolina ("P-A-C"). The P-A-C has been organized for a number of years and has developed a successful program and procedures for alternative dispute resolution.

Would it be unethical for a lawyer to suggest to a client that the lawyer and client agree in their employment contract to refer any future dispute arising out of their contractual relationship to the Private Adjudication Center at the Duke Law School for binding resolution under one or more of its alternative dispute resolution procedures?

Opinion #1:

No. As a matter of professionalism, lawyers should avoid litigation to collect fees wherever possible. In that regard lawyers are encouraged to employ reasonably available alternative forms of dispute resolution.

Inquiry #2:

Would it be unethical for a lawyer to require such an agreement by including in all engagement letters and employment contracts a provision such as:

> Any dispute arising under this contract for legal services will be referred to the Private Adjudication Center and the resolution of such dispute shall be binding on the parties to this agreement;
>
> PROVIDED, that no such agreement shall be construed as designed to divest the North Carolina State Bar of its authority or responsibility for disciplinary action for breaches of professional ethics, or otherwise used by the lawyer to evade the consequences of unethical conduct.

Opinion #2:

No.

Inquiry #3(a):

Would the ethics opinion be different if the agreement were nonbinding on either party?

Opinion #3(a):

No.

Inquiry #3(b):

Would the ethics opinion be different if the agreement were binding upon the lawyer but nonbinding upon the client?

Opinion #3(b):

No.

Inquiry #3(c):

Would the ethics opinion be different if the agreement provided that the nonbinding results could be used in any future litigation to the extent permitted under rules of evidence and procedure (or could not be used in any way)?

Opinion #3(c):

No.

Inquiry #3(d):

Would the ethics opinion be different if the agreement provided that binding results could be pled in bar of any future covered claims?

Opinion #3(d):

No.

Inquiry #3(e):

Would the ethics opinion be different if the agreement contained a statement that either party has a right to the advice and use of independent counsel at any state of the negotiation of the employment contract or the resolution of any dispute arising out of such employment.

Opinion #3(e):

No.

Inquiry #4:

Are agreements for the private resolution of disputes between attorneys and clients subject to any restriction or limitation if there is no predispute agreement?

Opinion #4:

Such agreements would be appropriate assuming that the nature of the alternative dispute resolution procedures is fully disclosed to the client and the client is given full opportunity to consult independent counsel relative to the wisdom of foregoing other possible remedies in favor of alternative dispute resolution.

RPC 108

Editor's Note: RPC 108 was withdrawn on April 11, 1991, and no revised opinion was published under this number.

RPC 109

January 17, 1992

Editor's Note: This opinion was originally published as RPC 109 (Revised). See RPC 251 for additional guidance.

Representation of Parents Individually and as Guardians Ad Litem

Opinion rules that a lawyer may not represent parents as guardians ad litem for

their injured child and as individuals concerning their related tort claim after having received a joint settlement offer which is insufficient to fully satisfy all claims.

Inquiry #1:

Y, the infant son of Mr. and Ms. X, received serious injuries during the course of his birth. Y was profoundly brain damaged as a result of those injuries and will always require around-the-clock institutional care. Mr. and Ms. X have qualified and have been duly appointed as guardians ad litem for Y. They have employed law firm A to represent them in regard to their claim against the obstetrician for negligent infliction of emotional distress. As guardians ad litem, they have also employed law firm A to represent Y's interest in prosecuting a claim for damages relating to alleged medical malpractice. It is apparent that the obstetrician's insurance company would like to settle the case.

Assuming the above facts, what are the ethical considerations for attorneys in law firm A under the following four different settlement scenarios?

Insurance company agrees to settle for a lump sum and tells law firm A to disburse the funds between the parents and the child as the attorneys see fit.

Opinion #1:

Under the facts presented in the inquiry, the attorneys in law firm A represent conflicting interests which cannot be reconciled. Rules 5.1(a), 5.1(b) and 5.7. It is clear that in this scenario, every dollar made available to one of the firm's clients will diminish the amount of the settlement offer funds available to satisfy the claim of the other client.

The parents have a conflict of interest between their personal claims and the claims of the child for whom they are fiduciaries. An attorney may not ethically assist clients in putting themselves in a position where there is a conflict of interest between their personal claims and their fiduciary responsibilities. When, as here presented, the claims are in a conflict situation, the attorney may not ethically represent both claimants and may not divide up a joint offer.

Under the circumstances, law firm A must withdraw from representing both clients. The attorneys may not continue representing either of their clients unless their continuing participation is intelligently consented to by the other client, and this is impossible under the facts stated.

Inquiry #2:

Parents insist that law firm A present child's claim and parents' claim separately, but equal in value, to the insurance company. The attorneys know that parents' claim is traditionally not worth as much as the child's claim, but that the insurance company will be willing to negotiate a settlement as long as the aggregate of both claims does not exceed the insurance company's previous lump sum offer.

Opinion #2:

See the opinion in response to inquiry one.

Inquiry #3:

Insurance company offers one million dollars on the child's claim and one hundred thousand dollars for the parents' claim and will only settle if both claims are discharged. The parents decline on the grounds that the offer to them is inadequate. The attorneys feel that the offer on the child's claim is a superior offer and that the parents' conflict of interest is preventing them from acting in the best interests of the child.

Opinion #3:

See the opinion in response to inquiry one.

Inquiry #4:

Insurance company insists that any offers of settlement shall be a lump sum for both claims. Parents cannot agree how the money should be divided. The attorneys petition the court to hear evidence of the separate claims of parents and child and make a distribution of the funds.

Opinion #4:

See the opinion in response to inquiry one.

RPC 110

October 18, 1991

Editor's Note: This opinion was originally published as RPC 110 (Revised).

Attorneys Retained by Liability and Underinsured Motorist Insurers

Opinion rules that an attorney employed by an insurer to defend in the name of the defendant pursuant to underinsured motorist coverage may not communicate with that individual without the consent of another attorney employed to represent that individual by her liability insurer and that the attorney employed by the liability insurer may not take a position on behalf of the insured which is adverse to the insured.

Inquiry #1:

Driver One sued Driver Two for personal injuries sustained in a motor vehicle accident. The automobile liability insurance company (Liability Co.) that provided coverage to Driver Two retained Attorney X, who has appeared for and is engaged in the defense of Driver Two. Driver One has underinsured motorist coverage with UIM Co., and UIM Co. has retained Attorney Y to appear in the lawsuit to protect the interest of UIM Co. by defending in the name of Driver Two pursuant to G.S. §20-279.21(b)(3)a and 20-279.21(b)(4).

Liability Co. now wishes to pay its coverage and be relieved of any further liability or obligation to defend. Liability Co. has retained Attorney Z to petition the court for an order allowing that relief, pursuant to G.S. §20-279.21(b)(4). UIM Co. has instructed Attorney Y to oppose the petition as it relates to Liability Co.'s duty to defend.

Driver Two has not retained independent counsel to represent him in connection with the lawsuit or the petition by Liability Co.

May Attorney Y communicate with Driver Two concerning the defense of the lawsuit, without the consent of Attorney X?

Opinion #1:

No. Although the answer may depend on unresolved issues of statutory interpretation, UIM Co. has a statutory right (but not necessarily a duty) to defend the suit in the name of Driver Two. Thus, Attorney Y owes his allegiance to the court and UIM Co. whose interest may or may not be aligned with the interest of Driver Two on particular issues or at various times. For example, UIM Co. will initially share the interest of Driver Two in preventing or reducing recovery by Driver One, but UIM Co. may later be adverse to Driver Two on the same issues if UIM Co. becomes the subrogee of Driver One. Because Driver Two is represented by Attorney X (*see* RPC 56), Attorney Y (as counsel for UIM Co.) must obtain the consent of Attorney X to communicate with Driver Two. Rule 7.4(a). To avoid frustrating the rights granted to UIM Co. by the underinsured motorist statute, Attorney X should normally consent to communication on any issue where the interests of UIM Co. and Driver Two are aligned. However, Attorney Y should fully disclose his role to Driver Two, and Attorney X should have the opportunity to be present during the communication between Attorney Y and Driver Two.

Inquiry #2:

May Attorney X represent Driver Two in connection with Liability Co.'s petition to be relieved of its obligation to defend Driver Two?

Opinion #2:

No. Because Attorney X represents both the insurer (Liability Co.) and the insured (Driver Two), his representation of the insured would be materially limited by his responsibility to the insurer and he could not reasonably believe otherwise. Rule 5.1, RPC 91 and RPC 92. However, Attorney Y, representing the interest of UIM Co. as an unnamed party, may appear in opposition to the petition of Liability Co.

RPC 111

July 12, 1991

Representation of Insured and Insurer

Opinion rules that an attorney retained by a liability insurer to defend its insured may not advise insured or insurer regarding the plaintiff's offer to limit the insured's liability in exchange for consent to an amendment of the complaint to add a punitive damages claim.

Introduction:

Driver One sued Driver Two for personal injury sustained in a motor vehicle accident. Driver One is represented by Attorney A. The automobile liability insurance company (Liability Co.) that provided coverage to Driver Two retained Attorney X, who has appeared for and is engaged in the defense of Driver Two.

The complaint filed by Attorney A seeks only compensatory damages. It does not allege conduct by Driver Two that would support a claim for punitive damages and does not ask for punitive damages. However, there is evidence that Driver Two was driving while impaired, and that evidence is probably sufficient to support a claim for punitive damages.

On behalf of Driver One, Attorney A has moved to amend the complaint to seek punitive damages and allege the requisite conduct by Driver Two. Attorney A has also proposed to Attorney X that the parties enter into a binding consent order, stipulation, or other agreement allowing Driver One's motion to amend the complaint, but providing further that (a) no judgment for punitive damages shall be enforceable against either Driver Two or Liability Co. and (b) no judgment for compensable damages shall be enforceable in excess of the auto liability insurance coverage provided by Liability Co.

The proposal appears to be in the best interest of Driver Two, because it would fully protect Driver Two from personal liability and would put at risk only the liability coverage provided by Liability Co.

It is the position of Liability Co. that it provides no coverage to Driver Two for punitive damages.

Inquiry #1:

How should Attorney X handle the proposal communicated by Attorney A?

Opinion #1:

Because Attorney X represents both the insured (Driver Two) and the insurer (Liability Co.) in connection with the defense of the action, Attorney X has an obligation to communicate the proposal to both of them. Rule 6. However, because of the potential conflict between the interests of the insured (who would likely favor the agreement) and the insurer (who may be adversely impacted by the amended complaint), Attorney X may not advise either of them concerning the advisability of accepting the proposal. *See* RPC 91. Rule 5.1. Attorney X should advise the parties that it would be appropriate to consider employing separate counsel on the limited questions presented.

Inquiry #2:

Does Attorney X's assessment of the probability of an adverse verdict, on issues of liability for compensatory or punitive damages, make a difference?

Opinion #2:

No.

Inquiry #3:

Does it make any difference whether, in the opinion of Attorney X, any verdict against Driver Two for damages, if reached, will probably be much less than, or somewhere close to, or much more than, the liability coverage that Liability Co. has agreed it provided Driver Two?

Opinion #3:

No.

RPC 112

July 12, 1991

Representation of Insured and Insurer

Opinion rules that an attorney retained by an insurer to defend its insured may not advise insurer or insured regarding the plaintiff's offer to limit the insured's liability in exchange for an admission of liability.

Introduction:

Driver One sued Driver Two for personal injury sustained in a motor vehicle accident. Driver One is represented by Attorney A. The automobile liability insurance company (Liability Co.) providing coverage to Driver Two retained Attorney X, who has appeared for and is engaged in the defense of Driver Two.

The complaint filed by Attorney A seeks only compensatory damages. It does not allege conduct by Driver Two that would support a claim for punitive damages and does not ask for punitive damages. There is no known evidence to support an allegation of conduct on the part of Driver Two that would support a claim for punitive damages, and liability for the accident is unclear.

Attorney A has proposed to Attorney X that the parties enter into a binding consent order, stipulation, or other agreement which would provide that Driver Two admits liability for damages arising out of the accident, but would provide further that no judgment shall be enforceable in excess of the auto liability insurance coverage provided by Liability Co.

The proposal appears to be in the best interest of Driver Two, because it would fully protect Driver Two from personal liability and would put at risk only the liability coverage that Liability Co. has agreed it provides to Driver Two.

Inquiry #1:

How should Attorney X handle the proposal communicated by Attorney A?

Opinion #1:

Because Attorney X represents both the insured (Driver Two) and the insurer (Liability Co.) in connection with the defense of the action, Attorney X has an obligation to communicate the proposal to both of them. Rule 6. However, because of the potential conflict between the interests of the insured (who would likely favor the agreement) and the insurer (who may be adversely impacted by the admission), Attorney X may not advise either of them concerning the advisability of accepting the proposal. *See* RPC 91. Rule 5.1. Attorney X should advise the parties that it would be appropriate to consider employing separate counsel on the limited questions presented.

Inquiry #2:

Does Attorney X's assessment of the probability of an adverse verdict, on issues of liability for compensatory or punitive damages, make a difference?

Opinion #2:

No.

Inquiry #3:

Does it make any difference whether, in the opinion of Attorney X, any verdict against Driver Two for damages, if reached, will probably be much less than, or somewhere close to, or much more than, the liability coverage that Liability Co. has agreed it provided Driver Two?

Opinion #3:

No.

RPC 113

July 12, 1991

Legal Advice Concerning Lien Rights

Opinion rules that a lawyer may disclose information concerning advice given to a client at a closing in regard to the significance of the client's lien affidavit.

Inquiry #1:

A lender (Mortgagee) loaned money to an owner (Owner). The note evidencing the loan was to be secured by a first lien deed of trust on certain real property that had been owned by the Owner for some period of time prior to the closing of the loan. An attorney (Attorney) represented both the Owner and the Mortgagee at the closing of the loan. The Mortgagee required, and instructed the Attorney, that, as a condition to the closing of the loan, a mortgagee's title insurance policy be obtained by the Attorney with respect to Mortgagee's first lien deed of trust. The title insurance company, as a condition to issuing the title insurance policy, required the usual owner's affidavit with respect to mechanics' lien.

During the course of the closing of the loan, the Owner executed the usual owner's affidavit running in favor of the title insurance company in which the Owner "certified" that no third parties had any rights to any "mechanics' lien" on the real property.

Subsequent developments indicate that, in fact, at least one third party had "mechanics' lien" rights which, because of the relation back to the commencement of the work on the Owner's real property, may be superior to the lien of the deed of trust in favor of the Mortgagee.

Litigation has now been commenced against the Mortgagee and the Owner by the contractor who claims a mechanics' lien superior to the rights of the Mortgagee in the subject real property. The Mortgagee and the title insurance company have employed counsel (Counsel), other than Attorney, and the Owner has advised Counsel that the Owner did not realize that he was signing

an affidavit certifying that there were no mechanics' lien rights superior to that of the deed of trust. Counsel for the Mortgagee and title insurance company has inquired of Attorney what Attorney told the Owner about the affidavit before it was executed by the Owner.

Based on the foregoing:

Can Attorney advise Counsel as to the nature and extent of his conversation to Owner at the closing with respect to the affidavit?

Opinion #1:

Yes. Rule 4(c)(5).

Inquiry #2:

Can Attorney advise Counsel as to the nature and extent of Owner's conversation to Attorney at closing with respect to the affidavit?

Opinion #2:

Yes. See the answer to question #1.

Inquiry #3:

Would the answers to 1 and 2 be any different if Attorney was asked the questions in a deposition taken in connection with the litigation?

Opinion #3:

No.

RPC 114

July 12, 1991

Advising the *Pro Se* Litigant

Opinion rules that attorneys may give legal advice and drafting assistance to persons wishing to proceed pro se without appearing as counsel of record.

Inquiry #1:

Carolina Legal Services (CLS) represents indigent clients who are unable to afford private attorneys. Each client must meet income eligibility requirements in addition to having a type of case which fits within CLS's priority guidelines. All of CLS's attorneys carry a heavy caseload and the private bar is not always able to do enough through its own *pro bono* efforts to help meet all the legal needs of the indigent citizens in the community.

First Hypothetical:

An indigent person comes to CLS. She and her husband have recently separated and she has no job, no money and cannot afford to hire an attorney. Due to her marital situation, she has ample grounds for an alimony claim, which could be accomplished through a divorce from bed and board. She would like to file some sort of action, possibly a divorce from bed and board, to obtain some temporary alimony, child custody and child support. Unfortunately, CLS cannot represent her.

Can a CLS attorney draft a complaint seeking divorce from bed and board for the woman, explain to her how to file it, have the woman sign her name on all the pleadings, go over courtroom procedure with her, but allow her to represent herself in court *pro se* and not list herself as the attorney of record?

Opinion #1:

Yes, as the comment to Rule 3.1 makes clear, an attorney may counsel nonlawyers who wish to proceed *pro se*. In so doing an attorney may provide assistance in the drafting of legal documents, including pleadings. When an attorney provides such drafting assistance, the Rules of Professional Conduct do not require the attorney to make an appearance as counsel of record.

Inquiry #2:

Are there court approved pleading forms that CLS attorneys can give the woman to sign and file *pro se*?

Opinion #2:

If such forms exist, attorneys may make them available to individuals wishing to proceed pro se.

Inquiry #3:

Are the ethical considerations the same if CLS attorneys make their own form pleadings available to the indigent woman to sign and file pro se?

Opinion #3:

See the answer to question #1.

Inquiry #4:

Assuming a CLS attorney can do the above, is there a difference, ethically, as to which party, the attorney or the woman, actually drafts the pleadings or fills out any court approved forms which may exist, so long as the attorney clearly states that she is not representing the woman, but is merely helping her with her lawsuit?

Opinion #4:

No.

Inquiry #5:

Second Hypothetical:

A man comes into CLS's office. He has just been served with a custody complaint by his ex-wife. CLS cannot take the case. The man is willing to consent to his ex-wife's having custody but wants to make sure that his rights are protected as far as visitation, etc.

Can a CLS attorney draft an answer for him without signing the pleading if she lets him know that she is not representing him and that he must proceed *pro se*?

Opinion #5:

See the answer to question #1 above.

Inquiry #6:

If a CLS attorney is not the attorney of record, how much leeway would such an attorney have in advising the man on how to represent himself in court if he and his ex-wife are unable to settle the custody matter? Can the attorney instruct him on which witnesses to call, what evidence to present and how to give an opening and closing argument? Can the attorney fill out subpoenas for him or instruct him on how to fill them out himself?

Opinion #6:

Nothing in the Rules of Professional Conduct prohibits a lawyer from volunteering advice regarding strategy, tactics or techniques of litigation. As was mentioned above, an attorney volunteering assistance to an individual wishing to proceed *pro se* may offer assistance in drafting documents or completing forms.

Inquiry #7:

Third Hypothetical:

A woman consults CLS about stopping the physical abuse that her husband frequently subjects her to. She has already taken out an assault warrant, but wants to proceed *pro se* with a 50B Domestic Violence Protective Complaint. No CLS attorney can represent her in court.

Can a CLS attorney fill out the 50B complaint for her based on the information she has given and have her proceed *pro se*?

Opinion #7:

Yes.

Note: While it appears ethically permissible for an attorney to volunteer assistance of the sort described above without appearing as counsel of record, it is noted that attorney-client relationships would generally be formed under such circumstances and the Rules of Professional Conduct, particularly those concerning confidentiality and conflict of interest would apply. The Ethics Committee offers no opinion on the question of whether attorneys undertaking to offer such voluntary assistance might be liable for malpractice but suggests that any lawyer acting in such capacity would be required by Rule 6 to act competently in offering advice and assistance.

RPC 115

October 18, 1991

Sponsorship of Legal Information

Opinion rules that a lawyer may sponsor truthful legal information which is provided by telephone to members of the public.

Inquiry:

Audio Services, Inc. ("Audio Services") provides by telephone free information ranging from health to news and weather to the general public. It is a for-profit organization which does business in fifteen states and in Canada. The service includes certain free legal information, the content of which has been written and/or approved by attorneys in the state in which the information is

made available. The legal information is provided through a recorded message which can be heard by dialing a free local number. Attorneys who want to participate in the Audio Services program pay a fee in exchange for recorded advertising announcements in the telephone portion of the service. These advertisements consist of a 10-second announcement prior to the recorded legal information and a 15-second announcement following the information. After the last recorded announcement, the caller has the option to dial a single number on the telephone in order to be directly connected with the law firm making the advertisement or to dial a different number to receive a free pamphlet on the subject of his inquiry. The printed portion of the service in the telephone directory does not include any advertisement by the participating attorneys.

Does participation by a North Carolina attorney in the Audio Services program violate the North Carolina Rules of Professional Conduct?

Opinion:

No, assuming that the advertising material in question is not false or misleading as defined in Rule 2.1 of the Rules of Professional Conduct.

Rule 2.2(a) allows a lawyer to advertise through public media. Public media includes media such as "telephone directories, legal directories, newspapers or other periodicals, outdoor advertising, radio or television or written communications not involving solicitation" as defined in Rule 2.4. Although recorded telephone announcements are not included in the listing of accepted advertising media, the use of the words "such as" indicates that other types of media not listed within the rule are acceptable. Since the listing of acceptable advertising media includes printed, audio and audio/visual forms, recorded telephone announcements should also be acceptable. The recorded announcements are subject to Rule 2.2(b) which requires that a recording of the advertisements must be kept for two years after their last dissemination along with a record of when and where they were used, and to Rule 2.2(e) which requires that the recorded announcements must include the name of at least one lawyer or law firm responsible for their content.

Rule 2.4(a) states that, "[a] lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." Since there is not in-person or live telephone contact between the person in need of legal services and the lawyer until such person elects to dial another number after the recorded messages, the recorded advertisements do not violate Rule 2.4(a).

Rule 2.4(c) requires that the words, "This is an advertisement for legal services" be included at the beginning and ending of any "recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter and with whom the lawyer has no family or prior professional relationship." Since a caller must be presumed to be in need of legal services, the recorded messages must include the statement described in Rule 2.4(c).

Rule 3.1 prohibits an attorney from aiding "a person not licensed to practice law in North Carolina in the unauthorized practice of law." GS. §84-2.1 defines, in relevant part, the practice of law as: "performing any legal service for any other person, firm or corporation, with or without compensation." In addition, it is necessary that the person charged shall have customarily or habitually held himself out to the public as a lawyer, or that he has demanded compensation for his services as such. *State v. Bryan*, 98 N.C. 644, 4 S.E. 522 (1887). Since the recorded legal information contains legal information describing the law in general, it is not "a legal service for any person, firm or corporation." Neither does Audio Services hold itself out as an attorney or law firm. Therefore, the attorneys who participate in the Audio Services program would not be aiding the unauthorized practice of law.

RPC 116

October 18, 1991

Partnership Between Lawyers

Opinion rules that lawyers may not hold themselves out as practicing in a partnership unless the lawyers are actually partners.

Inquiry:

An issue has arisen as to whether a particular "partnership agreement" creates a proper partnership under the provisions of the Rules of Professional Conduct for purposes of two attorneys holding themselves out to the public as a law partnership.

The issue arises in the context of a threatened legal malpractice claim in which a former client alleges negligent representation by one of the two attorneys in the "partnership." Although the law does not permit a plaintiff to base a claim of malpractice on an ethical violation, the attorney believed the partnership agreement to be a valid partnership agreement. The two attorneys practiced law under their two names, have stationery with their two names, etc.

The partnership agreement in question is largely concerned with shared office expenses. It also contemplates the likelihood of sharing certain cases (and fees related to those shared cases). The dollar volume of the cases shared in 1990 was not insubstantial. The particular case which is the subject of the threatened litigation was not one of the shared cases. In fact, the partnership agreement was not entered into at the time the initial retainer agreement was executed. However, the partnership agreement was executed prior to the alleged negligent act.

Must the two attorneys make any changes in their partnership agreement to be in compliance with the Rules of Professional Conduct?

Opinion:

Rule 2.3(e) forbids a lawyer from holding himself or herself out as practicing in a law firm unless the association is in fact a firm. The question of whether the business association in question is a bona fide partnership or, in the parlance of the rule, a "firm," is a legal question beyond the purview of the Ethics Committee. If as a matter of law the association in question is a bona fide partnership, it is obvious that the attorneys may continue to hold themselves out as partners. If, on the other hand, the arrangement is not a bona fide partnership, it would be unethical for the attorneys involved to continue to represent that they are partners.

RPC 117

July 17, 1992

Editor's Note: This opinion was originally published as RPC 117 (Revised).

Reporting Contagious Disease

Opinion rules that a lawyer may not reveal confidential information concerning his client's contagious disease.

Inquiry:

During the course of representation, Attorney L learned that Client C has a contagious disease which can be transmitted through casual contact in a normal everyday setting. The client currently works as a waiter. Lawyer L has consulted with a public health official concerning the disease in question but has not revealed the name of the client. Lawyer L was informed by the public health official that although the disease is contagious and can be transmitted by touch, quarantine is not warranted under the circumstances. Had the disease been more serious, could Lawyer L have reported the identity of the client to the local public health authorities along with the information that the client is infected without the client's consent?

Opinion:

No. Since the subject information was gained in the professional relationship and disclosure would likely be embarrassing or detrimental to the client, it must be considered confidential information which is protected from disclosure by Rule 4(b) of the Rules of Professional Conduct. This would be true regardless of the seriousness of the client's disease. *See* RPC 120.

RPC 118

October 18, 1991

Waiver of Affirmative Defense

Opinion rules that an attorney should not waive the statute of limitations without the client's consent.

Inquiry:

Can an attorney who is retained by an insurer to defend a tort claim grant an extension of the statute of limitations on behalf of both the insurer and the insured, or would an extension of time have to be obtained directly from the insured?

Opinion:

Unless the insured has by contract surrendered to the insurer the authority to waive affirmative defenses, no such waiver should be undertaken by the attorney without the consent of the insured. In a typical liability case, the lawyer employed by the insurer would represent both the insurer and the insured. The insured would be considered the lawyer's primary client. RPC 92. Generally speaking, a lawyer is obliged by Rule 7.1 of the Rules of Professional Conduct to "seek the lawful objectives of his client through reasonably available means permitted by the law and these rules,..." It is further provided that "a lawyer does not violate this rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client,..." Because the waiver of an affirmative defense, such as the statute of limitations, would be prejudicial to the rights of the client, the insured, it would be necessary for the insured to consent to a waiver.

RPC 119

October 18, 1991

Editor's Note: *But see* Rule 4.2(a) of the Revised Rules.

Communication Between Opposing Parties

Opinion rules that an attorney may acquiesce in a client's communication with an opposing party who is represented without the other attorney's consent, but may not actively encourage or participate in such communication.

Inquiry:

Attorney A represented a passenger who suffered serious injuries when thrown from an auto driven by a fraternity friend who was represented by Attorney B. Attorney B also represented the father of the driver under family purpose allegations. Attorney C represented the liability carrier. The injuries sustained by the plaintiff were severe and the liability carrier indicated that it would pay its limits. The principal issue was the contribution of the driver and his father. A few days before the scheduled trial and after inconclusive negotiations between the attorneys on the excess aspect, Attorney B permitted his client, the driver, to telephone Attorney A's client who was a military officer in another state in an effort to negotiate a settlement. Attorney A had no knowledge of the communication until receiving a call from his client. Confusion resulted over what the plaintiff agreed to accept. Attorney A protested to Attorneys B and C concerning the direct communication with his client. Again, without the knowledge of Attorney A but with the permission of Attorney B, the defendant-driver contacted Attorney A's client and attempted to resolve the amount and method of paying the excess.

Is it permissible for an attorney to allow his client to contact the adverse party and attempt to negotiate settlement without the knowledge or permission of the attorney for the adverse party, even though at one time the parties may have been close friends?

Opinion:

Yes. Opposing parties themselves may communicate with each other with or without the consent of their lawyers about any matters they deem appropriate. Such communications may include efforts to negotiate a resolution of a controversy between the parties, the results of which may be reported to the parties' lawyers. At the same time Rule 7.4(a) provides: "During the course of his representation of a client, a lawyer shall not: (1) communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." Although client contact with the opposing represented party can be allowed or permitted by the attorney, the attorney cannot cause (by active encouragement, client preparation, or personal participation) such communication so as to accomplish indirectly what he or she could not do directly due to the prohibition of Rule 7.4(a). The lawyer must be careful to distinguish between active encouragement and participation on the one hand and passive acquiescence on the other. It is improper for the attorney to use his or her client as an agent, or to use any other actual agent of the attorney, to communicate with the opposing represented party in violation of Rule 7.4(a).

This opinion supersedes CPR 150.

RPC 120

July 17, 1992

Editor's Note: This opinion was originally published as RPC 120 (Revised). *See also* RPC 175.

Reporting Child Abuse

Opinion rules that, for the purpose of the Rules of Professional Conduct, a lawyer may, but need not necessarily, disclose confidential information concerning child abuse pursuant to a statutory requirement.

Inquiry:

Attorney A represents Clients H and W who are the parents of three minor children. During the course of the representation, H and W inform Attorney A of a matter unrelated to the representation, namely, that the minor children are the victims of continuing emotional and/or sexual and/or physical abuse.

G.S. §7A-543 generally requires that "any person or institution who has cause to suspect that any juvenile is abused or neglected shall report the case of that juvenile to the director of the Department of Social Services in the county where the juvenile resides or is found." The rule does not except from its terms attorneys whose suspicions are aroused by information received in confidence. Must Attorney A report the abuse of H and W's children to the director of the Department of Social Services against the wishes of her clients H and W?

Opinion:

No. A lawyer is not ethically required to report the child abuse under the facts described in the inquiry. Rule 4(b)(1) generally prohibits a lawyer from knowingly revealing confidential information of her client. The information in question is certainly confidential information as that term is defined in Rule 4(a) in that it was gained in the professional relationship, the clients have requested that it be held inviolate, and its disclosure would likely be embarrassing or detrimental to the clients. Rule 7.1(a)(3) states that a lawyer shall not intentionally prejudice or damage his or her client during the course of the professional relationship. Despite the language used by G.S. §7A-543 ("any person" shall report suspected child abuse or neglect to the director of the Department of Social Services in that county), there is nothing in Chapter 7A, Article 44, of the North Carolina General Statutes on "Screening of Abuse and Neglect Complaints" that abrogates attorney-client confidentiality or privilege. (G.S. §7A-551 specifically abrogates the physician-patient and psychologist-client privileges, while not mentioning the attorney-client privilege.)

Recognizing the State Bar's lack of authority to rule on questions of law, and rendering this opinion as an ethical matter only, until such time as our courts should dispositively rule that G.S. §7A-543 abrogates client confidentiality and privilege and requires a lawyer to report child abuse, Rule 4 controls and the lawyer is not ethically required to report child abuse (from information gained in the professional relationship), and the failure to so report will not be deemed a violation of Rule 1.2(b) and (d) and/or Rule 7.2(a)(3). In other words, although a lawyer failing to report suspected child abuse might sometime be criminally prosecuted pursuant to G.S. §7A-543, the State Bar will not treat this conduct as unethical under the present state of the law.

The above notwithstanding, it is possible that the exception contained in Rule 4(c)(4) might justify the disclosure of the confidential information in question. That provision authorizes an attorney to disclose confidential information regarding the intention of her clients to commit a crime. If Attorney A in this situation is satisfied that her clients intend to continue abusing their children, disclosure would certainly be allowed by this exception to the general rule.

Further, because G.S. §7A-543 is unclear and subject to being interpreted as abrogating attorney-client confidentiality and privilege, until our courts settle the legal question, an attorney will be allowed, in his or her discretion, to interpret G.S. §7A-543 as requiring such report and thus may ethically report the information gained through the confidential relationship concerning child abuse under the exception to Rule 4(b) contained in Rule 4(c)(3) to the effect that confidential information may be disclosed when "required by law."

This inquiry and response has focused solely on reporting suspected, but unknown and previously unreported, past and possibly ongoing child abuse, in order for it to be investigated and dealt with by the Department of Social Services. Once a client is accused of, under investigation for, or charged with child abuse that is a past act, attorney-client confidentiality and privilege would

be protected by the client's constitutional rights to effective assistance of counsel, and it would be unethical to divulge such information gained in the professional relationship as to the client's past conduct.

RPC 121

October 18, 1991

Legal Opinion for Nonclient

Opinion rules that a borrower's lawyer may render a legal opinion to the lender.

Inquiry:

Lawyer A represents a borrower in negotiating a loan from a bank. The bank has a policy of requiring that counsel for its borrower render to it (the bank) a legal opinion that the loan in question and the terms of the loan do not violate any laws, including, without limitation, any usury laws or similar laws relating to the charging of interest.

May Lawyer A ethically render such an opinion to the bank?

Opinion:

Yes, Lawyer A may ethically render an opinion to the bank with the borrower's consent. The rendering of an opinion to the bank does not give rise to an attorney/client relationship between Lawyer A and the bank. Lawyer A is still representing the borrower only. Rule 5.1(a).

This opinion supersedes RPC 101.

RPC 122

January 17, 1992

Judicial Consultations with the Attorney General

Opinion rules that a member of the attorney general's staff may not consult ex parte with a trial court judge if it is likely that that lawyer will represent the state in the appeal of the case.

Inquiry:

May a member of the attorney general's staff engage in an *ex parte* communication with a trial court judge concerning the merits of a case pending before that judge in which the state, though a party, is not presently represented by the attorney general?

Opinion:

Note: For the purposes of the Rules of Professional Conduct, disqualification is generally imputed within a law firm or its functional equivalent. Here it is assumed that within the organizational structure of the attorney general's office, a "division" is the functional equivalent of a law firm.

A member of the attorney general's staff may not engage in such an *ex parte* communication if it is likely that that lawyer or a member of his or her division within the attorney general's office will be called upon to represent the state in the event of an appeal. Under such circumstances the member of the attorney general's staff must be treated as the alter ego of counsel for the state in the trial court, and any such communication would be tantamount to an illicit *ex parte* communication by the state's lawyer. Rule 7.10(b). The member of the attorney general's staff would also be disqualified for reasons of conflict of interest. The ability of such a lawyer to give the court disinterested advice would be materially limited by the fact that that lawyer or another member of that lawyer's division within the attorney general's staff would be expected to take a partisan role on behalf of the state on appeal. Rule 5.1(b).

The ethics committee has previously determined that the attorney general's office will not be treated as a monolithic law firm for the purposes of the Rules of Professional Conduct. RPC 55. Therefore, there is no ethical impediment to the attorney general's offering advice to a trial court judge in any case in which the state has an interest if the state will not be represented on appeal by the consulting lawyer or a member of the consulting lawyer's division within the attorney general's office. Under such circumstances the consulting attorney, though a member of the attorney general's staff, would be considered as belonging to a "firm" which is separate and apart from the division or "firm" within the office of the attorney general for which the lawyer ultimately assigned responsibility for the appeal works.

Once a member of the attorney general's staff undertakes to consult with a trial court judge on an *ex parte* basis, neither that lawyer nor any other member of that lawyer's division within the attorney general's office should undertake to represent the state on appeal. This is necessary to avoid the appearance of impropriety. Canon X. Rule 9.2(a), though not dispositive, is supportive of this conclusion. In advising the court the consulting lawyer is in effect providing the services of a law clerk. Rule 9.2(a) prohibits a lawyer who has participated in a matter as a judge's law clerk from representing anyone in the same matter. The disqualification, which was designed to avoid the appearance of impropriety, is imputed to the other members of the lawyer's firm. The same concern justifies disqualification of the consulting lawyer and the other members of his or her division in the instant case.

The foregoing opinion is inapplicable to communications that are not *ex parte.* The trial court may avoid putting members of the attorney general's staff in the position of being precluded from participation in the case as advocates for the prosecution after having participated as advisors to the court by ensuring that all parties to the pending case are also parties to the communication.

RPC 123

January 17, 1992

Editor's Note: See RPC 251 for additional guidance.

Representation of Parents and Child

Opinion rules that a lawyer may represent parents and an independent guardian ad litem for their child concerning related tort claims under certain circumstances.

Inquiry:

A child is injured due to the apparent malpractice of a physician. Incident to the injury there accrues to the parents of the child a claim against the physician for negligent infliction of emotional distress. Under what circumstances, if any, may the same attorney represent the interests of the parents and the child?

Opinion:

Note: This opinion is intended to address in a broader way the issues raised in RPC 109. It is offered for the general guidance of the bar and is not intended to contradict the advice given in response to the specific facts recited in RPC 109.

Although the interests of the parents and the child are potentially in conflict, an attorney may represent the parents and through them the child in negotiating with the physician or his insurer prior to the initiation of litigation. Once a lawsuit is commenced, the attorney should insist upon the appointment of an independent guardian ad litem for the child. If it appears that the interests of the parents and the child will not necessarily conflict, the attorney may undertake to represent both with the intelligent consent of the parents and the child's independent guardian ad litem. Since the interests of the child and the parents would be inextricably linked in the establishment of the physician's liability for negligence, it is unlikely that any actual conflict between the attorney's two clients would arise prior to the receipt of a settlement offer. Should the defendant make a joint offer requiring the plaintiffs to divide the proceeds, the potential conflict of interest would become actual. Given the fact that the attorney's clients are bound by family ties and would have economic interests which would not be necessarily antagonistic, the conflict of interest would not automatically disqualify the attorney from continuing the joint representation. In some instances it may also be appropriate for an attorney to attempt to assist his clients in evaluating their respective claims and in amicably agreeing to an equitable and appropriate division which could then be presented to the court for its approval. Under no circumstances may the attorney, while representing both clients, assume a role of advocacy for one as opposed to the other.

Should it become apparent to the attorney that his clients' conflicting interests cannot be mediated, the attorney will generally be required to withdraw from the representation of both. It is conceivable that the attorney may continue to represent one or the other with the consent of the former client whose case he relinquishes. Rule 5.1(d).

RPC 124

January 17, 1992

Editors Note: *But see In re S.E. Hotel Properties Ltd. Partnership*, 151 F.R.D. 597 (W.D.N.C. 1993).

Costs of Class Action Litigation

Opinion rules that a lawyer may not agree to bear the costs of federal class action litigation.

Inquiry:

In a class action under Rule 23 of the Federal Rules of Civil Procedure, can the plaintiff's counsel agree to bear all or part of the costs of the litigation? In an ordinary civil suit, are there any circumstances under which the plaintiff's counsel can agree to bear the costs of litigation? If so, what are some of those circumstances?

Opinion:

An attorney may never ethically agree to be ultimately responsible for the costs of litigation. Rule 5.3(b) of the Rules of Professional Conduct allows a lawyer to advance the costs of litigation if the client remains ultimately liable for such expenses. The rule contains no exception for lawyers prosecuting class action litigation in federal court. It is therefore impermissible for an attorney to agree with his or her client to bear some or all of the costs of such litigation.

RPC 125

January 17, 1992

Disbursement of Settlement Proceeds

Opinion rules that a lawyer may not pay a medical care provider from the proceeds of a settlement negotiated prior to the filing of suit over his client's objection unless the funds are subject to a valid lien.

Inquiry:

Lawyer A represents a plaintiff in a personal injury action. During the course of settling the case, the attorney receives medical bills from medical care providers which treated the client for the personal injuries. Settlement is reached without the filing of a lawsuit. There is no dispute over the medical bills. The client instructs Lawyer A to pay all proceeds of the settlement over to her and to not pay the medical bills. The medical care providers have not taken the steps set forth in G.S. §44-49 to perfect the lien provided in that statute, but Lawyer A has actual notice of the bills (*see* G.S. §44-50). Does RPC 69 mandate that the attorney pay the settlement proceeds to the client rather than following the distribution scheme set forth in G.S. §44-50?

Opinion:

RPC 69 ruled that an attorney has an ethical obligation to disburse funds belonging to the client as instructed by the client in the absence of a valid lien in favor of a health care provider. Rule 10.2(e). From the standpoint of the Rules of Professional Conduct, the situation is the same regardless of whether the case is settled before or after the initiation of litigation. The interpretation of G.S. §44-50 is beyond the purview of the ethics committee. Suffice it to say that if that statute has the effect of imposing a lien upon settlement proceeds in the hands of an attorney when the attorney has received actual notice of the medical care provider's claim and suit has not been filed, then the attorney may pay the medical care provider's undisputed claim in spite of his client's objection. If, on the other hand, a lien is not perfected by the attorney's acquisition of actual notice under such circumstances, the attorney would have to abide by the instructions of the client in regard to the disbursement of the proceeds of settlement.

RPC 126

April 17, 1992

Letterhead Listing of Nonlawyers

Opinion rules that nonlawyers may be listed as such on the letterhead of lawyers.

Inquiry #1:

Guideline 9 of the Guidelines for Use of Nonlawyers in Rendering Legal Services which was adopted by the North Carolina State Bar in October of 1986 indicates that a legal assistant may not be included upon the employing lawyer's letterhead. The Paralegal Committee of the North Carolina State Bar is considering proposing an amendment to the guideline which would permit a nonlawyer to be listed on a lawyer's letterhead so long as the listing clearly indicates that the subject individual is a nonlawyer.

Would such listings be consistent with the Rules of Professional Conduct?

Opinion #1:

Yes. The Rules of Professional Conduct do not prohibit the listing of nonlawyers as nonlawyers on law firm letterhead. Rule 2.3(c) prohibits only the listing of persons not licensed to practice law in North Carolina as attorneys affiliated with the firm. It is, of course, necessary that any communication of a lawyer or law firm be presented in a manner which is not false, deceptive or misleading. *See* Rule 2.1. To ensure that the public is not led to believe that a nonlawyer is eligible to practice law, the nonlawyer's limited capacity should be clearly set forth on the letterhead.

Inquiry #2:

Would the answer to question 1 be different if the nonlawyer is a disbarred lawyer?

Opinion #2:

No.

RPC 127

April 17, 1992

Conditional Delivery of Settlement Proceeds

Opinion rules that deliberate release of settlement proceeds without satisfying conditions precedent is dishonest and unethical.

Inquiry #1:

Attorney D is regularly employed by an automobile liability insurance company to defend claims or litigation against its insureds, or against the insurance company when the claim is against other coverage that the company has provided (such as uninsured and underinsured motorist insurance coverage). When a settlement of any such claim or litigation is negotiated, Attorney D typically prepares the documents that he and his client or clients will require to conclude the settlement (the settlement documents). The settlement documents usually consist of a release, as well as a consent judgment, or a notice or a stipulation to effect a dismissal of any pending litigation.

Attorney D routinely sends the settlement documents to opposing counsel, Attorney P, with a letter which directs the manner in which the settlement is to be concluded with the use of the settlement documents by Attorney P.

Attorney D also sends the check or checks for the settlement proceeds to Attorney P with a letter stating that each check is conditionally delivered to Attorney P in trust and upon the condition that, while in some instances a check may be deposited in the trust account of Attorney P, no check may otherwise be delivered, and no proceeds from any check may be disbursed by Attorney P until the settlement documents have been executed in the manner directed in the letter and returned to Attorney D.

With respect to this conditional delivery of a settlement check or its proceeds, is Attorney D a "client" of Attorney P as defined by Rule 10.1(b)(4)?

Opinion #1:

No.

Inquiry #2:

Is Attorney P required to render appropriate accountings to Attorney D with respect to the receipt, delivery or disbursement of a settlement check or its proceeds?

Opinion #2:

No.

Inquiry #3:

Has Attorney P violated a rule if he delivers a settlement check or disburses any of the proceeds from a settlement check in violation of any condition under which Attorney P received the settlement check?

Opinion #3:

Yes. Whenever an attorney accepts conditional delivery of settlement proceeds from opposing counsel, the attorney implicitly agrees to abide by the prescribed conditions. Any deliberate failure to abide by those conditions, such as by disbursing the proceeds without first having obtained a signed release, would be dishonest and violative of Rule 1.2(c) which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." It does not appear that such conduct would violate any of the provisions of Rules 10.1 or 10.2 since the obligations imposed by those rules are owed exclusively to clients and adverse counsel cannot properly be considered a client.

Inquiry #4:

Is Attorney D required by Rule 1.3(a) to inform the North Carolina State Bar if it comes to his attention that the settlement check has or may have been delivered, or that proceeds from the settlement check have or may have been disbursed, by Attorney P without meeting a condition required for any such delivery or disbursement?

Opinion #4:

Not necessarily. Rule 1.3(a) requires only the reporting of violations of the Rules of Professional Conduct that raise substantial questions as to the offending lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects...." A willful failure on the part of the attorney to whom such funds were entrusted to satisfy the conditions of tender would raise a substantial question about the lawyer's trustworthiness and would necessitate a report of the apparent violation to the State Bar. If, however, it appears that the failure to satisfy the conditions of tender resulted from mistake, as opposed to knowing disregard, a report of the misconduct would not be required. It should be noted that Rule 1.3 does not, in any case, require disclosure of confidential information. Rule 1.3(c).

Inquiry #5:

With respect to any obligation Attorney D might have to inform the North Carolina State Bar of Attorney P's misconduct, does it make any difference whether the conditions upon which a settlement check was delivered to Attorney P are subsequently satisfied, or whether the settlement is otherwise subsequently concluded to the satisfaction of Attorney D and his client or clients?

Opinion #5:

If it appears to the attorney for the adverse party that Attorney P knowingly violated the conditions of tender, there would be a duty to report the apparent misconduct regardless of subsequent actions on the part of Attorney P to rectify the situation or otherwise satisfy Attorney D and his client.

Inquiry #6:

With respect to inquiries 4 and 5, does it make any difference whether Attorney D is also aware that Attorney P is or has been under investigation by the North Carolina State Bar for other alleged violations of Canon X or a rule promulgated thereunder?

Opinion #6:

The mere fact that Attorney D is aware that Attorney P is or has been under investigation by the State Bar for other alleged violations of the trust account rules would not necessarily compel a report of Attorney P's disbursement in violation of the conditions of tender. There may exist circumstances, however, in which an attorney becomes aware of a pattern of misconduct so pronounced as to warrant the conclusion that a similar violation was knowing and intentional. Under such circumstances, an attorney would have an obligation to report the misconduct to the State Bar.

RPC 128

April 16, 1993

Editor's Note: This opinion was originally published as RPC 128 (Second Revision).

Communication with Adverse Corporation's House Counsel

Opinion rules that a lawyer may not communicate with an adverse corporate party's house counsel, who appears in the case as a corporate manager, without the consent of the corporation's independent counsel.

Inquiry:

Attorney A represents plaintiff corporation in an action to recover life insurance proceeds under a "key man" policy covering an officer of the corporation who is now deceased. Attorney B appears as counsel of record for the life insurance company, a foreign corporation, defending on the basis of a suicide exclusion in the life insurance policy. At the trial of the action, Mr. C appeared as the corporate representative for the insurance company. Mr. C is an assistant general counsel for the insurance company. Although Mr. C is an attorney, he appeared at trial as a person having managerial responsibility on behalf of the defendant. Mr. C did not appear as counsel of record in the pending litigation and is not licensed in the State of North Carolina.

A jury verdict of suicide was returned in favor of the defendant insurance company. Attorney A filed a motion for JNOV or new trial. Before the time for the defendant's response had expired, Attorney A attempted to contact Attorney B in order to enter into settlement negotiations. Attorney B's secretary advised Attorney A that Attorney B and his associate, who was also counsel of record in the action, were both on vacation. Attorney A then telephoned Mr. C directly, without the knowledge or consent of Attorney B or his associate. Attorney A advised Mr. C that both Attorney B and his associate were on vacation and asked whether he could speak directly with Mr. C, knowing Mr. C to be a lawyer with general counsel's office for the defendant insurance company. Mr. C agreed to talk directly with Attorney A, and an agreement to settle the lawsuit prior to post-trial motions was reached without the advice or input of Attorney B or his associate.

Did Attorney A act properly in contacting Mr. C without the knowledge or consent of the adverse corporate party's independent counsel of record?

Opinion:

No. Since Mr. C. participated at trial as a person having managerial responsibility, Rule 7.4(a) prohibited Attorney A from contacting him concerning the case without the consent of the corporation's counsel of record.

RPC 129

January 15, 1993

Editor's Note: This opinion was originally published as RPC 129 (Second Revision).

Waiver of Appellate and Postconviction Rights in Plea Agreement

Opinion rules that prosecutors and defense attorneys may negotiate plea agreements in which appellate and postconviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct.

Inquiry:

Attorney A represents Client C in regard to several serious federal criminal charges. In the process of plea negotiations, the government, through Government Attorney B, has offered to dismiss all but one of the charges in return for Client C's waiver of all appellate and postconviction remedies. Under the terms of the proposed agreement, the sentencing decision will be made by the court, after acceptance of the plea, in accordance with applicable federal sentencing guidelines.

May Attorney A and Government Attorney B ethically execute a plea agreement in which Client C's rights to appellate and postconviction review are waived?

Opinion:

Yes, except to the extent that the plea agreement purports to waive defendant's rights to appellate and postconviction remedies based on allegations of (a) ineffective assistance of counsel or (b) prosecutorial misconduct.

Whether a plea agreement is constitutional and otherwise lawful is a question to be determined by the courts. Whether the conduct of attorneys with respect to a plea agreement is ethical is a question addressed concurrently to the courts and the State Bar.[1]

As a general proposition, the execution of a lawful plea agreement by North Carolina attorneys does not appear to contravene the Rules of Professional Conduct. Indeed, the negotiation and execution of such an agreement by the prosecutor and defense attorney may well serve the administration of justice and, on balance, be in the best interest of the defendant. Rules 1.2(d) and 7.1(a) and (b).

Attorney A must recognize that, on occasion, waiver of appellate and postconviction rights may result in unreviewable error. Thus, Attorney A has a duty to explain to Client C the effect and possible consequences of the proposed plea agreement (including any inability to predict with confidence the sentence to be imposed or the likelihood of a sentencing error). Rule 6(b)(2). Having done so, Attorney A must abide by the client's decision concerning the plea agreement. Rule 7.1(c).

However, the waiver of rights arising from the ineffective assistance of counsel or prosecutorial misconduct appears to be, and shall prospectively be

deemed to be, in conflict with the ethical duties expressed or implied in the rules. Under the rules, Attorney A has an obligation to represent Client C zealously and competently, and Government Attorney B has special responsibilities relating to his conduct in office. Rules 6, 7.1, and 7.3. Attorneys are expressly prohibited from making agreements prospectively limiting their liability for malpractice. Rule 5.8. Even if the plea agreement would not waive Client C's right to assert grievances against Attorney A or Government Attorney B or the right to sue Attorney A for malpractice, those sanctions may be hollow and ineffective remedies for the incarcerated Client C and insufficient to assure compliance with the rules. In the context of a criminal case, a logical and appropriate interpretation of the rules is a prohibition against agreements waiving the client's right to complain about an attorney's incompetent representation or misconduct. Moreover, an agreement waiving the right of Client C to complain about the conduct of either Attorney A or Government Attorney B may have the appearance or effect of serving the lawyer's own interests in contravention of Rule 5.1(b). In any event, the effective enforcement of the rules relating to the responsibilities of Attorney A and Government Attorney B requires that they not execute a plea agreement waiving appellate or postconviction rights or remedies based on allegations of ineffective assistance of counsel or prosecutorial misconduct.

Footnote

1. In the case of a direct conflict between the State Bar rules and the rules of the federal court, the latter would prevail under the federal supremacy doctrine. The Rules of Professional Conduct have been adopted and incorporated by reference in the local rules of practice and procedure of the United States District Courts in this state. *See* Eastern District Rule 2.10, Middle District Rule 505 and Western District Rule l(a).

RPC 130

October 23, 1992

Editor's Note: This opinion was originally published as RPC 130 (Revised).

Employment of Board Member's Law Firm

Opinion rules that a law firm may accept employment on behalf of a governing board upon which its partner sits if such is otherwise lawful.

Inquiry:

Lawyer L is a partner in Law Firm A, B & L. Other members of Law Firm A, B & L currently represent County C in several matters. Law Firm A, B & L expects to be employed by County C in regard to several other matters in the near future. Lawyer L has just been elected to County C's board of commissioners. In light of Lawyer L's new political office, can members of Law Firm A, B & L represent County C?

Opinion:

Yes. If an attorney or an employee of that attorney serves as a member of a county or municipal governing board, or state or federal legislative body or any entity thereunder, or committee thereof, it shall not be unethical for a partner, associate, or law firm of that attorney to represent such governing board, body, or entity provided the selection of the partner, associate, or law firm of that attorney is made with full disclosure of the relationship with the attorney board member and provided further that the attorney board member takes no part in the selection of the partner, associate, or law firm of that attorney for the representation of the governing board, body, or entity and the engagement is otherwise lawful. Reference is made, for example, to the prohibition and the exceptions thereto in G.S. §14-234. CPR 290 is overruled to the extent that it conflicts with this opinion.

RPC 131

July 17, 1992

Representation of County While Suing Department of Social Services

Opinion rules that a lawyer employed to represent a county in appellate matters may also sue the county's department of social services.

Inquiry:

Attorney A is retained by the county to represent the county with regard to matters in the appellate division of the general court of justice and tax issues associated with such appellate matters. Attorney A has not been employed to represent the county in any trial proceedings. Attorney A has no responsibility of any kind with regard to social services cases.

Clients B and C have approached Attorney A and requested that he represent them in regard to their federal claim against the county's department of social services for an alleged violation of their civil rights.

May Attorney A represent Clients B and C against the county's department of social services?

Opinion:

Yes, with the consent of both the county and Clients B and C. Generally speaking, a lawyer may not sue his or her own client in another matter even though the subject causes of action are unrelated. Rule 5.1(a). In the instant situation, however, Attorney A might reasonably conclude that his or her representation of the county in its appellate matters would not necessarily be adversely affected by his or her prosecution of a claim against the county's department of social services on behalf of Clients B and C. If that is Attorney A's conclusion, and if both his or her current and prospective clients consent after full factual disclosure, there is no ethical impediment to Attorney A's acceptance of the case against the department of social services. *See* CPR 179.

RPC 132

January 15, 1993

Editor's Note: This opinion was originally published as RPC 132 (Revised). See Rule 4.2(b) for additional guidance.

Communications with Government Officials

Opinion rules that a lawyer for a party adverse to the government may freely communicate with government officials concerning the matter until notified that the government is represented in the matter.

Inquiry #1:

Citizen C received a loan from the city which loan was secured by a deed of trust against certain real property owned by Citizen C. Sometime after obtaining the loan, Citizen C defaulted in making payments as specified in the note evidencing the obligation and was informed by the mortgage company servicing the loan that the city would proceed to foreclose if she failed to pay the arrearage owed on the loan. Citizen C then employed Lawyer L to represent her interests. Lawyer L wishes to contact a city employee who dealt with Citizen C in the origination of the loan to inquire as to whether the city would accept a deed in lieu of foreclosure. Lawyer L is aware that the city is generally represented by the city attorney who is a full-time salaried employee of the city. Under the circumstances may Lawyer L contact the city employee without the knowledge or consent of the city attorney?

Opinion #1:

Yes. This inquiry involves a matter in which there is no suggestion that Lawyer L has received notice of government lawyer participation in this particular matter; hence, the government employee to be contacted should not be deemed to be represented by another lawyer within the meaning of Rule 7.4(a) which provides:

> During the course of his representation of a client, a lawyer shall not:
>
> (a) Communicate or cause another to communicate about the subject of the representation with a party 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 by law to do so.

If contact is made with the government employee, it is incumbent upon Lawyer L to fully disclose his representative capacity and to clearly state the reasons behind any request he might make on behalf of his client. So as to avoid any misunderstanding as to Lawyer L's role in the situation posited, Lawyer L should neither state nor in any manner imply that the city employee is cloaked with other than absolute discretion to respond or not to his communication. Rule 7.4(c).

Inquiry #2:

Attorney A was retained to represent Client W relative to her claim for employment discrimination against the city. Prior to bringing suit, Attorney A would like to write a letter to the city manager to determine whether the city would care to negotiate a settlement of the claim and, failing that, whether the city might volunteer information which might have a bearing upon the claim's

merit. Attorney A is aware that the city is represented by the city attorney, a full-time salaried employee of the city. May Attorney A write a letter to the city manager for the stated purpose without the knowledge or consent of the city attorney?

Opinion #2:

Yes. As there is no indication that Attorney A has received notice of the city attorney's participation in this particular matter, the answer will be as in Inquiry #1 above.

Inquiry #3:

Lawyer B has been employed to represent a former city employee concerning a grievance filed by the employee relative to his termination from city employment. While the grievance is pending, Lawyer B would like to telephone a member of the city council for the purpose of offering her views regarding the law pertaining to her client's situation, complaining that her client is being treated unfairly and unlawfully and urging that the council member intervene and have her client reinstated. Lawyer B is aware that the city is generally represented by the city attorney, a full-time salaried city employee. May Lawyer B communicate with the council member in the manner described without the knowledge or consent of the city attorney?

Opinion #3:

No. Assuming from the question that the elected city council member either has or might have some adjudicatory authority over the particular matter at issue, contact with the elected city council member constitutes ex parte communication within the meaning of Rule 7.10(b) which provides:

> In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending except:
> (1) In the course of official proceedings in the cause.
> (2) In writing, if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.
> (3) Orally, upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
> (4) As otherwise authorized by law.

If the city council member neither has nor will have adjudicatory authority over the particular matter at issue and there has been no notice given to Lawyer B of active participation by the city attorney in this particular matter, contact with the elected city council member would be proper under the circumstances.

If contact is made with the city council member, it is incumbent upon Lawyer B to fully disclose his representative capacity and to clearly state the reasons behind any request he might make on behalf of his client. So as to avoid any misunderstanding as to Lawyer B's role in the situation posited, Lawyer B should neither state nor in any manner imply that the elected city council member is cloaked with other than absolute discretion to respond or not to his communication. Rule 7.4(c).

RPC 133

July 17, 1992

Recycling Office Waste Paper

Opinion rules that a law firm may make its waste paper available for recycling.

Inquiry #1:

What kind of guarantees must be obtained from a recycling company before a law office may give the company its waste paper products?

Opinion #1:

A lawyer has a professional obligation under Rule 4 of the Rules of Professional Conduct to protect confidential information in his or her possession from unauthorized disclosure. This obligation extends to the handling of waste paper products embodying confidential information generated in the ordinary course of legal business. However, this professional obligation does not generally compel any particular mode of trash handling or disposal. In particular, there is no general requirement that waste paper which may evidence client confidences be shredded. It is sufficient in most cases for the responsible attorney to ascertain that those persons or entities responsible for the disposal of waste paper employ procedures which effectively minimize the risk that confidential information might be disclosed. The responsible attorney should take particular care to ensure that custodial personnel under his or her direct supervision are conscious of the fact that confidential information may be present in waste paper products and are aware that the attorney's professional obligations require that there be no breach of confidentiality in regard to such information. So long as the attorney takes the precautions noted above, there is no reason why his or her law firm's waste paper products could not be made available for recycling.

Inquiry #2:

Do any of a law firm's waste paper products need to be shredded to comport with ethical considerations of client confidentiality?

Opinion #2:

A law firm will occasionally generate waste paper embodying confidential information which is so sensitive that the attorney's professional obligations under Rule 4 can only be satisfied by the paper's retention or its destruction. Under such circumstances shredding the waste paper would be appropriate.

RPC 134

July 17, 1992

Taking Assignment of Client's Judgment

Opinion rules that a lawyer may not accept an assignment of her client's judgment while representing the client on appeal of the judgment.

Inquiry:

May a law firm take an assignment of a judgment in whole or in part as payment/security for fees rendered to a client while the law firm is representing that client in the active pursuit and appeal of the judgment and while representing the client in various other matters?

Opinion:

No. Rule 5.3(a) of the North Carolina Rules of Professional Conduct provides generally that, "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client,...." A lawyer's accepting an assignment of a judgment which is the subject of an appeal being handled by the lawyer would violate Rule 5.3(a). Generally speaking, a lawyer may not accept assignment of her client's judgment unless and until all appeals concerning the judgment have been exhausted and the client has determined not to pursue collection. Even under such circumstances, however, the practice of lawyers purchasing judgments from their own clients is not encouraged. CPR 291.

RPC 135

July 17, 1992

Advertisement of a Lawyer as the "Best"

Opinion rules that lawyers may not participate in a private lawyer referral service that advertises that its participants are "the best."

Inquiry:

Law Firm ABC would like to participate in a private referral service doing business as "Consumer Connection." The referral service in question recruits participants from many different business and professional categories. Consumers desiring particular types of business and professional services are referred to participating entities when they call "Consumer Connection's" toll free number. The toll free number and information about the referral service are disseminated to consumers by means of television, radio, newspapers and direct mail advertising throughout eastern North Carolina. Promotional material made available to the Ethics Committee by the referral service indicates that "Consumer Connection" only represents "quality" businesses and that consumers "always get the best from Consumer Connection!" Although the promotional material indicates that "Consumer Connection is a locally owned and locally operated service...," it does not state that a list of all participating lawyers will be mailed free of charge to members of the public upon request or state that such information may be obtained. Further, it does not indicate that the service is not operated or endorsed by any public agency or disinterested organization.

May Law Firm ABC participate in the referral service as described?

Opinion:

No. Rule 2.2(c) of the Rules of Professional Conduct provides that a lawyer may participate in and share the cost of a private lawyer referral service only so long as certain specified conditions are met. Among the conditions are requirements that all advertisements of the service "state that a list of all participating lawyers will be mailed free of charge to members of the public upon request... and indicate that the service is not operated or endorsed by any agency or any disinterested organization." Rule 2.2(c)(5)(b) and (c). Since the promotional material advertising the referral service fails to include the required information, it would be inappropriate for a lawyer to participate in the referral service. Furthermore, the characterization of participating lawyers as "the best" would appear to be a misleading communication violative of Rule 2.1(c) in that it "constitutes a comparison of the participating lawyers' services with those of other lawyers" in a way which cannot be factually substantiated.

If the deficiencies noted above were remedied, there would appear to be no other impediment to a lawyer's participation in the referral service.

RPC 136

July 17, 1992

Attorneys as Notaries

Opinion rules that a lawyer may notarize documents which are to be used in legal proceedings in which the lawyer appears.

Inquiry:

In light of the repeal of G.S. §47-8 which prohibited attorneys holding the office of notary public from administering "any oaths to a person to a paper writing to be used in any legal proceedings in which he appears as attorney," is there any ethical impediment to a lawyer's now acting as a notary public in that capacity?

Opinion:

No. In Ethics Opinion 354, decided under the former Canons of Ethics, the council generally ruled that an attorney acting as a notary public could notarize documents drawn by him in his capacity as an attorney. In subsequent Ethics Opinion 801, also decided under the Canons of Ethics, the scope of Ethics Opinion 354 was limited in recognition of then G.S. §47-8, and attorneys were ethically prohibited from administering oaths in regard to paper writings such as complaints, answers or affidavits which were to be used in legal proceedings in which the attorney appeared of record. Since the statute in question has since been repealed and there is no other compelling justification for the restriction, it is now permissible for an attorney to notarize documents for use in legal proceedings in which the attorney appears.

RPC 137

October 23, 1992

Estate Representation

Opinion rules that a lawyer who formerly represented an estate may not subsequently defend the former personal representative against a claim brought by the estate.

Inquiry:

Mr. X was named by his grandmother in her will as executor of her estate. Mr. X qualified as the executor and began his duties. Thereafter he employed Attorney A to assist him in fulfilling his duties as executor. Attorney A assisted Mr. X in the preparation of a few of the probate filings and various miscellaneous matters.

Allegations of misconduct were informally made against Mr. X after he began his duties as executor. Attorney A received a telephone call from the husband of one of the heirs making general accusations against Mr. X, containing no specific facts or statements. Attorney A received no documentary evidence. The accusations were that Mr. X procured real estate from his grandmother while he was her attorney-in-fact. Attorney A related the accusations to Mr. X and asked him to explain. Mr. X did explain the transactions involved, and the physical evidence bore out his explanation that his grandmother signed a deed to him of her own free will under no duress or influence. Attorney A continued to advise Mr. X with regard to his duties as executor.

Thereafter, a petition was filed to have Mr. X removed as executor of the estate. At the time of a hearing before the clerk of Superior Court, Mr. X resigned stating to the clerk that he was unable to conduct his duties in the face of disharmony and conflict with the heirs making those accusations. Mr. S was named as administrator C.T.A., and Mr. X turned over to Mr. S all of the estate's assets in his possession.

Thereafter, Mr. S filed a civil action against Mr. X alleging breach of fiduciary duty and breach of contract. Mr. X asked Attorney A to defend him in the civil action. Attorney A undertook to do so. Various discovery requests were exchanged between the parties and Attorney A represented Mr. X in this aspect of the proceeding.

Subsequently, Mr. S, through his attorney, filed a petition in Superior Court to disqualify Attorney A as attorney representing Mr. X on the basis of conflict of interest.

May Attorney A continue representing Mr. X?

Opinion:

No. In accepting employment in regard to an estate, an attorney undertakes to represent the personal representative in his or her official capacity and the estate as an entity. Rule 5.1(d) of the Rules of Professional Conduct prohibits an attorney from representing any interest adverse to that of a former client in the same or substantially related matter without the former client's consent. In the subject action for breach of fiduciary duty and breach of contract, the interests of Attorney A's former client, the estate, are adverse to those of Mr. X. That being the case, Attorney A may not continue to represent Mr. X against the estate without the estate's consent.

RPC 138

January 15, 1993

Editor's Note: This opinion was originally published as RPC 138 (Revised).

Arbitration

Opinion rules that a partner of a lawyer who represents a party to an arbitration should not act as an arbitrator.

Inquiry:

Client A entered into a contract for the sale of his business with Client B. The contract of sale contained an arbitration clause wherein it provided that should a dispute arise between A and B regarding any matter to be performed by A and B under the contract, that A should elect an arbitrator and B should elect an arbitrator and the two arbitrators should elect a third. Subsequent to the transfer and sale of the business, a genuine dispute arose between A and B, and Attorney X (on behalf of Client A) demanded arbitration and selected as an arbitrator Attorney O, who is not a member of Attorney X's law firm nor associated with him in any manner. In response to the demand for arbitration, Attorney Y (for Client B) served notice on Attorney X that they selected Attorney P as their arbitrator. Attorney P is a partner in Attorney Y's law firm.

May Attorney P serve as an arbitrator?

Opinion:

No. In order to avoid even the appearance of impropriety, a lawyer should never undertake to serve as an arbitrator in a case in which his or her partner represents one of the parties to the arbitration. Canon IX.

RPC 139

October 23, 1992

Signing an Adoption Petition as an Accommodation

Opinion rules that a lawyer may not sign an adoption petition prepared by an adoption agency as an accommodation to that agency without undertaking professional responsibility for the adoption proceeding.

Inquiry:

Attorney A regularly represents a private social services organization which places children for adoption. The social services organization would like to prepare and file adoption petitions on behalf of the prospective adoptive parents of children placed by the agency. Attorney A has been asked to sign those petitions as an accommodation to the social services organization with the understanding that he would not thereby assume any responsibility for the matters

or actually undertake to represent the adoptive parents. May Attorney A sign the petitions under such circumstances?

Opinion:

No. An attorney who signs a pleading initiating a legal proceeding thereby makes an appearance in that proceeding and accepts responsibility for representation of the party on whose behalf he or she has appeared. It is therefore not possible for an attorney to sign a pleading as "an accommodation" without incurring the obligations of an attorney in the matter. If Attorney A is willing to accept responsibility for representing the adoptive parents, and they desire his services, he may sign and file adoption petitions prepared by the social services organization, provided that such petitions are prepared under his direct supervision. *See* Rule 3.1(a), Rule 3.3, RPC 29, and RPC 70.

RPC 140

October 23, 1992

Representation of Insured

Opinion finds no disqualifying conflict of interest where an attorney is retained by an insurer to represent an insured during the pendency of a declaratory judgment action relating to coverage in which the attorney is a nonparticipant.

Inquiry:

Lawyer M was contacted by Insurance Company and asked to represent its insured, the Shady Rest Home, and its employee, Nurse N, who were named as defendants in a medical malpractice action brought by Plaintiff P. Lawyer M undertook the representation. Prior to filing responsive pleadings, Lawyer M received a communication from Attorney D, who advised Lawyer M that he, Attorney D, would be representing the Shady Rest Home and would be overseeing the litigation. Shortly thereafter, Lawyer M received a telephone call from a representative of Insurance Company advising him that Insurance Company would neither defend nor indemnify Shady Rest Home and Nurse N because they were not named insureds in the subject policy. Insurance Company also notified Shady Rest Home directly of its position. Attorney D then contacted Lawyer M to ask that Lawyer M continue the defense of Shady Rest Home and Nurse N and advised that Shady Rest Home would continue paying for Lawyer M's services. Lawyer M agreed to continue.

Soon thereafter, Lawyer M met the plaintiff's attorneys, Lawyers I and L, and informed them that a question of coverage had arisen and that Insurance Company had taken the position that it did not provide coverage for either defendant. Lawyer M indicated that Shady Rest Home could pay a small amount in settlement and further suggested that pursuit of the lawsuit would be fruitless because Shady Rest Home had no substantial assets. This effort to negotiate was unavailing.

In the meantime, Attorney D obtained information which caused Insurance Company to reconsider its position about coverage. Not long thereafter, Lawyer M was again contacted by a representative of Insurance Company and advised that Insurance Company had decided to provide a defense under a reservation of rights. Lawyer M was requested to provide Insurance Company with copies of his billings to Shady Rest Home so that the insurance company could reimburse Shady Rest Home and was further requested to bill Insurance Company in the future.

Subsequently, Lawyer M learned that Insurance Company filed a declaratory judgment action against Shady Rest Home, Nurse N and Plaintiff P to resolve the coverage question. In the meantime, Lawyer M continues to represent Shady Rest Home and Nurse N and has been paid for his services by the insurance company.

Lawyer M has represented only Shady Rest Home and Nurse N throughout the litigation. All information he has received has come through discovery, depositions and communications with Shady Rest Home and its employees. He has not been involved in the declaratory judgment litigation. Under the circumstances, may Lawyer M continue to represent Shady Rest Home and Nurse N?

Opinion:

Yes. Nothing in the facts as stated discloses a disqualifying conflict of interest. Rule 5.1(b).

RPC 141

October 23, 1992

Contingent Fees and Structured Settlements

Opinion rules that an attorney's contingent fee in a case resolved by a structured settlement should, if paid in a lump sum, be calculated in terms of the settlement's present value.

Inquiry:

Client hired Lawyer to represent him concerning a medical malpractice claim and agreed to pay him 40% of the amount recovered. Lawyer negotiated a structured settlement which will pay Client a substantial amount of money in each of the next ten years. Are there any ethical considerations which would prevent Lawyer from collecting his entire fee immediately, rather than taking a percentage of each annual payment to the Client? If Lawyer may collect his entire fee immediately, is it proper for Lawyer to calculate his fee without discounting Client's settlement to present value?

Opinion:

Rule 2.6(a) provides that, "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." Generally speaking, it is necessary to examine all relevant facts and circumstances relating to a fee and the legal services for which it is charged in order to make a determination as to whether it is "clearly excessive." For that reason, the Ethics Committee has generally refrained from adopting *per se* rules prohibiting certain types of agreements or methods of computation. Nevertheless, the committee is of the opinion that where an attorney is entitled to receive a contingent fee calculated as a percentage of any amount recovered and arrangements are made for the payment of sums certain over a prolonged period of time in the form of a structured settlement, the attorney may collect immediately only the prescribed percentage of the total settlement reduced to its present value.

RPC 142

January 15, 1993

Lawyer as a Witness

Opinion rules that a lawyer may not represent an estate in litigation against a claimant where the lawyer's testimony may be necessary to resolve the validity of the claim.

Inquiry:

Mr. X, the father of Miss M, applied for life insurance in the amount of $100,000 in 1985. Miss M contends that Mr. X intended for the proceeds of the policy to be used to educate Miss M who was then 13 years old. Mr. B, the uncle of Mr. X, was living with Mr. X when the policy was issued. Mr. B was shown as the primary beneficiary of the policy, and Miss M was shown as the secondary beneficiary.

Mr. X died intestate on January 20, 1989. Mr. B hired Lawyer L to represent his interests in regard to the estate of Mr. X. The insurance company paid Mr. B $100,000. Mr. B subsequently invested some of the insurance proceeds in certificates of deposit in his own name. Shortly after the death of Mr. X, Lawyer L, on behalf of Mr. B, wrote a letter to Ms. W, the former wife of Mr. X and the mother of Miss M, in which Ms. W was asked to renounce any rights she might have to administer the estate of Mr. X. Thereafter Ms. W did renounce her right to administer the estate. She and Miss M contend that the renunciation was executed only after they had met with Lawyer L in his office and had been assured by Lawyer L that Mr. B would use the entire insurance proceeds to pay for Miss M's college and law school education. Lawyer L denies ever having offered such assurances to Ms. W and Miss M.

After the renunciation was filed, Mr. B was appointed administrator of Mr. X's estate and employed Lawyer L to represent him in that capacity.

Mr. B died intestate on September 22, 1990, and his daughter, Ms. F, qualified as administratrix of his estate. Ms. F employed Lawyer L as attorney for the estate of Mr. B. The certificates of deposit mentioned above and perhaps other funds derived from the subject insurance proceeds became assets of the estate of Mr. B.

Sometime after Mr. B's death, Miss M and Ms. W were informed by Ms. F, either personally or through Lawyer L, that only $25,000 from the estate of Mr. B would be paid toward Miss M's educational expenses.

On April 1, 1991, Miss M filed a claim against the estate of Mr. B for

$92,773.49. This claim was rejected on April 11, 1991, in a letter from Lawyer L.

Subsequently, Attorney A filed suit against the estate of Mr. B on behalf of Miss M seeking payment of Miss M's claim. Attorney A has requested that Lawyer L withdraw citing conflicts and the possibility that Lawyer L will be called upon to testify in the lawsuit. Lawyer L has refused to withdraw.

May Lawyer L continue representing the estate of Mr. B in the defense of the lawsuit brought by Miss M?

Opinion:

No. At issue in the lawsuit will almost certainly be Mr. B's understanding of why Mr. X purchased life insurance, how Mr. B came to be named as the primary beneficiary and what assurances, if any, were offered to Ms. W and Miss M by Lawyer L in conjunction with the renunciation of Ms. W's right to administer Mr. X's estate. The testimony of Lawyer L will be necessary to the resolution of these questions. In particular, only Lawyer L is in a position to deny the contentions of Ms. W and Miss M that it was affirmatively represented to them by Lawyer L that in consideration for Ms. W's renunciation, the proceeds of the life insurance would be used to pay for Miss M's education. Rule 5.2(a) of the Rules of Professional Conduct provides that "a lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he...ought to be called as a witness..." None of the exceptions to the general rule appear to be applicable in this case. Since it appears that it will be necessary for Lawyer L to testify, he is disqualified from representing the estate in a litigation.

RPC 143

October 29, 1993

Editor's Note: This opinion was originally published as RPC 143 (Second Revision).

City Council Member as Client

Opinion rules that a lawyer who represents or has represented a member of the city council may represent another client before the council.

Inquiry:

Attorney A represents X, a dairy farmer, whose entire property (including the milking machines but not the cows) is being condemned for a new airport by the city. Attorney A also represents Y, a landowner whose real estate was condemned in 1968 for the express purpose, as stated in the petition, of extending the runway and relocating state highway and public utility lines and other alleged matters of then public convenience and necessity concerning the old airport, which purposes were never undertaken.

The city recently had an election in which none of the incumbent council members who favored the new airport were reelected.

Mr. B who received about 70% of the vote to unseat an incumbent has now been scheduled for a hearing concerning his residency under G.S. §163-282 and G.S. §163-57.

Attorney A has been asked to consider appearing before the county board of elections on behalf of Mr. B.

Is it ethical for Attorney A to represent Mr. B concerning his residency when Attorney A has two legal matters pending involving the city which might come before Mr. B as one of six regularly voting members of the city council? Will Mr. B have to disqualify himself? If Attorney A handles some of Mr. B's real estate matters, can he appear before the city council or otherwise contact the city or its employees?

Opinion:

It is ethical for a lawyer to represent persons before an elected or appointed governing body following or during representation of a member of the governing body so long as the lawyer does not use his relationship to the member of the governing body to obtain favorable decisions from the body. Rule 1.2(d). The lawyer should also take care not to suggest that he has the ability improperly to influence the body on account of his representation of the member. Rule 1.2(e).

RPC 144

January 15, 1993

Conflict in Joint Representation

Opinion rules that a lawyer, having undertaken to represent two clients in the same matter, may not thereafter represent one against the other in the event their interests become adverse without the consent of the other.

Inquiry #1:

Attorney A drew a will. The will set up a "family trust" which will invest the corpus of the estate. The "family trustee" who invests the corpus is obligated to pay a set amount to a separate "charitable trust" established by the will. The charitable trust directs that all monies coming from the family trustee shall be disbursed for charitable uses. After ten years of charitable payments, the charitable trustee is to distribute its balance to charitable purposes and family trustee is to distribute the remaining principle and accumulated interest to testator's family. The family trustee has no discretion as to the amount of money to be distributed to the charitable trust. Attorney A currently represents the executor of the estate whose duty is to pay estate debts and to deposit all sums remaining into the family trust. Attorney A would also like to represent the charitable trust and the family trust. In the absence of any failure of the family trustee to pay the mandated amount to the charitable trust, may Attorney A represent the charitable trust, the family trust and the executor?

Opinion #1:

Yes. Based upon the facts presented, there is no disqualifying conflict of interest present among the executor, the family trust, and the charitable trust. Rule 5.1(b). Obviously, if the family trust failed to pay the required amount to the charitable trust, an unwaivable conflict of interest would develop between those entities, and Attorney A could not continue to represent both.

Inquiry #2:

If Attorney A undertakes to represent both the family trust and the charitable trust, and the family trust fails to distribute the amounts mandated to the charitable trust, may Attorney A cease to represent the family trust and represent the charitable trust in a suit to mandate distribution to the charitable trust from the family trust?

Opinion #2:

Yes, if the family trust consents. In the event that the family trust fails to distribute the required amounts to the charitable trust, there would be an irreconcilable conflict of interest between those two clients, and Attorney A would be required to withdraw from the representation of one or the other of the trusts. Rule 5.1(b). If Attorney A chooses to withdraw from representation of the family trust, the family trust then becomes Attorney A's former client. Rule 5.1(d) prohibits a lawyer from representing an interest adverse to that of a former client in the same or substantially related matter without the former client's consent. Since the matters involved are substantially related, it follows that Attorney A may not represent the charitable trust in an action adverse to the interest of her former client, the family trust, without the consent of the family trust. In determining whether to ask for such consent, Attorney A should be mindful of language contained in comment 4 of Rule 5.1, which declares that a lawyer cannot properly ask for consent when a disinterested lawyer would conclude that the client should not consent under the circumstances. In this case, the family trust should not be asked to consent if Attorney A's continuing representation of the charitable trust will require the use of confidential information of the family trust.

RPC 145

January 15, 1993

Lawyer Approval of Settlement

Opinion rules that a lawyer may not include language in an employment agreement that divests the client of her exclusive authority to settle a civil case.

Inquiry:

I write to request an opinion from the North Carolina State Bar regarding the following language which I contemplate inserting in my employment agreements for contingency fee cases:

> No settlement of my claim shall be made without the consent of both me and my attorney.
>
> I have read this contract and understand it, agree, and sign it of my own free will.

Clearly, through this language, the client contracts to waive his exclusive right to settle the case. Would this allow me to refuse to settle the case for a given amount, and, if need be, try the case if I thought an offer the client was willing to accept was less than the settlement value of the case; or would the use of this language violate Canon VII and Rule 7.1 of the Rules of Professional Conduct? What language, if any, do you suggest I insert in an employment agreement that would assist me in resolving a situation where the client and I disagree on the value of a settlement offer?

Opinion:

Rule 7.1(c)(l) provides that a lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. Therefore, a lawyer cannot divest a client of his exclusive authority to settle his case.

There is no ethical impropriety in having the sentence, "I have read this contract and understand it, agree, and sign it of my own feel will," in the retainer agreement.

RPC 146

January 15, 1993

Invitations to Law Firm's Hospitality Suite

Opinion rules that a law firm may invite existing clients to a social function hosted by the law firm prior to a bid letting for contracts. Opinion further rules that the law firm may host a social function for nonclients who attend the bid letting as long as the law firm does not solicit employment from nonclients.

Inquiry #1:

The North Carolina Department of Transportation awards contracts on a monthly basis. Many contractors and subcontractors occupy rooms at the North Raleigh Hilton the evening prior to such letting.

Law Firm A is interested in hosting a hospitality suite at the North Raleigh Hilton the evening before such letting. Law Firm A wants to invite existing clients who may be in attendance as well as other contractors who are not existing clients.

Opinion #1:

Yes. The law firm may host a hospitality suite at the site of the bid letting for those persons or firms that are existing clients of the law firm. Rule 2.4 does not prohibit a lawyer's contact with existing clients.

Inquiry #2:

May Law Firm A send an invitation to nonclient contractors it knows will be attending?

Opinion #2:

Yes. Law Firm A may send an invitation to nonclient contractors it knows will be attending the bid letting as long as Law Firm A does not solicit business from the nonclients who come to the hospitality suite. Rule 2.4(a) of the Rules of Professional Conduct prohibits a lawyer's in-person or live telephone solicitation for professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. Assuming that the hospitality suite function is a means of promoting good will, which could lead to employment of Law Firm A by the nonclients, Law Firm A may invite nonclient contractors. Again, members of Law Firm A must be very careful to avoid solicitation of professional employment from the nonclient contractors who come to the hospitality suite.

RPC 147

January 15, 1993

Percentage Bonuses for Paralegals

Opinion holds that an attorney may not pay a percentage of fees to a paralegal as a bonus.

Inquiry:

A law firm employed an experienced certified legal assistant who worked exclusively in the area of real estate for many years. The legal assistant, under the supervision of the attorneys in the firm, participates in all phases of real estate practice: searching titles, preparing deeds, closing papers, and foreclosure documents.

The firm pays the legal assistant a regular salary which is supplemented by periodic bonuses. The bonuses are discretionary with the firm's partners, but are generally related to the profitability of the firm's real estate practice.

The firm wishes to implement a system of performance-based incentives for its employees. It proposes to supplement the legal assistant's salary with monthly bonuses calculated on the firm's net income from the real estate closings which the legal assistant has worked on. Each bonus would be equal to a small percentage (approximately five percent) of the compensation which the firm received for real estate services in which the assistant has participated during that month.

May the firm pay such bonuses without violating Rule 3.2, or any other provision, of the Rules of Professional Conduct if:

a) The bonuses, and the means for calculating them, are made an express part of the legal assistant's employment contract; or

b) The bonuses remain discretionary and the same method of calculating them is used for purposes of guidance only?

Opinion:

While bonuses for productivity are not prohibited, the firm may not pay the bonuses to its paralegal under either alternative set out in the inquiry without violating Rule 3.2 of the Rules of Professional Conduct. That rule prohibits attorneys from sharing legal fees with nonlawyers, except in certain circumstances not relevant to this inquiry. It is apparent from the inquiry that the paralegal's bonuses would be calculated based upon a percentage of the income the firm derives from legal matters on which the paralegal has worked. This plan in effect pays the paralegal a percentage of the legal fees received by the firm and therefore falls squarely within the prohibition of Rule 3.2. The proposed method of calculation violates Rule 3.2 regardless of whether the bonuses are made part of the paralegal's employment contract or whether they are paid at irregular intervals at the discretion of the partners in the firm. *See* CPR 289.

RPC 148

January 15, 1993

Division of Fees

Opinion holds that a lawyer may not split a fee with another lawyer who does not practice in her law firm unless the division is based upon the work done by each lawyer or the client consents in writing, the fee is reasonable, and responsibility is joint.

Inquiry #1:

Attorney A and Attorney B do not practice in the same firm. Attorney A refers a case to Attorney B because the nature of the case involves matters not normally handled by Attorney A but within the area of practice of Attorney B (IRS estate tax matter). There is no written or oral agreement between the attorneys or with the client concerning a division of fees before, during, or after the relationship (there has never been any written or oral agreement of fee sharing between Attorney A and Attorney B in any past relationship); the client is not advised of any joint representation and the work is performed by Attorney B.

After a fee is received by Attorney B, Attorney A contacts Attorney B asking that one-third of the fee be shared with Attorney A in accordance with a practice which Attorney A has with other attorneys. Attorney B has not had any prior arrangement with Attorney A or any other attorney concerning such a fee splitting, and Attorney B is primarily concerned about the ethical implications of such a fee splitting arrangement given the following additional facts:

In the course of his representation, Attorney B had to make a disclosure to a government agency (IRS) concerning his fee which was signed under penalty of perjury. The disclosure was necessary in order to obtain a benefit (tax deduction) for his client. Attorney B is now concerned that any fee splitting arrangement entered into between the parties after a resolution of the case may jeopardize the estate's deduction previously obtained for the client. Attorney B has disclosed this to the client who has denied permission for a fee split because of the potential problems that such a reopening could have on the estate. Attorney A believes there is no ethical conflict with his receiving a one-third fee for his referral.

May Attorney B ethically fee split any portion of the fee with Attorney A?

Opinion #1:

Attorney B may not split any portion of the fee with Attorney A. Rule 2.6(d) provides that attorneys not in the same law firm may split fees only if the division is in proportion to the work done by each lawyer or if the client agrees to the division in writing, each lawyer assumes joint responsibility for the representation, and the total fee is reasonable. The inquiry makes it clear that Attorney A has not done any work on the matter and that the client has not agreed to the fee splitting arrangement. Consequently, a division of the fee would violate Rule 2.6(d). Additionally, it appears that, in light of the situation with the IRS, that any fee splitting arrangement might prejudice the client, in violation of Rule 7.1(a)(3).

Inquiry #2:

Would the answer to question 1 above be different if the additional facts above were not in existence?

Opinion #2:

No. The fee splitting proposal would still violate Rule 2.6(d).

RPC 149

January 15, 1993

Unclaimed Client Funds

Opinion rules that an attorney may not donate a client's funds to a charity without the client's consent.

Inquiry #1:

When Attorney A undertakes to represent a client in regard to a traffic ticket, Attorney A tries to estimate the fines and costs and have the client pay that amount in advance. Sometimes the client is owed a refund. Attorney A sends a trust account check for the refund together with a receipt from the court. Sometimes the client never cashes the check and it stays on the books. After a certain period of time has elapsed, may the attorney stop payment on the check and contribute the money to a charity in the client's name but without the client's consent?

Opinion #1:

No. Since the attorney knows the identity of the client and presumably has a recent address for the client from the traffic ticket, the attorney should make every effort possible to get the client to cash the trust account check. Nothing else can be done with the client's money, without the client's consent, except escheating it to the treasurer pursuant to G.S. §116B as prescribed by Rule 10.2(h)(3)(a). G.S. §116B-31.5 provides a method for voluntary early delivery of funds to the treasurer under certain circumstances. *See* RPC 89.

Inquiry #2:

Attorney A is considering writing clients that the total costs of the citation will be a certain amount payable in advance, that any fines and costs will be paid out of that in full and that the balance will be his fee. Would that be ethical? Is there any better way to handle this problem?

Opinion #2:

No. A lawyer shall not enter into a contingent fee arrangement for representing a defendant in a criminal case. A contingent fee is one which is dependent on the outcome of the matter for which service is rendered. Further, a lawyer shall not acquire a proprietary interest in the subject matter of litigation he is conducting for a client. Rule 5.3(a). The lawyer may collect a fixed fee in advance and an amount estimated for the fines and costs, but the client must remain ultimately responsible for the actual expenses. Rule 2.6(c). *See* RPC 76.

RPC 150

January 15, 1993

Linking Trust and Business Accounts

Opinion rules that an attorney cannot permit the bank to link her trust and business accounts for the purpose of determining interest earned or charges assessed if such an arrangement causes the attorney to use client funds from the trust account to offset service charges assessed on the business account.

Inquiry:

Attorney A maintains a trust account and a business account with Sunshine Bank. Attorney A has been a participant in IOLTA. Over the last several months, however, Attorney A's account has been incurring substantial charges (over $400 in the last year).

After repeated inquiries, Attorney A discovered that her business account and trust account were "linked" for the purposes of determining interest earned or charges assessed. Both accounts are subject to a charge per deposit or check, and interest accrues on daily balances such that a substantial balance in the account should offset the check and deposit charges.

Since Attorney A had repeatedly instructed the bank not to debit the trust account for charges, intending to avoid charges for new checks, etc., the bank had linked the two accounts so that the charges from the trust account were assessed against the business account. Of course, being a member of IOLTA, the interest on the trust account balance, which would otherwise have offset the charges, was sent to IOLTA. In effect, Attorney A was paying for contributions to IOLTA. Being deprived of the offsetting interest on the trust account, the numerous checks she wrote for real estate conveyances created a considerable debit.

At this point, the bank has changed both accounts to commercial accounts which do not draw interest, but the balances in the accounts create "credits" which offset the charges per check or deposit. Any negative balance on the trust account is shifted over to the business account.

Does this situation create any ethical problems? Neither account will ever yield a credit in the form of interest income, and hopefully the ongoing balances will offset the debit charges such that they will usually be "free" accounts.

Opinion:

Yes. Under Rules 10.1 and 10.3, client funds in a trust account may not be used to pay bank service charges or fees of the bank because such funds are the sole property of the client and cannot benefit the attorney. Rules 10.1 and 10.3 do permit the payment of bank service charges and fees of the bank from interest earned on client funds deposited in the lawyer's trust account. The new arrangement established by Attorney A's bank could create ethical problems if the credits and service charges to the trust and business accounts were not accounted for independently. Since the trust and business accounts are "linked" for the purposes of determining interest earned or charges assessed, it would be impossible for one to separate out the specific amount of interest earned or charges assessed for either account. If for a particular statement period the trust account earned more "credits" than it was assessed charges, while the business account was assessed more service charges than it earned "credits", the trust account "credits" could offset the service charges assessed on the business account. Rule 10.1 does not permit the lawyer to use client funds from the trust account ("credits" from the trust account) for the lawyer's personal benefit (the offset of service charges assessed on the business account).

RPC 151

July 9, 1993

Editor's Note: This opinion was originally published as RPC 151 (Revised).

Representation of Insured and Insurer

Opinion discusses when an attorney who is a full-time employee of an insurance company may represent the insurance company, the insured, or others respecting various matters of interest to the insurance company.

Note: The following inquiries were submitted to seek a clarification of CPR 326 (adopted January 14, 1983) which reconsidered opinion 682 (1969) and CPR 19 (1974).

Inquiry #1:

May an attorney who is a full-time salaried employee of insurance company A appear as attorney of record on behalf of insurance company A in a declaratory judgment action brought by insurance company A?

Opinion #1:

CPR 326 (1983) was reviewed by the North Carolina Supreme Court in *Gardner v. N.C. State Bar*, 316 N.C. 285, 341 S.E.2d 517 (1986). The North Carolina Supreme Court held that a licensed attorney who is a full-time employee of an insurance company may not ethically represent one of the company's insureds as counsel of record in an action brought by a third party for a claim covered by the insurance policy. 316 N.C. at 286. The court also held that the attorney could not properly appear as counsel of record for the insured

in the prosecution of a subrogation claim for property damage. *Id.* The insurance company is not a named party in either the third party action or the subrogation claim and in both cases, the insured is the real party in interest. Thus, an insurance company attorney who appears under these circumstances is acting for the insured not the company, in violation G.S. §84-5, which forbids corporations to engage in the practice of law or to represent a person in court. 316 N.C. at 291.

Where an insurance company brings a declaratory judgment action, the company is a named party to the action. A staff attorney for the company may appear as attorney of record for the insurance company in such a situation without running afoul of G.S. §84-5.

Inquiry #2:

May a staff attorney employed full time by an insurance company appear as attorney of record on behalf of the insurance company in a declaratory judgment action filed against it by its insured or another insurance carrier?

Opinion #2:

Yes, so long as the staff attorney represents the insurance company and not its insured. *See* answer to Inquiry #1.

Inquiry #3:

In a declaratory judgment action which names both insurance company A and the policyholder, may a staff attorney who is a full-time salaried employee of insurance company A represent both insurance company A and the policyholder if the interests of the policyholder and the insurance carrier are identical?

Opinion #3:

No. CPR 326 noted that the attorney's paramount responsibility is to the court and client which he serves before the court. This responsibility should not be influenced by any other entity. When an attorney, who is employed by a corporation, is directed by his employer in the representation of other individual litigants, he is subject to the direct control of his employer, which is not itself the litigant and which is not itself subject to professional discipline as an officer of the court. This diluted responsibility to the court and the client must be avoided.

The conflict perceived by the ethics committee is thus as much a function of the relationship of the insurance company, in-house counsel and the insured as the actual difference in their interests in the particular litigation. Even where, as in this inquiry, the insurance company and the insured have similar interests in the lawsuit, the problem of the "diluted responsibility" to the client created by the introduction of a corporate entity into the legal relationship will continue to exist.

Inquiry #4:

May a staff attorney who is a full-time salaried employee of insurance company A appear as attorney of record before the North Carolina Industrial Commission on behalf of insurance company A and its insured, the employer?

Opinion #4:

No. The interests of the insurance company and its insured in such an action conflict, in violation of Rule 5.1 of the Rules of Professional Conduct. *See also* answer to Inquiry #3.

Inquiry #5:

A claim has been submitted to insurance company A. The claimant's attorney and insurance company A's representative have agreed to refer the claim to voluntary binding arbitration.

There is a high/low agreement which prescribes the perimeters of possible arbitration awards, and the high is within the insured's policy limits. In this situation may an attorney who is a full-time salaried employee of insurance company A appear at a live hearing of the arbitration to represent the insurance company's interest in this claim which has been made against its insured's policy and to argue the matter before the arbitrator?

Opinion #5:

No. The insured, not the insurance company, is the real party in interest in such an arbitration proceeding. "If an insurance company, through its employees, appears for an insured, it would be appearing as an attorney for someone else. The company itself is not the party to the action. The insured is the one who is named." *Gardner v. N.C. State Bar,* 316 N.C. 285, 291 (1986). Consequently, the insurance company would violate G.S. §84-5 by appearing through its in-house counsel at the proceeding. Independent outside counsel should be hired to appear for the insured. The fact that the arbitration award will be within the insured's policy limits does not completely negate the intrusion on the attorney's professional independent judgment created by the in-house attorney's relationship with the employer/insurance company.

Inquiry #6:

Under the same fact situation as Inquiry #5, if the arbitration were conducted through documents procedure only without a live hearing, may the staff attorney for the insurance company appear as attorney of record in the name of its insured to protect the insurance company's interest?

Opinion #6:

No. *See* response to Inquiry #5. The insurance company would still be practicing law for another, in violation of G.S. §84-5, even though its activities would be restricted to the preparation and submission of documents.

Inquiry #7:

May a staff attorney employed full time by an insurance company take an examination under oath of its insured who is pursuing a first party claim under the insured's insurance policy?

Opinion #7:

Yes, so long as the in-house attorney is acting only for the insurance company in the proceeding.

Inquiry #8:

May a staff attorney employed full time by an insurance company appear as attorney of record on behalf of and in the name of the company and pursue a claim against its insured?

Opinion #8:

Yes. There is no conflict of interest or infringement of the staff attorney's professional judgment while the company is pursuing a claim against the insured for the company. The company has a primary interest in the claim and may represent itself respecting such claim without running afoul of G.S. §84-5.

Inquiry #9:

May a staff attorney employed full time by an insurance company appear as attorney of record on behalf of the company and pursue a subrogation claim on behalf of the company joining with its insured as a coplaintiff against a third party who is liable for damages to the insured?

Opinion #9:

No. In pursuing the subrogation claim on behalf of the company with the insured as coplaintiff, the insurance company attorney would be required to make decisions respecting the rights of the insured, in violation of G.S. §84-5. Such a situation also creates a potential conflict of interest in violation of Rule 5.1.

Inquiry #10:

May a staff attorney employed full time by an insurance company appear as attorney of record for the company in a hit-and-run suit brought against the name of the insurance company or brought against an unknown defendant designated as "John Doe?"

Opinion #10:

Yes. In this case, it appears that the insurance company is the real party in interest and may be subject to liability apart from the insured's liability. Consequently, the insurance company may represent itself without violating G.S. §84-5.

Inquiry #11:

May a staff attorney employed full time by an insurance company appear as attorney of record for the company, but making that appearance in the name of an uninsured tort-feasor if the company's insured is pursuing an uninsured motorist claim? Assume for the sake of this inquiry that the insurance company has waived its subrogation rights.

Opinion #11:

No. Although G.S. §20-279.21(b)(3) in the uninsured motorist setting and G.S. §20-279.21(b)(4) in the underinsured motorist setting permit the insurance carrier to appear in defense of the claim although not named in the caption or named as a party, "anonymously" defending the lawsuit brought against the tort-feasor logically requires defense counsel to seem to be appearing on behalf of the tort-feasor. To do so constitutes practicing law, as that term is defined in G.S. §84-2.1, on behalf of another. The corporate insurer through its employees cannot practice law and appear on behalf of others under G.S. §84-5 as interpreted by the court in *Gardner v. N.C. State Bar, supra.*

Inquiry #11(a):

Same facts as Inquiry #11 except in this situation assume that the insurance company does not waive its subrogation rights.

Opinion #11(a):

No. *See* response to Inquiry #11.

Inquiry #12:

Same facts as Inquiry #11 except in this situation the staff attorney is representing the insurance company's interest in the name of an underinsured tort-feasor instead of in the name of an uninsured tort-feasor.

Opinion #12:

No. *See* response to Inquiry #11.

Inquiry #13:

Same inquiry as Inquiry #12 above; however, assume the insurance carrier is not willing to waive its subrogation rights.

Opinion #13:

No. *See* response to Inquiry #11.

Inquiry #14:

May a full-time salaried staff attorney of an insurance company appear for the company and file an interpleader action seeking court's approval for the allocation of settlement proceeds in a liability claim situation?

Opinion #14:

Yes, provided that the insurance company is a real party in interest and has rights which would be affected by the allocation of the settlement proceeds. The attorney could not properly represent the insured in this situation, however.

RPC 152

January 15, 1993

Disclosure of Material Terms of Plea Agreements

Opinion rules that the prosecutor and the defense attorney must see that all material terms of a negotiated plea are disclosed in response to direct questions concerning such matters when pleas are entered in open court.

Inquiry #1:

A prosecutor and defense attorney discuss the circumstances under which a defendant in a pending criminal case will plead guilty. It is tentatively agreed that the defendant will plead guilty to a lesser included offense as to one charge and that another unrelated charge will be dismissed. After discussion with counsel, defendant accepts the plea arrangement.

A transcript of plea is prepared which does not refer to the charge that is to be dismissed. Further, the transcript, as prepared, does not state that the defendant has agreed to plead as part of a plea arrangement.

When the plea is actually entered and accepted by the presiding judge, the defendant, under oath, states that there is no plea agreement. Neither the prosecutor nor defense counsel inform the judge about the earlier plea discussion or that in return for the plea of guilty, the defendant is being allowed to plead guilty to a lesser included offense and that another unrelated charge is to be dismissed as a result of the plea.

Under the above recited factual situation, would the conduct of all counsel be consistent with the Rules of Professional Conduct?

Opinion #1:

No. Rule 1.2(c) of the Rules of Professional Conduct prohibits attorneys from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. From the facts presented, it is clear that the client's guilty plea was the product of a negotiated plea arrangement. The client's untruthful answers to questions relating to the subject plea agreement and the lawyer's signature on the transcript, misrepresent the plea arrangement and thus are in violation of Rule 1.2(c). Additionally, Rules 7.2(a)(5) and (8) prohibit an attorney from knowingly using perjured testimony or false evidence and from counseling or assisting his client in conduct that the lawyer knows to be fraudulent.

Inquiry #2:

Assume a similar factual situation where the prosecutor agrees to tell the judge in open court before sentencing that the state is not opposed to a probationary sentence in return for the defendant's guilty plea, the transcript of plea states that the defendant has not agreed to plead as part of a plea agreement, when the plea is accepted by the trial court, the defendant, under oath, states there is no plea agreement and the judge is again unaware of the plea negotiations.

Opinion #2:

No. *See* opinion #1.

Inquiry #3:

Assume a similar factual situation where the plea negotiation takes place between a lay administrative assistant of the district attorney and defense counsel. Assume further that the administrative assistant has not discussed the case beforehand with the district attorney or the assistant district attorney assigned to the case, but that the district attorney and his assistants are aware that the lay administrative assistant engages in such practice as a routine matter and that the district attorney has not disapproved of such practice.

Opinion #3:

Even though the district attorney may not directly participate in or become familiar with particular cases in which plea negotiations have been undertaken on his behalf by the administrative assistant, he or she is professionally responsible for the conduct described in the preceding inquiry to the extent that he or she has knowingly ratified the practice by acquiescence. Rule 3.3(c)(1) makes a lawyer professionally responsible for any conduct of a nonlawyer under his or her supervision which would violate the Rules of Professional Conduct if engaged in by a lawyer if the supervising lawyer "orders or, with the knowledge of specific conduct, ratifies the conduct involved...." Since the above described practice is described as being "routine" and the district attorney is aware of the conduct, such conduct would be inconsistent with the requirements of Rule 3.3(c)(1).

RPC 153

January 15, 1993

Termination of Joint Representation: The Former Client's Right to the File

Opinion rules that in cases of multiple representation a lawyer who has been discharged by one client must deliver to that client as part of that client's file information entrusted to the lawyer by the other client.

Inquiry:

Minor Plaintiff was injured during a surgical procedure at Hospital. Nurse anesthetist, a hospital employee, participated actively in the surgery, along with several others. Due to the focus of the early investigation by the hospital, Nurse independently sought an attorney to represent her interests and selected Attorney A, who was in private practice and who coincidentally generally represented Hospital and the liability insurance carrier for the hospital and the nurse, as a hospital employee. At the same time Nurse was represented by Attorney B, who was in charge of Hospital's legal department, and who held himself out to Nurse as her attorney during investigation of the occurrence and in protecting her in the event of a lawsuit that was felt to be "imminent." Before undertaking representation of Nurse, Attorney A obtained approval of Attorney B and his office on behalf of Hospital and the liability insurance carrier. After Attorney A, Attorney B on behalf of Hospital, and the insurance company determined that the interests of Nurse and Hospital were the "same," they agreed to the joint representation of Nurse and Hospital and undertook investigation and management of the case, which continued for some time. Despite recognition by Attorneys A and B from the outset that reports of the incident by various participants differed, no disclosure was made of potential conflicts of interest existing at the time or that might arise later, and no attempt

was made to limit the representation or sharing of information. During the period of joint representation of Nurse and Hospital, substantial information concerning the incident was gathered and placed in the file(s) maintained concerning the joint representation by both Attorneys A and B. Among the items contained in the files were statements obtained from individuals participating in the surgery by persons in Hospital's risk management department, a division of Hospital's legal department, headed by Attorney B. The files also contained hospital records of the injured party, which were furnished by Hospital. Nurse became aware of a "proposed statement" of facts concerning the occurrence, which was proposed by Attorney A as a report to be given to the injured minor's family, and, in her opinion, erroneously focused blame on her. Nurse had not participated in formulation of this statement and had not authorized it. Nurse requested a copy of the file from Attorney A for her review and use and asked if her interests were being protected. Nurse did not receive the file and did not receive answers satisfactory to her. Nurse then consulted Attorney X, who undertook to represent Nurse. Attorney X contacted Attorney A and requested a copy of all materials in the files relating to the representation of Nurse in order to assist in properly representing Nurse. Attorney A, on instructions from Attorney B for Hospital, refused to surrender statements that were given him by Hospital's risk management department, claiming that such materials are privileged as having been obtained in anticipation of litigation or trial. Attorney A also refused to surrender a copy of hospital records of the injured party claiming that those records are also privileged.

Under the circumstances, do Attorneys A and B have an ethical obligation to surrender the contents of the file(s) to Nurse and her new Attorney X?

Opinion:

Yes, otherwise irreparable harm could be done to a client needing the accumulated information to assist her defense. Rule 5.1 makes loyalty an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation and comply with Rule 2.8. Rule 2.8(a)(2) obligates a lawyer whose employment has been terminated to surrender to the former client those portions of the file to which the client is entitled. Loyalty to a client is impaired when a lawyer cannot 1) represent the client zealously under Rule 7.1 and avoid prejudicing or damaging the client during the course of the professional relationship (Rule 7.1 (a)(3)), and 2) when the lawyer cannot keep the client reasonably informed or promptly comply with reasonable requests for information (Rule 6(b)(1)). When a lawyer undertakes representation of codefendants, an impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony or incompatibility of positions. Identifying and resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation and not the client's responsibility. Once Attorneys A and B determined that Nurse's and Hospital's interests were the same and, presumably, that no conflict of interest existed and then undertook joint representation of Nurse and Hospital, with the consent of Hospital and its insurance company, information gathered on behalf of Nurse and Hospital (who were deemed to have the "same interest") lost its confidential nature as between Nurse and Hospital by implied authorization, if not actual consent, under Rule 4(c)(1) and (2). Since Nurse relied on reasonable attorney-client expectations of protection of her interests and access to information, Attorneys A and B are now estopped to negate consent to the rights inuring to Nurse's benefit from the joint representation. Nurse is entitled to immediate possession of all information in the joint representation file or files of Attorneys A and B accumulated to the date of termination of representation that would or could be of some value to her in protecting her interests. This includes the items specified in the inquiry and any others that would or could be of some help to Nurse. The information must be surrendered unconditionally by Attorneys A and B without regard to whether the cost of its acquisition was advanced by either attorney or client (hospital). RPC 79. The attempt by Attorneys A and B to revoke the implied or actual authority to share information with Nurse can only apply prospectively to information gathered and work done after termination of representation.

RPC 154

January 15, 1993

Representation of Insured, Insurer, and UIM Carrier

Opinion rules that an attorney may not represent the insured, her liability insurer and the same insurer relative to underinsured motorist coverage carried by the plaintiff.

Inquiry #1:

Passenger A was injured in an automobile accident as a result of the admitted negligence of Driver B, who rented a room in A's home. Two other people were injured in another vehicle hit by B. A has underinsured motorist coverage (UIM) of $200,000 with Insurance Company X. B has a policy of liability insurance of $25,000/$50,000 also with Insurance Company X. A sued B and asserted a claim in excess of all insurance coverage. Insurance Company X hired Attorney Y. Attorney Y undertook representation of B, Insurance Company X under the liability policy, and Insurance Company X under the UIM policy.

Does Attorney Y have a disqualifying conflict of interest in representing B, Insurance Company X under the liability policy, and Insurance Company X under the UIM policy?

Opinion #1:

Yes. The provisions of G.S. §20-279.21(4) provide for certain subrogation or assignment rights by a UIM insurer against the owner, operator or maintainer of an underinsured vehicle. This would cause the interests of Driver B and Insurance Company X under its UIM policy to likely be materially different and adverse. Therefore, Attorney Y's representation of both clients would cause his representation of one client to be directly adverse to that of the other in violation of Rule 5.1(b). For example, Attorney Y's advice to Insurance Company X to pay a proposed settlement with Passenger A in such a manner as to enable Insurance Company X to proceed against Driver B under the subrogation rights provided in G.S. §20-279.21(4) would necessarily be adverse to Driver B. Conversely, for Attorney Y not to so advise Insurance Company X would be potentially adverse to that client.

Inquiry #2:

Prior to suit, B requested Insurance Company X to pay the liability limits to A but Insurance Company X refused to do so. Insurance Company X stated it had reserved the primary coverage for the two other injured parties. A offered a Covenant Not to Execute Judgment in excess of insurance coverage in return for immediate payment of the liability coverage of $25,000. Attorney Y offered to settle the case for $75,000 but refused to tender the $25,000 liability limits and accept the Covenant from A.

Does Attorney Y have a disqualifying conflict of interest in light of these circumstances?

Opinion #2:

Yes. *See* answer to Inquiry #1. Additionally, the circumstances set out in Inquiry #2 reveal a further conflict of interest between Insurance Company X and Driver B. It would appear that Insurance Company X's interest might be best served by allocating Insurance Company X's primary insurance policy in such a manner as to best benefit its financial obligations under its UIM policy, and such allocation might adversely affect Driver B's interest by raising her personal exposure to the other claimants injured in the accident. Attorney Y would once again be likely to have his ability to represent both clients materially impaired in violation of Rule 5.1(b).

RPC 155

October 29, 1993

Editor's Note: This opinion was originally published as RPC 155 (Second Revision).

Contingent Fees in Child Support Cases

Opinion rules that an attorney may charge a contingent fee to collect delinquent child support.

Inquiry:

May an attorney charge and collect a contingency fee in the amount of one-third of the funds collected for the recovery of delinquent child support when the custodial parent has insufficient means to defray legal expenses?

Opinion:

Yes. RPC 2. *However, see Davis v. Taylor*, 81 N.C. App. 42 (1986).

RPC 156

October 29, 1993

Editor's Note: This opinion was originally published as RPC 156 (Revised).

Informing Client Concerning Representation

Opinion rules that an attorney who has advised a client that he has been retained by the client's insurance company to represent him must reasonably inform the client and explain the matter completely when the insurance company pays its entire coverage and is "released from further liability or obligation to participate in the defense" under the provisions of G.S. §20-279.21(b)(4).

Inquiry:

Attorney A was retained by Insurance Company Y to represent Defendants L and M who are the named insureds on a policy of auto liability insurance issued by Insurance Company Y. A suit was brought by the adverse driver. Attorney A settled the suit for the policy limit applicable to driver's claim and obtained a Release and Dismissal with Prejudice as to driver's claim against L and M. Now Insurance Company Y has paid Plaintiff X the entire policy limits applicable to Plaintiff X's claim and has secured from Plaintiff X a Covenant Not to Enforce Judgment against L and M. With this payment to Plaintiff X, Insurance Company Y's policy limits have been exhausted. The Plaintiff's underinsured motorist carrier was put on notice of the proposed settlement prior to settlement pursuant to G.S. §20-279.21(b)(4), and the underinsured motorist carrier failed to advance payment to its insured Plaintiff X to preserve its subrogation rights. Plaintiff X has been unable to negotiate a settlement of her UIM claim with her UIM carrier and therefore is in the process of filing suit so that she can recover damages from her underinsured motorist carrier. In the case of Plaintiff X, the only action Attorney A has taken is to write a letter to L and M advising them that suit may be filed and that Attorney A has been retained to represent them. Suit has not been filed yet and therefore Attorney A has not filed an answer on behalf of L and M. Insurance Company Y would like for Attorney A to file a motion with the court when the lawsuit is filed pursuant to G.S. §20-279.21(b)(4) to be released from further liability or obligation to participate in the defense of the proceeding.

Can Attorney A represent Insurance Company Y and file this motion to be released?

Opinion:

No opinion is given as to the ethics of filing a motion in a suit that has not yet been filed. Attorney A has written L and M advising them that a suit may be filed, and Attorney A has been retained by Insurance Company Y to represent them. However, since Insurance Company Y has paid its full limits, it is "released from further liability or obligation to participate in the defense" of such proceeding by G.S. §20-279.21. Under such circumstances, Attorney A is required by Rule 6(b) to keep the client reasonably informed and to fully explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding this matter.

As Attorney A has written to L and M advising L and M that Attorney A has been retained to represent them, Attorney A should promptly inform L and M, in writing, that Attorney A will not be representing them and explain the full provisions of the statute and the situation to the extent reasonably necessary to permit the clients to make informed decisions regarding employing Attorney A, any other attorney, or electing not to be represented in any future lawsuits under the facts as given.

RPC 157

April 16, 1993

Editor's Note: See Rule 1.14 of the Revised Rules for additional guidance.

Representing a Client of Questionable Competence

Opinion rules that a lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection.

Inquiry #1:

Attorney A represents a client on a social security matter and determines, from confidential communications with his client, that the client is, in the attorney's opinion, not competent to handle his affairs in relation to the representation and that the client's actions in regard to the matters involved in the representation are detrimental to the client's own interest. For example, the client who sought the attorney's assistance with receipt of benefits from the social security administration, refuses to cash checks obtained for the client from social security despite the client's obvious need for financial support. The attorney believes that either a guardian should be appointed for the client under state law or that a representative payee should be appointed for the client under federal social security law. The client refuses to agree for the attorney to seek the appointment of a guardian, to seek the appointment of a representative payee, or even for the attorney to discuss this problem with the client's family. The attorney is of the opinion that the client lacks the capacity to form objectives necessary for a normal attorney/client relationship.

May the attorney seek the appointment of a guardian or a representative payee for the client?

Opinion #1:

Yes. The Rules of Professional Conduct do not speak directly to the question presented. There is language in the comment to Rule 2.8 concerning discharge and withdrawal suggesting that where an attorney is representing a client who is mentally incompetent she may "in an extreme case... initiate proceedings for a conservatorship or similar protection of the client." It follows that Attorney A may under the circumstances described seek the appointment of a guardian or a representative payee without the client's consent and over the client's objection if such appears to be reasonably necessary to protect the client's interests. In so doing, the attorney may disclose only her belief that there exists a good faith basis for the relief requested and may not disclose the confidential information which led her to conclude that the client is incompetent, except as permitted or required by Rule 4(c).

Inquiry #2:

In taking that action, may the attorney reveal confidential information so as to establish the grounds for guardianship or representative payee status?

Opinion #2:

See the answer to Inquiry #1.

Inquiry #3:

If the attorney may not seek appointment of a representative payee or guardian, must the attorney withdraw from the matter?

Opinion #3:

See the answer to Inquiry #1.

RPC 158

April 15, 1994

Editor's Note: This opinion was originally published as RPC 158 (Third Revision).

Advance Payment of Legal Fees

Opinion rules that a sum of money paid to a lawyer in advance to secure payment of a fee which is yet to be earned and to which the lawyer is not entitled must be deposited in the lawyer's trust account.

Inquiry #1:

Attorney A undertakes to handle a traffic matter for Client B. Client B gives Attorney A a check for $400. They agree that $350 of that sum represents A's fee and the rest is to be used for costs. Attorney A and Client B have no signed fee agreement and there is no specific negotiation between A and B regarding whether the fee would be refundable under any circumstances. Nevertheless, Attorney A considers the fee as a nonrefundable "true retainer."

Attorney A deposits Client B's $400 check into his attorney trust account and immediately withdraws $350 which he spends at once. Attorney A leaves the $50 in costs in the trust account. Two days after Client B has paid Attorney A, Client B discharges Attorney A and demands a refund of the $400. Attorney A has done no work on the matter, except for a 20 minute initial meeting with Client B. Attorney A gives Client B $50 only and refuses any additional refund on the grounds that the $350 was a nonrefundable retainer.

Has Attorney A violated the Rules of Professional Conduct by immediately withdrawing the entire $350 fee from his trust account or should he have left the fee in the account until he did more work on B's case?

Opinion #1:

In order for a payment made to an attorney to be earned immediately, the attorney must clearly inform the client that it is earned immediately, and the client must agree to this arrangement. In the instant case, it is plain that the fee was negotiated and paid as compensation for services which were to be rendered. Nothing was said by the attorney to indicate that the payment was nonrefundable or earned immediately upon payment. Therefore, despite Attorney A's misperception, the fee was a deposit securing the payment of a fee which was yet to be earned. As such, it was incumbent upon Attorney A to deposit the money in her trust account. *See* Rule 10.1(c)(2) and official comment. To the extent that any portion of the fee paid in this case was unearned at the time Attorney A was discharged, that amount should be paid back to Client B by check drawn on the trust account. Rule 2.8(a)(3).

Inquiry #2:

Attorney Z undertakes to handle a traffic case for Client X. Attorney Z tells X that he will handle the entire matter for $500 and that the $500 will cover his fees as well as any fines or costs in the case. Although Z knows generally how much the fines and costs are in traffic cases, the amounts do vary somewhat, depending upon the judge and the facts of the particular case. Consequently, the smaller the fine and costs, the more of the $500 which Attorney Z gets to keep as a fee.

Does this fee arrangement violate any provision of the Rules of Professional Conduct?

Opinion #2:

No. Although the amount of the fee earned by Attorney Z may be partially indefinite at the time the fee is paid by Client X, the fee earned by Attorney Z is not a contingent fee which would otherwise be prohibited in a criminal case by Rule 2.6(c) of the Rules of Professional Conduct. In order for a fee to be contingent, the fee received by the lawyer and the amount paid by the client must both be contingent upon the outcome of the case. In the present case, the amount paid by Client X remains the same whatever the amount of the fine and whatever the costs. This type of flat charge for representation on a traffic offense gives a client certainty as to the ultimate cost of the representation.

Inquiry #3:

How much, if any, of the $500 must be held in Attorney Z's trust account until the traffic matter is resolved?

Opinion #3:

If Attorney Z and Client X intend that the $500 represents a payment of fees to be earned and costs, then Attorney Z must deposit the entire $500 in the trust account. If Attorney Z and Client X agree that the payment represents costs and a flat fee to which Attorney Z is immediately entitled, and the payment is in cash, any portion of the payment which is intended to cover costs must be deposited in Attorney Z's trust account and any portion of the payment which is Attorney Z's fee must be deposited in her operating account. *See* Rule 10.1(c)(2). If Attorney Z and Client X agree that the payment represents costs and a flat fee to which Attorney Z is immediately entitled and the payment of the entire $500 is by check, the check must be deposited in Attorney Z's trust account and, upon ascertaining the amount of the costs or an amount sufficient to cover the costs, Attorney Z should promptly withdraw that portion that is fee and deposit it in her operating account. Rule 10.1(c)(2). Whether the fee portion is deposited in the trust account or paid over to the operating account, any portion of the fee which is clearly excessive may be refundable to the client either at the conclusion of the representation or earlier if Attorney Z's services are terminated before the end of the engagement. Rule 2.6 (a). *See also O'Brien v. Plumides,* 79 N.C. App. 159, 339 S.E.2d 54, *cert. dismissed*, 318 N.C. 409, 348 S.E.2d 805 (1986).

Inquiry #4:

Will the answer to Inquiry #3 be any different depending upon whether Attorney Z and Client X agree that Z's fee is a nonrefundable retainer?

Opinion #4:

The situation posited in Inquiry #2 does not involve a nonrefundable retainer. *See* RPC 50. *See also* Opinion #3 above.

RPC 159

January 14, 1994

Editor's Note: This opinion was originally published as RPC 159 (Second Revision).

Settlement of Dispute Involving Impropriety of Mental Health Professional

Opinion rules that an attorney may not participate in the resolution of a civil dispute involving allegations against a psychotherapist of sexual involvement with a patient if the settlement is conditioned upon the agreement of the complaining party not to report the misconduct to the appropriate licensing authority.

Inquiry:

Lawyer L frequently represents patients who have civil claims against psychotherapists with whom they have become sexually involved. Such matters, obviously, have implications in regard to the therapist's license and the defense sometimes wishes to keep the allegations confidential.

May attorneys for the plaintiff and the defendant participate in the resolution of such a matter where settlement is conditioned upon the plaintiff's agreeing not to file a complaint against the defendant with the State Board of Medical Examiners or any other appropriate licensing body?

Opinion:

No. It is unethical for the attorney for either party to participate in the resolution of civil claims involving allegations of sexual involvement with patients by a psychotherapist where the settlement is conditioned upon the complaining party's agreement not to report the psychotherapist's misconduct to the appropriate licensing authority. *See* Rule 1.2(d).

RPC 160

July 21, 1994

Editor's Note: This opinion was originally published as RPC 160 (Second Revision).

Lawyer as Member of Hospital's Board of Trustees

Opinion rules that a lawyer whose associate is a member of a hospital's board of trustees may not sue the hospital on behalf of a client.

Inquiry #1:

Attorney A is an associate (nonshareholder) in a law firm in North Carolina. He was appointed to the board of trustees of a local hospital on October 7, 1991, and has served as a trustee since that time. The hospital is a public, nonprofit, charitable hospital governed by a board of trustees.

After the appointment of Attorney A as a trustee, Attorney B, a shareholder in the same law firm, filed a malpractice claim against a doctor and the hospital. Attorney B handled all aspects of the claim from the initial investigation forward without discussing it with Attorney A and without any assistance from Attorney A.

After oral discussions between Attorney A and the hospital attorney concerning his firm's involvement in the case, Attorney A wrote the hospital attorney a letter in which he stated that he did not feel there was a conflict of interest because he had complied with the procedures prescribed in CPR 290 . At all times Attorney A refrained from any expression of opinion about the case, as well as from formal or informal consideration of the matter, including any communications with anyone at the hospital concerning the matter, and absented himself from all hospital meetings during any discussion or vote concerning the case. Attorney B reached a settlement of the case through negotiations with attorneys for the doctor and the hospital.

The hospital now has a program which began on October 1, 1990, under which it pays a substantial portion of all malpractice claims out of hospital funds. Prior to October 1, 1990, the hospital was insured, but had a large deductible, and the settlement of this claim was paid entirely out of the deductible.

With respect to any new cases that may arise, would it be ethical for Attorney B to represent a client with a claim against the hospital, so long as there is adherence to the procedures prescribed in CPR 290 ?

Opinion #1:

No. Under Rule 5.1(b), an irreconcilable conflict would exist if a lawyer who is a member of the board of trustees of a nonprofit hospital were to represent a client who is suing the board or the hospital which is managed and controlled by that board. Rule 5.1(b). While lawyers are associated in a firm,

none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by the Rules of Professional Conduct. Rule 5.11(a) and CPR 66. RPC 53 is hereby overruled.

Other prior ethics opinions which appear to be in conflict with this opinion are distinguishable. CPR 290 allows a lawyer to appear before a government board upon which a lawyer from his or her firm is a member provided four specified steps are taken to insulate the attorney board member from the board's consideration of the particular matter. *See also* CPR 327. RPC 130 allows a law firm to accept employment on behalf of a governing board upon which its partner sits provided the representation is otherwise lawful and certain steps are taken to insulate the attorney board member from the decision. None of these prior opinions involve the representation of a client whose interests are directly adverse to those of the board and who is filing a lawsuit against the board upon which the attorney board member sits. CPR 290 and CPR 327 are unchanged by this opinion and remain in effect.

In reliance on RPC 53, lawyers have undertaken to represent clients in litigation or other adversarial proceedings filed against a board upon which a member of their law firm serves. To require lawyers who have relied upon RPC 53 to withdraw from the representation of a client in the midst of an adversarial proceeding or litigation would work a hardship upon the client. Therefore, this opinion shall be applied prospectively. Lawyers may continue to represent clients in litigation or other adversarial proceedings which were filed as of the effective date of this opinion despite service by another lawyer from the same firm on the board. However, the procedures for removing the attorney board member from involvement in the case set forth in CPR 290 must be observed. This opinion shall apply to the representation of clients in litigation or other adversarial proceedings against a board upon which a member of the firm serves which are filed on or after the effective date of the opinion.

Inquiry #2:

If the answer to Inquiry #1 is "no," is it permissible under any circumstances for Attorney A to sit on the hospital board and for Attorney B at the same time to handle the malpractice case against the hospital?

Opinion #2:

See the answer to Inquiry #1 above.

Inquiry #3:

Finally, would it make any difference in the answers to Inquiries #1 and #2 if Attorney A were a shareholder in the firm rather than an associate?

Opinion #3:

No.

RPC 161

April 15, 1994

Editor's Note: This opinion was originally published as RPC 161 (Revised).

Television Commercials for Legal Services

Opinion rules that a television commercial for legal services which fails to mention that bankruptcy is the debt relief described in the commercial and which describes results obtained for others is misleading.

Inquiry:

Attorney A advertises on television. The commercial does not mention bankruptcy but the announcer on the commercial says "you can get financial relief" and "you can pay your creditors as little as $25 per week pursuant to a federal payroll deduction plan." During the commercial, it is stated that relief is "under 11 U.S. Code Section 109." At the end of the commercial, no attorney's name is mentioned. Instead viewers are directed to call a telephone number which has additional recorded information about financial relief from debts. Viewers who call this telephone number listen to a 12-minute tape recording during which bankruptcy filing options, including bill consolidation under Chapter 13, are discussed. Callers are advised that they have reached "the 24-hour information hotline for debt reorganization." The 12-minute tape does not explain the circumstances under which creditors can be paid "as little as $25 per week" but it does state that the caller can combine "every bill...into one low monthly payment." Does this advertisement fall within the guidelines set forth in the Rules of Professional Conduct?

Opinion:

No. Rule 2.2(a) allows a lawyer to advertise his services on television provided the commercials comply with Rule 2.1. Rule 2.1 prohibits false and misleading communications about a lawyer's services. A communication is false or misleading if it omits a fact necessary to make the statement, as a whole, not materially misleading. Rule 2.1(a). A communication is also false or misleading if it is likely to create an unjustified expectation about the results the lawyer can achieve. Rule 2.1(b).

Under the circumstances described in this inquiry, the failure of the television commercial to mention bankruptcy as the form of relief being described is an omission which makes the commercial materially misleading. Moreover, the statement in the commercial that the viewer "can pay creditors as little as $25 per week" is inherently misleading and creates an unjustified expectation about the results the lawyer can achieve which is not cured by the additional information in the 12-minute tape.

Rule 2.4(c) requires that the words, "This is an advertisement for legal services" be included at the beginning and ending of any "recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter and with whom the lawyer has no family or prior professional relationship." Viewers who call the telephone number for additional information must be presumed to be in need of legal services. Therefore, the recorded messages must include the statement described in Rule 2.4(c). *See* RPC 115.

RPC 162

July 21, 1994

Editor's Note: This opinion was originally published as RPC 162 (Third Revision).

Communications with Opposing Party's Physicians

Opinion rules that an attorney may not communicate with the opposing party's nonparty treating physician about the physician's treatment of the opposing party unless the opposing party consents.

Inquiry #1:

Attorney A is defense counsel in a personal injury case. Through discovery, Plaintiff, P, produces complete medical records from her attending physicians. The records of certain of these attending physicians appear to be favorable to the defendant and supportive of defendant's theory of the case. Before the case is set for trial, may Attorney A communicate with Plaintiff's physicians without seeking the consent of Plaintiff or her counsel in order to have the physician decipher his handwriting and medical codes in the records that Attorney A has received as a part of discovery in the civil action?

Opinion #1:

No. Communications with Plaintiff's nonparty treating physician concerning any aspect of the physician's treatment of Plaintiff or the substance of the physician's testimony at trial is unethical as against public policy unless the opposing party consents. *See Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990).

Note: This opinion does not address communications with treating physicians in workers' compensation cases and no opinion is thereby expressed as to any ethical or public policy limitations on such communications. *See* G.S. §97-27.

Inquiry #2:

Under the same circumstances outlined in Inquiry #1, may Attorney A discuss with the physician his generalized opinions without regard to the medical treatment and medical condition of the Plaintiff at issue in the lawsuit?

Opinion #2:

See answer to Inquiry #1.

Inquiry #3:

After the case has been called for trial and the physician in question is subpoenaed as a witness for defense, may Attorney A communicate with physician to discuss the matters set forth in Inquiries #1 and #2 above?

Opinion #3:

See answer to Inquiry #1.

Inquiry #4:

Under the circumstances outlined in Inquiry #3, may Attorney A communicate with physician to arrange for his witness's appearance at the trial?

Opinion #4:

Yes, Attorney A may communicate with the plaintiff's nonparty treating physician in order to arrange the physician's appearance at the trial as a witness.

Inquiry #5:

Under the circumstances mentioned in Inquiry #3, may Attorney A communicate to physician the questions the attorney expects to pose to the physician at trial, so long as neither privileged information or responses to those inquiries are sought from physician?

Opinion #5:

Yes, provided the communication is in writing.

RPC 163

April 15, 1994

Editor's Note: This opinion was originally published as RPC 163 (Revised).

Request for Independent Guardian Ad Litem Where Existing Guardian Has Conflict

Opinion rules that an attorney may seek the appointment of an independent guardian ad litem for a child whose guardian has an obvious conflict of interest in fulfilling his fiduciary duties to the child.

Inquiry #1:

Attorney X represents A, a seventeen-year old high school student who was injured in a motor vehicle accident at the time that she was riding in an automobile being driven by her mother, M. There is a question as to whether the oncoming vehicle was negligent, whether M was negligent, or both. A's father, F, and M originally asked Attorney X to represent both M and A. Attorney X explained that there appeared to be a conflict of interest between M and A and that Attorney X would be willing to represent only A. M and F agreed. Attorney X entered into a fee agreement with F signing as guardian for A. No lawsuit has been filed at this time. After investigating the motor vehicle accident, Attorney X concluded that M was most likely negligent, although the driver/owner of the oncoming vehicle may also have been negligent. F left a telephone message for Attorney X indicating that he was no longer interested in pursuing A's claims since it appeared likely that M would be the major defendant and if a judgment was entered against her, it would raise F and M's automobile insurance rates. F did not respond to Attorney X's request that he come in to discuss the matter in person. Attorney X wrote to F explaining that M and F's insurance rates would go up if the driver of the other car made a claim against M and, therefore, making a claim on A's behalf would have no additional adverse effect on the family's insurance rates. In this letter, Attorney X told F that he believed that F and M had a moral as well as an ethical duty to A to proceed. Attorney X believes that A's parents are not acting in A's best interests. They appear to be protecting their own interests to the exclusion of A's interests. Having advised F that Attorney X believes that he has an ethical and moral duty to proceed, is Attorney X's ethical duty satisfied?

Opinion #1:

Yes. However, on these particular facts, where F's only stated reason for failing to pursue his daughter's claim is the protection of the family's automobile insurance rates and no other concerns or contingencies have been indicated by F, it would be permissible for Attorney X to seek the appointment of an independent guardian ad litem to represent A's interests. This would be consistent with Attorney X's primary duty to represent the interest of A, who is the real party in interest. *See* CPR 15.

Inquiry #2:

May Attorney X seek the appointment of an independent guardian ad litem and proceed with filing suit after the independent guardian ad litem has reviewed the case and agrees that Attorney X should proceed?

Opinion #2:

Yes. *See* Opinion #1 above.

RPC 164

October 29, 1993

Television Advertising of Legal Services

Opinion rules television commercials for an attorney's services that depict fictional clients and cases are misleading and prohibited.

Inquiry #1:

Attorney A wants to advertise on television. The scripts for the commercials are fictional and will be dramatized by actors depicting fictional clients of Attorney A. The scripts are based on representative cases of Attorney A and outcomes that Attorney A has achieved in actual cases. In each script, a fictional client of Attorney A tells the viewer why he or she used Attorney A's services and that Attorney A achieved a good outcome for the fictional client. The fictional client then recommends the service of Attorney A. Is the use of a fictional script based on representative cases of Attorney A and an actor dramatizing the role of a satisfied client a violation of the Rules of Professional Conduct?

Opinion #1:

Yes. Commercial dramatizations of fictional cases are misleading communications about Attorney A and Attorney A's services in violation of Rule 2.1. Rule 2.1 prohibits false or misleading communications about a lawyer or the lawyer's services. A communication about a lawyer or the lawyer's services is misleading if it contains a material misrepresentation of fact or omits a fact necessary to make the statement, considered as a whole, not materially misleading. Rule 2.1(a). Viewers of Attorney A's commercials do not know that they are seeing actors and not Attorney A's actual clients. Even if a viewer is astute enough to realize the commercial contains actors, the viewer would not know that the characters, cases and outcomes portrayed are fictional. The commercials are misrepresentations of fact not only because they are dramatized by actors but also because they do not describe or depict actual events or cases handled by Attorney A.

Inquiry #2:

In the event that you find a violation of the Rules of Professional Conduct, would the use of a written disclaimer on the screen, such as "Dramatization," remedy such violation?

Opinion #2:

No. *See* Opinion #1.

RPC 165

October 29, 1993

Providing Confession of Judgment to Unrepresented Adverse Party

Opinion rules that an attorney may provide a confession of judgment to an unrepresented adverse party for execution by that party so long as the lawyer does not undertake to advise the adverse party or feign disinterestedness.

Inquiry:

Attorney represents the custodial parent of minor children. The noncustodial spouse has agreed to pay child support in an amount equal to that determined by application of the child support guidelines promulgated pursuant to G.S. §50-13.4(c). Attorney and custodial parent wish to have the child support payable through the clerk of superior court. May the attorney mail a confession of judgment to the unrepresented opposing party for execution and subsequent submission to the clerk of Superior Court for endorsement and entry of judgment?

Opinion:

Yes. A lawyer may communicate directly with an adverse party who is not known to be represented by counsel in regard to the matter at issue. Rule 7.4(a). In order to accomplish her client's purposes, the attorney may draft a confession of judgment for execution by the adverse party and solicit its execution by the adverse party so long as the attorney does not undertake to advise the unrepresented party concerning the meaning or significance of the document or to state or imply that she is disinterested. Rule 7.4(b) and (c). The attorney should advise the adverse party that she represents her client, that she cannot give legal advice to the adverse party, and that the adverse party should seek the advice of another attorney concerning whether he should sign the confession of judgment. Although previous ethics opinions, CPRs 121 and 296,

have ruled that it is unethical for a lawyer to furnish consent judgments to unrepresented adverse parties for their consideration and execution, there appears to be no basis for such a prohibition when the lawyer is not furnishing a document which appears to represent the position of the adverse party such as an answer, and the lawyer furnishing a confession of judgment or consent judgment does not undertake to advise the adverse party or feign disinterestedness. CPRs 121 and 296 are therefore overruled to the extent they are in conflict with this opinion.

RPC 166

January 14, 1994

Increases in Lawyer's Hourly Rate

Opinion rules that a lawyer may seek to renegotiate a fee agreement with a client provided he does not abandon or threaten to abandon his client to cut his losses or to coerce a higher fee.

Inquiry #1:

Where Firm A has an existing contract with a client specifying that fees will be based on usual hourly rates, is it ethical for Firm A to unilaterally impose increases to its hourly rates (ranging from 5% to 10%) without securing further consent from its client regarding these increases?

Opinion #1:

The inquiry appears to ask for a legal construction of a fee contract with a client and only provides an incomplete description of the contract. To the extent that a legal construction of a fee contract is sought, this is a question of law upon which no opinion is expressed.

There are ethical considerations raised by the inquiry. As noted in the comment to Rule 2.6 of the Rules of Professional Conduct, "[a]n attorney may seek to renegotiate his fee agreement in light of changed circumstances or for other good cause, but he may not abandon or threaten to abandon his client to cut his losses or to coerce an additional higher fee." Moreover, an attorney may not charge a clearly excessive fee under any circumstances, including renegotiation of his fee. Rule 2.6(a).

Inquiry #2:

If a schedule for hourly rates for each attorney has been attached to the original engagement agreement (which includes an agreement as to fees), would it then be ethical for Firm A to impose a unilateral increase to the hourly rates of those attorneys listed on the schedule without securing further consent from the client?

Opinion #2:

See Opinion #1 above.

Inquiry #3:

Is the answer to either (1) or (2) affected by a provision in the fee contract that specifically gives Firm A the right to increase fees annually?

Opinion #3:

See Opinion #1 above.

RPC 167

January 14, 1994

Receiving Compensation from Potentially Adverse Party

Opinion rules that a lawyer may accept compensation from a potentially adverse insurance carrier for representing a minor in the court approval of a personal injury settlement provided the lawyer is able to represent the minor's interests without regard to who is actually paying for his services.

Inquiry #1:

Attorney A frequently receives a case from an insurance adjustor who has negotiated a settlement of a minor's personal injury claim with the unrepresented family of the minor. Typically, the insurance adjustor will request that Attorney A obtain court approval of the settlement. Attorney A usually asks an attorney in private practice to represent the minor and his or her parents, if they also have a claim, in connection with a "friendly lawsuit" which is filed in the appropriate court for judicial approval of the minor's settlement. The attorney who is representing the minor is paid directly by the insurance company in order to avoid reducing the negotiated settlement amount. May the attorney who is representing the minor and the parents accept payment from the liability insurance company without violating any of the provisions of the Rules of Professional Conduct?

Opinion #1:

Yes. Rule 5.6 of the Rules of Professional Conduct allows a lawyer to be paid from a source other than the client provided the following conditions are met:

(a) The client consents after full disclosure;

(b) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(c) Information relating to representation is protected as required by Rule 4.

When a lawyer undertakes to represent a minor and his or her parents under the circumstances described in Inquiry #1, he is bound by the duty of loyalty to represent the best interests of his clients "without regard to who is actually paying for [his] services or the interests of such other third party or entity." CPR 346. If the lawyer reasonably believes the payment arrangement will adversely affect his representation of the minor and the minor's family, the lawyer must decline the employment. *See* Rule 5.1(b)(l).

Inquiry #2:

If it is unethical to accept a legal fee paid by the insurance company outside of the settlement, is it ethical for the attorney representing the minor and the parents to charge a flat rate to the family for his services in aiding the approval of the minor's settlement and then allow the insurance company to add the amount of that flat rate to the total settlement so that the amount received and retained by the minor and the parents is the same as the amount for which they originally negotiated?

Opinion #2:

See Opinion #1 above.

RPC 168

April 15, 1994

Editor's Note: This opinion was originally published as RPC 168 (Revised).

Waiver of Objection to a Possible Future Conflict of Interest

Opinion rules that a lawyer may ask her client for a waiver of objection to a possible future representation presenting a conflict of interest if certain conditions are met.

Inquiry #1:

The ABA recently issued Formal Opinion 93-372 allowing waivers of future conflicts of interest under certain circumstances. The ABA Model Rules address conflicts of interest in Model Rule 1.7. Model Rule 1.7 is substantially identical to Rule 5.1(a) and (b) of the North Carolina Rules of Professional Conduct. Is it permissible for a North Carolina lawyer to obtain an advance waiver of future conflicts from a client or prospective client?

Opinion #1:

Yes, it is permissible provided the following conditions, which are set forth and explained in ABA Formal Opinion 93-372, are met:

1) The prospective waiver of a future conflict of interest is in writing;

2) Although the future conflict may not be known to exist at the time of the waiver, the writing must demonstrate that the future conflict, when it arises, was within the contemplation of the parties;

3) It must be patently clear that the existing representation will not be adversely affected by the subsequent representation; and

4) The subsequent representation will not result in disclosure or use of information imparted by the client in the representation existing at the time of the waiver, or any subsequent representation of that client.

ABA Formal Opinion 93-372 is hereby adopted by reference.

Inquiry #2:

If a waiver of future conflicts of interest is obtained from a client or a prospective client, will it be effective?

Opinion #2:

Yes, if the conditions set forth in Opinion #1 were met at the time the writ-

ten waiver was executed and, if a conflict subsequently arises, the conflict was contemplated by the parties at the time the written waiver was executed, the existing representation will not be adversely affected by the subsequent representation, and the subsequent representation will not result in the disclosure or use of confidential information of the client giving the waiver.

RPC 169

January 14, 1994

Providing Client with Copies of Documents from the File

Opinion rules that a lawyer is not required to provide a former client with copies of title notes and may charge a former client for copies of documents from the client's file under certain circumstances.

Inquiry #1:

Attorney represented Ex-client on a number of real estate transactions prior to the termination of the employment. Attorney provided Ex-client with the original documents or copies of most of the pertinent documents at the time of the closing for each real estate transaction. All of the real estate transactions Attorney handled for Ex-client were completed and Attorney no longer represents Ex-client. Ex-client has asked Attorney to provide him with copies of the documents in his closed real estate files. Attorney has provided Ex-client with copies of deeds, maps, title opinions, title insurance policies, correspondence and all of the significant information regarding the purchases and the loans for Ex-client's respective properties. He has not provided Ex-client with copies of his title notes. Attorney considers his title notes to be work product which often involves using base title notes for subdivisions or title notes from other files as well as the conveyance list files maintained by Attorney's law firm. Is Attorney ethically required to provide Ex-client with a copy of the title notes for the properties?

Opinion #1:

No. Although Rule 2.8(a)(2) requires a lawyer to deliver to a former client "all papers ...to which the client is entitled," the comment to the rule notes that "[t]he lawyer's personal notes...need not be released." *See also* CPR 3.

Inquiry #2:

If Attorney does not condition the delivery of the copies to Ex-client on the payment of his bill for prior legal services, may Attorney charge Ex-client for the copies he delivers to Ex-client of documents which Attorney had already provided to Ex-client at the time of the closings?

Opinion #2:

Yes. When Attorney delivered the original documents to Ex-client at the time of the closings for the real estate transactions, he fulfilled the requirements of Rule 2.8 (a)(2). If Attorney kept copies of these original documents, Attorney may charge Ex-client for any additional copies which Attorney makes for Ex-client but attorney may not condition the delivery of these copies to Ex-Client on the payment of his bill for legal services. If Attorney retained in his office files any original documents from Ex-client's real estate transactions, Attorney must bear the cost of making copies for Ex-client until such time as he delivers the original documents to Ex-client.

RPC 170

April 15, 1994

Editor's Note: This opinion was originally published as RPC 170 (Revised).

Joint Representation of Injured Party and Medical Insurance Carrier Holding Subrogation Agreement

Opinion rules that a lawyer may jointly represent a personal injury victim and the medical insurance carrier that holds a subrogation agreement with the victim provided the victim consents and the lawyer withdraws upon the development of an actual conflict of interest.

Inquiry #1:

Attorney A represents Victim B with respect to her personal injury claim. Carrier C provides health insurance benefits under an ERISA health insurance plan. Victim B has signed a "subrogation authorization form" for Carrier C which purports to give Carrier C the right to seek reimbursement directly from Tortfeasor D for benefits paid on behalf of Victim B because of her injuries. For purposes of effecting this recovery from Tortfeasor D, Carrier C wants to retain Attorney A to also represent Carrier C. May Attorney A represent both Victim B and Carrier C?

Opinion #1:

Yes, if Attorney A reasonably believes the representation will not be adversely affected and the client consents after full disclosure of the implications of the common representation. Rule 5.1(b).

Inquiry #2:

If so, what must Attorney A do if an actual conflict of interest arises in representing both parties?

Opinion #2:

Attorney A has a continuing obligation to evaluate the situation and must withdraw from the representation of both parties upon the development of an actual conflict of interest, unless one party consents, after full disclosure, to Attorney A's continued representation of the other party. Rule 5.1(c) and Rule 5.1(d).

Inquiry #3:

Is there any way, by advance agreement with Carrier C or otherwise, for Attorney A to ethically continue representing Victim B in the event that a conflict of interest arises?

Opinion #3:

Yes, provided the four conditions for a waiver of a future conflict of interest set forth in RPC 168 are met at the time that a conflict arises. *See* Rule 5.1(c).

RPC 171

April 15, 1994

Editor's Note: This opinion was originally published as RPC 171 (Revised).

Tape Recording Conversation with Opposing Lawyer

Opinion rules that it is not a violation of the Rules of Professional Conduct for a lawyer to tape record a conversation with an opposing lawyer without disclosure to the opposing lawyer.

Inquiry:

Is it unethical for an attorney to make a tape recording of a conversation with an opposing attorney regarding a pending case without disclosing to the opposing attorney that the conversation is being recorded?

Opinion:

No, it would not be a violation of the Rules of Professional Conduct. However, as a matter of professionalism, lawyers are encouraged to disclose to the other lawyer that a conversation is being tape recorded.

RPC 172

April 15, 1994

Representation of Insured on Compulsory Counterclaim

Opinion rules that an attorney retained by an insurance carrier to defend an insured has no ethical obligation to represent the insured on a compulsory counterclaim provided the attorney apprises the insured of the counterclaim in sufficient time for the insured to retain separate counsel.

Inquiry #1:

Motor vehicle liability insurance carrier hires Defense Counsel to represent its insured, A, who has been sued for motor vehicle negligence. There is a compulsory counterclaim which could be made on behalf of A. Is it ethical for Defense Counsel to answer the complaint, omit the compulsory counterclaim and advise A of the need to retain separate counsel at A's expense in order to prosecute the claim within the 30 day amendment period provided by Rule 15 of the Rules of Civil Procedure?

Opinion #1:

No. There are two separate aspects of the representation of A in this fact situation. One is the defense of A and the other is the representation of A on the counterclaim. The defense of A is governed by the insurance agreement, the Rules of Professional Conduct, and the ethics opinions adopted by the State

Bar. By paying premiums for insurance, A purchased indemnity coverage for liability claims and a legal defense. A did not contractually acquire a right to have a claim prosecuted on his or her behalf. That is a matter which is up to A to negotiate with counsel of A's choice. A may negotiate with Defense Counsel to represent A on the counterclaim and Defense Counsel may choose to represent A on the counterclaim if Defense Counsel reasonably foresees no conflict of interest. Defense Counsel is under no ethical obligation to assert a compulsory counterclaim on behalf of A. Having been retained to defend A, however, it is incumbent upon Defense Counsel to take reasonable steps to apprise A of the compulsory nature of the counterclaim prior to the filing of the answer to the complaint and in sufficient time for A to negotiate the prosecution of the counterclaim with Defense Counsel or for A to retain separate counsel to prosecute the counterclaim in concert with Defense Counsel's defense of the claim.

Inquiry #2:

May Defense Counsel fulfill his ethical obligations to A by drafting the counterclaim and including it in the answer on the condition that A sign the pleading as "*pro se* counterclaimant" and with the understanding that Defense Counsel will not represent A on the counterclaim?

Opinion #2:

Yes, if Defense Counsel does not wish to represent A on the counterclaim and A cannot find separate counsel to prosecute the counterclaim.

RPC 173

April 15, 1994

Advancing Funds to Client to Post Bond

Opinion rules that a lawyer who represents a client on a criminal charge may not lend the client the money necessary to post bond.

Inquiry:

Attorney A represents Client B who is charged with assault on a female. In light of G.S. §15A-541 and Rule 5.3(b) of the Rules of Professional Conduct, may Attorney A ethically lend Client B the sum necessary for Client B to post a cash bond?

Opinion:

No. Rule 5.3(b) prohibits a lawyer from advancing or guaranteeing financial assistance to his client while representing the client in connection with contemplated or pending litigation. Although the Rule contains an exception allowing a lawyer to advance the expenses of litigation provided the client remains ultimately liable for such expenses, lending a client the funds necessary to post a cash bond does not fall within this exception and is contrary to the policies prohibiting conflicts of interest and solicitation which underlie Rule 5.3(b). A lawyer who lends a client the funds to post a bond has a vested interest in seeing that the client is apprehended if he or she flees the jurisdiction. This creates a conflict of interest for the lawyer between his professional responsibilities to his client and his personal interests. Also, there is a strong likelihood that a lawyer could solicit clients by suggesting that he is willing to lend a criminal defendant bond money in order to solicit the defendant's criminal case.

Whether lending a client the funds to post a bond is a violation of G.S. §15A-541 is a question of law upon which the State Bar has no authority to rule.

RPC 174

April 15, 1994

Fees for the Collection of "Med-Pay"

Opinion rules that a legal fee for the collection of "med-pay" which is based upon the amount collected is unreasonable.

Inquiry:

Lawyer B charges $150.00 to collect up to $2000.00 due to a client under the medical payments provisions (or "med-pay" provisions) of the client's liability insurance policy. He charges $250.00 to collect a client's med-pay if the med-pay is $2000.00 or more. Is it ethical for Lawyer B to charge a sliding fee for the collection of med-pay?

Opinion:

No. RPC 35 ruled that a lawyer may not charge a contingent fee to collect med-pay because with most med-pay claims there is no risk that the insurance company will refuse payment and there is no dispute as to the amount due to the claimant. Therefore, such contingent fees are unreasonable, in violation of Rule 2.6(a), because "[t]he element of risk which is necessary to justify the typically elevated contingent fee is not present." Unless there exists a significant risk that a med-pay claim will not be paid, it is unreasonable for a lawyer to charge a fee for collecting med-pay which is not related to the cost to the lawyer of providing the service. A sliding fee for collecting med-pay claims is based upon the amount of the claim and not upon the cost to Lawyer B to provide the service. Such a fee structure is unreasonable in violation of Rule 2.6(a).

RPC 175

January 13, 1995

Editor's Note: This opinion was originally published as RPC 175 (Revised).

Reporting Child Abuse

Opinion rules that a lawyer may ethically exercise his or her discretion to decide whether to reveal confidential information concerning child abuse or neglect pursuant to a statutory requirement.

Inquiry #1:

RPC 120 was adopted by the Council of the State Bar on July 17, 1992. The opinion provides that a lawyer may, but need not necessarily, disclose confidential information concerning child abuse pursuant to a statutory requirement set forth in G.S. §7A-543 *et seq.* In 1993 the North Carolina General Assembly amended G.S. §7A-543 and G.S. §7A-551. G.S. §7A-543 now generally provides that as follows:

> ...any person or institution who has cause to suspect that any juvenile is abused, neglected, or dependent...or has died as a result of maltreatment shall report the case of that juvenile to the director of the Department of Social Services in the county where the juvenile resides or is found.

G.S. §7A-551 now generally provides as follows:

> ...[n]o privilege shall be grounds for any person or institution failing to report that a juvenile may have been abused, neglected or dependent, even if the knowledge or suspicion is acquired in an official professional capacity, except when the knowledge or suspicion is gained by an attorney from that attorney's client during representation only in the abuse, neglect or dependency case.

Does Rule 4 of the Rules of Professional Conduct require an attorney report his or her suspicion that a child is abused, neglected or dependent to the local Department of Social Services (DSS) if the information giving rise to the suspicion was gained during a professional relationship with a client, which is not for the purpose of representing the client in an abuse, neglect or dependency case, and the information would otherwise be considered confidential information under Rule 4?

Opinion #1:

No. Rule 4(b) prohibits a lawyer from revealing the confidential information of his or her client except as permitted under Rule 4(c). Rule 4(c) includes a number of circumstances under which a lawyer "may reveal" the confidential information of his or her client. Subsection (3) of Rule 4(c) allows a lawyer to reveal confidential information "when... required by law or court order."

The rule clearly places the decision regarding the disclosure of a client's confidential information within the lawyer's discretion. While that discretion should not be exercised lightly, particularly in the face of a statute compelling disclosure, a lawyer may in good faith conclude that he or she should not reveal confidential information where to do so would substantially undermine the purpose of the representation or substantially damage the interests of his or her client. See Rule 7.1(a)(3) (which prohibits actions by a lawyer which will intentionally "[p]rejudice or damage his client during the course of the professional relationship..."). For example, a lawyer may be unwilling to comply with the child abuse reporting statute because he or she believes that compliance would deprive a client charged with a crime of the constitutional right to effective assistance of counsel. Under such circumstances, where a lawyer reasonably and in good faith concludes that revealing the confidential information will substantially harm the interests of his or her client and, as a matter of professional responsibility, declines to report confidential client information regarding

suspected child abuse or neglect to DSS, the failure to report will not be deemed a violation of Rule 1.2(b) and (d) (respectively defining misconduct as committing a criminal act and engaging in conduct prejudicial to the administration of justice) or Rule 7.2(a)(3) (prohibiting a lawyer from concealing that which he is required by law to reveal). It is recognized that the ethical rules may not protect a lawyer from criminal prosecution for failure to comply with the reporting statute.

Inquiry #2:

Is it ethical for a lawyer to reveal confidential information of a client regarding suspected child abuse or neglect to DSS pursuant to the requirements of the child abuse reporting statute?

Opinion #2:

Yes, a lawyer may ethically report information gained during his or her professional relationship with a client to DSS in compliance with the statutory requirement even if to do so may result in substantial harm to the interests of the client. Rule 4(c)(3).

Note: The foregoing opinion is limited to the specific inquiries set out therein. It should not be read to stand for the general proposition that an attorney's good faith is a bar to a disciplinary proceeding based upon the attorney's violation of a statute.

RPC 176

July 21, 1994

Conflict of Interest Involving a Legal Assistant

Opinion rules that a lawyer who employs a paralegal is not disqualified from representing a party whose interests are adverse to that of a party represented by a lawyer for whom the paralegal previously worked.

Inquiry:

Attorney A had two full-time staff members: a receptionist/secretary and a paralegal/secretary ("Paralegal"). Paralegal's normal duties included working on personal injury actions and real estate matters. On occasion, Paralegal helped with domestic actions. While Paralegal was employed by Attorney A, Attorney A represented Client A in a domestic matter. Paralegal denies working on the case on a regular basis while she was employed by Attorney A. Paralegal also denies having any knowledge of the specific facts of the case. Attorney A contends that Paralegal was substantially involved in assisting in the representation of Client A and was privy to confidential information regarding Client A. It is clear that Paralegal had some exposure to the case while employed by Attorney A.

After the employment of Paralegal was terminated by Attorney A, Paralegal went to work for Attorney B in another law firm. Attorney B represents Client B in the same domestic action in which Attorney A represents Client A.

Attorney A has requested that Attorney B withdraw from the representation of Client B because of Paralegal's prior involvement in the action. Should Attorney B withdraw from the representation of Client B?

Opinion:

No, Attorney B may continue to represent Client B in the case and may continue to employ Paralegal. The imputed disqualification rules contained in Rule 5.11 of the Rules of Professional Conduct do not apply to nonlawyers. However, Attorney B must take extreme care to ensure that Paralegal is totally screened from participation in the case even if Paralegal's involvement in the case while employed by Attorney A was negligible. *See* RPC 74. This requirement is consistent with a lawyer's duty, pursuant to Rule 3.3(b), to make reasonable efforts to ensure that the conduct of a nonlawyer over whom the lawyer has direct supervisory authority is compatible with the professional obligations of the lawyer including the obligation to avoid conflicts of interest and to preserve the confidentiality of client information.

RPC 177

July 21, 1994

Representation of Insured, Insurer, and UIM Carrier

Opinion rules that an attorney may represent the insured, his liability insurer, and the same insurer relative to underinsured motorist coverage carried by the plaintiff if the insurer waives its subrogation rights against the insured and the plaintiff executes a covenant not to enforce judgment.

Inquiry #1:

Attorney A is retained by Insurance Company to represent Defendant M in an automobile negligence lawsuit under its policy with Defendant M which provides him with liability coverage. Attorney A makes an appearance in the lawsuit on behalf of Defendant M, files responsive pleadings and discovery, and otherwise actively defends Defendant M.

Insurance Company also provides underinsured motorist coverage for Plaintiff. Insurance Company tenders its liability coverage limits to Plaintiff pursuant to G.S. §20-279.21(b)(4) and waives all subrogation rights against Defendant M. In addition, Plaintiff agrees to execute a covenant not to enforce judgment against Defendant M. The lawsuit initiated by Plaintiff against Defendant M will continue so that Plaintiff can recover UIM proceeds from Insurance Company.

After tender of Insurance Company's liability limits, can Attorney A remain in the case as attorney for Insurance Company and protect Insurance Company's interests under its UIM coverage in the lawsuit, with Defendant M's consent, since Defendant M has no personal exposure?

Opinion #1:

Yes. Rule 5.1(b). RPC 154, also involving an automobile negligence case, addressed the question of whether a lawyer may represent both the defendant, under an insurance company's liability policy with the defendant, and the same insurance company under its UIM policy with the plaintiff. The opinion noted that the provisions of G.S. §20-279.21(b)(4) give certain subrogation or assignment rights to an UIM insurer against the owner, operator or maintainer of an underinsured vehicle. Therefore, RPC 154 held that an attorney representing both parties would have a disqualifying conflict of interest because the subrogation or assignment rights of the insurance company would cause the interests of the defendant and the insurance company under its UIM policy to be materially different and adverse. *See also*, RPC 110.

In the instant inquiry, Defendant M has no personal liability because Insurance Company has waived its right of subrogation against Defendant M, and Plaintiff has executed a covenant not to enforce judgment against Defendant M. The interests of Defendant M and Insurance Company are not, therefore, adverse, and Attorney A would not be likely to have his ability to represent both parties materially impaired in violation of Rule 5.1(b).

Inquiry #2:

If the answer to Inquiry #1 is affirmative, must a motion be filed and an order entered relieving Attorney A of his duty to defend Defendant M and substituting him as attorney of record for Insurance Company?

Opinion #2:

No opinion is given with regard to whether any changes in the nominal appearance of Attorney A in the lawsuit need to be made, or with regard to the procedural requirements under G.S. §20-279.21(b)(4) for making an appearance in the lawsuit on behalf of Insurance Company as the UIM insurer. However, if Insurance Company elects, pursuant to the provisions of G.S. §20-279.21, to appear in the action in its own name as the UIM insurer and to be released from further liability or obligation to participate in the defense of Defendant M, Attorney A must comply with the requirements of the statute with regard to apprising Defendant M "of the nature of the proceeding and [giving him] the right to select counsel of his own choice to appear in the action on his separate behalf." Attorney M must explain the nature of the proceedings to the extent reasonably necessary to permit Defendant M to make an informed decision with regard to individually retaining another lawyer to represent him or electing not to be represented in the lawsuit. RPC 156.

RPC 178

October 21, 1994

Editor's Note: This opinion was originally published as RPC 178 (Revised).

Release of Client's File

Opinion examines a lawyer's obligation to deliver the file to the client upon the termination of the representation when the lawyer represents multiple clients in a single matter.

Inquiry #1:

Attorney represented Client A on complicated litigation which resulted in

the settlement and voluntary dismissal of all claims. Numerous documents were filed with the court and exchanged between the adverse parties. Client A agreed to reimburse Attorney for all out-of-pocket expenses associated with the representation. After the settlement agreement was signed, Client A obtained new counsel who required Client A to sign a release requesting Client A's file from Attorney. The release provides that only authorized out-of-pocket expenses will be reimbursed. Client A then requested a copy of the entire file from Attorney but refused to authorize Attorney to incur any out-of-pocket expenses. Is Attorney ethically required to incur the expense of copying the seven cartons of papers which constitute the file when Client A agreed to pay for the out-of-pocket expenses associated with the representation?

Opinion #1:

Yes, if Attorney would like to keep a copy of the documents in the file for her own records. Rule 2.8(a)(2) of the Rules of Professional Conduct requires a lawyer who is withdrawing from a case to deliver to the client all papers and property to which the client is entitled. By requiring a withdrawing or dismissed lawyer to provide the client with all of his or her papers and property, Rule 2.8(a)(2) recognizes that the file belongs to the client. *See* CPR 3, CPR 315, CPR 322 and CPR 328.

CPR 3 explains that a lawyer must provide a former client with originals or copies of anything in the file which would be helpful to the new lawyer but that "[t]he discharged lawyer's notes made for his own future reference and study and similar things not representing a completed work product need not be turned over."

Inquiry #2:

If Attorney represented several other clients in the same matter in which she represented Client A, is Attorney required to incur the expense of copying the file for each of the several clients she represented in the litigation?

Opinion #2:

No. Attorney must only incur the expense for making one set of copies to keep as her own record of the file. However, if Attorney has represented multiple clients on the same matter, she may give the original file to the client that the other clients agree should receive the original file and the other clients may make their own arrangements to get a copy of the file. If the clients cannot agree among themselves as to which client should receive the original file, Attorney may give the file to the client that the majority of the clients designate as the person who should receive the file or she may retain the file until such time as she receives a written agreement from all of the clients or a court order indicating to whom she should give the original file.

Inquiry #3:

Attorney is still representing a majority of the clients on the particular matter and the original file is required for the representation of the remaining clients. If Client A decides to obtain new legal counsel, is Attorney required to incur the expense of copying the file for Client A?

Opinion #3:

No. She must give Client A a reasonable opportunity to make copies of the materials in the file but does not have to do so at her own expense. However, any original documents in the file that relate solely to Client A must be given to Client A. If those original documents are not given to Client A, Attorney must make a copy for Client A at Attorney's expense and, until the original is provided to Client A, Attorney must provide and pay for copies of the original document requested by Client A. *See* RPC 169.

Inquiry #4:

Who is entitled to retain the original documents procured, filed, or exchanged on behalf of all the clients?

Opinion #4:

See Opinion #2 above. If the clients cannot agree who should get custody of the file, Attorney must give each client a reasonable opportunity to copy the materials in the file at his or her own expense. Attorney may withhold the delivery of the original file to one of the clients until she receives a court order or written agreement of the clients indicating that the original file may be released to a designated individual.

Inquiry #5:

If Attorney delivered original documents, but not the entire file, to Client A during the course of the representation, has she fulfilled the requirement under Rule 2.8(a)(2) to deliver the file to the client so that she may charge Client A for additional copies of these original documents?

Opinion #5:

When Attorney delivered original documents to Client A during the course of the representation, she fulfilled the requirements of Rule 2.8(a)(2) with regard to the delivery of those original documents. *See* RPC 169. If Attorney kept copies of the original documents, Attorney may charge Client A for any additional copies of those documents which Attorney makes for Client A, but Attorney may not condition the delivery of these copies upon the payment of her bill for services. *See* RPC 169. However, to the extent that there are other documents in the file, either originals or copies, which were not previously provided to Client A, Attorney has not fulfilled the requirement under Rule 2.8(a)(2) to deliver the entire file to the client upon the conclusion of the representation. With regard to Attorney's duty to deliver the file when she has multiple clients, see Opinions #2, #3, and #4 above.

Inquiry #6:

If the original documents were timely filed with the court or delivered to a third party on behalf of Client A and/or the other clients, has Attorney fulfilled the requirement under Rule 2.8(a)(2) to deliver the file to the client so that she may charge Client A and/or the other clients for additional copies of these original documents?

Opinion #6:

No. *See* Opinion #5 above.

RPC 179

July 21, 1994

Settlement Agreement Restricting a Lawyer's Practice

Opinion rules that a lawyer may not offer or enter into a settlement agreement that contains a provision barring the lawyer who represents the settling party from representing other claimants against the opposing party.

Inquiry #1:

Attorney A and counsel represent several plaintiffs whose civil rights and constitutional rights were allegedly violated as a result of the conduct of defendant municipality and several of its employees. During the course of litigation and settlement negotiations, individual settlement offers are made by Attorney B and his counsel who represent the municipality and its employees.

Attorney B submits to Attorney A a settlement agreement and release that requires Attorney A and his counsel to join in the release and agree not to represent any potential claimants (other than those already represented by Attorney A and counsel) who may have also been damaged by the alleged conduct of the municipality. The settlement documents also contain provisions requiring confidentiality as to the terms and content of the settlement agreement and the sealing of the agreement by court order. Because the defendant is a municipality, in order to seal what would otherwise be public records, a court order will have to be entered pursuant to G.S. §132-1.3(b).

May Attorney A enter into such an agreement?

Opinion #1:

No. A lawyer may not be a party to a settlement agreement wherein he agrees to refrain from representing other potential plaintiffs in the future. To do so would be a violation of Rule 2.7(b) which prohibits a lawyer from entering into an agreement, in connection with the settlement of a controversy or suit, that restricts his right to practice law. Although public policy favors settlement, the policy that favors full access to legal assistance should prevail.

Nevertheless, participation in a settlement agreement conditioned upon maintaining the confidentiality of the terms of the settlement is not unethical. The amount and terms of any settlement which is not a matter of public record are the secrets of a client which may not be disclosed by a lawyer without the client's consent. If a client desires to enter into a settlement agreement requiring confidentiality, the lawyer must comply with the client's request that the information regarding the settlement be confidential. *See* Rule 4.

Inquiry #2:

May Attorney B offer such a settlement agreement?

Opinion #2:

No. A lawyer may not offer a settlement agreement that contains a restriction on a lawyer's right to practice law as a condition of the agreement. *See* Rule 2.7(b).

Inquiry #3:

What should Attorney A do when his client desires to accept the agreement?

Opinion #3:

Attorney A must advise his client that neither he nor Attorney B may ethically participate in an agreement restricting a lawyer's right to practice law.

Inquiry #4:

May Attorney A withdraw with the permission of the client so that the client may accept the monetary terms of the settlement?

Opinion #4:

Since the participation of both the plaintiff's attorney and the defendant's attorney in such an agreement is unethical, this inquiry is moot.

Inquiry #5:

May Attorney B settle with Attorney A's then former client after Attorney A withdraws?

Opinion #5:

See Opinion #4 above.

Inquiry #6:

May Attorney A and his client agree, as part of a settlement, not to be heard when Attorney B seeks, at an ex parte proceeding, to seal otherwise public records under G.S. §132-1.3(b), when Attorney A believes that there is no apparent basis in law for requesting the sealing other than preventing a class action or additional lawsuits?

Opinion #6:

It is not unethical for Attorney A to agree not to be heard when Attorney B attempts to show to the court that the requirements of the statute allowing the sealing of the record have been met. *See* G.S. §132-1.3(b). It is the responsibility of Attorney B to not advance claims that are unwarranted under existing law unless there is a good faith argument for an extension or modification of existing law. *See* Rule 7.2(a)(2).

RPC 180

July 21, 1994

Editor's Note: See 99 Formal Ethics Opinion 2 for additional guidance.

Communications with Opposing Party's Physicians

Opinion rules that a lawyer may not passively listen while the opposing party's nonparty treating physician comments on his or her treatment of the opposing party unless the opposing party consents.

Inquiry #1:

Attorney A is defense counsel in a personal injury case. When the case is set for trial, Attorney A subpoenas Plaintiff's treating physician ("Doctor") for trial. Doctor then contacts Attorney A to discuss the subpoena. Although Attorney A asks no questions regarding Plaintiff's medical treatment, Doctor begins to discuss Plaintiff's medical condition with Attorney A. May Attorney A passively listen while Doctor discusses Plaintiff's medical treatment, or does Attorney A have an affirmative duty to inform Doctor that he cannot participate in communications regarding the treatment of Plaintiff without Plaintiff's consent other than to arrange for Doctor's appearance at trial as a witness?

Opinion #1:

Attorney A may not participate, either passively or actively, in communications with Plaintiff's nonparty treating physician concerning the physician's treatment of Plaintiff unless Plaintiff consents. To do so is contrary to public policy and, therefore, unethical. *See Crist v. Moffatt,* 326 N.C. 326, 389 S.E.2d 41 (1990) and RPC 162. Attorney A must inform Doctor that he may not participate in such communications.

Inquiry #2:

After the case has been called for trial and Doctor has been subpoenaed as a witness for the defense, may Attorney A accept medical records in the mail directly from Doctor?

Opinion #2:

Yes.

RPC 181

July 21, 1994

Disqualifying Opposing Counsel by Instructing Client to Seek Consultation

Opinion rules that a lawyer may not seek to disqualify another lawyer from representing the opposing party by instructing a client to consult with the other lawyer about the subject matter of the representation when the client has no intention of retaining the other lawyer to represent him.

Inquiry #1:

Attorney A meets with Client for a consultation about a family law matter. During the consultation, Attorney A recommends that Client set up appointments with Attorney X and Attorney Y. Attorney A advises Client to discuss his domestic case with the two other lawyers but with no intention of retaining either lawyer to represent him. The sole purpose for consulting with Attorney X and Attorney Y is to create a conflict of interest so that neither Attorney X nor Attorney Y can represent Client's spouse in the domestic action. Is it ethical for Attorney A to give this advice to his client?

Opinion #1:

No. Rule 7.2(a)(1) prohibits a lawyer from taking action on behalf of his client "when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." Assisting a client in creating a conflict of interest in order to obstruct the opposing party's access to counsel of her choice is action that serves merely to harass the other party and is an impediment to the right of clients freely to choose counsel.

Inquiry #2:

Does it make a difference if Client has paid a retainer fee to Attorney A before receiving this advice?

Opinion #2:

No.

Inquiry #3:

Does it make a difference if Client, and not Attorney A, raises the issue by asking Attorney A whether he should consult with Attorney X and Attorney Y for the purpose of preventing his spouse from hiring either lawyer?

Opinion #3:

No. Whether the lawyer or the client first suggests this course of action, it is unethical for a lawyer to encourage his client to seek to disqualify certain lawyers from representing the opposing party.

RPC 182

October 21, 1994

Disclosure of Client's Death

Opinion rules that a lawyer is required to disclose to an adverse party with whom the lawyer is negotiating a settlement that the lawyer's client has died.

Inquiry #1:

Attorney is retained by Client to handle a slip-and-fall personal injury case of questionable liability. During the course of representation, but after Client has been treated by his doctor for injuries caused by the fall, Client dies of AIDS. Attorney continues handling the matter without informing the tortfeasor's insurance company of Client's death. Attorney's decision not to disclose the death to the insurance company is based on Attorney's belief that to do so would undermine Client's case. In addition, at least one of Client's heirs requested that Attorney not disclose the death of Client to the insurance company adjuster.

No lawsuit is ever filed, and no defense counsel is involved. Attorney negotiates a settlement with the insurance company and receives two settlement checks, both made out jointly to Attorney and the deceased Client. One check is issued under the insurance carrier's medical payments coverage, and the other

under its liability coverage. At no point during the course of Attorney's representation did the insurance adjuster question whether Client was still alive or inquire about Client's current condition. Attorney never made any representations to the adjuster as to Client's current condition.

May Attorney arrange for the appointment of an administrator and have the settlement checks endorsed and deposited into Attorney's trust account, pending a decision on Inquiry #2?

Opinion #1:

No.

Inquiry #2:

Is Attorney required to disclose Client's death to the tortfeasor's insurance company?

Opinion #2:

Yes. Rule 7.2(a)(4) prohibits a lawyer from making a false statement of law or fact in the representation of a client. In the personal injury practice area, all lawyer communications with insurance company officials are directed toward the contractual resolution of a client's claim, with the client being a party to a contract, a Release. If the client dies, the lawyer no longer has a client. Only when the lawyer is subsequently retained by the deceased client's personal representative does the lawyer have a client. The identity of the client must be disclosed to the insurance company officials. The lawyer may not negotiate with insurance company officials when the lawyer has no client. To fail to disclose the identity of the client or to negotiate without a client would be to communicate a false statement of fact.

Inquiry #3:

If the answer to Inquiry #2 is "yes," when must the disclosure be made?

Opinion #3:

The lawyer must disclose the death of the client to the insurance company before continuing negotiations.

Inquiry #4:

Do the same ethical issues apply to each check, in light of the fact that Client's death from AIDS could never impact settlement of the medical payments claim?

Opinion #4:

Yes. *See* Opinion #2 above.

Inquiry #5:

Would it make any difference if the tortfeasor or the tortfeasor's insurance company was represented by legal counsel?

Opinion #5:

No.

Inquiry #6:

Would it make any difference if Client was a minor?

Opinion #6:

No.

RPC 183

October 21, 1994

Role of Legal Assistant in Deposition

Opinion rules that a lawyer may not permit a legal assistant to examine or represent a witness at a deposition.

Inquiry #1:

Is it ethical for a lawyer to permit a legal assistant to examine a witness at a deposition?

Opinion #1:

No. Pursuant to Rule 3.3(b) of the Rules of Professional Conduct, a lawyer having direct supervisory authority over a nonlawyer employed by a law firm must make reasonable efforts to ensure that the nonlawyer's conduct is "compatible with the professional obligations of the lawyer." Although several ethics opinions have indicated that a legal assistant or paralegal may undertake to handle certain matters such as negotiating with a claims adjuster, the opinions have all required that the legal assistant be directly supervised by the lawyer. *See* RPC 70, RPC 139, and RPC 152. In RPC 70, it is noted that "[u]nder no circumstances should the legal assistant be permitted to exercise independent legal judgment...." In a deposition, a lawyer is required to exercise her independent legal judgment, experience, and skill from moment to moment as she formulates questions in response to the statements made by the witness, considers objections to be made to questions, and analyzes any privilege the witness may assert. Allowing a legal assistant to examine a witness at a deposition is aiding the unauthorized practice of law in violation of Rule 3.1(a), may cause substantial harm to the client's case, and is improper.

Inquiry #2:

Is it ethical for a lawyer to permit a legal assistant to represent a witness at a deposition who is being deposed by the opposing counsel?

Opinion #2:

No. *See* Opinion #1.

Inquiry #3:

Is it ethical for a lawyer to permit a legal assistant to represent a client who is being deposed by an opposing counsel if the legal assistant is carefully instructed in advance that his or her sole role is to ensure that the opposing counsel's examination does not go beyond specific subject matters agreed upon in advance by the lawyer and the opposing counsel?

Opinion #3:

No. *See* Opinion #1.

RPC 184

October 21, 1994

Communications with Physician Performing Autopsy

Opinion rules that a lawyer for an opposing party may communicate directly with the pathologist who performed an autopsy on the plaintiff's decedent without the consent of the personal representative for the decedent's estate.

Inquiry #1:

Attorney A represents Decedent's Estate in a wrongful death case arising out of medical malpractice. An autopsy was performed on the decedent by a pathologist immediately following the decedent's death upon the authorization of the decedent's next of kin. The autopsy was performed prior to the retention of Attorney A to represent the Decedent's Estate and prior to the filing of the lawsuit.

Attorney C represents the defendant doctor and his practice group. Attorney C would like to contact the pathologist who performed the autopsy without informing or obtaining the permission of Attorney A or the personal representative of Decedent's Estate in order to discuss the pathologist's findings and conclusions regarding the decedent's death. May a lawyer contact the pathologist who performed an autopsy on a decedent whose medical treatment while living is the subject matter of a wrongful death case without the consent of the lawyer for the decedent's estate or the personal representative of the estate?

Opinion #1:

Yes, unless otherwise prohibited by statute or case law. The public policy of protecting a patient's right to privacy regarding his or her medical treatment is furthered by the prohibition on communications with a plaintiff's nonparty treating physician if the communications are by means other than the recognized methods of discovery in a civil lawsuit. *See Crist v. Moffatt*, 326 N.C. 326, 389 S.E. 2d 41 (1990) and RPC 162. However, the public policy interest in protecting a patient's right to privacy about his or her medical treatment is not relevant to an autopsy performed after the patient's death by a physician who is not providing the decedent with medical treatment. *See Prince v. Duke University*, 326 N.C. 787 (1990).

Inquiry #2:

Does the answer to this question change if the decedent's autopsy was ordered by the medical examiner rather than her next of kin?

Opinion #2:

No. *See* Opinion #1 above.

RPC 185

October 21, 1994

Ownership of Stock in Title Insurance Agency

Opinion rules that a lawyer who owns any stock in a title insurance agency may not give title opinions to the title insurance company for which the title insurance agency issues policies.

Inquiry:

Attorney A has been invited to purchase shares of stock in a new North Carolina corporation to be called "Title Agency." Pursuant to a written contract, Title Agency will be an agent of Title Insurer for the purpose of issuing title policies and title commitments. Title Agency will do business in conformity with G.S. §58-27-5 and will comply with the prohibition on the unauthorized practice of law set forth in Chapter 84 of the General Statutes. Attorney A will give Title Insurer title opinions regarding transactions for which Attorney A acts as the closing lawyer. Attorney A is not an agent of Title Insurer and will not be an employee of Title Agency or a person holding a license pursuant to Chapter 58 of the General Statutes. Attorney A would like to acquire stock in Title Agency without violating the requirements of CPR 101 or engaging in any other unethical conduct. What percentage of the shares of stock of Title Agency may Attorney A acquire without violating the Rules of Professional Conduct?

Opinion:

CPR 101 held that it is unethical for a lawyer who owns a substantial interest, directly or indirectly, in a title insurance company, agency, or agent, who acts as a lawyer in a real estate transaction insured by such title insurance company or through such agency or agent, to receive any commission, fee, salary, dividend, or other compensation or benefit from the title insurance company, agency, or agent, regardless of whether the ownership interest is disclosed to the client for whom the services are performed.

CPR 101 was based on the Code of Professional Responsibility which has been supplanted by the Rules of Professional Conduct. Rule 5.1(b) now governs potential conflicts of interest between a lawyer's own interests and the representation of a client. The rule disqualifies a lawyer from representing a client if the representation of the client may be materially limited by the lawyer's own interests unless: 1) the lawyer reasonably believes that the representation will not be adversely affected; and 2) the client consents after full disclosure.

CPR 101 authorized a lawyer who owns an insubstantial interest in a title insurance agency to render title opinions to the title insurer and to receive compensation from the title insurance agency in the form of dividends or otherwise. Even an insubstantial interest in a title insurance agency, however, could materially impair the judgment of a closing lawyer. RPC 49 addresses a closing lawyer's duty to his or her client when the lawyer owns shares in a realty firm that will realize a commission upon the closing of the transaction. RPC 49 states that the conflict of interest is too great to be allowed even if the client wishes to consent. This conflict is also present when a title agency, and, therefore, indirectly the closing lawyer who owns an interest in the title agency, will receive compensation from the client as a result of the closing of the transaction. The lawyer's personal interest in having the title insurance agency receive its compensation could conflict with the lawyer's duty to close the transaction only if it is in the client's best interest.

This opinion does not prohibit a lawyer from owning stock in a publicly traded title insurance company.

RPC 186

April 14, 1995

Editor's Note: This opinion was originally published as RPC 186 (Revised).

Security Interest in Real Property Which is Subject of Domestic Litigation

Opinion rules that a lawyer who represents a client in a pending domestic action may take a promissory note secured by a deed of trust as payment for the lawyer's fee even though the deed of trust is on real property that is or may be the subject of the domestic action.

Inquiry #1:

Client in a domestic case is without financial means to pay the entire fee owed to her lawyer. Client offers to execute a deed of trust and promissory note in favor of the lawyer as payment for the lawyer's services. Generally speaking, in a domestic case may a lawyer take a note secured by a deed of trust against real property which is not the subject of the litigation for which the client is being represented?

Opinion #1:

Yes, a lawyer may take a promissory note secured by a deed of trust on real property as payment for services rendered provided that the lawyer does not acquire a proprietary interest in the subject matter of the litigation the lawyer is conducting for the client in violation of Rule of Professional Conduct 5.3(a) and further provided that the transaction is fair to the client. In evaluating the fairness of such a transaction, the client's sophistication, financial ability, and the ability of the client to pay the fee by other methods must be taken into consideration.

Inquiry #2:

Generally speaking, may a lawyer handling a domestic case obtain a note secured by a deed of trust on real property which is the subject of the litigation for which the client is being represented?

Opinion #2:

Yes, provided the transaction is fair to the client. Although Rule 5.3(a) prohibits a lawyer from acquiring a proprietary interest in the subject matter of the litigation the lawyer is conducting for the client, the acquisition of a deed of trust on real property is not a proprietary interest prohibited by the rule.

Inquiry #3:

If the answer to either Inquiry #1 or Inquiry #2 above is affirmative, under which of the following circumstances would a lawyer be allowed to accept a promissory note secured by a deed of trust for services rendered in a domestic action for divorce and equitable distribution?

Inquiry #3(a):

If the real property is marital property, may the attorney secure his or her fee with a promissory note secured by a deed of trust against the marital property?

Opinion #3(a):

Yes. *See* Opinion #2 above.

Inquiry #3(b):

Prior to the granting of an absolute divorce and judgment of equitable distribution, may a lawyer accept a promissory note secured by a deed of trust on property held by the client, and his or her spouse in a tenancy by the entirety?

Opinion #3(b):

Yes. *See* Opinion #2 above.

Inquiry #3(c):

After the granting of an absolute divorce but prior to the entry of a judgment of equitable distribution, may a lawyer accept a promissory note secured by a deed of trust on marital property as payment of the legal fee?

Opinion #3(c):

Yes. *See* Opinion #2 above.

Inquiry #3(d):

After the granting of an absolute divorce and the entry of a judgment of equitable distribution whereunder the real property was distributed to the client, may a lawyer accept a promissory note secured by a deed of trust on property that was formerly marital property as payment of the legal fee?

Opinion #3(d):

Yes. *See* Opinion #2 above.

Inquiry #3(e):

Would there be a different response to any of the inquiries posed above if the real property were not the marital property but was merely a parcel of real property owned by the litigants?

Opinion #3(e):

No.

Inquiry #4:

If the real property is titled solely in the name of the client and was acquired during the marriage, may the lawyer accept a promissory note secured by a deed of trust on the property as payment for the legal fees under any of the following circumstances:

Inquiry #4(a):

Prior to the granting of an absolute divorce and judgment of equitable distribution?

Opinion #4(a):

Yes. *See* Opinion #2 above.

Inquiry #4(b):

After the granting of an absolute divorce but prior to the entry of a judgment of equitable distribution?

Opinion #4(b):

Yes. *See* Opinion #2 above.

Inquiry #4(c):

After the granting of an absolute divorce and the entry of a judgment of equitable distribution?

Opinion #4(c):

Yes. *See* opinion #2 above.

Inquiry #5:

If the real property is titled solely in the name of the client and was acquired before the marriage or was acquired by bequest, devise, descent, or gift during the course of marriage, may the attorney accept a promissory note secured by a deed of trust on the property as payment of the legal fee under the following circumstances:

Inquiry #5(a):

Prior to the granting of an absolute divorce and judgment of equitable distribution?

Opinion #5(a):

Yes. *See* Opinion #2 above.

Inquiry #5(b):

After the granting of an absolute divorce but prior to the entry of a judgment of equitable distribution?

Opinion #5(b):

Yes. *See* Opinion #2 above.

Inquiry #5(c):

After the granting of an absolute divorce and the entry of a judgment of equitable distribution?

Opinion #5(c):

Yes. See Opinion #2 above.

Inquiry #6:

Does the attorney have an ethical obligation to file the client's *lis pendens* prior to the recordation of his deed of trust?

Opinion #6:

Yes.

Inquiry #7:

What effect does the filing of a notice of *lis pendens* by either party have on the lawyer's deed of trust?

Opinion #7:

It is outside the authority of the Ethics Committee to respond to a question that seeks an opinion about the law.

RPC 187

October 21, 1994

Proprietary Interest in Domestic Client's Support Payments

Opinion rules that a lawyer may not acquire a proprietary interest in the subject matter of domestic litigation by obtaining a client's authorization to instruct the clerk of superior court to forward the client's support payments to the lawyer to satisfy the client's legal fees.

Inquiry:

Attorney has a fee agreement that he would like to use with his clients. In the agreement, the client promises to pay Attorney a "nonrefundable retainer fee" which "shall become the sole property of Attorney." Pursuant to the agreement, the services of Attorney are to be charged at $125 per hour. The retainer will be applied against accrued legal fees until the retainer is exhausted. The excess amount will then be billed on a monthly basis. The agreement further provides that in the event the legal matter is settled or there is a reconciliation in a domestic action, Attorney shall keep the "retainer fee" unless Attorney withdraws from the representation of the client. In the event Attorney withdraws, the agreement provides that Attorney will be compensated for the actual time spent on the legal matter at Attorney's regular hourly rate and any portion of the "nonrefundable retainer fee" in excess of this amount shall be refunded to the client. The agreement also contains the following provision:

> In matters pertaining to alimony and/or child support, in the event of nonpayment of fees as provided in paragraph 5 herein, I hereby authorize Attorney to direct the clerk of superior court to forward all alimony and/or child support payments for my benefit to the offices of Attorney until such time as my bill is paid in full. I further authorize Attorney, or his agent, to endorse any alimony and/or child support checks so forwarded in my name such that said check(s) may be deposited in the bank trust account of Attorney. Attorney and I agree that he may withdraw and apply up to 50 percent of any such payments deposited in his trust account for application to any past due account balance, with the balance paid to me.

Are the provisions of the agreement in compliance with the Rules of Professional Conduct?

Opinion:

No. The provision of the agreement authorizing the clerk of court to pay the client's alimony and/or child support payments directly to Attorney in the event that the client's legal fees are unpaid violates Rule 5.3(a) of the Rules of Professional Conduct. This provision essentially gives Attorney a security interest in the client's child support and/or alimony payments which Attorney has been hired to pursue. Rule 5.3(a) prohibits a lawyer from acquiring a proprietary interest in the subject matter of the litigation he is conducting for a client except that he may (1) acquire a lien granted by law to secure his fee, or (2) contract with a client for a reasonable contingent fee in civil cases. The exception allowing a lawyer to secure a fee by asserting a lien granted by law does not apply in this situation because statutory liens do not arise by contractual agreement between a lawyer and a client. *See* Chapter 44A. The purpose of the prohibition on acquiring an interest in the subject matter of litigation is to prevent a lawyer from having a personal financial stake in the outcome of the case which may adversely affect the lawyer's professional judgment. In the instant case, Attorney's security interest in the future child support and/or alimony payments of his client may cloud his professional judgment with regard to the negotiation and resolution of the domestic dispute including the issue of the client's right to and the amount of child support and alimony.

With regard to the other provisions of the fee contract, lawyer may charge a client an advance fee against which future services will be billed and may pay the money to himself immediately if the client agrees the fee is earned immediately. *See* RPC 158. The agreement in the present inquiry should fully disclose to the client and the client should explicitly agree that the advance fee (which the agreement incorrectly describes as a "nonrefundable retainer," *see* RPC 50) will be paid to Attorney immediately and not held in Attorney's trust account for the possible refund of any excess balance at a later date. It should be noted that despite the provision of the agreement stating that the excess balance will be refunded only if Attorney withdraws, if a lawyer's services are terminated, any portion of the fee that is clearly excessive may be refundable to a client whether the fee is deposited in the trust account or the operating account. *See* RPC 158.

RPC 188

January 13, 1995

Editor's Note: This opinion was originally published as RPC 188 (Revised).

Receipt of Commission by Relative of Closing Lawyer

Opinion rules that a lawyer may close a real estate transaction brokered by the lawyer's spouse with the consent of the parties to the transaction.

Inquiry #1:

Lawyer practices law with XYZ Law Firm. His wife, W, is a real estate agent with Real Estate Agency located in a neighboring city. From time to time, members of XYZ Law Firm have been asked to represent one of the parties to a real estate transaction brokered by W or another realtor with Real Estate Agency and from which W or another realtor with Real Estate Agency will receive a commission. If all parties to the closing are made aware of the marital relationship between Lawyer and W, may Lawyer represent any party to a real estate transaction brokered by W?

Opinion #1:

Yes. There is no conflict of interest if a lawyer represents only the seller in a real estate transaction brokered by his wife because the interests of the seller and the real estate broker are the same: both want to ensure that the transaction is consummated promptly. With regard to his representation of the buyer and/or the lender, who are, respectively, interested in assuring that the buyer gets the property he bargained for and the loan to the buyer is properly documented and secured, Lawyer must first consider whether the exercise of his independent, professional judgment on behalf of his client (or clients) will be "materially impaired" by his desire to advance the interests of his spouse who will receive a valuable commission only if the transaction goes forward. Rule 5.1(b); *see also* RPC 88. If Lawyer reasonably believes his judgment will not be adversely affected by his relationship with his wife and all clients consent to Lawyer's participation after full disclosure of this relationship and the risks involved, Lawyer may proceed with the representation. On the other hand, if Lawyer concludes that his judgment on behalf of the buyer and/or the lender will be adversely affected by his desire to financially benefit his wife, it would be a disqualifying conflict of interest.

Inquiry #2:

Are the other lawyers in XYZ Law Firm disqualified from representing a party to a real estate transaction brokered by W?

Opinion #2:

No, if Lawyer could reasonably conclude that his judgment on behalf of the client would not be adversely affected under the circumstances and the client consents after full disclosure, then no conflict would be imputed to the other lawyers in XYZ Law Firm. *See* Rule 5.1(b) and Rule 5.11(a).

Inquiry #3:

May Lawyer represent the parties to a real estate closing if the transaction was brokered by a real estate agent affiliated with Real Estate Agency other than W?

Opinion #3:

Yes. *See* Opinion #1 above. If Lawyer concludes that his independent professional judgment on behalf of the buyer or lender might be affected by the desire to benefit Real Estate Agency, with whom W is affiliated, or her fellow real estate agent at Real Estate Agency, it would be a disqualifying conflict of interest.

Inquiry #4:

Real Estate Developer has been a client of XYZ Law Firm for several years and insists that the deeds for lots in the subdivisions it is developing be prepared by a member of XYZ Law Firm in order to ensure accuracy and uniformity. If W brokers a transaction for a lot in one of Developer's subdivisions, may Lawyer or another lawyer with XYZ Law Firm prepare the deed and sale papers for Developer?

Opinion #4:

Yes. *See* Opinion #1 above.

Inquiry #5:

In a real estate transaction under contract, but not closed, W acted as realtor for the seller. Before closing, legal problems relating to the land arose which required additional legal services beyond those usually required for a standard real estate closing. May Lawyer or another lawyer with XYZ Law Firm represent the seller on this matter?

Opinion #5:

Yes. *See* Opinion #1 above.

Inquiry #6:

W is also a paralegal and she sometimes assists her husband by performing his clerical work at her desk at the offices of Real Estate Agency. Lawyer represents Client on her claim for damages arising out of a traffic collision with another car. Ms. S, the driver/owner of the other automobile involved in the accident, works as a real estate agent with W at Real Estate Agency. Lawyer has not discussed Client's claim with Ms. S and is negotiating only with the insurance carrier. Lawyer advised Client that Ms. S works with W and offered the names of other lawyers in the area if Client chose to get a different lawyer. Does Lawyer need to do anything else to avoid a conflict of interest?

Opinion #6:

Yes. Although Lawyer could reasonably conclude that his representation of Client will not be impaired by the relationship between Ms. S and his wife, he has a duty to ensure that the confidential information of Client is not accidentally revealed to Ms. S. *See* Rule 4(b)(1). If W is working on any of the documents that relate to Client's claim at her desk in the offices of Real Estate Agency, there is a substantial risk that confidential information of Client may be revealed to Ms. S.

RPC 189

October 21, 1994

Communications by DA's Staff with Unrepresented Traffic Violators

Opinion rules that the members of a district attorney's staff may not give legal advice about pleas to lesser included infractions to an unrepresented person charged with a traffic infraction.

Inquiry:

In County X, when a citizen receives a traffic citation, he or she is often told by the police officer or state trooper making the stop to call the district attorney's office directly in order to get the charge reduced or to get a prayer for judgment continued. If the citizen subsequently calls or goes to the district attorney's office, he or she will speak with an assistant district attorney, a victim/witness coordinator, or a secretary. The member of the district attorney's staff counsels the citizen about pleas to lesser infractions available to the citizen which will reduce insurance points and save the citizen money on his or her insurance premiums. If relevant, the staff member might also give the citizen advice about pleas that would prevent a forfeiture of the citizen's driver's license. Following the discussion, a Form CR-202, from the Administrative Office of the Courts, entering the citizen's guilty plea to a lesser included infraction, is prepared for the citizen. Is the practice of advising citizens as to their plea options allowed under the Rules of Professional Conduct?

Opinion:

No. An assistant district attorney or nonlawyer member of the district attorney's staff who is supervised by the district attorney may not give legal advice to a citizen charged with a traffic infraction who is not represented by a lawyer. The district attorney and his or her legal staff represent the State of North Carolina when they negotiate a traffic citation against a citizen. Where the interests of an unrepresented person and the interests of a lawyer's client are in conflict, Rule 7.4(b) and Rule 7.4(c) prohibit the lawyer from (1) giving advice to the unrepresented person other than the advice to seek counsel and (2) implying that the lawyer is disinterested. If the lawyer knows or should know that the unrepresented person misunderstands the lawyer's role, the lawyer must make reasonable efforts to correct the misunderstanding. Rule 7.4(c). In addition, Rule 7.3(b) imposes upon a prosecutor a special duty to advise unrepresented individuals who are charged in a criminal matter of the individual's right to obtain counsel. The district attorney and the other lawyers in his or her office must make reasonable efforts to ensure that the conduct of nonlawyer members of the staff is compatible with the professional obligations of the lawyers not to give legal advice to an unrepresented citizen charged with an infraction. *See* Rule 3.3(b). The foregoing opinion does not prohibit a member of a district attorney's staff from responding to questions from an unrepresented citizen regarding the pleas the district attorney's office would be willing to approve.

RPC 190

October 21, 1994

Billing for Reused Work Product

Opinion rules that a lawyer who has agreed to bill a client on the basis of hours expended may not bill the client on the same basis for reused work product.

Inquiry #1:

A lawyer with Law Firm researched a legal issue for Client A. Client A was billed for the work by Law Firm and paid the bill. Client B is also a client of Law Firm. Client B's legal matters are totally unrelated to those of Client A. However, the legal research which was prepared for Client A is relevant to Client B's legal matter and if Law Firm had not previously researched the particular legal issue and preserved the prior research, it would be necessary to research the issue again for Client B. Client B and Law Firm agreed that Client B would be billed at an hourly rate for each hour expended by one of Law Firm's lawyers doing work on Client B's behalf. May the research originally prepared for Client A be reused and Client B billed for the research?

Opinion #1:

No. A lawyer who has agreed to bill a client on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than was actually expended on the client's behalf.

The comment to Rule 2.6 of the Rule of Professional Conduct, the rule that regulates legal fees, states, "[o]nce a fee contract has been reached between attorney and client, the attorney has an ethical obligation to fulfill the contract and represent the client's best interest regardless of whether he has struck an unfavorable bargain." A lawyer also has a duty to deal honestly with clients. *See* Rule 1.2(c). Implicit in an agreement with a client to bill at an hourly rate for hours expended on the client's behalf is the understanding that for each hour of work billed to the client, an hour's worth of work was actually performed. If a lawyer who has agreed to accept hourly compensation for her work subsequently bills the client for reused work product, the lawyer would be engaging in dishonest conduct in violation of Rule 1.2(c).

However, the lawyer may bill at an hourly rate for the time expended tailoring old work product to the needs of a new client, and the lawyer is also free, with full disclosure, to suggest to a client that additional compensation would be appropriate because the lawyer was able to reuse prior work product for the client's benefit. Moreover, it is not unethical to charge for the value of reused work product if the original fee agreement with the client or any renegotiated fee agreement includes the express understanding that the client will be charged a reasonable fee, which is not based upon hourly compensation, for the reused work product.

Inquiry #2:

If the answer to Inquiry #1 is affirmative, may Law Firm charge Client B at the same rate that it charged Client A for the service?

Opinion #2:

No. *See* Opinion #1 above.

RPC 191

October 20, 1995

Revised January 24, 1997

Editor's Note: RPC 191 originally became a formal opinion of the State Bar on October 20, 1995. The opinion sets forth the duty of a closing lawyer to disburse from the trust account only in reliance upon the deposit of specified negotiable instruments which have a low risk of noncollectibility. On June 21, 1996, the North Carolina General Assembly ratified the Good Funds Settlement Act, G.S. Chapter 45A, which became effective October 1, 1996. The act sets forth the duty of a settlement agent for a residential real estate closing to disburse settlement proceeds from a trust or escrow account only in reliance upon the deposit of specified negotiable instruments. There was some inconsistency between the list of negotiable instruments against which disbursement was permitted in the Act and a similar list in RPC 191. To correct this, RPC 191was revised to reference the list of acceptable negotiable instruments found in the Act.

Disbursements Upon Deposit of Funds Provisionally Credited to Trust Account

Opinion rules that a lawyer may make disbursements from his or her trust account in reliance upon the deposit of funds provisionally credited to the account if the funds are deposited in the form of cash, wired funds, or by specified instruments which, although they are not irrevocably credited to the account upon deposit, are generally regarded as reliable.

Introduction:

In the wake of the financial failure of an out-of-state mortgage lender, the State Bar received numerous requests to reexamine prior ethics opinions CPR 358 and RPC 86 which permitted a lawyer to issue trust account checks against funds which, although uncollected, were provisionally credited to the lawyer's trust account by the financial institution with which the trust account was maintained. RPC 86 cautioned that the closing lawyer should disburse against provisionally credited funds only when the lawyer reasonably believed that the underlying deposited instrument was virtually certain to be honored when presented for collection. Nevertheless, lawyers did accept, deposit, and disburse against the residential loan proceeds checks of the out-of-state mortgage lender that failed. Some of these checks were ultimately dishonored and charged back against the trust accounts of the closing lawyers. In the meantime, some trust account checks issued for the closings were presented for collection and paid, resulting in the use of funds deposited by other clients to pay the closing checks presented for payment.

Inquiry:

In the typical residential real estate closing, the lending institution that finances the purchase of the property delivers the loan proceeds to the closing lawyer in the form of a check drawn upon a financial institution which may or may not be located in North Carolina. Loan proceeds are seldom delivered to the closing lawyer in the form of wired funds. Similarly, the real estate agent sometimes delivers the earnest money to the closing lawyer in the form of a check drawn on his or her trust account and the buyer sometimes delivers a personal check to the closing lawyer to cover the difference between the loan amount and the buyer's obligations. May a closing lawyer deposit such checks in his or her trust account and, if the depository bank will provisionally credit the lawyer's trust account, immediately disburse against the items before they have been collected?

Opinion:

Yes, but only upon the conditions set forth in this opinion.

A lawyer (1) may disburse funds from a trust account only in reliance upon the deposit of a financial instrument specified in the Good Funds Settlement Act, G.S. Chap. 45A (the Act), which became effective on October 1, 1996, and the securing of provisional credit for the deposited item, and (2) as an affirmative duty, must immediately act to protect the property of the lawyer's other clients by personally paying the amount of any failed deposit or securing or arranging payment from other sources upon learning that a deposited instrument has been dishonored. It shall be unethical for a lawyer to disburse funds from a trust account in reliance upon the deposit of a financial instrument that is not specified in the Act, regardless of whether the item is ultimately honored or dishonored.

In reliance on CPR 358 and RPC 86, many closing lawyers deposit the checks from the lender, the real estate agent, and the buyer into their trust accounts, receive provisional credit for the items from the depository bank and immediately disburse funds from their trust accounts in accordance with the schedule of receipts and disbursements prepared for the closing. There is typically some delay, generally three to four days but in some instances as much as fifteen days, between the time of the deposit of the checks of the lender, the buyer, and the real estate agent into the lawyer's trust account and the time when the funds are irrevocably credited to the lawyer's trust account by the depository institution. Because of the time lag between the deposit and the collection of the checks, the closing lawyer runs the risk that a check may be ultimately dishonored and charged back against the trust account of the closing lawyer, resulting in the use of the funds of other clients on deposit in the trust account to satisfy the disbursement checks from the closing.

A lawyer who receives funds that belong to a client assumes the responsibilities of a fiduciary to safeguard those funds and to preserve the identity of the funds by depositing the funds into a designated trust account. Rule 10.1 of

the Rules of Professional Conduct. It is a lawyer's fiduciary obligation to ensure that the funds of a particular client are used only to satisfy the obligations of that client and are not used to satisfy the claims of the lawyer's creditors. Rule 10.1 and comment. Furthermore, Rule 10.2 of the Rules of Professional Conduct requires a lawyer to maintain complete records of all funds or other property of a client received by the lawyer and to render to the client appropriate accountings of the receipt and disbursement of any of the client's funds or property held by the lawyer. Rule 10.2(e) recognizes a lawyer's obligation to pay promptly or deliver to the client, or to a third person as directed by the client, the funds in the possession of the lawyer to which the client is entitled. Strictly interpreted, these rules would appear to require a lawyer not to disburse upon items deposited in his or her trust account until the depository bank has irrevocably credited the items to the account.

Requiring a closing lawyer to postpone disbursement until all items have been credited to the lawyer's trust account would result in inconvenience, delay, and could have an adverse effect on the economy. Nevertheless, there is some risk that certain instruments, such as ordinary commercial checks, may be uncollectible in any given transaction. Conversely, there are financial instruments that are generally regarded as extremely reliable. In fact, other state bars that have considered the issue have held that there are certain financial instruments for which the risk of noncollectibility is so slight as to make it unnecessary to prohibit a closing lawyer from disbursing immediately against such items before they are collected. *See* Virginia State Bar Legal Ethics Opinion 183 and Rule 5-1.1(g) of the Rules Regulating the Florida Bar. Similarly, the North Carolina Good Funds Settlement Act permits a "settlement agent," or person responsible for conducting the settlement and disbursement of the proceeds for a residential real estate closing, to disburse against uncollected funds but only if the deposited instrument is in one of the forms specified in the Act.

Notwithstanding the fact that some of the forms of funds designated in the Act are not irrevocably credited to the lawyer's trust account at the time of deposit, the risk of noncollectibility is so slight that a lawyer's disbursement of funds from a trust account in reliance upon the deposit into the account of provisionally credited funds in these forms shall not be considered unethical. However, a closing lawyer should never disburse against any provisionally credited funds unless he or she reasonably believes that the underlying deposited instrument is virtually certain to be honored when presented for collection. A lawyer may immediately disburse against collected funds, such as cash or wired funds, and may immediately make disbursements from his or her trust account in reliance upon provisional credit extended by the depository institution for funds deposited into the trust account in one or more of the forms set forth in G.S. §45A-4.

The disbursement of funds from a trust account by a lawyer in reliance upon provisional credit extended upon the deposit of an item into the trust account which does not take one of the forms prescribed in the Act constitutes professional misconduct, regardless of whether the item is ultimately honored or dishonored. However, a lawyer who disburses in reliance upon provisional credit extended upon the deposit of an item prescribed in the Act shall not be guilty of professional misconduct if that lawyer, upon learning that the item has been dishonored, immediately acts to protect the property of the lawyer's other clients by personally paying the amount of any failed deposit or securing or arranging payment from sources available to the lawyer other than trust account funds of other clients. An attorney should take care not to disburse against uncollected funds in situations where the attorney's assets or credit would be insufficient to fund the trust account checks in the event that a provisionally credited item is dishonored.

To the extent that CPR 358 and RPC 86 are inconsistent with this opinion, they are overruled. However, there are provisions in both opinions that remain operative. Specifically, the provision of CPR 358 that prohibits a lawyer from disbursing against the "float" in the trust account during the time lag between the deposit of the checks of the lender, the buyer, and the real estate agent and the time when these items are irrevocably credited to the account unless provisional credit for the items is extended by the depository institution remains in effect. If provisional credit is not extended by the depository institution, the disbursing lawyer is using the funds of other clients to cover the closing disbursements until the deposited items are collected in violation of Rule 10.1.

It should be emphasized that this opinion shall apply to any disbursements from the trust account against items which are not irrevocably credited to the account upon deposit, whether such disbursements are for the purpose of closing a real estate transaction or for the purpose of concluding some other transaction or matter.

RPC 192

January 13, 1995

Use of Information Obtained from Illegal Tape Recording

Opinion rules that a lawyer may not listen to an illegal tape recording made by his client nor may he use the information on the illegal tape recording to advance his client's case.

Inquiry #1:

Attorney represents Client W in a contested domestic matter involving allegations of adultery. Client W, without the knowledge or consent of Attorney, illegally tape records a conversation between Client W's Spouse and Spouse's paramour. Attorney advises Client W that tape recording the conversation was illegal and should not be repeated. The tape recording is inadmissible in court but may be admitted for purposes of impeaching Spouse and his paramour. May Attorney ethically listen to the illegal tape recording in order to be aware of its content in the event Spouse makes a statement in court that can be impeached with the tape recording?

Opinion #1:

No. The tape recording is the fruit of Client W's illegal conduct. If Attorney listens to the tape recording in order to use it in Client W's representation, he would be enabling Client W to benefit from her illegal conduct. This would be prejudicial to the administration of justice in violation of Rule 1.2(d). *See also* Rule 7.2(a)(8). Attention is directed to the Federal Wiretap Act, 18 U.S.C. Section 2510, *et seq.*, particularly Sections 2511 and 2520, regarding criminal penalties for endeavoring to use or using the contents of an illegal wire communication.

Inquiry #2:

If Attorney may listen to the tape recording, may he use the information obtained from the tape recording to gather additional evidence?

Opinion #2:

No. *See* opinion #1.

Inquiry #3:

If Attorney may listen to the tape recording, may he use the information acquired from the tape recording to form questions to be asked to Spouse and Spouse's paramour at the trial?

Opinion #3:

No. *See* opinion #1.

RPC 193

January 13, 1995

Communications with Uninsured Motorist

Opinion rules that the attorney for the plaintiffs in a personal injury action arising out of a motor vehicle accident may interview the unrepresented defendant even though the uninsured motorist insurer, which has elected to defend the claim in the name of the defendant, is represented by an attorney in the matter.

Inquiry #1:

Attorney A represents Plaintiffs in a civil action instituted against Defendant for damages arising out of a motor vehicle accident. Defendant has no motor vehicle insurance and is not represented by a lawyer. Attorney B represents the uninsured motorist insurer ("Insurer") which is defending the claim in the name of the defendant without being named as a party pursuant to G.S. §279.21(b)(3)a. May Attorney A speak to Defendant without Attorney B's knowledge or consent?

Opinion #1:

Yes. Rule 7.4(a) of the Rules of Professional Conduct only prohibits communication with a person known to be represented by counsel in regard to the matter in question. Although G.S. §20-279.21(b)(3)a. allows an insurer to

defend in the name of an uninsured motorist, the attorney for the insurer does not represent that individual. For that reason, Attorney A need not obtain the consent of Attorney B in order to interview Defendant. However, in dealing with Defendant, who is unrepresented in this matter, Attorney A must comply with the requirements of Rule 7.4(b) and (c) which prohibit a lawyer from giving advice to an adverse party who is not represented by a lawyer, other than the advice to secure counsel, and also prohibits such a lawyer from stating or implying that he or she is disinterested.

Inquiry #2:

There is motor vehicle insurance covering the vehicle driven by Defendant in the accident but the limits of liability are inadequate to compensate Plaintiffs. The motor vehicle insurer providing primary liability coverage on the underinsured vehicle driven by Defendant pays the limits of liability and, upon application to the court pursuant to G.S. §20-279.21(b)(4), is released from further liability and the obligation to provide a defense. Defendant is therefore unrepresented. The underinsured motorist insurer (represented by Attorney B) is defending the action in the name of Defendant pursuant to G.S. §20-279.21(b)(4). May Attorney A communicate with Defendant without Attorney B's knowledge or consent if Plaintiffs release Defendant from personal liability?

Opinion #2:

Yes. *See* opinion #1.

RPC 194

January 13, 1995

Communications with Unrepresented Prospective Defendant

Opinion rules that in a letter to an unrepresented prospective defendant in a personal injury action, the plaintiff's lawyer may not give legal advice nor may he create the impression that he is concerned about or protecting the interests of the unrepresented prospective defendant.

Inquiry:

Plaintiff and Defendant were involved in an automobile accident. Plaintiff retained Attorney to represent her. Attorney attempted to negotiate a settlement with Defendant's liability insurance carrier without success. Attorney decided to file suit. Prior to filing the complaint and serving the complaint on Defendant, Attorney wants to send Defendant, who is unrepresented, a letter. The letter will inform Defendant that Attorney represents Plaintiff in connection with the accident and that Attorney attempted to settle the case with the carrier. The letter will include the following statement:

> Such a settlement would avoid litigation and would avoid even the possibility that you might have personal exposure for payment of part of a judgment, should you have insufficient liability insurance to cover a judgment.

The letter will also indicate that the insurance carrier either failed to negotiate or was unwilling to pay what Attorney believed to be a fair settlement and that "this means we must sue you on behalf of our client." The letter will advise Defendant to contact his insurance adjuster upon receiving the suit papers. The letter will then state the following:

> Please understand that nothing personal is intended by this action. It has become necessary because we have been unable to settle the case with your insurance carrier.

The letter will recommend that Defendant consult a lawyer of his own choosing if Defendant has only minimum liability insurance coverage. The letter will conclude with the following statement:

> Although the insurance company will hire a lawyer to defend this claim, his or her responsibility will be divided between you and the insurance company. Sometimes, your interests and that of the insurance company are not the same.

Will the content of this letter violate the Rules of Professional Conduct?

Opinion:

Yes. Rule 7.4(b) prohibits a lawyer from giving advice to a prospective opposing party who is not represented by a lawyer, other than the advice to secure counsel. In the letter, the advice to secure counsel is given not in an attempt by Attorney to avoid a conflict of interest on his own part but in the context of giving Defendant legal advice about a possible conflict of interest on the part of any lawyer who may be retained by the insurance carrier to defend Defendant. The letter also gives the unrepresented Defendant advice about the effect of a settlement on his personal liability.

More problematic is the general tenor of the letter which, through numerous statements such as "nothing personal is intended by this action," implies that Attorney is not only disinterested but he is actually concerned about and protecting the interests of Defendant. This is a clear violation of Rule 7.4(c) which states

> ...in dealing on behalf of a client with a person who is not represented by counsel, [a lawyer shall not] 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.

RPC 195

January 13, 1995

Disclosure of Confidential Information of Personal Representative of an Estate

Opinion rules that the attorney who formerly represented an estate may divulge confidential information relating to the representation of the estate to the substitute personal representative of the estate.

Inquiry #1:

Attorney A was consulted by Widow after her husband's death in an automobile accident. At the time of the consultation, Widow had not qualified as personal representative of her husband's estate. Attorney A advised Widow about the handling of her husband's estate, the estate's possible liability to another person injured in the automobile accident that killed her husband, and how the liability of the estate might affect her and her children's inheritance. Widow qualified as personal representative of the estate and commenced the administration of the estate without the assistance of Attorney A. Before the time for filing claims against the estate expired and before the person injured in the accident filed a claim against the estate, Widow disbursed most of the assets of the estate to herself and her children. Ultimately, Widow was removed as personal representative and Attorney B was appointed in her place. Attorney B is preparing a suit against Widow and the children in which he will seek to restore the assets of the estate. He would like to interview Attorney A about the substance of any consultations Attorney A had with Widow and any of the heirs regarding her duties as personal representative of her husband's estate. Attorney B would also like to see Attorney A's file for Widow. Does Attorney A have a duty of confidentiality to Widow that prohibits him from opening his file to Attorney B and being questioned by Attorney B about the advice he gave Widow with regard to the administration of the estate?

Opinion #1:

Yes. At the time of her consultation with Attorney A, Widow had not qualified as personal representative. Therefore, Attorney A was not representing the estate or the personal representative in her official capacity. Any disclosure by Attorney A of information gained during his professional relationship with Widow which would result in embarrassment or harm to Widow would be a violation of Attorney A's duty to preserve the information of his client. Rule 4(a).

Inquiry #2:

Would the answer to inquiry #1 be different if Widow sought the legal advice of Attorney A in her official capacity as personal representative of her husband's estate?

Opinion #2:

Yes. RPC 137 states that "[i]n accepting employment in regard to an estate, an attorney undertakes to represent the personal representative in his or her official capacity and the estate as an entity." If Attorney A was representing Widow in her official capacity as the personal representative of the estate, Attorney B, as the substitute personal representative, may consent to the release of the file by Attorney A and the divulging of confidential communications between Attorney A and Widow. When a lawyer represents a personal representative of an estate in his or her official capacity, the duty of confidentiality

is owed to the personal representative acting in his or her official capacity and to the estate itself. Whomever is serving as personal representative of the estate, including a substitute personal representative, may consent to the disclosure of confidential information relating to the representation of the estate and the personal representative.

Inquiry #3:

If Attorney A gave legal advice to Widow both personally, prior to her appointment as personal representative, and, subsequently, as the personal representative of the estate, would Attorney A have a duty of confidentiality prohibiting him from opening the estate file to Attorney B and prohibiting him from divulging his communications with Widow in her capacity as personal representative of the estate?

Opinion #3:

No. Attorney A may open the estate file to Attorney B and may divulge to Attorney B the substance of his communications with Widow when he was representing Widow in her capacity as personal representative. However, information obtained from Widow during the time that Attorney A represented her in her personal capacity would be subject to the duty of confidentiality. *See* opinion #2.

RPC 196

January 13, 1995

Recovering Legal Fees from Opposing Party

Opinion rules that a law firm may not charge a clearly excessive fee for legal representation even if the legal fee may be recovered from an opposing party.

Inquiry:

Law Firm has considerable experience in the practice of community association and planned community law. Over time, Law Firm has established certain fees for collection activities provided to its association clients. These collection activities include the prosecution of liens, foreclosures, and bankruptcy proceedings. Law Firm has determined that the fees it charges for these collection activities are reasonable based upon the time and labor required; the difficulty of the questions involved; the skill required to perform the legal service; the experience, reputation, and ability of the lawyers providing the services; and the customary fee for like work in the same locality. Where possible and permitted by law, Law Firm recovers attorney's fees and expenses incurred in connection with these collection activities from the responsible debtor. All fees not recovered are paid by the client association that retained Law Firm to pursue the action.

Manager of Association X has requested that Law Firm agree to substantially increase the legal fees it charges to debtors from whom fees are recovered and to agree not to bill Association X on cases where fees are not recovered from the debtor. Association X would continue to pay expenses incurred by Law Firm in connection with the collection activity. No part of the monies recovered by Law Firm for Association X would be paid to Law Firm as a contingent fee. Is this fee arrangement ethical?

Opinion:

No. Essentially, the fee arrangement requires Law Firm to offset the losses it may realize on cases where legal fees cannot be collected from the debtor by inflating fees in the cases where it is able to recover fees from the debtor. Rule 2.6(a) prohibits a lawyer from charging or collecting a clearly excessive fee. Subsection (b) of Rule 2.6 sets forth certain factors to be taken into consideration in determining the reasonableness of a fee including, but not limited to, the following: (1) the time and labor required and the skill involved; (2) whether the acceptance of particular employment will preclude other employment; (3) fees customarily charged in the same locality; (4) the results obtained; (5) time limitations; and (6) whether the fee is fixed or contingent. If Law Firm collects more than the fee that it has already determined to be reasonable for the services rendered to Association X after taking into account the factors set forth in Rule 2.6(b), Law Firm would be charging and collecting an unethical excessive fee whether the fee is collected from Association X or an opposing party. In addition, if Law Firm inflates its fee in a request to a court and/or a demand to a debtor for recovery of legal fees, Law Firm would be engaging in misrepresentation of the actual fees incurred for that particular collection action in violation of Rule 1.2(c) which prohibits a lawyer from engaging in conduct involving dishonesty, deceit, or misrepresentation.

RPC 197

January 13, 1995

Prosecutor's Duty to Notify Appropriate Persons of Dismissal of Criminal Charges

Opinion rules that a prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.

Inquiry #1:

Defendant is being held in pretrial detention because he is unable to make bond. He is represented by Defense Lawyer. Prosecutor files a notice of voluntary dismissal of all charges pending against Defendant, pursuant to G.S. §15A-931, without placing the case on a published trial calendar. Prosecutor has access to a list of persons held in jail and the charges under which they are being held. This list includes an entry for Defendant. Is Prosecutor required by the Rules of Professional Conduct to serve Defense Lawyer with a copy of the written dismissal?

Opinion #1:

Yes, the prosecutor is required to either serve Defense Lawyer with a copy of the written dismissal or take other steps to notify Defense Lawyer, jail officials, or other appropriate persons in order to avoid the unnecessary detention of Defendant.

A lawyer has a duty to avoid conduct that is prejudicial to the administration of justice pursuant to Rule 1.2(d) of the Rules of Professional Conduct. Prosecutors have a special duty "to seek justice, not merely to convict." *See* comment to Rule 7.3. In particular, Rule 7.3(d) requires a prosecutor to make timely disclosure to the defense of all evidence or information that tends to negate the guilt of the accused or mitigate the offense. The spirit, if not the letter of these rules, when considered *in pari materia*, calls for a prosecutor to take reasonable steps to ensure that a criminal defendant is not held in jail without charge.

Inquiry #2:

Is Prosecutor required by the Rules of Professional Conduct to provide the jail with a certified copy of the dismissal?

Opinion #2:

See opinion #1 above.

Inquiry #3:

Would the response to inquiry #2 be different if Defendant was unrepresented?

Opinion #3:

No. *See* opinion #1 above.

RPC 198

January 13, 1995

Responsibilities of Stand-by Counsel Upon the Assumption of the Defense in a Capital Case

Opinion explores the ethical responsibilities of stand-by defense counsel who are instructed to take over the defense in a capital murder case without an opportunity to prepare.

Inquiry #1:

Defendant chose to defend himself in the trial of a capital murder charge. Several months prior to the trial, the court appointed Attorney A and Attorney B as stand-by defense counsel. The stand-by counsel were present at all pretrial hearings. At the time of the appointment and at other points during the trial, Attorney A and Attorney B were advised that if Defendant decided at any point that he did not want to proceed *pro se*, they would take over his defense. When Attorney A and Attorney B were advised that they could be elevated from stand-by counsel to trial counsel for Defendant at any time, they objected unless they would be given adequate time to prepare.

At numerous hearings prior to the trial, Defendant was offered the opportunity to have stand-by counsel take over his defense. Defendant refused each

time and proceeded to represent himself throughout the "guilt/innocence phase" of the trial. A guilty verdict was returned by the jury. After the State completed the presentation of its evidence during the sentencing phase and after Defendant had called several witnesses, Defendant advised the court that he wanted stand-by counsel to handle the presentation of the remainder of his case. The court advised Attorney A and Attorney B to proceed with the presentation of Defendant's evidence in the sentencing phase of the trial. Attorney B advised the court that he and Attorney A were unprepared to proceed at that time because, in their role as stand-by counsel, they had not interviewed the witnesses subpoenaed by Defendant nor had they had any discussions with Defendant regarding the substantive aspects of his case. Attorney B also advised the court that there were other aspects of the case, including appropriate motions which might be made during the sentencing phase, which required investigation and research. Attorney A and Attorney B filed a motion for a three-week continuance to prepare the presentation of Defendant's case in the sentencing hearing, and they also filed a motion for a new sentencing hearing.

The court denied both motions. Attorney A and Attorney B made motions to withdraw on the grounds that they could not effectively represent Defendant without preparation. The motions to withdraw were denied. Attorney A and Attorney B filed petitions for writs of supersedeas and mandamus and an application for stay of proceedings with the North Carolina Supreme Court but the Supreme Court had not ruled at the time the trial court ordered Attorney A and Attorney B to proceed with the defense. Is it unethical for Attorney A and Attorney B to fail to present a defense in the sentencing hearing?

Opinion #1:

No, provided Attorney A and Attorney B made every effort to be adequately prepared, but reasonably and in good faith, concluded that under the circumstances they could not present a competent defense.

Rule 6(a)(2) of the Rules of Professional Conduct provides that a lawyer shall not handle a legal matter "without adequate preparation under the circumstances." The comment to Rule 6 notes "[t]he required attention and preparation [for the competent handling of a particular matter] are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence." Certainly the sentencing phase of a capital murder trial requires the utmost preparation. A lawyer who is serving as stand-by counsel to a criminal defendant has a duty competently to represent the defendant at the juncture in the trial at which he is instructed to take over the defense. If that lawyer reasonably and in good faith concludes that he has not had an adequate opportunity to prepare under the circumstances, at a minimum he should advise the court and request a continuance in order to have the opportunity to prepare. Additionally, he may make a motion to withdraw from the representation. *See* Rule 2.8(b)(2). If the court determines that the lawyer should proceed without a continuance and does not allow the lawyer to withdraw, the lawyer should exhaust all reasonably available legal procedures by which he might seek additional time to prepare. However, having exhausted such avenues, if the lawyer continues, reasonably and in good faith, to believe that his lack of preparation makes him incompetent to present a defense, it is not unethical for the lawyer to decide not to present a defense. By declining to present a defense the lawyer must not be irresponsibly abandoning his client but must believe that under the circumstances and given the limited time available, even if he made heroic efforts to prepare himself, he would be unable to present a competent defense.

Inquiry #2:

After the motion for a continuance was denied, would it have been unethical for Attorney A and Attorney B to present a defense?

Opinion #2:

No. If after being put on notice that a lawyer believes himself to be incompetent to proceed without additional time to prepare, the court determines that the lawyer is adequately prepared and denies a motion to continue, it is not unethical for the lawyer to proceed with the representation on this basis.

Inquiry #3:

May a lawyer refuse to present a defense for a criminal defendant for the purpose of creating grounds for a post-trial ineffective assistance of counsel motion?

Opinion #3:

No. A lawyer may not pursue a course of conduct that would intentionally prejudice or damage his client nor may he engage in conduct that is prejudicial to the administration of justice. Rule 7.1(a)(3) and Rule 1.2(d). A lawyer may not intentionally present an inadequate or ineffective defense of a criminal defendant for the primary purpose of creating error and assuring his client a new trial.

RPC 199

January 13, 1995

Ethical Responsibilities of Court-Appointed Lawyer

Opinion addresses the ethical responsibilities of a lawyer appointed to represent a criminal defendant in a capital case who, in good faith, believes he lacks the experience and ability to represent the defendant competently.

Inquiry #1:

Attorney A was appointed by a district court judge to serve as lead counsel in defending an indigent defendant ("Defendant") against a charge of first-degree murder. Attorney A is licensed to practice in North Carolina but has limited experience in representing criminal defendants. He practices law in a rural area without a sufficient library and other resources appropriate for the ongoing legal research necessary for a capital case. Attorney A believes he is not competent to represent a client in a capital murder case. He has never been on any court list for appointment to represent indigent defendants.

Attorney A filed a motion to withdraw with the district court which advised the court that he did not believe he was competent to provide legal representation in such a matter. After a hearing, the district court concluded that Attorney A is competent and denied the motion to withdraw. Attorney A in good faith still believes that he is not competent to represent Defendant. Is it ethical for Attorney A to take additional steps to legally challenge the appointment?

Opinion #1:

Yes. Rule 6 of the Rules of Professional Conduct provides that a lawyer shall not handle a legal matter that he knows he is not competent to handle unless he can associate an experienced lawyer to assist him. If a lawyer who is appointed to represent an indigent criminal defendant honestly and reasonably concludes that he is not competent to represent the client, at a minimum, he has a duty to advise the court of his perceived lack of competency, as Attorney A did in the preceding inquiry. If the court determines that the lawyer is competent but the lawyer in good faith continues to believe that he is not competent and his representation would be harmful to the client's interests, it is not unethical for the lawyer to challenge the appointment by appropriate legal procedures, including but not limited to, making a motion to have the appointment set aside in superior court, filing a petition for *certiorari* with the appellate courts or appealing a contempt ruling for refusal to serve. If the lawyer controverts his appointment through such legal proceedings, he must be acting in good faith and not merely to avoid the inconvenience or expense of the appointment. *See* Rule 7.2(a)(1).

Although the lawyer has an initial duty to advise the court that he believes he is not competent to handle a matter, if the court nevertheless determines that the lawyer is competent and refuses to release the lawyer from the appointment, it is not unethical for the lawyer to proceed with the representation on this basis without further challenge to the appointment.

Inquiry #2:

Is it ethical for Attorney A to refuse to serve as appointed counsel for Defendant and accept the court's sanction?

Opinion #2:

Yes, if Attorney A has unsuccessfully challenged the appointment through reasonably available legal procedures and he continues, as a matter of professional responsibility, to believe that he is not competent to serve as legal counsel to Defendant, it is not unethical for Attorney A to refuse to serve and to accept the court's sanction. *See* Rule 6(a)(1).

Inquiry #3:

Would the responses to inquiry #1 or inquiry #2 be different if Attorney A is appointed to assist another experienced lawyer who will serve as lead coun-

sel?

Opinion #3:

Yes. Whether Attorney A is appointed lead counsel or appointed to assist an experienced lawyer would be relevant to the assessment of Attorney A's competency to represent Defendant. As noted in Rule 6, a lawyer may consider himself competent to handle a legal matter he would otherwise not be competent to handle if he associates an experienced lawyer to assist him with the matter. If Attorney A is serving as "second chair" to an experienced lawyer, it would not be reasonable for him to conclude that he is not competent to handle the matter.

Inquiry #4:

Attorney A's malpractice insurer has expressed concern that Attorney A's representation of Defendant in the capital case may present an unreasonable risk of exposure to a malpractice claim, particularly since it would require Attorney A to practice in an area outside his chosen areas of concentration. If Attorney A represents Defendant, he believes he should make a record that will document his own lack of competence in order to preserve a due process or other constitutional challenge to the state system of appointing attorneys for indigent defendants charged with capital crimes. By so doing, Attorney A fears he may be building a civil case against himself for malpractice if Defendant is convicted of first-degree murder or some lesser charge. Does Attorney A have a conflict of interest?

Opinion #4:

No. The fact that Attorney A's malpractice insurer has expressed concern regarding Attorney A's representation of Defendant does not create a disqualifying conflict of interest because Attorney A's responsibility to his client should not be limited or affected by his malpractice carrier's concern. *See* Rule 5.1(b). If Attorney A accepts the appointment of the court and proceeds with the representation, Attorney A has a duty to zealously represent his client to the best of his ability. *See* Canon VII. This includes taking whatever steps are necessary to make himself competent to handle the case including, but not limited to, attempting to associate an experienced lawyer or seeking the court appointment of an experienced lawyer to assist him, educating himself about the relevant law, utilizing available resources such as the resource center in the office of the appellate defender (which provides assistance to counsel for those accused of capital crimes), traveling to an adequate law library, etc. Attorney A may not pursue a course of conduct that will intentionally prejudice or damage Defendant during the course of the professional relationship. *See* Rule 7.1(A)(3). This would include approaching the representation from the perspective that his job is to document his own incompetence.

If Attorney A represents Defendant to the best of his ability, but concludes that he may have committed an error or errors that were prejudicial to Defendant's case, he must advise Defendant that mistakes were made that may have been harmful to Defendant's case and that it is in Defendant's best interest to consult independent counsel regarding his legal rights. *See* Rule 6(b)(2)(1) and (2).

Note: Whether a lawyer can be required, over his objection, to represent a criminal defendant if he has not voluntarily placed his name on a list for court appointments is a legal issue which the Ethics Committee has no authority to address. Moreover, no opinion is expressed herein as to the constitutional propriety of appointing inexperienced lawyers to represent indigent criminal defendants in capital cases.

RPC 200

January 13, 1995

Contacts with Clients after a Lawyer Leaves a Firm

Opinion rules that the lawyers remaining with a firm may contact by phone or in person clients whose legal matters were handled exclusively by a lawyer who has left the firm.

Inquiry #1:

ABC Law Firm has several offices across the state. For many years, Attorney D was the sole attorney present in ABC Law Firm's satellite office in Little City. While he worked for ABC Law Firm, the clients for whose matters Attorney D was responsible were almost exclusively residents of Little City. These clients were not referred to Attorney D by other members of ABC Law Firm nor did the other members of ABC Law Firm assist with the representation of these clients.

Attorney D recently resigned from ABC Law Firm in order to set up his own law practice. He would like to telephone or go to see the clients that he was representing at the time of his departure from ABC Law Firm in order to inform these clients that he is no longer with the firm and to advise each client of the client's options with regard to the continuation of the client's representation. May Attorney D contact these clients for this purpose?

Opinion #1:

Yes, Attorney D may personally contact, telephone or write to the clients for whose work he was responsible at the time of his departure from the firm. Together with the lawyers remaining with ABC Law Firm, Attorney D has an obligation to ensure that the representation of these clients continues despite his departure from the firm. RPC 48. Notice, either written or in-person, should be given to each such client informing the client of Attorney D's departure from the firm and advising the client of the right freely to choose counsel. Rule 6(b) of the Rules of Professional Conduct. Specifically, the client should be advised that he or she has the option of retaining Attorney D as his or her lawyer, requesting that another lawyer with ABC Law Firm take over the representation, or engaging a lawyer from another firm. The notice should also advise the client that he or she will need to instruct ABC Law Firm with regard to the disposition of the client's file if the client chooses to move his or her representation to another law firm. Rule 2.8(a)(2).

The preferred method of advising clients of the departure of a lawyer or lawyers from a law firm is by the sending of a notice upon which the remaining and departing lawyers agree and which clearly informs the clients of their right freely to choose counsel. *See* RPC 48.

Inquiry #2:

May Attorney D call or personally visit clients for whose work he was responsible while he was a lawyer with ABC Law Firm but whose representation was complete at the time of his departure from the firm if the primary purpose of his contact with these former clients is to solicit employment?

Opinion #2:

Yes. Rule 2.4(a) only prohibits in-person or live telephone contact to solicit professional employment from a prospective client if the lawyer has no family or prior professional relationship with the prospective client. A "prior professional relationship" means "that the subject attorney actually was involved in a personal attorney-client relationship with the prospective client." RPC 98. Such communication should be in compliance with Rule 2.4(b) which prohibits solicitation by written, recorded or in-person communications even when not otherwise prohibited by Rule 2.4(a) if the client has made known to the lawyer a desire not to be solicited by the lawyer or the solicitation involves coercion, duress, harassment, etc.

Inquiry #3:

May the other lawyers in ABC Law Firm telephone or visit the clients whose legal matters were being handled by Attorney D at the time of his departure in order to advise the clients of Attorney D's departure and to discuss their representation?

Opinion #3:

Yes, the firm may designate a member of the firm who will be responsible for notifying the clients of the departure of Attorney D and advising them of the right freely to choose counsel as described in opinion #1 above.

Such verbal or written contact with these clients is not improper solicitation of prospective clients in violation of Rule 2.4(a) or (c) because the clients are not prospective clients of the firm. With regard to such clients, the remaining lawyers with ABC Law Firm have an obligation to ensure that the representation of each client continues or is responsibly transferred to an outside lawyer chosen by the client. To the extent that RPC 48 or RPC 98 imply that a member of ABC Law Firm would be prohibited under these circumstances from contacting any of the clients whose matters were being handled by Attorney D at the time of his departure from the firm unless such a lawyer had a personal professional relationship with the client, RPC 48 and RPC 98 are overruled.

Inquiry #4:

If their purpose is to solicit professional employment, may the lawyers remaining with ABC Law Firm telephone or visit clients for whose work Attorney D was responsible prior to his departure from ABC Law Firm but whose representation had ended prior to the time that Attorney D left the firm?

Opinion #4:

Yes, provided such communication does not violate Rule 2.4(b). *See* opinion #3.

Inquiry #5:

May the lawyers remaining with ABC Law Firm use written, telephone or in-person communications to solicit professional employment from a client whose active file was being handled by Attorney D at the time of his departure if the client has notified the firm that he or she has obtained other legal counsel and no longer needs the services of the firm?

Opinion #5:

Yes, provided such communication does not violate Rule 2.4(b). *See* opinion #3.

RPC 201

January 13, 1995

Combining Law Practice and Work as Realtor

Opinion explores the circumstances under which a lawyer who is also a real estate salesperson may close real estate transactions brokered by the real estate company with which he is affiliated.

Inquiry #1:

Attorney A has an active real estate license and is a real estate salesman for Real Estate Company. Attorney A's office is located inside the offices of Real Estate Company. From his office, Attorney A operates his law practice and sells real estate. There is no signage on the office door for Real Estate Company or on the exterior of the building that indicates that Attorney A operates a separate law practice from within the offices of Real Estate Company. The same telephone number is used for Real Estate Company and Attorney A's law practice.

Attorney A does not separately advertise his services as a lawyer. He does advertise and hold himself out as a lawyer in Real Estate Company's television and print advertisements. Real Estate Company advertises itself as providing "full service" which includes real estate closing services. Most of Attorney A's legal business comes from referrals from Real Estate Company, and Real Estate Company recommends that its customers use Attorney A to close their real estate transactions.

May Attorney A receive a real estate sales commission on a real estate transaction for which he provided legal services to any party involved in the transaction other than Real Estate Company?

Opinion #1:

No. Rule 5.1(b) requires a lawyer to decline to represent a client if the representation of the client may be materially limited by the lawyer's own interest. If Attorney A would realize a valuable commission from the closing of a real estate transaction, it is likely that Attorney A's judgment on behalf of the buyer, seller, or lender will be materially limited. CPR 307 specifically holds that a lawyer may not certify title to property he has listed or sold. *See also* RPC 49.

Inquiry #2:

May Attorney A close real estate transactions brokered by Real Estate Company if he did not list or sell the property and he will not earn a commission from the transaction?

Opinion #2:

Yes, provided Attorney A reasonably concludes that the exercise of his independent, professional judgment on behalf of his clients will not be "materially impaired" by his desire to advance the interests of Real Estate Company or his desire to encourage future referrals. Rule 5.1(b). A lawyer is not prohibited by the Rules of Professional Conduct from utilizing the same office for both the practice of law and for conducting another business. *See* CPR 266. However, in analyzing his ability to exercise his independent, professional judgment on behalf of his clients, Attorney A must consider whether the location of his law practice within the confines of the offices of Real Estate Company will affect his professional judgment because of the close physical proximity of realtors who are referring legal business to him. If the location of his office will affect his professional judgment, Attorney A must either decline to represent the parties to real estate transactions brokered by Real Estate Company or he must relocate his law practice to separate offices. If Attorney A concludes that he can manage the potential conflict of interest, the clients must also consent to the potential conflict after full disclosure of Attorney A's affiliation with Real Estate Company. *See* Rule 5.1(b).

[Apart from the potential conflict of interest posed by this inquiry, the Ethics Committee has serious concerns about Attorney A's ability to fulfill his duty of confidentiality while he is practicing law within the confines of the offices of the real estate company with which he is affiliated.]

Inquiry #3:

May Attorney A waive his legal fee for services rendered in closing a real estate transaction in exchange for the real estate commission he earned as the agent responsible for the sale of the real property?

Opinion #3:

No. *See* opinion #1 above.

Inquiry #4:

May Attorney A receive a real estate commission in lieu of a legal fee for closing a real estate transaction if Attorney A shares the commission with other realtors with Real Estate Company or other unrelated real estate companies?

Opinion #4:

No. *See* opinion #1 above.

Inquiry #5:

May Attorney A perform legal services in connection with real estate closings for clients referred to him by Real Estate Company if Attorney A did not list or sell the property involved in the transaction?

Opinion #5:

Yes. This is the same inquiry as inquiry #2 above. *See* opinion #2 above.

Inquiry #6:

Is Attorney A required to disclose to all clients referred by Real Estate Company that he is a real estate agent for Real Estate Company and paid commissions by Real Estate Company?

Opinion #6:

Yes. *See* opinion #2 above.

Inquiry #7:

May Attorney A provide legal services to customers of Real Estate Company if Attorney A fully discloses his relationship to Real Estate Company?

Opinion #7:

Yes, *see* opinion #2 above. Attorney A may only provide legal services to customers of Real Estate Company who are referred to him by Real Estate Company, but he may not share his legal fees with Real Estate Company nor may he pay Real Estate Company anything for recommending his services. See Rule 2.3(c), which prohibits a lawyer from giving anything of value to someone for recommending his services, and Rule 3.2, which prohibits the sharing of legal fees with nonlawyers. Moreover, if Attorney A is employed by Real Estate Company as in-house counsel and, as such, is providing legal services to the customers of Real Estate Company, it would be a violation of G.S. §84-5 which forbids corporations to engage in the practice of law.

Inquiry #8:

Is Real Estate Company engaged in the unauthorized practice of law under the foregoing facts?

Opinion #8:

The determination of whether a nonlawyer is engaged in the unauthorized practice of law is outside of the authority of the Ethics Committee.

Inquiry #9:

Is Attorney A assisting Real Estate Company in the unauthorized practice of law under the foregoing facts?

Opinion #9:

If Attorney A is employed by Real Estate Company as in-house counsel and, in this capacity, he is providing legal services to the customers of Real Estate Company, it would be a violation of G.S §84-5, which prohibits a corporation from engaging in the practice of law. Such conduct would constitute aiding the unauthorized practice of law in violation of Rule 3.1(a).

Inquiry #10:

May a lawyer for a title insurance company issue a title insurance policy based upon Attorney A's certification of title if Attorney A is providing legal services to customers of Real Estate Company as an employee or in-house counsel for Real Estate Company?

Opinion #10:

If an attorney for a title insurance company knows that Attorney A is providing legal services to customers of Real Estate Company in violation of G.S. §84-5, which prohibits a corporation from engaging in the practice of law, the attorney for the title insurance company may not aid in this practice. Rule 3.1(a).

Inquiry #11:

May Attorney A practice law from his office in Real Estate Company's office and use the same telephone number as Real Estate Company?

Opinion #11:

Yes, if the office receptionist and the office signage clearly indicate that Attorney A's legal practice is separate and distinct from the real estate business operated by Real Estate Company. Rule 2.1(a) and CPR 266.

Inquiry #12:

May Attorney A or Attorney A's name appear in Real Estate Company's television and print ads, including brochures identifying Attorney A as a lawyer as well as a real estate salesman?

Opinion #12:

Yes, if the advertisements do not include false or misleading communications about Lawyer A or Lawyer A's services in violation of Rule 2.1 and do not imply that legal services will be provided by a corporation in violation of G.S. §84-5. *See* CPR 307.

Inquiry #13:

May Attorney A include business cards identifying him as a lawyer in sales promotion packets sent by Real Estate Company to customers whether the packets are solicited or unsolicited by the customers?

Opinion #13:

Yes, see opinion #12 above.

Inquiry #14:

May Attorney A be employed as in-house counsel for Real Estate Company and also close real estate transactions referred to him by Real Estate Company?

Opinion #14:

No. *See* opinion #7 above.

RPC 202

July 21, 1995

Editor's Note: This opinion was originally published as RPC 202 (Revised).

Communications with Elected Officials

Opinion rules that an attorney may communicate in writing with the members of an elected body that is represented by a lawyer in a matter if the purpose of the communication is to request that the matter be placed on the public meeting agenda of the elected body and a copy of the written communication is given to the attorney for the elected body.

Inquiry:

Attorney A and Attorney B represented Clients X and Y before the town board of adjustment where they were successful in getting a sign variance. The town's attorney, acting on behalf of the town, filed an appeal in superior court of the variance granted by the board of adjustment. The appeal has been pending since 1991.

Attorneys A and B believe that the town lacks standing to file an appeal against its own board of adjustment. Also, Attorneys A and B believe that the case has become moot by the town's issuance of permit for the sign and the construction of the sign in 1991.

An intervening election changed the composition of the town council. The present council may not want to continue to pursue the appeal, given the expense and the questionable merits of the appeal. Attorney A and Attorney B wrote to the town attorney seeking his permission to petition the town council to drop the appeal. The town attorney refused to permit Attorney A and Attorney B to communicate with the members of the town council. Attorney A and Attorney B believe that their clients, as citizens and taxpayers, should have the right to petition their elected officials through their chosen legal representative. May Attorneys A and B petition the elected members of the town council, on behalf of their clients, without the consent of the town attorney?

Opinion:

Yes, Attorneys A and B may communicate in writing with the members of the town council for the purpose of petitioning to have a matter placed on the agenda for the next public meeting of the town council. A copy of the written communication should be provided to the town attorney.

Rule 7.4(a) of the Rules of Professional Conduct prohibits communications about the subject of representation with a party the lawyer knows to be represented by another lawyer in the matter unless the other lawyer consents or unless the lawyer is authorized by law to communicate with the party. The First Amendment of the United States Constitution, however, prohibits the enactment of laws that abridge the right of the people "to petition the government for a redress of grievance." The Comment to Rule 7.4 recognizes this constitutional right where it notes that "[c]ommunications authorized by law include...the right of a party to a controversy with a government agency to speak with government officials about the matter."

If the town is represented in a matter by legal counsel, the appropriate forum in which a lawyer should address the elected officials of the town on behalf of a client is a public meeting of the town council. A written request to be heard, including a discussion of the merits of the client's position and why it should be heard by the town council may, therefore, be sent directly to the members of the town council without interference from the legal counsel for the town. The decision as to whether a particular item will be placed on the agenda for a public meeting of the town council must be made, however, by the elected officials, presumably with the advice of their attorney.

This opinion does not restrict a client's right to communicate directly with his or her elected representatives without the consent of the lawyer for the town.

RPC 203

April 14, 1995

Editor's Note: See Rule 3.3(a)(4) for additional guidance.

Client Perjury

Opinion rules that dismissal of an action alone is not sufficient to rectify the perjury of a client in a deposition and the lawyer must demand that the client inform the opposing party of the falsity of the deposition testimony or, if the client refuses, withdraw from the representation.

Inquiry:

Lawyer A represents Client H in a domestic dispute with his wife, W. Client H told Lawyer A that there was physical violence and verbal abuse in the marriage because of the actions of W and that any acts on his part were provoked. Client H wanted to move out of his house because of the abuse, and Lawyer A advised him concerning the requirements for filing a complaint for divorce from bed and board. Lawyer A recommended that a complaint alleging indignities, constructive abandonment, and cruel and unusual treatment by W should be filed shortly after separation. Lawyer A questioned Client H as to whether he had committed adultery during the marriage and advised Client H that a complaint for divorce from bed and board must contain an affirmative allegation that the actions alleged to have been perpetrated by W occurred without just cause or provocation. Client H informed Lawyer A that he had not committed adultery and that none of his acts were unprovoked.

Lawyer A filed a complaint for Client H seeking a divorce from bed and board against W based upon constructive abandonment and alleged indigni-

ties and cruel and unusual acts by W toward Client H. The complaint was verified by Client H and contained an affirmative allegation that he had been a dutiful and faithful husband.

W filed an answer denying the allegations in the complaint and seeking temporary and permanent alimony from Client H based upon allegations of physical abuse, other indignities, and failure to provide requisite support. There was no allegation in the answer that Client H had engaged in adulterous conduct.

The depositions of Client H and W were taken. At his deposition, Client H was asked whether he committed adultery during the marriage. Lawyer A objected to the question but did not instruct his client not to answer. Client answered by denying that he had committed adultery during the marriage. In conference with Lawyer A after the deposition, Client H advised Lawyer A that he had lied in his deposition and in the complaint and that he had, in fact, engaged in adultery during the marriage.

Lawyer A advised Client H that the action for divorce from bed and board must be dismissed because Client H did not have grounds for such an action. Client H consented and the action for divorce from bed and board was voluntarily dismissed without prejudice. There are no affirmative allegations currently pending seeking temporary or permanent alimony based upon the adultery of Client H. Must Lawyer A take any further action with regard to the false allegation in the verified complaint and the false testimony of Client H in his deposition?

Opinion:

Yes. Rule 7.2(b)(1) requires a lawyer who receives information clearly establishing that a client has perpetrated a fraud upon a person or upon a tribunal to call upon the client to rectify the fraud, and, if the client refuses or is unable to do so, the lawyer must discontinue his representation of the client in the matter. The dismissal of the divorce from bed and board action by Client H is not sufficient to rectify the fraud upon W because, in future proceedings, W and her attorney may rely upon his false testimony. Lawyer A must insist that his client rectify the fraud by allowing Lawyer A to advise W's lawyer of Client H's untruthful response in the deposition and the untruthful allegation in the verified complaint. If Client H refuses to rectify the fraud, Lawyer A must withdraw from his representation.

RPC 204

July 21, 1995

Editor's Note: This opinion was originally published as RPC 204 (Revised).

Prosecutor's Offer of Special Treatment to Defendants Who Make Charitable Contributions

Opinion rules that it is prejudicial to the administration of justice for a prosecutor to offer special treatment to individuals charged with traffic offenses or minor crimes in exchange for a direct charitable contribution to the local school system.

Inquiry:

District Attorney X would like to offer more favorable plea bargains to persons charged with traffic violations and minor criminal offenses upon condition that the individual charged make a direct charitable contribution to the local school board. In exchange for such contributions, the District Attorney would also like to offer to agree to the granting of continuances and PJCs (prayers for judgment continued) in traffic citation and minor criminal cases. The charitable contributions would not be court fines and would not be channeled through the court system. The District Attorney contends that by making a direct contribution to the school system, defendants are paying more money than they would be required to pay if they were fined by the court and the school system receives more money than it would receive from court fines alone. Would this practice be ethical?

Opinion:

No. The offer of special treatment from a prosecutor to individuals charged with traffic violations or minor criminal offenses in exchange for direct donations to even the most worthy charity implies that justice can be purchased. Such conduct is clearly prejudicial to the administration of justice in violation of Rule 1.2(d) of the Rules of Professional Conduct. *See also* Rule 7.2(a)(9). This practice would also be contrary to a prosecutor's special responsibility "to seek justice, not merely to convict." Comment to Rule 7.3.

This opinion does not limit or prohibit the exercise of the authority granted to a prosecutor to recommend a particular plea arrangement which includes restitution or reparation pursuant to G.S. §15A-1021.

RPC 205

April 14, 1995

Referral Fees

Opinion rules that a lawyer may receive a fee for referring a case to another lawyer provided that, by written agreement with the client, both lawyers assume responsibility for the representation and the total fee is reasonable.

Inquiry #1:

Attorney A would like to refer cases to Attorney B in exchange for a referral fee in the amount of ten percent of the fee earned by Attorney B on each case referred. May Attorney A charge and receive a fee from Attorney B for referring cases?

Opinion #1:

Yes, provided that Attorney A complies with the requirements of Rule 2.6(d) of the Rules of Professional Conduct. As the comment to that rule notes, "[a] division of a fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well." Rule 2.6(d)(1) allows lawyers who are not in the same firm to divide a fee in one of two ways: (a) in proportion to the services performed by each lawyer, or (b) if the fee division is not in proportion to the services performed by each lawyer, by a written agreement with the client whereby each lawyer assumes joint responsibility for the representation. A referral fee would typically fall within the latter category. Thus, whenever a lawyer accepts a fee for referring a case to another lawyer, the lawyer remains responsible for the competent and ethical handling of the matter. Regardless of whether the fee is in proportion to the services rendered, the client must be advised of and not object to the participation of all lawyers involved and the total fee paid by the client must be reasonable. Rule 2.6(d)(2) and (3).

Inquiry #2:

May a referral fee be based upon a percentage of the fee charged to the client by the lawyer to whom the case is referred?

Opinion #2:

Yes, provided the requirements of Rule 2.6(d) are satisfied.

Inquiry #3:

If a referral fee may be based upon a percentage of the fee charged to the client by the lawyer accepting a referral, is there a maximum percentage for such a referral fee?

Opinion #3:

No. *See* opinion #2 above.

Inquiry #4:

May a flat fee be charged for the referral of a case to another lawyer?

Opinion #4:

Yes, provided the total fee is reasonable, the client does not object, and, by written agreement with the client, each lawyer assumes joint responsibility for the representation. Rule 2.6(d).

Inquiry #5:

If a flat fee for a referral is permissible, is there a limit on the amount of the flat fee that may be charged for the referral?

Opinion #5:

No. *See* opinion #4 above.

Inquiry #6:

Does the client have to be informed that a referral fee is being paid to the referring lawyer?

Opinion #6:

Yes. Rule 2.6(d)(1) and (2).

Inquiry #7:

Must the client be told and consent to the amount of the referral fee paid to the referring lawyer?

Opinion #7:

No. As noted in the comment to Rule 2.6, "[p]aragraph (d) does not require disclosure to the client of the share that each lawyer is to receive."

RPC 206

April 14, 1995

Disclosure of Confidential Information of a Deceased Client

Opinion rules that a lawyer may disclose the confidential information of a deceased client to the personal representative of the client's estate but not to the heirs of the estate.

Inquiry:

Decedent dies with a will that was written four months before his death and which does not provide for his brothers or sisters. The will was filed with the clerk of court in order that it might be probated. Attorney A is still in possession of earlier wills of Decedent. The brothers and sisters have asked Attorney A for copies of these earlier wills. What is Attorney A's ethical obligation in responding to this request?

Opinion:

Attorney A may only disclose confidential information of Decedent to the personal representative of Decedent's estate.

The duty of confidentiality continues after the death of a client. CPR 268 and Comment to Rule 4 of the Rules of Professional Conduct. A lawyer may only reveal confidential information of a deceased client if disclosure is permitted by the exceptions to the duty of confidentiality set forth in Rule 4(c). Specifically, a lawyer may reveal confidential information of a deceased client if the disclosure was impliedly authorized by the client during the client's lifetime as necessary to carry out the goals of the representation. Rule 4(c)(1). It is assumed that a client impliedly authorizes the release of confidential information to the person designated as the personal representative of his estate after his death in order that the estate might be properly and thoroughly administered. Unless the disclosure of confidential information to the personal representative, or a third party at the personal representative's instruction, would be clearly contrary to the goals of the original representation or would be contrary to express instructions given by the client to his lawyer prior to the client's death, the lawyer may reveal a client's confidential information to the personal representative of the client's estate and he may also reveal the deceased client's confidential information to third parties at the direction of the personal representative. To the extent that CPR 268 implies that a lawyer may reveal confidential information of a deceased client to the heirs of a decedent, in addition to the personal representative, CPR 268 is hereby specifically overruled.

RPC 207

October 20, 1995

Editor's Note: This opinion was originally published as RPC 207 (Second Revision).

Simultaneous Representation of Claimant and Insured Against Insurer in Bad Faith Action

Opinion rules that a lawyer may represent an insured in a bad faith action against his insurer for failure to pay a liability claim brought by a claimant who is represented by the same lawyer.

Inquiry #1:

Pedestrian Y was killed when he was struck by a vehicle operated by X. Administratrix, the personal representative of the estate of Y, retained Attorney A to represent the estate in a wrongful death action against X. Attorney A made a settlement demand on X's automobile liability insurance carrier, Insurer, for the limits of X's policy. Insurer declined to pay the limits. Attorney A filed suit against X for the wrongful death of Y. Insurer later offered to settle the claim against X for the policy limits. Administratrix refused this offer and the case was tried. The jury verdict against X was well in excess of X's liability insurance coverage limits.

Attorney A is now representing the Estate of Y and X in a bad faith action against Insurer. X has signed an assignment of all of his rights and privileges against Insurer to the Estate of Y. The assignment states that X acknowledges that he is liable to the estate as a judgment debtor and that all actions taken by X in the bad faith action must be done in accordance with the directions of Administratrix. May Attorney A represent X in the bad faith action against Insurer?

Opinion #1:

Yes, with the consent of both Administratrix and X after full disclosure.

Rule 5.1(b) permits a lawyer to represent a client even though the representation of the client might be materially limited by the lawyer's responsibilities to another client if (1) the lawyer reasonably believes the representation will not be adversely affected, and (2) the client consents after full disclosure which includes an explanation of the implications of the common representation and the advantages and risks involved.

In the present situation, the interest of X and the Estate of Y appear to be allied with regard to the pursuit of the bad faith action against Insurer. Attorney A could reasonably conclude that the joint representation of the two clients will not adversely affect the representation of either client individually. Full disclosure to both clients, in order to obtain the consent to the joint representation, should include the disclosure by Attorney A of the fact that if X and Administratrix are in conflict with regard to a particular matter relating to the representation, Attorney A may not advocate for one client as against the other despite the agreement between X and Administratrix. In the event of such a dispute or conflict between the interests of the two clients, Attorney A must withdraw from the representation of both unless one of the clients consents to his continued representation of the other client.

No opinion is expressed as to the validity or enforceability of an assignment of a bad faith claim against an insurance carrier.

Inquiry #2:

Attorney B represents Insurer in the bad faith action. Attorney B believes that a factual dispute concerning the negotiations in the underlying wrongful death action exists and intends to take Attorney A's deposition and possibly call Attorney A as a witness at trial. May Attorney A continue to represent X in the bad faith action?

Opinion #2:

Yes. Rule 5.2(c) provides that if, after undertaking employment in contemplated or pending litigation, a lawyer learns that he may be called as a witness by the opposing party, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

Inquiry #3:

May Attorney B depose Attorney A while Attorney A remains attorney of record for X?

Opinion #3:

Yes. *See* opinion #2 above. No opinion is expressed as to the propriety of such a deposition. Moreover, it may be appropriate for Attorney A to refuse to answer deposition questions on the grounds of client confidentiality.

Inquiry #4:

May Attorney A continue to represent X and also be called as a witness by Attorney B in the trial?

Opinion #4:

Yes. *See* opinion #2 above.

RPC 208

July 21, 1995,

Avoiding Offensive Trial Tactics

Opinion rules that a lawyer should avoid offensive trial tactics and treat others with courtesy by attempting to ascertain the reason for the opposing party's failure to respond to a notice of hearing where there has been no prior lack of diligence or responsiveness on the part of opposing counsel.

Inquiry #1:

Attorney A, who represents the defendant in a civil matter, did not receive the notice of hearing from opposing counsel, Attorney X, because Attorney A's address had changed. At the civil district court calendar call for the first day of the session, when hearing dates are set, Attorney A did not appear nor did his client. Attorney X asked the court to set the matter for trial at the earliest pos-

sible date. The case was set for trial two days later. Neither the judge nor Attorney X inquired as to whether Attorney A had received the notice of hearing nor did they attempt to ascertain whether Attorney A was prevented from appearing at the calendar call by an emergency or otherwise. Attorney L, who was at the calendar call on an unrelated matter and who is not associated with either Attorney A or Attorney X, subsequently advised Attorney A of the trial date. Under these circumstances, before asking the court to set the case for trial, must Attorney X verify that the notice of hearing was actually received and that there was no emergency or other problem preventing the appearance of Attorney A or his client at the calendar call?

Opinion #1:

No, Attorney X is not required to verify that the notice of hearing was actually received by the opposing lawyer. However, Rule 7.1(a)(1) of the Rules of Professional Conduct provides that a lawyer does not violate the duty to zealously represent a client

> ...by acceding to reasonable requests by opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

Avoiding offensive tactics and treating others with courtesy includes not taking advantage of the opposing party or the opposing counsel's failure to respond to a notice of hearing when there has been no prior lack of diligence or responsiveness on the part of the opposing counsel. Under these circumstances, as a matter of professionalism, Attorney X should make a reasonable effort to ascertain Attorney A's whereabouts or the reason for his absence before asking the judge to schedule the hearing at the earliest possible date.

Inquiry #2:

Does the court have a duty to verify that Attorney A has received notice of the hearing?

Opinion #2:

Judges are subject to the Code of Judicial Conduct and the regulation of the Judicial Standards Commission. Therefore, no opinion is expressed to the ethical duty of a judge in this situation.

Inquiry #3:

Do the other lawyers at the calendar call have a responsibility to verify that Attorney A has received notice of the hearing or that there was no emergency or other problem preventing Attorney A's appearance at the hearing?

Opinion #3:

No. However, as a matter of professionalism, lawyers are encouraged to treat other practitioners with courtesy and to assist other practitioners in meeting the duty of competent representation.

RPC 209

January 12, 1996

Editor's Note: This opinion was originally published as RPC 209 (Revised).

Disposing of Closed Client Files

Opinion provides guidelines for the disposal of closed client files.

Inquiry #1:

Attorney A has been in practice for 20 years. Whenever he completes a matter for a client, he closes the client's file and retains it in his office. Attorney A has run out of space to store files in his office. The expense of renting storage space to store files is prohibitive. May Attorney A dispose of the closed client files?

Opinion #1:

Yes, subject to certain requirements.

The original file belongs to the client and, because of the general fiduciary duty to safeguard the property of a client, a lawyer should store a client's file in a secure location where client confidentiality can be maintained. *See* Rule 4 and Rule 10.1 of the Rules of Professional Conduct, and RPC 79.

With the consent of the client, a closed file may be destroyed at any time. Absent the client's consent to disposal of a file, a closed file must be retained for a minimum of six years after the conclusion of the representation. Six years is the required minimum period for retaining a closed client file because this retention period is consistent with retention period for records of client property set forth in Rule 10.2(b). Of course, the statute of limitations may require the retention of a closed file for more than six years.

If six years have not passed since a client's file became inactive, the file may only be destroyed with the consent of the client or, after notice to the client, the client fails to retrieve the file. The client should be contacted and advised that the lawyer intends to destroy the file unless the client retrieves the file or, within a reasonable period of time, directs that the file be transferred to another lawyer. *See* RPC 16. If the client indicates that he or she does not wish to retrieve the file, the lawyer may dispose of the file. On the other hand, if the client indicates that he or she would like to retrieve the file, the client must be given a reasonable opportunity to do so. If the client fails to retrieve the file within a reasonable period of time, the file may be destroyed. RPC 16. If the client fails to retrieve the file after notice, the lawyer should review the file and retain any items in the file that belong to the client or contain information useful in the assertion or defense of the client's position in a matter for which the statute of limitations has not expired. *See* RPC 16. These items should be retained until the client consents to their destruction or retention is no longer required by law or necessary to protect the client's rights.

After the passage of six years, the lawyer is not required to notify the client that the file will be destroyed. However, if not previously reviewed and purged of the client's possessions, the lawyer should review the file and retain any items that belong to the client. These items should be returned to the client or retained in a secure place until retrieved by the client or until the items are deemed abandoned and escheat to the state under Chap. 116B of the North Carolina General Statutes. The remaining records in the file may be destroyed.

A record should be maintained of all destroyed client files. RPC 16.

Inquiry #2:

Do closed client files have to be destroyed or disposed of in a particular manner?

Opinion #2:

No particular method of destroying files is prescribed by the Rules of Professional Conduct. However, if closed files are destroyed, the method chosen must preserve client confidentiality. *See* Rule 4. RPC 133 ruled that a law firm may recycle its waste paper if the responsible attorney can "ascertain that those persons or entities responsible for the disposal of waste paper employ procedures which effectively minimize the risk that confidential information might be disclosed." When client files are destroyed, similar precautions should be taken.

Inquiry #3:

Attorney A has in storage not only the files of his own clients but also the client files of lawyers who were formerly his law partners. What should Attorney A do with these client files?

Opinion #3:

Although the files belong to clients of lawyers other than Attorney A, because Attorney A has retained possession of these files, he has a fiduciary obligation to see that the files are properly handled. A former client is most likely to look for the attorney who previously handled his or her matter when trying to locate a legal file. Therefore, Attorney A may return these files to the original lawyers. Alternatively, Attorney A may dispose of the files in a manner that is consistent with the guidelines set forth in this opinion.

RPC 210

April 4, 1997

Editor's Note: RPC 210 and RPC 211, companion opinions on representation in residential real estate closings, were adopted by the council of the State Bar on January 12, 1996. On April 12, 1996, the council withdrew the opinions following substantial negative comment from real estate practitioners who indicated that the opinions might eliminate the economic efficiencies inherent in one-lawyer residential real estate closings. A substitute opinion for RPC 210 was proposed and subsequently adopted on April 4, 1997.

Representation of Multiple Parties to the Closing of a Residential Real Estate Transaction

Opinion examines the circumstances in which it is acceptable for a lawyer to represent the buyer, the seller, and the lender in the closing of a residential real estate transaction.

Introduction:

This opinion clarifies the conditions under which a closing lawyer may engage in common representation of the multiple parties to the closing of a residential real estate transaction. To the extent that a prior ethics opinion is inconsistent with this opinion, the prior opinion is withdrawn.

Inquiry #1:

In the usual residential real estate transaction, the contract to purchase is entered into by the buyer and seller prior to the engagement of a lawyer to close the transaction. May the closing lawyer represent both the buyer and the seller to close the transaction?

Opinion #1:

Rule 5.1(a) prohibits the representation of a client if the representation is directly adverse to the representation of another client unless there will be no adverse effect on the interests of both clients and the clients consent. At first blush, it may appear that the interests of the buyer and the seller of residential real estate are adverse. Nevertheless, after the terms of the sale are resolved, the buyer and the seller of residential real estate have a common objective: the transfer of the ownership of the property in conformity with the terms of the contract or agreement. In paragraph [10] of the comment to Rule 5.1, "Conflicts of Interest," it is observed that "a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interests even though there is some difference of interests among them." If the interests of the buyer and seller of residential property are generally aligned and the lawyer determines that he or she can manage the potential conflict of interest between the parties, a lawyer may represent both the buyer and the seller in closing a residential real estate transaction with the consent of the parties. Rule 5.1(a).

A lawyer may reasonably believe that the common representation of multiple parties to a residential real estate closing will not be adverse to the interests of any one client if the parties have already agreed to the basic terms of the transaction and the lawyer's role is limited to rendering an opinion on title, memorializing the transaction, and disbursing the proceeds. Before reaching this conclusion, however, the lawyer must determine whether there is any obstacle to the loyal representation of both parties. The lawyer should proceed with the common representation only if the lawyer is able to reach the following conclusions: he or she will be able to act impartially; there is little likelihood that an actual conflict will arise out of the common representation; and, should a conflict arise, the potential prejudice to the parties will be minimal. *See*, *e.g.*, ABA Model Rule of Professional Conduct 2.2, "Intermediary."

If the closing lawyer reasonably believes that the common representation can be managed in the best interests of both the buyer and the seller, he must obtain the consent of each of the parties after full disclosure of the risks of common representation. Rule 5.1(a). Full disclosure should include an explanation of the scope of the lawyer's representation. The lawyer should advise each party of the right to separate counsel. The disclosure should also include an explanation that if a conflict develops, the lawyer must withdraw from the representation of all parties and may not continue to represent any of the clients in the transaction. Rule 2.8(b). Although it is a better practice to put such disclosures in writing, the Rules of Professional Conduct do not require written disclosures.

If common representation is appropriate, the representation of the seller may include preparing the deed, collecting the purchase price, and drafting the documents necessary to complete the transaction in accordance with the agreement between the buyer and the seller. The lawyer may charge the seller for this representation. CPR 100.

Inquiry #2:

The buyer and the lender usually agree to the basic terms of the mortgage loan (amount, security, interest rate, installment, and maturity) prior to the engagement of the closing lawyer. In this situation, may the closing lawyer represent both the lender and the buyer?

Opinion #2:

Yes, if the interests of the buyer and lender are generally aligned and the lawyer determines that the potential conflict of interest can be managed. Rule 5.1(a). As stated above, before concluding that the common representation will not be adverse to the interests of any one client, the lawyer must determine three things: he or she will be able to act impartially; there is little likelihood that an actual conflict will arise out of the common representation; and, should a conflict arise, the potential prejudice to the parties will be minimal.

Although full disclosure to the lender of the risks of common representation is recommended, if the lawyer reasonably believes that the lender understands the closing lawyer's role because the lender is a knowledgeable and experienced participant in residential real estate transactions, the lawyer does not have to make a full disclosure to the lender regarding the common representation as required in opinion #1 above.

Inquiry #3:

If the closing lawyer does not intend to represent all of the parties to the transaction, does the lawyer have any responsibility to the party or parties he or she does not intend to represent?

Opinion #3:

Yes. By custom, the lender and the buyer are usually represented by the same lawyer. Therefore, if the lawyer does not intend to represent both the buyer and the lender, the lawyer must give timely notice to the party that the lawyer does not intend to represent, so that this party may secure separate representation. CPR 100. If the lawyer does not give such notice, the lawyer will be deemed to represent both the buyer and the lender. CPR 100. If the lawyer represents only the buyer, the lawyer may nevertheless ethically provide title and lien priority assurances required by the lender as a condition of the loan. CPR 100. If the party that the lawyer is not representing obtains separate counsel, both lawyers should fully cooperate with each other in serving the interests of their respective clients and in closing the transaction promptly.

It is not generally assumed that the buyer's lawyer will represent the seller. Therefore, if the closing lawyer does not intend to prepare the deed or perform other legal services for the seller, the lawyer does not have to give notice to the seller. *But see Cornelius v. Helms*, 120 N.C. App. 172,461 S.E.2d 338 (1995), *disc. rev. denied*, 342 N.C. 653,467 S.E.2d 709 (1996), for related negligence issues.

Inquiry #4:

May a lawyer who is representing the buyer, the lender, and the seller (or any one or more of them) provide the title insurer with an opinion on title sufficient to issue a mortgagee title insurance policy, the premium for which is normally paid by the buyer?

Opinion #4:

Yes. CPR 100.

Inquiry #5:

If a lawyer is representing more than one party to a residential real estate closing, what should the lawyer do if a conflict develops between the clients before, during, or after the closing?

Opinion#5:

If a conflict or controversy relating to the transaction arises between any of the parties being represented by the closing lawyer, the lawyer must withdraw from the representation of all of the clients and is ethically barred from representing any of the clients in the transaction or any dispute arising out of the transaction. Rule 5.1(a).

RPC 211—Withdrawn

January 12, 1996
Withdrawn April 12, 1996
Editor's Note: RPC 211 was adopted on January 12, 1996, and withdrawn on April 12, 1996, by the State Bar Council. A substitute opinion was proposed and subsequently adopted on January 16, 1998, as 97 Formal Ethics Opinion 8, *supra*.

RPC 212

July 21, 1995

Notifying Opposing Counsel Prior to Seeking Default

Opinion rules that a lawyer may contact an opposing lawyer who failed to file an answer on time in order to remind the other lawyer of the error and to give the other lawyer a last opportunity to file the pleading.

Inquiry:

Attorney A represents the plaintiff in a civil action. Attorney A believes that the defendant is represented by Attorney X who she knows to be prompt, courteous, and professional. Thirty days have expired since the complaint in the action was filed and no answer has been filed for the defendant. May Attorney A call Attorney X to remind him to file the answer or must Attorney A proceed with obtaining an entry of default against the defendant?

Opinion:

A lawyer may contact an opposing lawyer who failed to file a pleading on time in order to remind the other lawyer of his error and to give the other lawyer a last opportunity to file the pleading. Such conduct is not unethical but rather illustrates the level of professional courtesy and consideration that should be encouraged among the members of the bar. Rule 7.1(a)(1) of the Rules of Professional Conduct provides that a lawyer does not violate the duty to represent a client zealously "by avoiding offensive tactics or by treating with courtesy and consideration all persons involved in the legal process." Furthermore, Rule 7.1(b)(1) authorizes a lawyer "where permissible, [to] exercise his or her professional judgment to waive or assert a right or position of the client." It is also observed in the Comment to Rule 7.1 that "...a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so...." Thus, the rule does not require the client's consent prior to notifying the opposing lawyer.

In many situations, professional courtesy urges notification to the other lawyer of the failure to file a pleading. However, a lawyer is not ethically required to do so. In some situations, for example where opposing counsel is known to procrastinate or delay or the interests of the client will be materially prejudiced by notifying opposing counsel, a lawyer may determine that the appropriate tactic is to proceed with obtaining an entry of default or other appropriate remedy.

RPC 213

October 20, 1995

Editor's Note: This opinion was originally published as RPC 213 (Revised).

Lawyer's Employee as Witness

Opinion rules that a lawyer may represent a defendant in an action to abate the nuisance of a fence even though his para-legal may be called as a witness.

Inquiry:

May a lawyer who is representing a defendant in an action to abate the nuisance of a fence have his real estate paralegal sign an affidavit, prepare exhibits, and testify in opposition to the plaintiff's motion for preliminary injunction?

Opinion:

Yes. RPC 19 holds that a lawyer may represent a client even though an employee may be called as a witness on behalf of a client.

RPC 214

July 21, 1995

Sending Questionnaire to Prospective Members of Jury

Opinion rules that a lawyer may not send a jury questionnaire directly to prospective members of the jury but, if the questionnaire is sent out by the court, such communications are not prohibited.

Inquiry:

Attorney A, who is the plaintiff's counsel in a personal injury case, would like to submit a jury questionnaire, prior to trial, to the people who are on the potential jury list. The questions on the questionnaire are neutral. Receiving answers to the questionnaire would save a significant amount of time in jury selection because both defense counsel and plaintiff's counsel could limit jury *voir dire* to questions about areas of concern disclosed by the questionnaire and matters involving particular facts of the case. The counsel for the defendant has reviewed the questionnaire and does not object to the questionnaire being sent to prospective members of the jury. Does Rule 7.8(a) prohibit Attorney A from submitting the written questionnaire to prospective members of the jury?

Opinion:

Rule 7.8(a) contains a blanket prohibition on communications by a lawyer connected with the trial of a case with "anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case." As noted in the Comment to the rule, "venire men and jurors should be protected against extraneous influences" in order to "safeguard the impartiality that is essential to the judicial process." It would appear that Rule 7.8(a) prohibits Attorney A from sending the questionnaire himself to prospective members of the jury even if it is done in a way that avoids identifying who is sending the questionnaire. However, the ban of Rule 7.8(a) does not apply to communications with prospective members of the jury by the court since the prohibition is only directed towards extrajudicial communications. Therefore, if the court approves of the questionnaire and agrees that the questionnaire will be sent out under the court's direction and letterhead, it would not be a violation of Rule 7.8(a) even if the lawyer pays for the cost of distribution.

RPC 215

July 21, 1995

Modern Communications Technology and the Duty of Confidentiality

Opinion rules that when using a cellular or cordless telephone or any other unsecure method of communication, a lawyer must take steps to minimize the risk that confidential information may be disclosed.

Inquiry #1:

Communications by means of cellular and cordless telephones are broadcast over the public airwaves rather than telephone lines. For this reason, a conversation over a cordless or cellular phone may be easily intercepted.

A cordless telephone uses AM or FM radio signals to transmit a communication from the handset to the base unit. This signal can be easily intercepted by a standard AM radio.[1] Cordless telephones are, therefore, particularly susceptible to both intentional and unintentional interception. Although less susceptible to unintentional interception, a communication by a cellular telephone can be intentionally intercepted by means of a sophisticated scanner specifically designed for the purpose or by a regular radio scanner, which is available at most electronics stores, that has been modified.[2]

What is a lawyer's ethical responsibility when using a cellular or cordless telephone to communicate client information that is intended to be confidential?

Opinion #1:

A lawyer has a professional obligation, pursuant to Rule 4 of the Rules of Professional Conduct, to protect and preserve the confidences of a client. This professional obligation extends to the use of communications technology. However, this obligation does not require that a lawyer use only infallibly secure methods of communication. Lawyers are not required to use paper shredders to dispose of waste paper so long as the responsible lawyer ascertains that procedures are in place which "effectively minimize the risks that confidential information might be disclosed." RPC 133. Similarly, a lawyer must take steps to minimize the risks that confidential information may be disclosed in a communication via a cellular or cordless telephone. First, the lawyer must use reasonable care to select a mode of communication that, in light of the exigencies of the existing circumstances, will best maintain any confidential information that might be conveyed in the communication. Second, if the lawyer knows or has reason to believe that the communication is over a telecommunication device that is susceptible to interception, the lawyer must advise the other parties to the communication of the risks of interception and the potential for confidentiality to be lost.

inquiry #2:

What is a lawyer's ethical obligation when using electronic mail to communicate confidential client information?

Opinion #2:

Although electronic mail or "e-mail," is not conveyed over the public airwaves like communications by cordless or cellular telephones, many of the same concerns for client confidences apply to communications by e-mail. E-

mail is susceptible to interception by anyone who has access to the computer network to which a lawyer "logs-on" and such communications are rarely protected from interception by anything more than a simple password. In using e-mail, or any other technological means of communication that is not secure, the same precautions must be taken to protect client confidentiality as are set forth in opinion #1 above.

Endnotes

1. Colorado State Bar Ethics Opinion 92-90.
2. *Id.*

RPC 216

July 18, 1997

Editor's Note: This opinion was originally published as RPC 216 (Third Revision).

Using the Services of an Independent Title Abstractor

Opinion rules that a lawyer may use the services of a nonlawyer independent contractor to search a title provided the nonlawyer is properly supervised by the lawyer.

Inquiry #1:

Paralegal is not a lawyer. She proposes to perform real estate title searches for lawyers working as an independent contractor. May Attorney A, who is a real estate lawyer, engage Paralegal as an independent contractor to perform title searches for real estate closings?

Opinion #1:

Yes, subject to certain limitations. A lawyer may use nonlawyers to assist him or her in the rendition of the lawyer's professional services. Comment to Rule 3.3 of the Rules of Professional Conduct. There is no requirement in the Rules of Professional Conduct that such nonlawyer assistants must be employees of the lawyer's firm. However, the lawyer must be able to meet his or her ethical responsibilities with regard to the supervision of a nonlawyer assistant regardless of whether the nonlawyer assistant is employed within the firm or as an independent contractor. The lawyer is responsible for the competent representation of clients, and therefore, the lawyer is also responsible for the work product of nonlawyer assistants. Rule 6(a)(1).

Before hiring or contracting with a nonlawyer assistant to perform title searches, Attorney A should take reasonable steps to ascertain that the nonlawyer is competent. Attorney A must also give the nonlawyer appropriate instruction and supervision. Comment to Rule 3.3 and RPC 29.

Inquiry #2:

Attorney Green has limited experience searching titles to real property and has limited knowledge of real property law. He would, however, like to expand his legal services to include the preparation of title opinions and real estate closings. He plans to expand into this area of practice by contracting with Paralegal to perform title searches and then relying upon her research to prepare an opinion on title. Is Attorney Green's proposal ethical?

Opinion #2:

No. It is impossible for a lawyer to supervise adequately the work of a nonlawyer, pursuant to the requirements of Rule 3.3, if the lawyer is not himself or herself competent in the area of practice. Moreover, it is incompetent representation of a client, in violation of Rule 6, for a lawyer to adopt as his or her own an opinion on title prepared by a nonlawyer or to render a legal opinion on title if the lawyer's opinion is not based upon knowledge of the relevant records and documentation and the lawyer's own independent professional judgment, knowledge, and competence in real property law. *See* RPC 29.

Inquiry #3:

If Attorney A uses the services of a nonlawyer to search a title, either as an employee of his firm or as an independent contractor, must Attorney A disclose this to the client?

Opinion #3:

Yes, if the client inquires, Attorney A should advise the client that he uses the services of a nonlawyer title searcher.

Inquiry #4:

Does Attorney A have a duty to tell the client the name of the nonlawyer title searcher?

Opinion #4:

No, unless the client requests this information.

Inquiry #5:

Should Attorney A explain to the client how the services provided by Paralegal will be charged to the client?

Opinion #5:

No, unless the client requests this information.

Inquiry #6:

If Attorney A hires Paralegal to perform title searches as an independent contractor, is Attorney A required to check for conflicts of interest?

Opinion #6:

Yes, a lawyer is always required to check for conflicts of interest. *See* Rule 3.3(b) and Rule 5.1.

Inquiry #7:

May Attorney A disclose to Paralegal the nature of the title search to be performed and the name of the client? Is client consent necessary prior to this disclosure?

Opinion #7:

If Attorney A has determined that Paralegal understands and will comply with Attorney A's duty to safeguard the confidences of his clients, he may disclose confidential information to Paralegal without the prior consent of the client. *See* Rule 4(c)(1).

RPC 217

October 20, 1995

Advertising a Local Telephone Number in a Community Where a Law Firm Has No Office

Opinion rules that a local or remote call forwarding telephone number may not be included in an advertisement for legal services disseminated in a community where the law firm has neither an office nor a lawyer present in the community unless an explanation is included in the advertisement.

Inquiry:

ABC Law Firm has a central office in Spartanburg, South Carolina, but has a Charlotte regional office where there is a full-time secretary and a North Carolina attorney assigned to do case work. ABC Law Firm also has offices in Asheville, Hendersonville, and Hickory which are manned daily by a North Carolina attorney. ABC Law Firm regularly has North Carolina attorneys try cases and attend hearings throughout North Carolina. Some of the attorneys with ABC Law Firm are only licensed in South Carolina, some of the attorneys are only licensed in North Carolina, and some of the attorneys with the firm are licensed in both jurisdictions.

ABC Law Firm would like to publish an advertisement in the phone directories for three North Carolina communities that are within commuting distance of ABC Law Firm's four North Carolina satellite offices. However, ABC Law Firm has no office nor is there an ABC attorney located in any of these communities. The advertisement will include the telephone numbers for each of the four North Carolina satellite offices as well as a toll free number for the firm. The advertisement will also list remote call forwarding telephone numbers under the names of the towns in which it has neither an office nor an attorney. A remote call forwarding telephone number appears to be a local telephone number because no area code must be dialed from the local community; if the phone number is called in the local community, the call is forwarded to a remote location.

The advertisement will also state that the firm has law offices in four North Carolina locations and three South Carolina locations and that both North Carolina and South Carolina attorneys are available through the firm. The names of individual attorneys in the firm will not be included in the advertisement, and there would also be no listing of jurisdictions in which the individual attorneys are licensed to practice. ABC Law Firm intends to only assign North Carolina licensed attorneys to North Carolina cases. Does the advertisement comply with the North Carolina Rules of Professional Conduct?

Opinion:

No. Rule 2.1 of the Rules of Professional Conduct prohibits false and misleading communications about a lawyer or the lawyer's services. Rule 2.1(a) describes a misleading communication as a communication that "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." It is misleading communication for a law firm to infer that it has an office or a lawyer located in a community when, in fact, there is no law office or lawyer for the firm present in the community. Listing what appears to be a local telephone number in an advertisement circulated in such a community, without including an explanation in the advertisement that the number is not a local telephone number and that there is no law office in that community, will mislead readers as to the actual location of the offices of ABC Law Firm.

It is not a violation of Rule 2.1 for ABC Law Firm to advertise in North Carolina communities even though some ABC lawyers are not licensed in North Carolina provided ABC Law Firm is registered with the North Carolina State Bar as an interstate law firm, the advertisement notes that the firm has locations in both North Carolina and South Carolina, and only North Carolina licensed lawyers handle North Carolina cases.

RPC 218

January 11, 1996
Withdrawn October 24, 1997
Editor's Note: This opinion was originally published as RPC 218 (Revised) and adopted on January 11, 1996. Following the amendment of G.S. §84-5, permitting in-house legal counsel to represent an employee of a corporation in an action against the corporation and the employee, the State Bar Council withdrew RPC 218 which prohibited such representation pursuant to the requirements of the statute prior to amendment. No substitute opinion was adopted.

RPC 219

October 20, 1995

Communication with Adverse Party to Request Public Records

Opinion rules that a lawyer may communicate with a custodian of public records, pursuant to the North Carolina Public Records Act, for the purpose of making a request to examine public records related to the representation although the custodian is an adverse party whose lawyer does not consent to the communication.

Inquiry:

E, a former employee of R County, brought suit against R County and the county manager, the county personnel officer, and the county building inspector in both their personal and official capacities. The defendants are represented by Attorney A, the county attorney, and by outside legal counsel, Attorney L. E is represented by Attorney X. The county manager is the custodian of the public records of R County pursuant to the North Carolina Public Records Act, Chapter 132 of the General Statutes. Attorney X made a public records request, pursuant to G.S. §132-6, to the county manager to inspect and examine all mobile telephone records for the county building inspector. Attorney X copied Attorney A on the written request for the public records but he did not obtain the consent of Attorney A or Attorney L to the direct communication with their client, the county manager. Subsequently, a public records request for files from the building inspections department of R County was made by a person believed to be a part-time employee in Attorney X's law firm. This request was directed to the building inspector as the custodian of these public records. A courtesy copy of this request was sent by Attorney X to Attorney A. May a lawyer make a direct written request to inspect public records related to the representation of a client if the custodian of the public records is an adverse party represented by legal counsel and the custodian's attorney does not consent to the communication?

Opinion:

Yes, a lawyer may communicate directly with the custodian of public records for the purpose of making a public records request regardless of whether the custodian's lawyer consents to the communication. Rule 7.4(a) of the Rules of Professional Conduct permits a lawyer to "communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter" in only two situations: (1) the lawyer has the consent of the opposing party's lawyer; or (2) the communication is "authorized by law." G.S. §132-6 provides

> [e]very person having custody of public records shall permit them to be inspected and examined at reasonable times and under his supervision by any person, and he shall furnish certified copies thereof on payment of fees as prescribed by law.

Confidential communications between a government body and its attorney are specifically exempted from the definition of "public records" by G.S. §132-1.1(a). By this exemption, it appears that the General Assembly contemplated the extent to which the representation of a government body by a lawyer should limit the right to request public records. Further, in *News and Observer Publishing Company v. Poole*, 330 N.C. 465, 412 S.E. 2d 7 (1992), the North Carolina Supreme Court held that a clear statutory exemption must exist in order to limit the liberal access to public records allowed by the Act. *Id.* at 474-475, 412 S.E. 2d at ___. No exemption exists in the Act for requests for public records when the custodian is represented by legal counsel in a particular matter.

Although not required by the Rules of Professional Conduct, it is professionally courteous to provide a copy of a written request to inspect public records to the lawyer for the custodian of the records when the public records relate to a particular matter in which the custodian is represented by legal counsel.

RPC 220

October 20, 1995

Use of Tape Recording Made by Someone Other Than the Lawyer's Client

Opinion rules that a lawyer should seek the court's permission to listen to a tape recording of a telephone conversation of his or her client made by a third party if listening to the tape recording would otherwise be a violation of the law.

Inquiry #1:

Client X was indicted on two counts of taking indecent liberties with a 14 year old boy. The boy's parents secretly tape recorded telephone conversations between the boy and Client X. Attorney A, who represents Client X, obtained discovery from the district attorney from which he learned of the existence of the tape and demanded copies. RPC 192 rules that a lawyer may not listen to an illegal tape recording made by his or her client nor may the lawyer use the information on the illegal tape recording to advance the client's case. Does the ethical responsibility of a lawyer change if a tape recording, which contains information relevant to the defense of the client, was made by someone other than the lawyer's client?

Opinion #1:

Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 *et seq.* (the "Act"), it is illegal to intentionally intercept any telephone conversation without the consent of one of the parties to the conversation. However, whether it is illegal for Client X or Attorney A to listen to or use information contained in a tape recording of Client X made under the circumstances described in the inquiry is a question of statutory interpretation which cannot be answered by the Ethics Committee. *See generally* 18 U.S.C. §2511(1)(d) and (2)(d). If listening to or using the information from the tape recording under these circumstances is not a violation of the Act, Attorney A may listen to the tape recording and may use the information obtained from the tape recording in trial. If Attorney A is unsure of the legality of listening to the tape recording and he believes that it is in the best interest of his client's defense to do so, he should take the appropriate procedural steps to obtain the court's determination regarding the issue. *See* Rule 7.1(a)(1) of the Rules of Professional Conduct.

This situation is distinguishable from RPC 192. RPC 192 prohibits a lawyer from listening to and using the information from a clearly illegal tape recording of a conversation of the opposing party made by a client because a lawyer should not enable a client to benefit from illegal conduct. Attorney A's client, on the other hand, is not seeking to benefit from her own illegal activity. Provided it is not a violation of the Act, listening to and using the contents of the tape recording to represent Client X is not prejudicial to the administration of justice. *See* Rule 1.2(d).

Inquiry #2:

If the district attorney advises Attorney A that the district attorney intends to offer the tape in evidence, does Attorney A have an obligation to listen to the tape recording in order to be prepared to address its contents in the trial?

Opinion #2:

Whether Attorney A may listen to the tape recording is a question of law which cannot be answered by the Ethics Committee. *See* opinion #1 above. However, if listening to the tape recording is illegal or Attorney A is unsure of the legality of listening to the tape recording, he should take the appropriate steps to seek the court's permission to listen to the tape recording in order to prepare for motions regarding the admissibility of the tape recording. *See* Rule 7.1(a)(1).

Inquiry #3:

In the fact situation set forth in RPC 192, the client made a tape recording of a conversation to which he was not a party. In this situation, may the lawyer file a motion to test the admissibility of the tape recording and, if the court determines that the tape is admissible, listen to the tape and use the information obtained on the tape and the tape itself at trial?

Opinion #3:

Yes. *See* opinions #2 above.

RPC 221

October 20, 1995

Receipt of Evidence of Crime

Opinion rules that absent a court order or law requiring delivery of physical evidence of a crime to the authorities, a lawyer for a criminal defendant may take possession of evidence that is not contraband in order to examine, test, or inspect the evidence. The lawyer must return inculpatory physical evidence that is not contraband to the source and advise the source of the legal consequences pertaining to the possession or destruction of the evidence.

Inquiry #1:

Attorney A and Attorney B work for different law firms. They have been appointed to represent Defendant who is charged with first degree murder. Defendant's wife, W, was apparently present during the altercation that led to the victim's death. During Attorney A and Attorney B's investigation, Defendant implicated W in the matter and told the attorneys that he had knowledge of relevant physical evidence. The police detectives who investigated the death are in possession of a stick they believe Defendant used to commit the murder but neither the police detectives nor the prosecutors are aware of the existence of other physical evidence.

Defendant brought the physical evidence to Attorney B's office. Attorney B took possession of the physical evidence for purposes of examination and consultation with Attorney A concerning the extent to which the physical evidence might incriminate or exculpate Defendant.

Attorney A and Attorney B interviewed W who incriminated herself. The story W told Attorney A and Attorney B is different from the statement that she gave to the police officers during the initial investigation.

Must Attorney A or Attorney B notify the district attorney's office or the investigating law enforcement agency of the existence of the physical evidence?

Opinion #1:

No. On the one hand, a lawyer has a duty to preserve the confidences of the client and to zealously represent the client within the bounds of the law. Rule 4 and Canon VII of the Rules of Professional Conduct. On the other hand, a lawyer is an officer of the court and should not engage in conduct that is prejudicial to the administration of justice. Rule 1.2(d). In the absence of a court order or a common law or statutory obligation to disclose the location or deliver an item of inculpatory physical evidence that is not contraband (the possession of which is in and of itself a crime, such as narcotics) to law enforcement authorities, a defense lawyer may take such evidence into his or her possession for the purpose of testing, examination, or inspection. The defense lawyer should return the evidence to the source from whom the lawyer received it. In returning the item to the source, the lawyer must advise the source of the legal consequences pertaining to the possession or destruction of the evidence by that person or others. This advice should include the advice to retain the evidence intact and not engage in conduct that might be a violation of criminal statutes relating to evidence. *See generally* ABA Standards for Criminal Justice Prosecution Function and Defense Function (3rd ed.), Standard 4-4.6(a)-(c), "Physical Evidence," and Commentary. If a defense lawyer receives a subpoena for inculpatory physical evidence in his or her possession, the lawyer may take appropriate steps to contest the subpoena in order to protect the interests of the client. However, the lawyer must comply with a court order to produce the evidence.

Similarly, pursuant to G.S. §15A-905, a defense lawyer must comply with any order entered by the court to produce evidence the defendant intends to introduce at trial.

Inquiry #2:

What specific information, if any, is Attorney A or Attorney B allowed to disclose to the district attorney or the law enforcement agency regarding the weapon or how it was obtained?

Opinion #2:

See opinion #1 above.

Inquiry #3:

W provided information to Attorney A and Attorney B which would assist Defendant in his defense. Since Attorney A and Attorney B might be witnesses for Defendant, do they have to withdraw from the representation of Defendant?

Opinion #3:

No. Rule 5.2(b) requires a lawyer to withdraw from the representation of a client if, "after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client." However, he may continue the representation and he or a lawyer in his firm may testify under the circumstances enumerated in Rule 5.2(a). It is not "obvious" that Attorney A or Attorney B "ought" to be called as a witness for their client. Any information gained by Attorney A and Attorney B during the professional relationship with Defendant, including information obtained from third parties such as W, is confidential information. Rule 4(a); *see also* G.S. §15A-906. Unless Defendant consents to disclosure of the information gained from W, the lawyers may not testify about what W told them. Even if Defendant consents to the use of this information, W may be called as a witness herself, thus avoiding the need for Attorney A or Attorney B to testify. A problem of this nature can be avoided by having a nonlawyer present at all interviews with prospective trial witnesses.

Inquiry #4:

Defendant has consented to the disclosure by Attorney A and Attorney B of the substance of W's statements to them. At trial, W is called as a witness and testifies contrary to her earlier statements to Attorney A and Attorney B. If the testimony of Attorney A or Attorney B is necessary to rebut the testimony of W, must one or both of them withdraw from the representation?

Opinion #4:

Withdrawal may not be required. It is possible that by aggressive cross-examination of W, the need for one of the lawyers to testify will be avoided. If Lawyer A or Lawyer B must testify in order to rebut the testimony of W, moreover, the lawyers might conclude that an exception in Rule 5.2(a)(4) applies which would allow the lawyer to testify without withdrawing from the representation. Rule 5.2(b). Rule 5.2(a)(4) allows a lawyer to continue the representation despite acting as a witness in the trial if withdrawal "would work a substantial hardship on the client because of the distinctive value of the lawyer...as counsel in the particular case."

If it is necessary for one of the lawyers to testify, the lawyer who testifies may have to withdraw from the representation but the other lawyer may remain in the case. Rule 5.2(b) only requires the lawyer who testifies for his client and the other members of his firm to withdraw from the representation.

RPC 222

October 20, 1995

Obtaining a Confession of Judgment to Secure a Fee

Opinion rules that prior to rendering legal services to a client, a lawyer may not obtain a confession of judgment from a client to secure a fee.

Inquiry #1:

Attorney A charges a flat fee for representation in certain criminal and domestic matters. Prior to rendering legal services, he requires the client to sign a confession of judgment, pursuant to G.S. §1A-1, Rule 68. On occasion, the confession of judgment recites the amount of the flat rate fee Attorney A has quoted to the client and, on occasion the confession of judgment is blank as to the amount. Regardless of the extent of the services actually rendered to the client, if the client fails to pay the fee, Attorney A files the confession of judgment with the clerk of court. If the confession is blank, he fills in the amount of the flat fee quoted to the client.

Attorney A agrees to represent Client X on the defense of a felony. He tells Client X he will represent him for a flat fee of $2000 which Client X must pay by the conclusion of the representation. Prior to rendering services to Client X, Attorney A obtains Client X's signature on a confession of judgment for $2000. Attorney A makes one minor court appearance on behalf of Client X but, before rendering any other services to Client X, the district attorney dismisses the charges on her own initiative due to insufficient evidence. Client X has made no payments to Attorney A. Attorney A files the confession of judgment with clerk of court and proceeds to enforce the judgment. Client X disputes the amount of the fee. Is Attorney A's fee arrangement with Client X ethical?

Opinion #1:

No, a lawyer may not obtain a confession of judgment from a client prior to the rendering of legal services to the client. CPR 250, which was adopted under the superseded Code of Professional Responsibility, allowed a lawyer to obtain a confession of judgment from a client to secure a fee for services. However, the practice of obtaining a confession of judgment prior to the rendering of legal services to a client violates Rule 2.6 of the current Rules of Professional Conduct. To the extent CPR 250 is inconsistent with this opinion, it is overruled.

The State Bar's fee dispute arbitration program was established in 1993 in order to provide an appropriate and effective vehicle for resolving fee disputes between a client and a lawyer. *See* "Professionalism Report," NCSB *Newsletter*, Volume 17, No. 4, pages 8-14. Prior to initiating legal proceedings to collect a disputed fee, a lawyer is required by Rule 2.6(e) of the Rules of Professional Conduct to notify the client of the existence of the State Bar's fee arbitration program and to participate in good faith in nonbinding arbitration of the fee dispute if the client submits a proper request for fee arbitration. Although a client who signed a confession of judgment at the beginning of the representation may subsequently contest the actual amount of the fee, a lawyer holding the confession of judgment appears to have no duty to advise the client of the existence of the fee arbitration program because the filing of a confession of judgment abrogates the need to initiate legal proceedings to collect the fee. Moreover, with a confession of judgment in hand, the lawyer has no motivation to resolve a fee dispute with the client through arbitration because he or she already has a judgment. Attorney A's fee arrangement frustrates the purpose of the State Bar's mandatory fee arbitration program and is, therefore, in violation of Rule 2.6(e).

Attorney A's fee arrangement also violates Rule 2.6(a) which prohibits a lawyer from entering into an agreement for, charging, or collecting an excessive fee. Rule 2.6(b) lists the factors to be taken into consideration in determining whether a fee is reasonable. These factors include the time and labor required to perform the legal services. In the present inquiry, Attorney A performed minimal services and the favorable outcome did not result from the work of Attorney A. Therefore, the $2000 fee for the services is unreasonable. In RPC 158, it is held that Rule 2.6(a) requires a lawyer to refund to the client at the conclusion of the representation any portion of the fee which is clearly excessive. If a confession of judgment is attained prior to the rendering of legal services, it may be used unethically to collect an excessive fee.

Inquiry #2:

Would opinion #1 be different if the confession of judgment was signed by Client X in blank?

Opinion #2:

No.

Inquiry #3:

Attorney B has rendered legal services to Client Y. Client Y indicates that he does not dispute the fee for the services rendered but he is unable to pay the fee at this time. May Attorney B obtain a confession of judgment from Client Y for the amount of the fee?

Opinion #3:

Yes, provided Attorney Y explains the confession of judgment to the client. Since Client Y does not dispute the known fee, this arrangement does not undermine the purpose of the fee arbitration program. *See* Rule 2.6(e).

RPC 223

January 12, 1996

Responsibility to Client Who Has Disappeared

Opinion rules that when a lawyer's reasonable attempts to locate a client are unsuccessful, the client's disappearance constitutes a constructive discharge of the lawyer requiring the lawyer's withdrawal from the representation.

Inquiry:

On July 7, 1993, Attorney A entered into an agreement to represent Client A in regard to minor injuries she sustained in an automobile accident. Attorney A met with Client A on that date and subsequently spoke with her by telephone on a couple of occasions. In these phone conversations, Client A informed Attorney A that she planned to see other health care providers.

Attorney A has not heard from Client A since 1993 although she has tried on numerous occasions and by a variety of methods to contact Client A. Initially, Attorney A called Client A but Client A did not return her phone calls. Last year, Attorney A wrote to Client A but the letters were returned without a forwarding address. Client A's telephone number was disconnected and there is no new listing for her. She no longer works for the company that employed her in July 1993. Attorney A asked Client A's former employer to forward a letter to Client A at the last address the employer had on file for Client A. She received no response to this letter. Attorney A tried to get Client A's new address from one of the doctors Client A was seeing in 1993. The doctor's office had her old address. The insurance company for the prospective defendant in the automobile accident has not heard from Client A and has closed its file. Client A's own automobile insurance policy was canceled in April 1994. The company does not have a new address for Client A. Finally, Attorney A checked the county property listings. The last listing for Client A was in 1993.

The statute of limitations on Client A's claim will expire in ten months. A complaint has not been filed. A representative of Attorney A's malpractice insurance carrier recommended that she file a complaint on behalf of Client A and then immediately make a motion to withdraw. What is Attorney A's ethical responsibility to Client A?

Opinion:

When a client stops communicating with his or her lawyer, the lawyer must take reasonable steps to locate and communicate with the client. In the present inquiry, Attorney A's efforts to locate Client A were more than reasonable. However, if the lawyer is still unable to locate the client and the client has made no effort to contact the lawyer, the client's failure to contact the lawyer within a reasonable period of time after the lawyer's last contact with the client must be considered a constructive discharge of the lawyer. Rule 2.8(b)(4) of the Rules of Professional Conduct requires a lawyer to withdraw from the representation of a client if the lawyer is discharged by the client. Therefore, Attorney A must withdraw from the representation.

Attorney A may not file a complaint on behalf of Client A although filing suit might stop the running of the statute of limitations. The determination of the objective of legal representation is the client's prerogative. As the comment to Rule 7.1 observes, "[t]he client has ultimate authority to determine the purposes to be served by legal representation within the limits imposed by law and the lawyer's professional obligation." If a client disappears, the lawyer cannot know whether the client wanted to proceed with the lawsuit, who the client was prepared to sue, and whether the allegations in the complaint are accurate. Therefore, if a client disappears and the lawyer is unable to locate the client

after reasonable efforts to do so, the lawyer should withdraw from the representation without taking further action on behalf of the client.

RPC 224

October 24, 1997

Editor's Note: This opinion was originally published as RPC 224 (Third Revision).

Communication with Treating Physician

Opinion prohibits the employer's lawyer from engaging in direct communications with the treating physician for an employee with a workers' compensation claim.

Inquiry #1:

Employee was injured in a work-related accident. Attorney A represents Employee in his workers' compensation claim. Attorney X represents the employer. Employee's treating physician is Dr. Care. May Attorney X contact Dr. Care privately, without the consent of Employee or Attorney A, to discuss Employee's medical treatment?

Opinion #1:

No. *See Salaam v. N.C. Department of Transportation*, 122 N.C. 83, 468 S.E.2d 536 (1996), disc. rev. improvidently granted, 345 N.C. 494, 480 S.E.2d 51 (1997) (applying the holding in *Crist v. Moffat*, 326 N.C. 326, 389 S.E.2d 41 (1990), to adversarial proceedings before the Industrial Commission and recognizing the public policy interest in protecting patient privacy in light of the adequacy of formal discovery procedures).

RPC 225

January 12, 1996

Seeking Cooperation on Plea Agreement from Crime Victim with Pending Civil Action

Opinion holds that the lawyer for a defendant in criminal and civil actions arising out of the same event may seek the cooperation of a crime victim on a plea agreement provided the settlement of the victim's civil claim against the defendant is not contingent upon the content of the testimony of the victim or the outcome of the case.

Inquiry:

Attorney A represents Client A who is charged with the crime of discharging a weapon into an occupied automobile. Attorney X represents the occupants of the automobile, Family X, which includes a father, a mother, and two children. Attorney X has advised Attorney A that Family X is seeking compensation from Client A for damages caused by the discharge of the weapon into the automobile. Attorney X did not represent the family at the time of the indictment of Client A and he is not involved in the criminal proceeding.

Attorney A would like to meet with Attorney X to discuss settlement of the claims of Family X in conjunction with a discussion of the cooperation of the family in obtaining a plea agreement or a dismissal of the charges against Client A. May Attorney A and Attorney X discuss cooperation on Client A's criminal charge in conjunction with a discussion of the settlement of the civil claim?

Opinion:

Yes, provided the lawyers do not discuss making the settlement of the family's civil claims contingent upon the content of the testimony of the members of the family or upon the outcome of the case. Rule 7.9(b) states "[a] lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case...." The Comment to Rule 7.9 recognizes that "[w]itnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

If no financial inducement is offered to the members of Family X, Attorney A may seek their cooperation on a plea agreement or dismissal of the charges. However, under no circumstances should a resolution of the civil matter result in a witness's refusal to testify or the withholding of factual information from the court. Moreover, the district attorney responsible for the case should be advised of the discussions between Attorney A and Attorney X.

RPC 226

April 12, 1996

Disposition of Unidentified Funds

Opinion rules that when a law firm receives funds that are not identified as client funds, the firm must investigate the ownership of the funds and, if it is reasonable to conclude the funds do not belong to a client or a third party, the firm may conclude that the funds belong to the firm.

Inquiry:

Law Firm received a check for $3,700 made out to Attorney A, a member of the firm, and Fire Insurance Company. The check is a payment from the liquidation of National Insurance Company which filed for bankruptcy approximately eight to ten years ago. Attorney A and the other lawyers in Law Firm are unable to determine whether the funds represented by the check belong to a client, to a third party, or to the firm. They have inquired of the chief deputy liquidator's office, the office of the court where National's bankruptcy action was filed, and Fire Insurance Company, but to no avail. The lawyers believe that the most logical explanation for the payment is as follows: when National went bankrupt, Law Firm made an uninsured motorist claim for a client under the client's insurance policy with Fire Insurance Company. The claim was settled and Fire Insurance Company required the client to sign a subrogation agreement for the amount of the settlement. Using that agreement, Fire Insurance Company filed a proof of claim with the bankruptcy court. If the check is being paid in satisfaction of this claim in the bankruptcy proceeding, the proceeds of the check would belong to Fire Insurance Company and not to the client or third party.

Fire Insurance Company would like to split the check with Law Firm. May Law Firm conclude that the funds do not belong to a client and share the check with Fire Insurance Company?

Opinion:

Yes, if Law Firm has made a reasonable effort to investigate the background of the check to determine whether the check belongs to a client or a third party and, having undertaken that investigation, now has a good faith belief that the check does not belong to a client or a third party. *See* Rule 10.1(c).

RPC 227

July 18, 1997

Editor's Note: This opinion was originally published as RPC 227 (Revised).

Release of Title Notes to Former Client

Opinion rules that a former residential real estate client is not entitled to the lawyer's title notes or abstracts regardless of whether such information is stored in the client's file. However, a lawyer formerly associated with a firm may be entitled to examine the title notes made by the lawyer to provide further representation to the same client.

Inquiry #1:

Attorney A is a real estate lawyer with Law Firm X. Two years ago, Attorney A represented Client 1 in the closing of the purchase of a house and lot. Client 1 recently requested her real estate file from the firm. What documents does Law Firm X have to give to Client 1?

Opinion #1:

Rule 2.8(a)(2) requires a lawyer who has withdrawn from the representation of a client to deliver to the client "all papers and property to which the client is entitled." RPC 178 cites CPR 3 for the proposition that

> a lawyer must provide a former client with originals or copies of anything in the file which would be helpful to the new lawyer except "the discharged lawyer's notes made for his own future reference and study and similar things not representing a completed work product."

See also CPR 3, CPR 315, CPR 322, CPR 328 and Rule 2.8(a)(2).

After a residential real estate transaction is completed, the client is entitled to originals or copies of the documents which were generated solely in connection with the client's closing, including the following: the deed to the property, plats, title opinion, title insurance policy, all closing documents, all documents prepared for the lender and other third parties, correspondence, memoranda regarding the client's transaction only, and documents referenced in the client's deed or title opinion. The client is not entitled to the lawyer's title notes, abstracts, or copies of documents not prepared solely for the client's

transaction regardless of whether such information is stored in the client's file.

Inquiry #2:

Are the title notes, the title opinion, copies of deeds, and other similar documents in the file considered "work product" which Law Firm X can refuse to return to Client 1 or her designated attorney?

Opinion #2:

See opinion #1 above.

Inquiry #3:

While a shareholder in Law Firm X, Attorney B was retained by Client 2 to represent her in the refinancing of her home. Attorney B supervised his paralegal in performing a title search, prepared a title opinion, obtained title insurance, prepared closing documents, and otherwise represented Client 2 in refinancing her home. Attorney B subsequently resigned from Law Firm X and opened his own practice. Client 2 has retained Attorney B to assist her in another refinancing of her home. In accordance with Attorney B's advice, Client 2 requested her original refinance file from Law Firm X. Law Firm X refused to release the file to Client 2, contending that all of the title notes and other information contained in the file, other than the actual title policy, are the "work product" of Law Firm X and Client 2 is not entitled to receive the originals or copies of this material. Attorney B's representation of Client 2 on the new refinancing would be facilitated by the receipt of the title notes from the prior refinancing. May Law Firm X refuse to provide Client 2's file, or a copy of the materials contained therein, to Client 2 or her attorney?

Opinion #3:

No. *See* opinion #1 above. If a lawyer who was formerly associated with a law firm asks the law firm for the file of a client the lawyer represented while he was a member of the firm and the use of the lawyer's title notes will assist the lawyer in providing further representation to the same client, in addition to giving the lawyer the originals or copies of the documents noted in opinion #1 above, the law firm must give the lawyer access to the title notes made by the lawyer (or by a paralegal of the firm acting at the lawyer's direction) during the previous representation of the client while the lawyer was still a member of the law firm. This opinion is subject to the file maintenance and destruction guidelines in RPC 209.

Inquiry #4:

Is the response to inquiry #3 affected by the fact that a paralegal employed by Law Firm X performed the actual title search?

Opinion #4:

No.

Inquiry #5:

Other clients of Attorney B when he was a member of Law Firm X have asked Law Firm X to forward their files, or copies thereof, to Attorney B. May Law Firm X refuse to send the files, or copies of the files, to Attorney B?

Opinion #5:

No. *See* opinion #3 above.

RPC 228

July 26, 1996

Editor's Note: This opinion was originally published as RPC 228 (Revised).

Indemnifying the Tortfeasor's Liability Insurance Carrier for Unpaid Liens of Medical Providers as a Condition of Settlement

Opinion rules that a lawyer for a personal injury victim may not execute an agreement to indemnify the tortfeasor's liability insurance carrier against the unpaid liens of medical providers.

Inquiry:

Attorney A represents Client A who was injured in an automobile collision caused by the negligence of Mr. X. Mr. X has liability insurance with Insurance Carrier. Attorney A negotiated a settlement of Client A's claim with Insurance Carrier for a sum certain. However, Insurance Carrier's settlement offer is conditioned upon the execution by Attorney A and Client A of an indemnity agreement in addition to the traditional general release. In the indemnity agreement, Attorney A would agree to indemnify Insurance Carrier against all claims Insurance Carrier might sustain as a result of any outstanding medical lien incurred by Client A as a result of the accident. The agreement requires Insurance Carrier to notify Attorney A of all medical provider claims or liens of which Insurance Carrier has actual or constructive knowledge. Is it ethical for Attorney A to sign the indemnity agreement as a part of the settlement of Client A's claim?

Opinion:

No. Rule 5.1(b) of the Rules of Professional Conduct.

RPC 229

July 26, 1996

Joint Representation of Husband and Wife in Estate Planning

Opinion rules that a lawyer who jointly represented a husband and wife in the preparation and execution of estate planning documents may not prepare a codicil to the will of one spouse without the knowledge of the other spouse if the codicil will affect adversely the interests of the other spouse or each spouse agreed not to change the estate plan without informing the other spouse.

Inquiry #1:

Husband and Wife asked Attorney to represent them in planning the disposition of their estates and in the preparation of their wills. Both spouses agreed that all of the property of the first to die would be left to the surviving spouse with the exception of a small trust that would be established at Husband's death for the benefit of the couple's minor children. The trust would be funded prior to the distribution of the residuary estate to Wife. Husband has a terminal illness and the couple anticipate that Husband will be the first to die. The wills were drafted and signed. Husband subsequently called Attorney and expressed concern about Wife's ability to manage her funds. Husband asked Attorney to draft a codicil to his will increasing the amount put in trust for the minor children, thereby reducing the residuary bequest to Wife. May Attorney A draft the codicil without the knowledge and consent of Wife?

Opinion #1:

Attorney may only prepare the codicil without informing Wife if there was no clearly expressed intent by Husband and Wife, at the time of the preparation of the original estate planning documents, that neither spouse would change the estate plan without informing the other spouse and the provisions of the codicil are consistent with the best interests of Wife. *See* Rule 5.1(a). There are insufficient facts presented in this inquiry to determine whether there was an agreement not to change the estate plan or to determine whether the codicil is consistent with Wife's interests.

Inquiry #2:

In an entirely unrelated matter, Husband X meets with Attorney regarding his personal estate plan. Husband X wants to minimize Wife X's share of his estate because he believes she suffers from dementia. Also, it is his second marriage, of which there are no children, and Wife X has her own assets. May Attorney advise Husband on how to structure his estate plan to preclude Wife from dissenting from his will?

Opinion #2:

Yes, Rule 7.1(a)(1) permits a lawyer to seek the lawful objectives of a client through reasonably available means permitted by law and the Rules of Professional Conduct.

RPC 230

July 26, 1996

Editor's Note: Compare Rule 3.3(d).

Editor's Note: See also 98 Formal Ethics Opinion 1 for additional guidance..

Disclosure of Adverse Medical Reports in a Social Security Disability Case

Opinion rules that a lawyer representing a client on a good faith claim for social security disability benefits may withhold evidence of an adverse medical report in a hearing before an administrative law judge if not required by law or court order to produce such evidence.

Inquiry #1:

Attorney represents Client L, a claimant for social security disability benefits. Attorney files a request for an administrative hearing before a Social Security Administration administrative law judge ("ALJ"). In administrative hearings before an ALJ, no one advocates or presents evidence in opposition to the claimant's case.

Attorney previously represented Client L on his claim for workers' compensation benefits. During the workers' compensation case, the workers' compensation carrier required Client L to submit to an independent medical examination. The report of the physician performing the examination states that there is little wrong with Client L and he is a malingerer. Attorney considers this report biased and unfair. At the administrative hearing, Attorney submits other medical records for Client L, and withholds the adverse report from the workers' compensation case. Is this ethical?

Opinion #1:

Yes, provided there is no law or court order mandating disclosure and further provided Attorney is advancing Client L's claim in good faith.

The Social Security Independence and Program Improvements Act of 1994, Pub.L.No. 103-296, Sect. 206, 108 Stat. 1464, 1509-16 (1994) provides, in pertinent part:

> (a)(1) Any person...who makes, or causes to be made, a statement or representation of a material fact for use in determining any initial or continuing right to or the amount of (A) monthly insurance benefits under title II, or (B) benefits or payments under title XVI, that the person knows or should know is false or misleading or knows or should know omits a material fact or makes such a statement with knowing disregard for the truth shall be subject to, in addition to any other penalties that may be prescribed by law, a civil money penalty of not more than $5,000 for each such statement or representation....

The statute defines "a material fact" as follows:

> (2) For purposes of this section, a material fact is one which the secretary may consider in evaluating whether an applicant is entitled to benefits under title II or eligible for benefits or payments under title XVI.

Whether the law requires disclosure of adverse medical opinions or medical reports generated in an unrelated adversarial proceeding is the subject of controversy. *See* Robert E. Raines, "The Advocate's Conflicting Obligations Vis-a-Vis Adverse Medical Evidence in Social Security Proceedings," 1995 B.Y.U.L. Rev. 99, 133-134. However, if a lawyer reasonably believes that this law or a court order requires the production of such evidence, the lawyer should comply with the law or court order. In so doing, the lawyer is not violating the duty of confidentiality. *See* Rule 4(c)(3) of the Rules of Professional Conduct.

If the lawyer reasonably believes that there is no law or court order requiring production of the evidence, Rule 4 of the Rules of Professional Conduct requires the lawyer to protect the confidential information of a client. Canon VII also requires the lawyer to represent the client zealously within the bounds of the law. In litigation, a conflict may arise between these duties and a lawyer's duty of candor to the court. *See* comment to Rule 7.2. In general, there is no ethical duty to volunteer adverse evidence to a tribunal absent a law or court order requiring disclosure. The lawyer must present the evidence that best advances the client's case and should not reveal confidential information if to do so would be detrimental to the client's interest. Rule 4(c)(2). Nevertheless, a lawyer may not knowingly advance a claim, make a false statement of fact, use false evidence, or assist the client in illegal or fraudulent conduct. Rule 7.2(a)(2), (4), (5), and (8).

In light of these conflicting obligations, the following position taken by the Committee on Professional Ethics of the New York County Lawyers Association in its decision of September 9, 1993, is sound:

> If a lawyer is able to advance a good faith claim for benefits despite knowledge of contrary medical reports, and if none of the evidence or statements made in support of that claim is known to be false in light of such knowledge, then nothing in the Code [of Professional Conduct] precludes assertion of the claim. If, however, the lawyer's knowledge of the adverse medical information constitutes knowledge that the claim itself is false, then the lawyer is not free to advance the claim and must withdraw from the representation.

Id. at 115 (quoting Comm. On Prof. Ethics of the N.Y. County Lawyers' Ass'n, New York County Lawyers Ethics Opinion, N.Y.L.J., September 9, 1993, at 2).

Thus, if Attorney is not knowingly advancing a false claim on behalf of Client L and Attorney reasonably believes that disclosure is not required by law or court order, he may represent Client L in the social security disability hearing without disclosing the adverse medical evidence.

Inquiry #2:

Attorney A represents a claimant for social security disability benefits. Attorney requests an administrative hearing. In the course of the representation, Attorney writes the claimant's treating physician and asks for a letter stating the physician's opinion about whether the claimant is disabled. In the responsive letter from the physician, the physician indicates that she believes the claimant is not disabled and should not be granted social security disability benefits. Attorney does not submit the adverse letter from the physician to the ALJ at the hearing. Is this unethical?

Opinion #2:

See opinion #1.

Inquiry #3:

In the same situation as inquiry #2, Attorney requests from the treating physician a letter plus the treating physician's office notes. The treating physician sends the office notes which merely describe the course of the claimant's treatment. However, the physician also sends a letter stating her opinion that the claimant is not disabled. Attorney submits only the office notes to the ALJ and withholds the adverse letter. Is this conduct ethical?

Opinion #3:

See opinion #1.

Inquiry #4:

Attorney has concluded that it would be a good litigation strategy to produce all relevant medical evidence at the administrative hearing on the claim for disability benefits of Client X. Attorney believes that if the adverse medical evidence is introduced, it can be explained and will not defeat Client X's claim. If Attorney introduces and explains the evidence, it will avoid any perception that Attorney is hiding relevant evidence and will, thereby, increase the ALJ's confidence in Attorney. It will also avoid the potential harm that might result if the ALJ learns of the evidence from another source. Is Attorney prohibited from introducing the adverse medical evidence?

Opinion #4:

No. The Rules of Professional Conduct do not prohibit a lawyer from presenting to the client the strategic advantage of disclosing adverse evidence and obtaining the client's consent to disclose. Rule 4(c)(1).

RPC 231

October 18, 1996

Editor's Note: This opinion was originally adopted as RPC 231 (Revised).

Collecting a Contingent Fee on the Gross Recovery and on the Medical Insurance Provider's Claim

Opinion rules that a lawyer may not collect a contingent fee on the reimbursement paid to the client's medical insurance provider in addition to a contingent fee on the gross recovery if the total fee received by the lawyer is clearly excessive.

Inquiry #1:

Attorney A's contingent fee agreement with Client for representation in a personal injury case will pay Attorney A a fee of one-third of the gross recovery from the defendant plus whatever contingent legal fee may be provided by law for recovering and paying the claim for reimbursement of an insurance carrier or medical insurance program that paid some or all of the client's medical expenses. Is it ethical for a lawyer to collect a contingent fee on the gross recovery and an additional contingent fee for recovering and paying the claim of the medical insurance carrier or program?

Opinion #1:

No opinion is expressed as to whether a legal fee for collecting a medical insurance provider's claim for reimbursement is permitted by law. If such a fee is permitted by law, the collection of this fee in addition to the collection of a

contingent fee on the gross recovery may render the lawyer's total fee for the representation of the client "clearly excessive" in violation of Rule 2.6(a) of the Rules of Professional Conduct. Whether the total fee is "clearly excessive" depends upon the facts and circumstances of the particular representation. "Contingent fees, like all legal fees, must be reasonable." RPC 35. Further, a lawyer may not charge a clearly excessive fee even though the fee may be recovered from an opposing party. RPC 196

Rule 2.6(b) provides that "[a] fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence experienced in the area of law involved would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." The rule then lists a number of factors to be taken into consideration in determining the reasonableness of a fee including the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> …
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> …
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

A lawyer may not know at the beginning of the representation whether collecting the additional fee will render the lawyer's total fee clearly excessive in violation of the rule. However, at the conclusion of the representation, the lawyer should examine the factors listed in Rule 2.6(b) to determine the reasonableness of the total fee. If the collection of the additional fee renders the total fee paid to the lawyer clearly excessive in light of these factors, the lawyer should reduce the fee paid by the client in an amount equivalent to the fee permitted by law for collecting and paying the claim of the medical insurance provider.

Inquiry #2:

At the beginning of the representation, should the lawyer disclose to the client the lawyer's intention to seek the fee from the medical insurance provider in addition to the contingent fee payable by the client on the gross amount of the recovery?

Opinion #2:

Yes, the fee arrangement should be fully explained to the client and the client should agree to the fee arrangement. *See* Rule 2.6 and comment.

RPC 232

October 17, 1996

Editor's Note: Opinion was originally adopted as RPC 232 (Revised). See RPC 191, as amended, for additional guidance.

Disbursement Upon Deposit of Mortgage Company Check Pursuant to an Agreement Purporting to Make Check Certified

Opinion concerns disbursements from a trust account in reliance upon the deposit of a mortgage company's check issued pursuant to an agreement with a mortgage company and the company's institutional lender purporting to render the check "certified" as that term is defined in the UCC.

Inquiry:

On October 20, 1995, RPC 191 was adopted by the Council of the North Carolina State Bar. The opinion allows a lawyer to make disbursements from his or her trust account in reliance upon the deposit of funds provisionally credited to the account provided the funds are deposited in the trust account in certain specified forms including certified checks.

Several mortgage companies and financial institutions making mortgage loans, (the "mortgage companies") have prepared a form agreement called the "Immediately Available Funds Procedure Agreement" (the "Agreement") which contains a procedure that mortgage companies believe will render certain mortgage loan proceeds checks "certified checks" as defined in the Uniform Commercial Code ("UCC"). If so, the mortgage companies contend that a lawyer closing a residential real estate transaction may make disbursements from his or her trust account immediately upon the deposit of such a mortgage loan proceeds check provisionally credited to the trust account.

The Agreement will be executed by the closing lawyer ("Attorney"), the mortgage company ("Financial Institution") for a particular borrower ("Borrower"), and an institutional lender legally authorized to make loans and receive deposits ("Federally-Insured Lender"). (All defined terms used herein are from the Agreement.) The procedure called for by the Agreement and some (but not all) of the terms of the Agreement are described below.

The Financial Institution shall transmit mortgage documents (promissory note, deed of trust, etc.) and closing instructions to Attorney to close the loan to Borrower. Prior to the scheduled closing of the loan, Financial Institution shall deliver a check ("Net Proceeds Check") drawn by Financial Institution on Federally-Insured Lender and payable jointly to Attorney and Borrower. After the mortgage documents are executed, but before closing the loan, Attorney will contact a duly authorized employee of Federally-Insured Lender ("Employee Contact"). Attorney will provide certain information to Employee Contact including the amount of the mortgage loan, that the mortgage documents have been executed by Borrower, and the amount of the Net Proceeds Check and any account number thereon. Upon providing this information to Employee contact, Attorney "shall be deemed to have made the same warranties to Federally-Insured Lender as if Attorney had obtained an acceptance as to the Net Proceeds Check from Federally-Insured Lender pursuant to Section 3-417 of the UCC." Federally-Insured Lender, through its Employee Contact, then issues Attorney a transaction code for manual notation by Attorney on the face of the Net Proceeds Check. The agreement provides that the issuance of the transaction code constitutes

> (a) notice from Federally-Insured Lender to Attorney pursuant to Section 9-305 of the Uniform Commercial Code as in effect in the state that Federally-Insured Lender has a security interest in the mortgage documents; and
> (b) the warranty by and unconditional agreement of Federally-Insured Lender with Attorney that
>
> > i) Federally-Insured Lender shall pay the Net Proceeds Check upon presentment without reference to amounts on deposit in any account.
> > ii) such notation, when made on the face of the Net Proceeds Check, constitutes an acceptance or certification of the Net Proceeds Check by Federally-Insured Lender pursuant to Sections 3-409, 3-410, and/or 3-411 of the Uniform Commercial Code as in effect in the state.
> > iii) Federally-Insured Lender undertakes the same obligations with respect to Net Proceeds Check as if certified or accepted in writing by Federally-Insured Lender.
> > iv) funds represented by the Net Proceeds Check are not subject to offset by Federally-Insured Lender.

The Agreement also states that

> no provision in this Agreement...shall be construed to expand the rights of Federally-Insured Lender to dishonor the Net Proceeds Check beyond those rights which Federally-Insured Lender has, by law, to dishonor any ordinary certified check which is not subject to this or any other special agreement. Likewise, no such provision shall limit Attorney's rights to collect on the Net Proceeds Check to less than that provided by law to a holder of an ordinary certified check which is not subject to this or any other special agreement.

The Federally-Insured Lender agrees that the transaction code will have the same effect as the Federally-Insured Lender's signature pursuant to Section 3-401 of the Uniform Commercial Code as in effect in the state, and the issuance of the transaction code shall evidence Federally-Insured Lender's "then-present acceptance or certification of a particular Net Proceeds Check."

The Agreement also contains representations of Financial Institution "to induce Attorney and Federally-Insured Lender to enter into this agreement." These include an agreement by Financial Institution not to issue a stop payment order or other direction with respect to the Net Proceeds Check after the transaction code is issued for the check; an agreement that Financial Institution shall remain liable on the Net Proceeds Check as drawer for payment to Attorney or any other holder of the Net Proceeds Check, even though a transaction code is issued on the check by Federally-Insured Lender; a recognition of an absolute and unconditional obligation by Financial Institution to repay Federally-Insured Lender on any check for which Federally-Insured Lender has issued a transaction code; and an indemnification agreement with Federally-Insured Lender.

May a lawyer follow the procedure in the Agreement, deposit in his or her trust account a Net Proceeds Check, with the transaction code issued by the Federally-Insured Lender noted on the face of the check, and upon receiving provisional credit for the check from the lawyer's depository institution, immediately disburse against the provisionally credited funds?

Opinion:

See Good Funds Settlement Act, G.S. §45A-1 *et seq.* (effective October 1, 1996).

RPC 233

January 24, 1997

Editor's Note: This opinion was originally published as RPC 233 (Revised).

Receipt of Letter from Represented Criminal Defendant

Opinion rules that a deputy attorney general who is representing the state on the appeal of a death sentence should send a copy to the defense lawyer of a letter he received from the defendant.

Inquiry #1:

Client is on death row. Attorney A is representing Client on the automatic appeal of his conviction and sentence of death to the North Carolina Supreme Court pursuant to G.S. §15A-2000(d). Client sent letters to Attorney X, the deputy attorney general who is representing the state on the appeal. In the letters, Client states that he wants to expedite his execution. For this reason, he does not want an appellate brief filed on his behalf nor does he want his case argued. Client asks Attorney X to advise him on how to have Attorney A removed from his representation. What should Attorney X do?

Opinion #1:

Copies of the letters should be sent to Attorney A without communicating directly with Client. However, a copy of the transmittal letter to Attorney A may be sent to Client.

RPC 234

October 18, 1996,

Electronic Storage of Client's File

Opinion rules that an inactive client file may be stored in an electronic format provided original documents with legal significance are preserved and the documents in the electronic file can be reproduced on paper.

Inquiry:

RPC 209 requires a lawyer to retain a client's file for six years after the file becomes inactive. During the six years, the file may only be destroyed with the consent of the client or, after notice to the client, the client fails to retrieve the file. Prior to the expiration of the six-year period, may a law firm convert the paper documents in a client's file into an electronic format, such as magnetic or optical disks readable by computer, store the disks, and destroy the original paper file?

Opinion:

Yes, provided: (1) original documents with legal significance, such as wills, contracts, stock certificates, etc., are culled from the paper file and stored in a safe place or returned to the client; and (2) the documents stored in an electronic format can be reproduced in a paper format. Rule 2.8(a)(1) and RPC 209

RPC 235

October 18, 1996

Fee Agreement for Hourly Rate Plus Contingent Fee

Opinion rules that a lawyer may charge a client an hourly rate, or a flat rate, for his or her services plus a contingent fee on the client's recovery provided the ultimate fee paid by the client is not clearly excessive and the client is given an honest assessment of the potential for recovery.

Inquiry:

Attorney A would like to enter into a fee agreement with a client that requires the client to pay a minimum fee calculated on an hourly charge or a flat fee basis plus a contingent fee on any amount recovered for the client. Is this fee arrangement ethical?

Opinion:

Yes, provided the fee that is ultimately charged and collected from the client is not clearly excessive in violation of Rule 2.6(a). Prior to entering into such a fee agreement with a client, a lawyer should fully explain to the client how the fee will be calculated and should give the client an honest assessment of the potential for recovery. Comment [2] to Rule 2.6. As events occur during the representation that may affect an earlier estimate of the ultimate fee, the lawyer should provide the client with a revised estimate of the fee and a revised assessment of the potential for recovery.

RPC 236

January 24, 1997

Editor's Note: This opinion was originally published as RPC 236 (Revised).

Editor's Note: See 99 Formal Ethics Opinion 2 for additional guidance.

Misuse of Subpoena Process

Opinion rules that a lawyer may not issue a subpoena containing misrepresentations as to the pendency of an action, the date or location of a hearing, or a lawyer's authority to obtain documentary evidence.

Inquiry #1:

Attorney A represents John Doe who was injured in an automobile accident. Witnesses are listed on the accident report. Attorney A issues subpoenas to the witnesses directing them to appear at his office at a designated time "to give testimony." The subpoenas are served on the witnesses who later appear at Attorney A's office at the appointed times. The only persons in attendance are Attorney A, a secretary/notary, and the witnesses. No notice was given to any adverse parties. Is Attorney A's conduct ethical?

Opinion #1:

No. Rule 45(a) of the Rules of Civil Procedure permits the issuance of a subpoena "for the purpose of attaining the testimony of a witness in a pending cause." Where no action is pending, it is false and deceptive, in violation of Rule 1.2(c) and Rule 7.2(a)(4), to issue a subpoena to a prospective witness that misleads the prospective witness as to the existence of a filed lawsuit and as to the prospective witness's legal obligation to appear.

Inquiry #2:

After the commencement of a child custody and support action, Mother's attorney issues and signs a subpoena to Father's employer directing the employer to appear in district court at a designated time and to produce Father's employment records. The case is not scheduled for trial or hearing. Mother's attorney attaches a letter to the subpoena that informs the employer that a court appearance may be avoided by sending copies of the employment records directly to the attorney. No notice is given to Father's attorney. Are the actions of Mother's attorney ethical?

Opinion #2:

No. Stating in the subpoena and in the letter to the employer that there is a scheduled court hearing at which the employment records must be produced is a misrepresentation of fact in violation of Rule 1.2(c) and Rule 7.2(a).

Inquiry #3:

Attorney A filed a caveat on behalf of two sons of Testator. Attorney A issues and serves a subpoena on Dr. John Smith, Testator's physician, directing Dr. Smith to appear at Attorney A's office at a designated time to produce all of the medical records pertaining to Testator. Attorney A also issues and serves a subpoena on the custodian of the records of ABC Bank directing the custodian to appear at Attorney A's office at a designated time to produce all of Testator's and Testator's executor's bank records for the preceding five years. No trial, hearing, or deposition is scheduled in the pending action. Attorney A writes letters to the witnesses advising them that they may avoid appearing at his office by providing him with copies of the documents he has subpoenaed. Attorney A did not give notice to any other party interested in the caveat proceeding. Is Attorney A's conduct ethical?

Opinion #3:

No. It is deceptive and a violation of Rule 1.2(c) and Rule 7.2(a)(4) for a lawyer to use the subpoena process (except in compliance with the Rules of Civil Procedure of the court where the action is pending) to mislead the cus-

todian of documentary evidence as to the lawyer's authority to require the production of such documents. However, a subpoena issued in compliance with the applicable Rules of Civil Procedure may be used by the lawyer.

Inquiry #4:

Is notice to opposing counsel required when a lawyer issues a subpoena pursuant to Rule 45(c) of the Rules of Civil Procedure commanding a person to appear and produce records?

Opinion #4:

This is a question of civil procedure which is outside the purview of the Ethics Committee.

RPC 237

October 18, 1996

Ex Parte Communications with Judge

Opinion rules that a lawyer may not communicate with the judge before whom a proceeding is pending to request an ex parte order unless opposing counsel is given adequate notice or unless authorized by law.

Inquiry #1:

Attorney A represented Wife in negotiations on a separation agreement from Husband. Husband was represented by a lawyer in Attorney B's law firm. A separation agreement, giving Wife custody of the minor child of the marriage, was executed and incorporated by reference in the divorce decree. The case was heard by Judge J.

Several years later, Attorney B filed a motion on behalf of Husband for a change of custody. Attorney B would like to contact Judge J in chambers to ask Judge J to sign an *ex parte* order changing the custody of the child to Husband. Without sending Attorney A a copy of the motion or notifying Attorney A of his intentions, may Attorney B communicate with Judge J outside the course of the official proceedings for the purpose of asking Judge J to sign the *ex parte* order?

Opinion #1:

No. Rule 7.10(b) prohibits a lawyer representing a client in an adversary proceeding from communicating as to the merits of the cause with a judge before whom the proceeding is pending if the communications will occur outside official proceedings. Rule 7.10(b)(3) does permit oral communications with a judge provided the opposing party is given adequate notice. Although Rule 7.10(b)(4) also permits *ex parte* communications with a judge about the merits of a cause if authorized by law, such communications must be specifically authorized by statute, court rule, or other law. *See*, e.g., G.S. §50B-2(c) (authorizing *ex parte* orders in domestic violence actions); G.S. §50-13.5(d)(3) (authorizing *ex parte* custody orders when a child is exposed to substantial risk of injury, abuse or abduction); and Rule 65 of the Rules of Civil Procedure (*ex parte* temporary restraining orders permitted).

Inquiry #2:

Does Attorney B have a duty to give Attorney A notice of oral or written communications with Judge J outside the course of official proceedings if Attorney A is the attorney of record?

Opinion #2:

Yes. *See* opinion #1. If the communications are in writing, Attorney B must promptly deliver a copy of the written communication to Attorney A. Rule 7.10(b)(2).

Inquiry #3:

If Attorney B asks the judge in chambers to issue a show cause order directing Husband to appear and show cause at some later date, may Attorney B communicate with Judge J, outside the course of official proceedings in the cause, without notifying Attorney A?

Opinion #3:

No, if Attorney B will communicate with Judge J as to the merits of the cause. However, if Attorney B submits only the written pleadings necessary for the issuance of a show cause order and does not communicate with the judge as to the merits of the cause, he may communicate with the judge in this manner provided he promptly delivers a copy of the pleadings and order to Attorney A. *See* Rule 7.10(b)(2).

Inquiry #4:

Does a lawyer have a duty to examine the court record to determine whether there is an attorney of record for the opposing party before seeking an order from a judge outside the course of official proceedings?

Opinion #4:

A lawyer should make reasonable inquiry, including an examination of the court record, to determine if there is an attorney for the opposing party. Although there may be no attorney of record, Rule 7.10(b) requires notification to an unrepresented opposing party prior to communicating orally with the judge as to the merits of the cause.

RPC 238

October 18, 1996

Offering Law Related Services to a Legal Client

Opinion rules that a lawyer is subject to the Rules of Professional Conduct with respect to the provision of a law related service, such as financial planning, if the law related service is provided in circumstances that are not distinct from the lawyer's provision of legal services to clients.

Inquiry #1:

Attorney A's law practice is limited to estate planning. To accomplish the objectives of an estate plan, a client frequently needs financial planning and advice about financial products such as annuities, life insurance policies, securities, etc. Often, the client's current financial and insurance advisors are unfamiliar with the legal rationale of an estate plan and are, therefore, unable to meet the client's needs. Frequently, a client does not have a financial advisor. It is often difficult to identify a competent financial advisor who will not undermine the advice of Attorney A.

Attorney A believes that the employment of a financial planner by her law firm will resolve these problems. The financial planner will provide competent advice to clients who have questions about their retirement plans, charitable giving, asset allocation, and asset preservation. Providing this service at the law firm will assure achievement of the client's estate planning goals. May an estate planning law firm employ a financial advisor to provide financial planning to clients of the firm?

Opinion #1:

Yes, however, a lawyer is subject to the Rules of Professional Conduct with respect to the provision of a law related service, such as financial planning, if the law related service is provided by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients.

If the financial advisor is a nonlawyer, he or she may be an employee of the law firm but may not become a partner, shareholder, or otherwise own an interest in the law firm. *See* Rule 2.3 and comment. Moreover, legal fees may not be shared with a nonlawyer employee. Rule 3.2.

In addition, the law firm must have in effect measures giving reasonable assurance that the conduct of a nonlawyer financial advisor will be compatible with the lawyer's professional obligations. Rule 3.3. In particular, the financial advisor may not be held out as offering legal services. Rule 3.1(a). Also, reasonable measures must be taken to explain to the client that the financial advisor is a nonlawyer who cannot provide legal advice.

Inquiry #2:

May an estate planning law firm provide financial products to clients as an extension of the services available to clients?

Opinion #2:

Yes, subject to the requirements of the Rules of Professional Conduct. To avoid conflicts of interest, no commission or fee may be earned (by the law firm, any lawyer with the law firm, or the financial advisor) on any financial product purchased by a client upon the recommendation of a lawyer in the firm or the financial advisor. Rule 5.4(c).

RPC 239

October 18, 1996

Advertising on the Internet

Opinion rules that a lawyer may display truthful information about the

lawyer's legal services on a World Wide Web site on the Internet.

Inquiry:

May a lawyer display information about his or her legal services on a site on the World Wide Web which can be accessed via the Internet, a global network of interconnected computers?

Opinion:

Yes, provided the lawyer complies with the applicable Rules of Professional Conduct.

Rule 2.2(a) permits advertising in public media or through written communications not involving solicitation as defined in Rule 2.4. A site on the World Wide Web is a public media advertisement.

All communications by a lawyer concerning the lawyer or the lawyer's services, including communications via computer, are subject to the prohibition in Rule 2.1 on false or misleading communications. To avoid misleading a user of the Internet from another jurisdiction, a Web site should list all jurisdictions in which the lawyers in a firm are licensed to practice law. Rule 3.1(b). Similarly, the Web site must disclose the geographic location of the lawyer's or law firm's principal office. Rule 2.5 prohibits communications implying or stating that a lawyer is a certified specialist unless the lawyer is certified as a specialist by the State Bar or a certifying organization approved by the State Bar. However, a lawyer who is not a certified specialist may indicate areas of concentration or interest on a Web site.

Rule 2.2(b) requires a lawyer to retain a copy or recording of an advertisement or written communication for two years after its last dissemination along with a record of when and where it was used. Because Web sites are updated frequently, compliance with Rule 2.2(c) may be achieved by printing a hard copy of all screens on the Web site as launched and subsequently printing hard copies of any material changes in the format or content of the Web site. These hard copies should be retained for two years together with a record of when the screens were used on the Internet.

RPC 240

January 24, 1997

Limiting Representation to Personal Injury Claim

Opinion rules that a lawyer may decline to represent a client on the property damage claim while agreeing to represent the client on the personal injury claim arising out of a motor vehicle accident provided that the limited representation will not adversely affect the client's representation on the personal injury claim and the client consents after full disclosure.

Inquiry #1:

Motorist A and Motorist B were involved in a motor vehicle collision. Motorist A sustained bodily injuries and damage to her automobile. Motorist A asked Attorney A to represent her. Attorney A agreed to represent her only on her personal injury claim. Attorney A sent a letter of representation to Motorist B's automobile liability insurance carrier indicating that Attorney A represents Motorist A with respect to Motorist A's personal injury claim only. The letter states that a claims representative for the insurance carrier may continue to "deal with" Motorist A with respect to Motorist A's property damage claim but representatives of the insurance carrier should have no further contact with Motorist A with regard to her personal injury claim. May Attorney A ethically limit his representation of Motorist A to her personal injury claim?

Opinion #1:

Yes, provided Attorney A determines that the representation of Motorist A on her personal injury claim will not be adversely affected by allowing Motorist A to represent herself on the property damage claim and Motorist A consents to the limited representation after full disclosure by Attorney A of the risks involved. *See* Rule 7.1(b)(3).

Inquiry #2:

May a claims representative for Motorist B's insurance carrier contact Motorist A concerning the motor vehicle collision after receiving a letter of representation of the type described in inquiry #1?

Opinion #2:

The Rules of Professional Conduct do not apply to the conduct of a claims representative for an insurance carrier. However, a lawyer who represents the insurance carrier is subject to the Rules. Rule 7.4(1) permits communications about the subject matter of a representation with a party the lawyer knows to be represented by another lawyer in the matter if the party's lawyer consents to the communication. Attorney A's letter of representation not only indicates that he does not represent Motorist A with regard to her property damage claim but that he also consents to communications with Motorist A about the property damage claim. Therefore, a lawyer for the insurance carrier may communicate with Motorist A provided the communications are limited to the property damage claim.

RPC 241

January 24, 1997

Participating in a Directory of Lawyers on the Internet

Opinion rules that a lawyer may participate in a directory of lawyers on the Internet if the information about the lawyer in the directory is truthful.

Inquiry:

A private company is developing an Internet site to be known as the National Attorney Locator. The site will contain an electronic directory of lawyers. The directory will include listings for lawyers from across the United States. These listings can be searched by lawyers' geographic location and areas of legal practice. Each listing will include the name of the lawyer or law firm, the name of a contact person at the firm, firm address, phone number, fax number, e-mail address, and areas of practice. Lawyers must apply and pay a fee to be listed on the directory. The Internet site will have a hypertext section on "Choosing an Attorney" which includes a statement that the National Attorney Locator is not a referral service but an electronic directory.

May a lawyer participate in a directory of lawyers on the Internet?

Opinion:

Yes, provided the information contained in the lawyer's listing is truthful and not misleading. Rule 2.1. To avoid misleading a user of the directory from another jurisdiction, the listing should indicate the jurisdictions in which the lawyer is licensed to practice law and the geographic location of the lawyer's or law firm's principal office. *See* RPC 239. Rule 2.5 prohibits communications implying that a lawyer is a specialist in an area of practice unless the lawyer is certified as a specialist by the North Carolina State Bar or a certifying organization approved by the State Bar. However, a lawyer who is not a certified specialist may indicate areas of concentration or interest in a listing on the directory.

RPC 242

January 24, 1997

Written Communication Soliciting Professional Employment from Newly Formed Corporation

Opinion rules that a lawyer may send a letter describing his services to the incorporators of a new business provided the words "This is an advertisement for legal services" are included in the communication.

Inquiry #1:

Attorney A regularly obtains a list of newly formed corporations from the secretary of state's office. Attorney A then sends a letter of introduction to the incorporators of the new corporations in his community. The letter provides a general explanation of the legal services offered by Attorney A's law firm. These services include the preparation of legal documentation, drafting contracts, pursuing trade receivables, closing commercial loans, etc. The words "This is an advertisement for legal services" do not appear on the envelope or at the beginning of the body of the letter. Is this a violation of Rule 2.4(c)?

Opinion #1:

Yes. See Rule 2.4(c) which requires the statement "This is an advertisement for legal services" on targeted direct mail letters.

Inquiry #2:

Attorney A provides business consulting services as well as legal services to clients of his law firm. These business consulting services include resolving financial issues and preparing business, marketing, and financial plans. May

Attorney A provide business consulting services to clients as a service of his law firm?

Opinion #2:

Yes. However, a lawyer is subject to the Rules of Professional Conduct with respect to the provision of a law related service, such as business consulting, if the law related service is provided by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients. *See* RPC 238.

RPC 243

January 24, 1997

Restraint in Exercising Prosecutor's Discretion to Calendar Cases

Opinion rules that it is prejudicial to the administration of justice for a prosecutor to threaten to use his discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant.

Inquiry #1:

Defense Attorney represents Client on a pending criminal charge. Prosecutor offered Client a plea bargain. Defense Attorney informs Prosecutor that Client will not accept the offered plea bargain. Prosecutor tells Defense Attorney that if Client does not accept the offered plea bargain, "Client's going to be sitting in the courtroom all week and he's going to be on the calendar every Monday morning for weeks to come." Is it unethical for Prosecutor to imply that he will use the statutory calendaring power of the district attorney's office to delay Client's trial if Client will not accept the plea bargain?

Opinion #1:

Yes, threatening to use the discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant is prejudicial to the administration of justice in violation of Rule 1.2(d) of the Rules of Professional Conduct. A prosecutor should use restraint in the discretionary exercise of the authority to calendar criminal cases. See comment [1] to Rule 7.3, "Special Responsibilities of a Prosecutor," ("... the prosecutor represents the sovereign and therefore should use restraint in the discretionary use of government powers....").

Inquiry #2:

If a lawyer overhears the conversation between Prosecutor and Defense Attorney, does the lawyer have a duty to report Prosecutor's conduct to the State Bar or other appropriate authority?

Opinion #2:

Rule 1.3(a) requires a lawyer who has knowledge that another lawyer has committed a violation of the Rules of Professional Conduct "that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects" to report the conduct to the North Carolina State Bar or other appropriate authority. Comment [3] to Rule 1.3 states that

> [t]his rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the alleged offense and not the quantum of evidence of which the lawyer is aware.

Prosecutor's conduct may be an isolated incident resulting from a momentary lapse in judgment. If so, such conduct does not raise a "substantial" question as to Prosecutor's fitness as a lawyer. The lawyer who overhears the conversation may want to counsel Prosecutor with regard to his conduct, but the lawyer is not required to report the conduct to the State Bar. However, if the lawyer knows that Prosecutor routinely abuses the discretionary power to schedule criminal cases or, after being advised that this conduct is a violation of the Rules, Prosecutor continues the conduct, the lawyer should report the matter to the State Bar or other appropriate authority.

RPC 244

January 24, 1997

Advance Disclaimer of Client-Lawyer Relationship

Opinion rules that although a lawyer asks a prospective client to sign a form stating that no client-lawyer relationship will be created by reason of a free consultation with the lawyer, the lawyer may not subsequently disclaim the creation of a client-lawyer relationship and represent the opposing party.

Inquiry:

Contemplating separation from his wife, Mr. A. scheduled a free initial consultation with Attorney X, an associate in XYZ Law Firm. Prior to the consultation, Mr. A completed an intake sheet that included the following disclosure in bold, capitalized print:

> It is acknowledged that my appointment is for a free office consultation. No legal advice will be given. I will be provided only general information concerning North Carolina laws. Upon a request, a fee will be quoted for legal representation. I understand that no attorney-client privilege will exist unless and until I pay this firm to represent me and that this free consultation will not preclude my spouse from employing Attorney X or any other attorney with XYZ Law Firm.

Mr. A's signature was required on the form.

Attorney X provided Mr. A with a general explanation of the law of domestic relations. During the consultation, Mr. A told Attorney X he was specifically interested in the consequences of separation and the effect of separation and divorce on his military retirement benefits. Mr. A divulged personal information pertinent to his potential separation from his wife. Attorney X addressed these areas as requested by Mr. A.

Three weeks later, Mr. A separated from his wife and set up a follow-up appointment with Attorney X. Four days before the scheduled appointment, Mr. A was served with a complaint for a divorce from bed and board. Another lawyer in XYZ Law Firm was identified in the complaint as the attorney of record for Mr. A's wife. Abandonment was alleged in the complaint and Mr. A's retirement benefits were included in the prayer for relief.

Is it permissible for a lawyer to disclaim the existence of a client-lawyer relationship in this manner and subsequently represent the opposing party?

Opinion:

No. *See* Rule 5.1 (d) of the Rules of Professional Conduct.

It is also unethical for a lawyer to encourage his or her client to seek to disqualify other lawyers from representing the client's adversary by arranging a series of initial consultations with the client in which confidential information is revealed. This is true whether it is the client or the lawyer who first suggests this course of action. RPC 181.

RPC 245

April 4, 1997

Release of File to Former Co-party

Opinion rules that a lawyer in possession of the legal file relating to the prior representation of co-parties in an action must provide the co-party the lawyer does not represent with access to the file and a reasonable opportunity to copy the contents of the file.

Inquiry:

Husband and Wife were represented jointly by Attorney A on a personal injury claim. During the settlement negotiations, Husband and Wife separated and subsequently divorced. The personal injury claim was settled. An equitable distribution claim is pending in which the proceeds of the personal injury settlement are in dispute.

After the personal injury claim was settled, the legal file for the matter was released by Attorney A to Husband's new lawyer, Attorney Z. Wife is represented in the domestic action by Attorney L. Wife and Attorney L asked Attorney Z to make the personal injury file available to Wife for copying, but Attorney Z refuses to release any of the contents of the file to either Wife or Attorney L. Should Attorney Z allow access to the personal injury file?

Opinion:

Yes. When there is joint representation of parties in a particular matter, each party is entitled to access to the legal file after the representation ends. *See* RPC 178. Although Attorney Z is not required to incur the expense of making a copy of the personal injury file for Wife, he must give Wife a reasonable opportunity to copy the materials in the file at her own expense. *Id.* Attorney Z should not release any confidential information of Husband that was received by Attorney A or Attorney Z after the joint representation in the personal injury matter ceased. Rule 4(b).

RPC 246

April 4, 1997

Duty of Confidentiality Owed to Prospective Client

Opinion rules that, under certain circumstances, a lawyer may not represent a party whose interests are opposed to the interests of a prospective client if confidential information of the prospective client must be used in the representation.

Inquiry:

In 1993, Attorney A represented Mr. and Ms. X on personal injury claims arising out of an automobile accident. In September 1996, Mr. X was seriously injured, as were three passengers in his automobile, in a single car accident. Mr. X contends that the accident was caused by the driver of another automobile who forced him off the road and then left the scene of the accident. While Mr. X was in the hospital, Ms. X went to Attorney A to retain him to represent Mr. X on his claim for injuries arising out of the accident. Attorney A interviewed Ms. X, discussed the facts of the case with her, and obtained confidential information from her concerning the cause of the accident. Attorney A kept a photocopy of the accident report Ms. X brought to him. At the end of the interview, Attorney stated that he believed Mr. X would be considered the party at fault and he did not want to represent Mr. X.

Attorney A now represents the three passengers in Mr. X's automobile on their liability claims against Mr. X for injuries arising out of the accident. Neither Mr. X nor Ms. X consents to the representation of the passengers on their claims against Mr. X. May Attorney A proceed with the representation of the passengers without the consent of Mr. X or Ms. X?

Opinion:

No, Attorney A may not continue his representation of the passengers if he obtained confidential information from Ms. X that he intends to use to the advantage of the passengers in their action against Mr. X.

Although the duties of professional responsibility flowing from the attorney-client relationship do not generally attach until after a lawyer has agreed to represent a client, "there are some duties, such as that of confidentiality under Rule 4, that may attach when the lawyer agrees to consider whether a client-lawyer relationship may be established." Rules of Professional Conduct, Section .02, Scope, comment [3]. When Ms. X met with Attorney A to retain him in the new matter, she did so in the context of her prior professional relationship with Attorney A. In this situation, it is reasonable to conclude that Ms. X believed that her communications with Attorney A would be treated as confidential. Therefore, the duty of confidentiality attached to her communications although Attorney A did not ultimately agree to the representation. Rule 4(b)(3) prohibits the use of confidential information of a client for the advantage of a third person unless the client consents. If Ms. X does not consent to the use of the information obtained from her, Attorney A has a conflict of interest and is disqualified from the representation of the passengers. Rule 5.1(c).

RPC 247

April 4, 1997

Payment of Fees by Electronic Transfer

Opinion provides guidelines for receipt of payment of earned and unearned fees by electronic transfers.

Inquiry #1:

Under Rule 10.1(c) of the Rules of Professional Conduct, mixed funds, unearned fees, and money advanced for costs must be deposited directly into a lawyer's trust account. Earned fees, nonrefundable retainers, and reimbursements for expenses advanced by the lawyer on behalf of a client must be deposited into the lawyer's general or operating account to avoid the commingling of the lawyer's funds with the clients' funds.

Lawyers may accept payment of fees by credit card. CPR 129. However, when a bank processes any payments by electronic transfer, the bank will only deposit funds into one bank account maintained by the bank's customer. There is no method whereby funds representing an earned fee can be deposited into the operating account and funds representing an advance payment for legal services yet to be rendered, or an unearned fee, may be deposited into the trust account. May a lawyer establish a third account to handle all payments by electronic transfer—including payments of earned and unearned fees? Or should the bank be instructed to send all payments by electronic transfer to the lawyer's trust account although a particular transfer may be for a fee that has already been earned?

Opinion #1:

An interim account should not be established. If a payment by electronic transfer of an earned fee cannot be distinguished by the bank from a payment by electronic transfer of an unearned fee, all payments by electronic transfer should be deposited into the lawyer's trust account and the earned fees should be withdrawn from the trust account promptly. *See* Rule 10.1(c). A lawyer may also deposit into the trust account funds sufficient to pay the bank's service charges for electronic transfers. Rule 10.1(c)(1). A ledger should be maintained for the service charges posted against such funds. Rule 10.2(c)(3).

Inquiry #2:

May a client charge legal expenses as well as legal fees to his credit card?

Opinion #2:

Yes. These funds should be deposited directly to the trust account and held there until used to pay expenses on behalf of the client.

Inquiry #3:

May a lawyer offset the discount rate charged by the bank for electronic transfers? For example, may the lawyer surcharge the client? If so, may the lawyer levy a surcharge on the whole amount or just that portion of the payment that constitutes the attorney's fee?

Opinion #3:

With full disclosure to the client, the lawyer may charge the client the expense associated with payment by electronic transfer.

Inquiry #4:

What procedure should a lawyer follow to return an unearned fee to a client if the fee was originally paid by electronic transfer?

Opinion #4:

A trust account check should be sent to the client in the amount of the unearned fee. Rule 10.2(c) and (e).

Inquiry #5:

May lawyers in different law firms share the use of electronic transfer equipment if the funds of the clients of different law firms will be temporarily commingled in one deposit account?

Opinion #5:

No, this procedure will jeopardize the integrity of the record keeping required for trust accounts. Rule 10.2.

RPC 248

April 4, 1997

Mortgage Brokerage Owned by Lawyers

Opinion rules that a lawyer who owns stock in a mortgage brokerage corporation may not act as the settlement agent for a loan brokered by the corporation. Nor may the other lawyers in the firm certify title or act as settlement agent for the closing.

Inquiry #1:

Attorneys A and B are shareholders in Corporation X, a mortgage brokerage. May Attorney C, a member of Attorney A and Attorney B's law firm but not a shareholder in Corporation X, certify title and/or act as settlement agent for a closing in which the mortgage was brokered by Corporation X?

Opinion#1:

No. Attorney A and Attorney B may not certify title or act as settlement agent because Attorney A and Attorney B's personal interest in seeing that Corporation X receives its fee or commission for placing the loan could conflict with the client-borrower's desire to close only when it is in his or her best interest to do so. *See* RPC 49 and RPC 188. The conflict of interest of Attorney A and Attorney B is imputed to Attorney C, and he is also disqualified from certifying the title and/or acting as a settlement agent for the closing. *See* Rule 5.11(a).

Inquiry #2:

May Attorney A and Attorney B act as "mere settlement agents" of a loan brokered by Corporation X if another lawyer, who is not a shareholder in Corporation X, certifies title and there is full disclosure as well as a waiver of any conflict of interests by the borrower?

Opinion #2:

No. The conflict between Attorney A and Attorney B's personal interests and the interests of the borrower may materially impair the judgment of Attorneys A and B. The risk to the client-borrower is so great that no lawyer should proceed, regardless of whether the client desires to consent. *See* RPC 49, Rule 5.1(b), and Rule 5.11(a).

RPC 249

April 4, 1997

Communication with a Child Represented by GAL and Attorney Advocate

Opinion rules that a lawyer may not communicate with a child who is represented by a GAL and an attorney advocate unless the lawyer obtains the consent of the attorney advocate.

Inquiry #1:

Joey is ten years old. He lives with his mother and her boyfriend. The Department of Social Services (DSS) substantiated numerous abuse allegations against the mother for improper discipline and beatings. After no improvement in the mother's behavior, DSS filed a neglect and abuse petition and received a nonsecure custody order. Pursuant to G.S. §7A-586(a) of the Juvenile Code, the court appointed a guardian ad litem and an attorney advocate to represent the interests of Joey. G.S. §7A-586(a) provides for the appointment of a guardian ad litem (GAL) for every child alleged to be abused or neglected. The statute states that a GAL who is not an attorney shall be appointed an attorney to assure the protection of the child's legal rights through the dispositional phase of the proceedings and after disposition when necessary to further the best interests of the child. The GAL and the attorney advocate have standing to represent the juvenile in all actions under the subchapter.

The attorney for Joey's mother, Attorney M, would like to interview Joey without informing the GAL or the attorney advocate. May he do so?

Opinion #1:

Rule 7.4(1) provides that, during the course of his or her representation of a client, a lawyer is prohibited from communicating or causing another to communicate about the subject of the representation with a party 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 by law to do so. Joey is represented by an attorney, and the attorney advocate's consent must be obtained prior to any communication by Attorney M with Joey.

Inquiry #2:

Is the permission of the attorney for DSS sufficient to allow Attorney M to interview Joey without the consent of the attorney advocate?

Opinion #2:

No, the attorney for DSS does not represent Joey.

Inquiry #3:

The district attorney intends to prosecute the mother for child abuse. The district attorney would like to interview Joey without informing or obtaining the consent of the GAL or the attorney advocate. May the district attorney interview Joey under these circumstances?

Opinion #3:

No. The comment to Rule 7.4 states, "This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." *See also* RPC 87.

Inquiry #4:

May the district attorney instruct a sheriff's deputy to interview Joey without informing or obtaining the consent of the GAL or the attorney advocate?

Opinion #4:

No, an attorney may not instruct an agent to do that which the attorney cannot do. *See* Rule 3.3.

Inquiry #5:

May the attorney for DSS interview Joey without informing or obtaining consent of the GAL or the attorney advocate?

Opinion #5:

No. *See* opinion #1 above.

Inquiry #6:

If the GAL is also an attorney, would any of the above opinions be different?

Opinion #6:

No. If an attorney advocate was appointed, the GAL is not acting in the capacity of an attorney for the juvenile. Rule 7.4(d) requires the consent of the attorney representing the client prior to direct communication with the client.

Inquiry #7:

If the court appoints a GAL for Joey but does not appoint an attorney advocate, may the attorney for Joey's mother, the district attorney, or the attorney for DSS interview Joey without the consent of the GAL?

Opinion #7:

No, the consent of the GAL must be obtained before communicating with Joey. This is consistent with the policy and purpose behind G.S. §71-586. *See also* RPC 61.

Inquiry #8:

Would the preceding opinions be different if a guardian ad litem were appointed pursuant to G.S. §1A-1, Rule 17, which provides for the appointment of a guardian ad litem for infants or incompetent persons who are parties in civil actions?

Opinion #8:

No, if the GAL has an attorney for the matter, opposing counsel may not communicate with the GAL or the minor without the consent of the attorney. Rule 7.4(1). Moreover, if the guardian ad litem is not represented by an attorney in the matter, RPC 61 still prohibits communications with the minor unless the consent of the guardian ad litem is obtained.

RPC 250—Withdrawn

July 18, 1997

Withdrawn October 24, 1997

Editor's Note: RPC 250 was adopted on July 18, 1997. The opinion was withdrawn by the State Bar Council on October 24, 1997. A substitute opinion was proposed and subsequently adopted in January 1998 as 97 Formal Ethics Opinion 10 *supra*.

RPC 251

July 18, 1997

Representation of Multiple Claimants

Opinion rules that a lawyer may represent multiple claimants in a personal injury case, even though the available insurance proceeds are insufficient to compensate all claimants fully, provided each claimant, or his or her legal representative gives informed consent to the representation, and the lawyer does not advocate against the interests of any client in the division of the insurance proceeds.

Inquiry #1:

Attorney A represents four unrelated adults on their individual claims for personal injuries arising out of an accident which occurred when the bus on which they were riding collided with an automobile. As passengers, none of the claimants is liable for the accident and there are no crossclaims between the claimants. Inadequate settlement offers were received and it is now apparent that the available insurance coverage is not sufficient to compensate all of the claimants fully. May Attorney A continue to represent the multiple claimants?

Opinion #1:

Yes, provided the claimants give informed consent to the multiple representation.

The representation of multiple claimants in a common accident can lead to two different conflicts of interest. On the one hand, there may be questions of liability and, therefore, potential crossclaims among the claimants.

Representing clients with potential claims against each other places the lawyer in the position of being an advocate against his or her own client or clients and, ordinarily, is impermissible. *See* Rule 5.1(a). On the other hand, although there may be no crossclaims between the claimants, as in this inquiry, when there are limited insurance funds from which multiple claimants may be compensated, there is a potential for competition between the claimants for their share of the insurance proceeds. A lawyer who represents multiple claimants in this situation risks becoming an advocate for the increased recovery of one claimant at the expense of the other claimants. Nevertheless, this potential conflict does not involve directly antagonistic interests and can be more readily managed than the former conflict.

Rule 5.1(b) permits a lawyer to represent a client, even though the representation of the client may be materially limited by the lawyer's responsibilities to another client, if the lawyer reasonably believes that the representation of the client will not be adversely affected and the client consents after full disclosure including an explanation of the risks and advantages of common representation. In the current inquiry, a lawyer may determine that he or she will be able to facilitate an acceptable division of the insurance proceeds among the multiple claimants without advocating against the interests of any of the claimants. Moreover, to require each claimant to have a separate lawyer to prove liability may result in a duplication of effort and additional expense for the claimants. Therefore, a lawyer may represent multiple claimants provided there are no conflicts with regard to the liability issue and the lawyer obtains informed consent from all of the claimants at the beginning of the representation. The disclosure to the claimants must include an explanation of the consequences of limited insurance funds and the possibility that there may be a dispute among the claimants as to the division of the insurance proceeds.

If the case is tried, the lawyer must zealously represent the damage claims of each of the claimants and let the jury decide the amount that each will recover. If an offer of settlement is made, the lawyer may facilitate mediation among the claimants to determine how the offer will be divided. *See* RPC 123. Alternatively, the claimants may agree to accept the recommendation of the lawyer with regard to an equitable division of the settlement offer. The lawyer may make such a recommendation only if the lawyer can do so impartially. *See* RPC 123. The lawyer must withdraw from the representation of all of the claimants if the lawyer is placed in the role of advocate for one or more of the claimants against the other claimants. The lawyer must also withdraw from the representation if one or more of the claimants do not agree to accept the settlement offer. Rule 5.7. If the lawyer must withdraw, the lawyer may continue to represent one or more of the claimants only with the consent of the claimants whose cases the lawyer relinquishes. Rule 5.1(d) and RPC 123.

Inquiry #2:

Attorney A represents six minor children and two adults on their claims for personal injuries which occurred when the school bus in which they were riding was involved in an accident. It is assumed Attorney A also represents the parents of the minor claimants on their separate claims for the medical expenses incurred by their children. After receiving inadequate settlement offers, Attorney A filed suit. It then became apparent that the available insurance proceeds are insufficient to compensate all claimants fully.

May attorney A represent the eight injured claimants?

Opinion #2:

Yes, provided there are no crossclaims between the claimants and, at the beginning of the representation, each claimant, or claimant's legal guardian, gives informed consent to the multiple representation. *See* opinion #1 above. Before a lawsuit is filed, the parents or legal guardian of each minor may give such consent. RPC 123. After litigation is commenced, even if it is for the sole purpose of obtaining court approval of the settlements of the minors' claims, independent guardians ad litem must be appointed for the minors and the guardians ad litem must give informed consent to the multiple representation. To be independent, a guardian ad litem should have no separate claim of his or her own to pursue, including a claim for medical expenses for a dependent child. *See* RPC 109 and RPC 123. The disclosure at the beginning of the representation, and to the guardians ad litem, must include an explanation of the consequences of limited insurance funds and the possibility of a dispute among the claimants as to the division of the insurance proceeds. Rule 5.1 (b).

See opinion #1 with regard to the lawyer's role upon receipt of an offer to settle the multiple claims.

Inquiry #3:

In the situation described in inquiry #2, may Attorney A represent more than one child from the same family?

Opinion #3:

Yes, subject to the requirements set forth in opinions #1 and #2 above.

Inquiry #4:

May Attorney A represent the parents of one of the minor claimants on the parents' claim for medical expenses and also represent the minor child through an independent guardian ad litem?

Opinion #4:

Yes. *See* opinion #2 and RPC 123.

RPC 252

July 18, 1997

Receipt of Inadvertently Disclosed Materials from Opposing Party

Opinion rules that a lawyer in receipt of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain from examining the materials and return them to the sender.

Inquiry #1:

Insurance Company is the liability carrier for Defendant Motorist. Plaintiff is represented by Attorney C. After settlement discussions failed, Attorney C filed suit on behalf of Plaintiff. Insurance Company hired Attorney X to defend the suit. Before responsive pleadings were filed, adjuster for Insurance Company erroneously sent the company's claim file to Attorney C. The claim file was sent by certified mail, return receipt requested, addressed to Attorney C. The cover letter was also addressed to Attorney C. However, the letter's salutation read "Dear Attorney X." A copy of the letter to the defendant from the adjuster was also enclosed with the file. This letter incorrectly informed the defendant that he would be defended by Attorney C. In addition to a photo of Plaintiff's vehicle, Plaintiff's medical records, and Attorney C's demand letter, the file included a "claim diary" that Attorney C read and believes contains *prima facie* evidence of an unfair and deceptive trade practice by Insurance Company.

Attorney C sent a copy of the file to the adjuster and to Attorney X. Attorney X demands the return of the original file. Is Attorney C required to return the original file to Insurance Company?

Opinion #1:

Yes. Attorney C has a duty of honesty and a duty of courtesy to all persons involved in the legal process. *See* Rule 1.2(c) and Rule 7.1(a). The original file does not belong to Attorney C or to his client. From the cover letter, it could be readily ascertained that the accompanying materials were subject to the attorney-client privilege or otherwise confidential and were sent to Attorney C inadvertently. Upon realizing that the materials were not intended for his eyes, Attorney C should have (1) refrained from reviewing the file materials, (2) notified the opposing counsel of their receipt, and (3) followed opposing counsel's instructions as to the disposition of such materials. Under these circumstances, the receiving attorney may not use the substance of the materials inadvertently sent to him to the advantage of his client.

Inquiry #2:

Was it acceptable for Attorney C to read the cover letter and examine the claim file although Attorney C realized from the salutation on the cover letter that the letter and the attached materials were sent to him erroneously?

Opinion #2:

No. A lawyer who is the recipient of an inadvertent disclosure of written materials by an opposing party or opposing counsel is required to discontinue reading the materials as soon as the lawyer realizes that the materials may be subject to the attorney-client privilege of others, or are otherwise confidential communications involving an attorney, and the materials were not intended for his or her eyes. This requirement is consistent with a lawyer's duty of honesty as well as a lawyer's duty to avoid offensive tactics and treat with courtesy and

consideration all persons involved in the legal process. Rule 1.2(c) and Rule 7.1(a)(1). It also respects the opposing party's confidentiality. *See* Rule 4.

Inquiry #3:

Would the response to inquiry #2 be different if the inadvertently disclosed materials were sent by opposing counsel instead of a representative of the opposing party?

Opinion #3:

No.

---

97 Formal Ethics Opinion 1

October 24, 1997

Editor's Note: Opinion was originally published as RPC 253. Before adoption, it was revised to reference the appropriate sections of the Revised Rules of Professional Conduct under which it was finally decided.

Appearance Before Judge Who Is Lawyer's Client

Opinion rules that a lawyer may appear in court before a judge the lawyer represents in a personal matter provided there is disclosure of the representation and all parties and lawyers agree that the relationship between the lawyer and the judge is immaterial to the trial of the matter.

Inquiry #1:

Attorney A regularly appears before Judge Z in domestic court. Judge Z asked Attorney A to represent him in his own domestic case. Attorney A sought the guidance of the chief district court judge. The chief district court judge instructed Attorney A to disclose his representation of Judge Z to the opposing lawyer in any case scheduled to be heard by Judge Z. The opposing lawyer may agree that Judge Z will hear the case or the lawyer may ask Judge Z to recuse himself. If the opposing lawyer asks Judge Z to recuse himself, the chief district court judge will find another judge to hear the matter. May Attorney A appear before Judge Z after disclosure of his representation of Judge Z to the opposing counsel and party and their consent to the hearing of the matter by Judge Z?

Opinion #1:

Yes. It appears that the chief district court judge's opinion is based upon Canon III D of the Code of Judicial Conduct which provides:

> A judge disqualified [in a proceeding in which his impartiality might reasonably be questioned by reason of financial interests or involvement] may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Compliance with the procedure set forth in the Code of Judicial Conduct protects the interest of the opposing party and satisfies any concern regarding Attorney A's conduct. To the extent it is inconsistent with this opinion, CPR 183 is withdrawn.

Inquiry #2:

Must Attorney A disclose his representation of Judge Z to his client?

Opinion #2:

Yes, this would appear to be necessary to obtain the consent to proceed from the opposing party and lawyer. Judge Z's consent to this disclosure is implied. Rule 1.6 (d)(1) of the Revised Rules of Professional Conduct.

Inquiry #3:

May Attorney A rely upon the opinion of the chief district court judge or should Attorney A request that Judge Z not be assigned to any of his cases?

Opinion #3:

The courts have concurrent jurisdiction with the State Bar over the conduct of the lawyers who appear before them. G.S. §84-36. A lawyer's compliance with the opinion of the local chief district court judge with regard to a matter involving potential bias on the part of a judge is not a violation of the Rules of Professional Conduct.

Inquiry #4:

After Judge Z's legal representation is concluded, does Attorney A have any further duty to inform opposing counsel of his prior representation of Judge Z?

Opinion #4:

No.

---

97 Formal Ethics Opinion 2

January 16, 1998

Editor's Note: Opinion was originally published as RPC 254. Before adoption, it was revised to reference the appropriate sections of the Revised Rules of Professional Conduct under which it was finally decided.

Communications with Unrepresented Former Employees of Represented Organizations

Opinion rules that a lawyer may interview an unrepresented former employee of an adverse represented organization about the subject of the representation unless the former employee participated substantially in the legal representation of the organization in the matter.

Inquiry #1:

Y Insurance Company carries the workers' compensation coverage for Employer. Adjuster, an employee of Y Insurance Company, was assigned to investigate and manage Employee's workers' compensation claim against Employer. During the three years that she handled Employee's claim, Adjuster played a major role in the decision making relative to the defense of the claim.

Last year, Attorney A was assigned to represent Y Insurance Company and Employer in Employee's workers' compensation action. Adjuster and Attorney A have worked closely together on the defense of the case. Adjuster's input, her knowledge of the claims file, and the records Adjuster has maintained in the claims file are integral to Attorney A's defense of the case.

May the lawyers for Employee communicate directly with Adjuster about Employee's claim without the consent of Attorney A?

Opinion #1:

No. Rule 4.2(a) of the Revised Rules of Professional Conduct provides: "[d]uring the representation of a client, a lawyer 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 by law to do so." The ABA Committee on Ethics and Professional Responsibility states, in Formal Opinion 95-396 (1995), that such "anticontact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests."

An organization that is represented by legal counsel in a matter also falls within the protection of Rule 4.2. Communications by adverse counsel with certain personnel of a represented organization are prohibited. Comment [5] to Rule 4.2 states that "…this rule will prohibit communications by the lawyer concerning the matter with persons having managerial responsibility on behalf of the organization…." *Compare* RPC 67 (permitting *ex parte* communications with a "rank and file" employee of an adverse corporate party). Although an adjuster for an insurance company may not be considered a "manager" or "management personnel" for the company, the adjuster does have managerial responsibility for the claims that she investigates. The adjuster is also privy to privileged communications with the legal counsel for the company and is generally involved in substantive conversations with the organization's lawyer regarding the representation of the organization. To safeguard the client-lawyer relationship from interference by adverse counsel and to reduce the likelihood that privileged information will be disclosed, Rule 4.2(a) protects from direct communications by opposing counsel not only employees who are clearly high-level management officials but also any employee who, like the adjuster in this inquiry, has participated substantially in the legal representation of the organization in a particular matter. Such participation includes substantive and/or privileged communications with the organization's lawyer as to the strategy and objectives of the representation, the management of the case, and other matters pertinent to the representation.

Inquiry #2:

About three months before an important Industrial Commission hearing in Employee's case, Adjuster left the employment of Y Insurance Company to become an adjuster for Z Insurance Company. Attorney B represents Employee in the workers' compensation action. Not long before the Industrial Commission hearing, Adjuster was in Attorney B's offices on an unrelated matter. Attorney A was not present. Attorney B approached Adjuster to discuss Employee's case. Should Attorney B have obtained the consent of Attorney A prior to speaking directly with Adjuster with regard to Employee's workers' compensation case?

Opinion #2:

Yes. The protection afforded by Rule 4.2(a) to "safeguard the client-lawyer relationship from interference by adverse counsel" can be assured to a represented organization only if there is an exception to the general rule that permits *ex parte* contact with former employees of an organization without the consent of the organization's lawyer. *See* RPC 81 (permitting a lawyer to interview an unrepresented former employee of an adverse corporate party without the permission of the corporation's lawyer). The exception must be made for contacts with a former employee who, while with the organization, participated substantially in the legal representation of the organization, including participation in and knowledge of privileged communications with legal counsel. Permitting direct communications with such a person, although no longer employed by the organization, would interfere with the effective representation of the organization and the organization's relationship with its legal counsel. Such communications are permitted only with the consent of the organization's lawyer or in formal discovery proceedings. The general rule, set forth in RPC 81, permitting a lawyer to interview an unrepresented former employee of an adverse organizational party without the consent of the organization's lawyer, remains in effect with the limited exception explained above.

Inquiry #3:

[The facts of this inquiry are unrelated to the preceding inquiries.]

Employee X is no longer employed by Corporation. While an employee of Corporation, however, Employee X may have engaged in activities that would constitute the sexual harassment of other employees of Corporation. An action alleging sexual harassment based on Employee X's conduct was brought against Corporation. Although he is not a named defendant in the action, Employee X's acts, while an employee, may be imputed to the organization. When he was employed, Employee X did not discuss the corporation's representation in this matter with Corporation's lawyer. Employee X is unrepresented. May the lawyer for the plaintiffs in the sexual harassment action interview Employee X without the consent of the lawyer for Corporation?

Opinion #3:

Yes. Unlike the adjuster in the two prior inquiries, Employee X was not an active participant in the legal representation of his former employer in the sexual harassment action. It does not appear that he was involved in any decision making relative to the representation of Corporation nor was he privy to privileged client-lawyer communications relative to the representation. Rather, Employee X is a fact witness and a potential defendant in his own right. Permitting *ex parte* contact with Employee X by the plaintiff's counsel will not interfere with Corporation's relationship with its lawyer nor will it result in the disclosure of privileged client-lawyer communications regarding the representation. Comment [5] to Rule 4.2, which indicates that the rule prohibits communications with any employee "… whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization," should be applicable only to current employees. The purpose of Rule 4.2 is not enhanced by extending the prohibition to former employees who, during the time of their employment, did not participate substantively in the representation of the organization.

Although the plaintiff's lawyer may communicate directly with the Employee X, the lawyer's communications are subject to the protections for unrepresented persons set fourth in Rule 4.3. Rule 4.3(a) prohibits a lawyer from giving advice to an unrepresented person, other than the advice to secure legal counsel, if the interests of the person are in conflict with the interests of the lawyer's client. Similarly, Rule 4.3(b) requires the lawyer to make known to the unrepresented person that the lawyer is not disinterested.

97 Formal Ethics Opinion 3

October 24, 1997

Editor's Note: Opinion was originally published as RPC 255. Before adoption, it was revised to reference the appropriate sections of the Revised Rules of Professional Conduct under which it was finally decided.

Ex Parte Communication with a Judge Regarding a Scheduling or Administrative Matter

Opinion rules that a lawyer may engage in an ex parte communication with a judge regarding a scheduling or administrative matter only if necessitated by the administration of justice or exigent circumstances and diligent efforts to notify opposing counsel have failed.

Inquiry #1:

Attorney A represents Defendant X who is charged with driving while impaired. The case is scheduled for trial in district court the following day. Criminal district court is in session daily, and a motion to continue could be heard in open court. Attorney A, outside the course of official proceedings, contacts the local district court judge to request a continuance of the trial of Defendant X. Attorney A does not discuss the merits of the case with the local judge. Is a communication with the local district court judge to request a continuance, made without the prosecutor's knowledge or presence, an ethical violation?

Opinion #1:

Yes, unless the *ex parte* communication is necessitated by the administration of justice or exigent circumstances and diligent efforts to contact the opposing lawyer (in this case, the prosecutor) have failed.

Rule 3.5(a) of the Revised Rules of Professional Conduct prohibits communications with the judge except in the following situations: (1) in the course of official proceedings; (2) in writing, if the lawyer promptly delivers a copy of the writing to opposing counsel; (3) orally, upon adequate notice to the opposing counsel; or (4) as otherwise authorized by law. If an *ex parte* oral communication with a judge may influence the outcome of a case, the lawyer should avoid the communication unless the opposing party receives adequate notice or the communication is allowed by law. *See* RPC 237 (citing statutes permitting *ex parte* communications in certain emergencies). Nevertheless, the administration of justice or exigent circumstances may necessitate an *ex parte* oral communication with a judge to resolve a scheduling or administrative matter. If so, the lawyer may engage in the *ex parte* communication with the judge only after a diligent effort has been made to notify the opposing lawyer.

Inquiry #2:

A retired judge from outside the district is scheduled to preside over the next day's session of district court. Attorney A is seeking the continuance from the local district court judge because he wants to avoid the trial of Defendant X's case by the visiting judge. Does this affect the opinion set forth above?

Opinion #2:

No.

Inquiry #3:

Defendant Z is charged with driving while impaired. He is the grandson of a retired deputy sheriff who has been very active in local politics for many years. The deputy sheriff supported and campaigned for at least two of the three local district court judges. At least two of the judges have visited in the retired deputy's home.

One of the three judges voluntarily recused himself from the trial of Defendant Z. The day before the case was scheduled for trial, the prosecutor separately approached each of the other two judges. Without the knowledge of Defendant Z's lawyer, the prosecutor informed each judge of Defendant Z's relationship to the retired deputy sheriff and inquired whether the judge would hear the case. Each judge indicated that he would recuse himself from the case. As a consequence, the trial was postponed in order that it might be heard by a judge from another county. Is a communication with a local judge to inquire as to whether the judge will recuse himself from a particular case, made without the opposing lawyer's knowledge or presence, an ethical violation?

Opinion #3:

Yes. *See* opinion #1 above.

97 Formal Ethics Opinion 4

April 17, 1998

Nonrefundable Fees

Opinion provides that flat fees may be collected at the beginning of a representation, treated as presently owed to the lawyer, and deposited into the lawyer's general operating account or paid to the lawyer but that if a collected fee is clearly excessive under the circumstances of the representation, a refund to the client of some or all of the fee is required.

Inquiry #1:

May a lawyer enter into a fee agreement with a client that characterizes a fee collected at the beginning of the representation as "nonrefundable" regardless of circumstances of the termination of the representation?

Opinion #1:

The better approach to the setting of fees is not to characterize any fee as "nonrefundable." This is because a lawyer may not enter into an agreement for, charge or collect a fee that is clearly excessive. Revised Rule 1.5(a) of the Revised Rules of Professional Conduct. Reasonable fees can be charged but what is reasonable depends upon the circumstances of a particular case. See Revised Rule 1.5(b) for the factors considered in determining whether a fee is clearly excessive. Whether a fee is described to a client as "nonrefundable" or no mention is made as to whether the fee is refundable, if a particular collected fee is clearly excessive under the circumstances, the portion of the fee that is excessive must be refunded.

The client has a right to terminate the representation at any time with or without cause. Covington v. Rhodes, 38 N.C. App. 61, 65, 247 S.E. 2d 305, 308 (1978), cert. denied, 296 N.C. 410, 251 S.E.2d 468 (1979). However, if a matter is in litigation, this right is subject to any rule of the tribunal requiring permission for withdrawal from representation. See Rule 1.16(c).

Inquiry #2:

May a lawyer charge and collect a set fee to perform specified legal services regardless of the time that will be required to complete the services?

Opinion #2:

Yes, such a fee is permissible provided the fee is not clearly excessive under the circumstances of the representation. Traditionally called a "flat fee," this type of fee provides economic value to the client and the lawyer alike because it enables the client to know, in advance, the expense of the representation and it rewards the lawyer for efficiently handling the matter.

A flat fee is usually collected at the beginning of the representation, treated by the lawyer as money to which the lawyer is immediately entitled, and deposited into the lawyer's general operating account or paid to the lawyer. See RPC 158 and Revised Rule 1.5(c).

Inquiry #3:

May a lawyer collect a fee at the beginning of a client's representation and deposit the fee in the lawyer's general operating account?

Opinion #3:

There are two types of fees that are charged and collected at the beginning of a representation which are considered "presently owed" to the lawyer and, therefore, may be deposited directly into the lawyer's general operating account (see Revised Rule 1.15-1(d)):

1. A "true" general retainer. A true general retainer is a payment "for the reservation of the exclusive services of the lawyer which is not used to pay for the legal services provided by the lawyer." Revised Rule 1.15-1, Comment [4]. The lawyer commits himself to represent the client for a time certain or on specified matters. The true general retainer finds general application in those instances where corporate clients, merchants or businessmen have a specific need to consult the lawyer on a regular or recurring basis. The retainer reserves the lawyer's services. The true general retainer must not be clearly excessive. What is customarily charged in similar situations may determine whether a specific true general retainer is clearly excessive. See Revised Rule 1.5(b)(3).

2. A flat fee for specified legal services to be completed within a reasonable period of time. The client and the lawyer both contemplate what the client needs and what the lawyer expects to perform, and they agree that the client will pay a flat fee for those services. A flat fee arrangement is customarily identified with isolated transactions such as representations on traffic citations, domestic actions, criminal charges, and commercial transactions. A client must make a decision as to whether he or she can afford counsel and may prefer to know, at the beginning of the representation, how much he or she will have to pay for the representation.

If a client gives a lawyer a check that includes payment for the legal fee and for court or other costs associated with the representation, the lawyer must deposit the check into the trust account and withdraw from the trust account that portion of the deposit that represents earned legal fees. See RPC 158.

Inquiry #4:

At the beginning of the representation, a lawyer may ask a client to make a payment which is in part a true general retainer or a flat fee and in part an advance to secure the payment of fees yet to be earned. Into which of the lawyer's bank accounts should the payment be deposited?

Opinion #4:

There should be a clear agreement between the lawyer and the client as to which portion of the payment is a true general retainer, or a flat fee, and which portion of the payment is an advance. Absent such an agreement, the entire payment must be deposited into the trust account and will be considered client funds until earned. If there is a clear agreement that a portion of the fee paid by the client is either a true general retainer or a flat fee and the client gives the lawyer a check for the entire amount, the entire amount should be deposited into the trust account and that portion of the payment that is the general retainer or the flat fee should be withdrawn and deposited into the general operating account or paid to the lawyer. Revised Rule 1.15-1(e)(2).

The funds advanced by the client and deposited in the trust account may be withdrawn by the lawyer when earned by the performance of legal services on behalf of the client pursuant to the representation agreement with the client. Revised Rule 1.15-1(d). Should the client terminate the relationship, that portion of the advance fee deposited in the lawyer's trust account which is unearned must be refunded to the client.

Written fee agreements are not required by the Revised Rules of Professional Conduct. Nevertheless, a prudent lawyer will insist upon a written fee agreement prior to the representation of every client. The written agreement makes certain what too often rests in uncertainty when differences occur.

97 Formal Ethics Opinion 5

January 16, 1998

Editor's Note: This opinion was decided pursuant to the Revised Rules of Professional Conduct.

Ex Parte Submission of Proposed Order to Judge

Opinion rules that a lawyer must give the opposing counsel a copy of a proposed order simultaneously with the lawyer's submission of the proposed order to a judge in an ex parte communication.

Inquiry #1:

Attorney A represents a prisoner condemned to death. He files a motion for appropriate relief ("MAR") seeking a new trial, pursuant to G.S. §15A-1415 *et seq.*, by mailing the motion to the clerk of Superior Court with a letter requesting that the MAR be brought to the court's attention. Attorney A also serves a copy of the motion on Attorney B who is the district attorney and represents the state of North Carolina in this matter. Attorney C, an assistant attorney general, also represents the state in the matter.

After receiving the MAR, Attorney C prepares an answer and proposed order. The proposed order decides numerous contested factual and legal issues in the state's favor, dismisses the MAR, and includes space for the judge's signature. Attorney B delivers the MAR, the unfiled answer, the proposed order, and documents from the court file to Superior Court Judge D in chambers. Judge D has had no previous involvement in the case. Attorney B offers to make any modifications to the proposed order requested by Judge D.

Subsequently, Judge D signs the proposed order and returns it to Attorney B. Attorney B then files the answer and the signed order with the clerk of court and mails copies of the documents to Attorney A. This occurs five days after

Attorney B delivered the answer and proposed order to Judge D. When Attorney A receives the answer and order from Attorney B, it is the first notice that Attorney A has received that the case was under consideration by Judge D. May lawyers make a written presentation to a judge without timely notice to the opposing lawyer?

Opinion #1:

No. Rule 3.5 of the Revised Rules of Professional Conduct addresses a lawyer's duty to maintain the impartiality of a tribunal. Comment [7] to Rule 3.5 includes the following observations:

> All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party.

This advice should be heeded in all *ex parte* communications with a judge.

Rule 3.5(a)(3)(ii) permits a lawyer to communicate *ex parte* with a judge in writing only "if a copy of the writing is furnished simultaneously to the opposing party." The repealed rule on the same topic, repealed Rule 7.10(b)(2), allowed a written communication with a judge "if the lawyer promptly deliver[ed] a copy of the writing to opposing counsel..." The rule was changed to emphasize the importance of notifying the opposing counsel of an *ex parte* written communication with a judge. Delivery of a document to opposing counsel five days after its submission to a judge would not be "prompt" under the standard of the repealed rule and it utterly fails to meet the requirement of "simultaneous" delivery under Rule 3.5(a)(3)(ii). To comply with Rule 3.5, a lawyer must hand deliver a copy of the written communication to the opposing lawyer at the same time or prior to the time that the written communication is hand delivered to the judge or, if the written communication is mailed to the judge, the lawyer must put the written communication in the mail for delivery to opposing counsel at the same time or before it is placed in the mail for delivery to the judge.

Inquiry #2:

It is the practice of the bar in this judicial district to give the opposing lawyer prior or contemporaneous notice of the submission to the court of a proposed order and the opportunity to comment upon or object to the proposed order. May a lawyer fail to comply with this practice by submitting a proposed order to a judge in an *ex parte* communication prior to providing the proposed order to the opposing counsel?

Opinion #2:

No. *See* opinion #1 above. Such conduct also violates Rule 3.5(a)(4)(i) which prohibits conduct intended to disrupt a tribunal, including "failing to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving opposing counsel timely notice of the intent not to comply." Moreover, failure to give the opposing lawyer an opportunity to comment upon or object to a proposed order before it is submitted to the judge is unprofessional and may be prejudicial to the administration of justice. It is the more professional practice for a lawyer to provide the opposing counsel with a copy of a proposed order in advance of delivering the proposed order to the judge and thereby give the opposing counsel an adequate opportunity to comment upon or object to the proposed order.

At a minimum, Rule 3.5(a)(3)(ii) requires a lawyer to furnish the opposing lawyer with a copy of the proposed order simultaneously with its delivery to the judge and, if the proposed order is furnished to the opposing counsel simultaneously, Rule 3.3(d) requires the lawyer to disclose to the judge in the *ex parte* communication that the opposing lawyer has received a copy of the proposed order but has not had an opportunity to present any comments or objections to the judge. Rule 3.3(d) provides that "in an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."

97 Formal Ethics Opinion 6

January 16, 1998

Failure to Include Address on Direct Mail

Opinion rules that the omission of the lawyer's address from a targeted direct mail letter is a material misrepresentation.

Inquiry #1:

Attorney sends targeted direct mail letters to individuals he knows to be in need of legal representation in particular matters. The letterhead on the stationery for the direct mail letters does not include an address for Attorney's law firm although it lists an 800 telephone number. May a lawyer send a targeted direct mail letter to a prospective client on stationery that includes no address for the lawyer or the lawyer's firm?

Opinion #1:

No. Rule 7.1 of the Revised Rules of Professional Conduct prohibits false or misleading communications by a lawyer. Paragraph (a) of that rule defines a false or misleading communication as a communication that "contains a material misrepresentation of fact or law, or omits a fact necessary to make a statement considered as whole not materially misleading." The omission of a lawyer's address from the stationery used for targeted direct mail letters is a material misrepresentation because a recipient of the letter will not be able to determine whether the lawyer practices in the recipient's community, in another community in North Carolina, or out of state. *Cf.*, RPC 217.

Inquiry #2:

Attorney's targeted direct mail letters include the disclosure statement, "This is an advertisement for legal services," which is required by Rule 7.3(c). The print used for the disclosure statement appears to be the same size as the print used for the name of Attorney's law firm. However, the name of Attorney's law firm appears in bold print while the disclosure statement appears in light print that provides little contrast with the color of the stationery. Therefore, the disclosure statement is very difficult to see. Does this stationery comply with the requirements of Revised Rule 7.3(c) regulating targeted direct mail letters?

Opinion #2:

No. The disclosure statement must be in a shade of print that contrasts sufficiently with the stationery to be easily read by a recipient. Revised Rule 7.3(c) requires the advertising disclosure statement "at the beginning of the body of the written communication in print as large or larger than the lawyer's or law firm's name..." The font size and location of the disclosure are dictated by the rule to insure that the recipients of direct mail letters have notice that the letters are advertisements and may be discarded. This purpose is defeated if the shade of the print is so light that the disclaimer cannot be read.

97 Formal Ethics Opinion 7

January 16, 1998

Representation of Corporation After Filing Bankruptcy

Opinion rules that, after a corporation files a Chapter 7 bankruptcy petition and at the request of the bankruptcy trustee, a lawyer who previously represented the corporation may continue to represent the corporation's bankruptcy estate and the bankruptcy trustee in a civil action provided the lawyer understands that the trustee is responsible for making decisions about the representation and the representation is not adverse to a former client of the lawyer.

Inquiry #1:

Attorney A was employed by Corporation B to represent the corporation in a civil suit against Attorney X for breach of contract, breach of fiduciary duty, and double damages. Shareholder D is the sole shareholder and president of Corporation B. Attorney A received his directions regarding the representation of Corporation B from Shareholder D.

While the civil suit was pending, Corporation B filed a Chapter 7 bankruptcy petition. The filing of a bankruptcy petition by Corporation B created a bankruptcy estate to be administered for the benefit of creditors. Under §541 of the United States Bankruptcy Code (11 USC. §541), the bankruptcy estate includes all legal and equitable interests of the debtor in property including the cause of action against Attorney C. Pursuant to §§541 and 704 of the Bankruptcy Code, the trustee is vested with all property of the bankruptcy estate and it is the trustee's duty to collect and reduce the property to money. The trustee has full control over the pending civil action since it is an asset of

the estate to be administered.

Initially, Shareholder D advised Attorney A that he wanted the action against Attorney X to be pursued by the trustee in bankruptcy (the "Trustee") and that Shareholder D would disclose confidential information about the civil suit to the Trustee. Subsequently, Shareholder D informed Attorney A that he wanted the Trustee to dismiss the civil action.

The Trustee has asked Attorney A to pursue the civil action against Attorney X as an asset of Corporation B's bankruptcy estate. The Trustee must obtain an order from the bankruptcy court allowing Attorney A to proceed with the representation and authorizing the payment of Attorney A's legal fees. It will be necessary for Attorney A to explain to the bankruptcy court any possible conflict of interest he may have in representing the bankruptcy estate in the action. The Trustee believes that Attorney A will not have a conflict of interest because the interests of Attorney A's former client, the pre-petition corporation, are not in conflict with the interests of the bankruptcy estate. Moreover, shareholders of a bankrupt corporation have no authority over an asset of the corporation's bankruptcy estate.

Counsel for Attorney X has filed a notice to take the deposition of Shareholder D in the civil action. Attorney A wants to clarify his role in the deposition. Attorney A has been unable to contact Shareholder D to discuss the matter.

Upon the filing of a Chapter 7 bankruptcy petition and the appointment of a trustee by the bankruptcy court, is the client of Attorney A the pre-petition corporation or the trustee?

Opinion #1:

Technically, Attorney A has no client until he is appointed by the Bankruptcy Court to represent Corporation B's bankruptcy estate and the Trustee in the civil action against Attorney X. However, the Trustee, as the fiduciary of the assets of the post-petition corporation, has the authority to make decisions about the assets of the bankrupt corporation including the civil action against Attorney X. If Attorney A's representation in the civil action continues, Attorney A's clients will be the bankruptcy estate and the Trustee acting in his official capacity. All decisions about the representation will be made by the Trustee. *Compare* Rule 1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.") and RPC 137 ("[i]n accepting employment in regard to a [decedent's] estate, an attorney undertakes to represent the personal representative in his or her official capacity and the estate as an entity").

Inquiry #2:

During the period of time between the appointment of the Trustee and a court order appointing an attorney for the bankruptcy estate and the Trustee in the pending civil action against Attorney X, what information is the Trustee entitled to receive concerning the representation of Corporation B in the civil action?

Opinion #2:

Trustee is the fiduciary of the assets of the corporation, including its civil claims, and is entitled to receive all information concerning Corporation B's pending civil claim. Attorney A may disclose to the Trustee all confidential information relating to the representation of the corporation in the civil action. *See* Rule 1.5(d)(1) and (2); *compare* RPC 195 (holding that in the representation of a decedent's estate and the personal representative, the lawyer owes the duty of confidentiality to the personal representative acting in his official capacity and to the estate itself).

Inquiry #3:

Shareholder D notified Attorney A that he does not want the Trustee to pursue the lawsuit against Attorney X. May Attorney A represent the bankruptcy estate and the Trustee in the civil action if Shareholder D objects to the pursuit of the lawsuit?

Opinion #3:

The decision to pursue the action against Attorney X is within the discretion of the Trustee in the discharge of his fiduciary duties under the Bankruptcy Code. Shareholder D has no authority over the Trustee. If Attorney A represented only Corporation B and never represented Shareholder D individually, Attorney A does not owe Shareholder D a duty of loyalty. He may, therefore, follow the directions of the Trustee and pursue the claim against Attorney X pursuant to the directions of the Trustee.

If, however, Attorney A represented Shareholder D individually with regard to Shareholder D's interests in the civil action against Attorney X or Attorney A made representations to Shareholder D that led Shareholder D reasonably to assume that Attorney A represented Shareholder D individually in the matter, Attorney A may have a conflict of interest in pursuing the civil action over the objection of Shareholder D. Rule 1.9(a) prohibits a lawyer who has formerly represented a client in a matter from thereafter representing another person in the same matter if the interests of the new client are materially adverse to the interests of the former client unless the former client consents. Although there is nothing in the facts that supports this conclusion, if Shareholder D was himself a client of Attorney A with regard to the action against Attorney X and the pursuit of the lawsuit against Attorney X is now materially adverse to the interests of Shareholder D, Attorney A may not represent the corporation's bankruptcy estate and the Trustee in the civil action unless Shareholder D consents.

Inquiry #4:

If Shareholder D is deposed in the lawsuit, does Attorney A have any obligations to Shareholder D during the deposition?

Opinion #4:

Attorney A has an obligation to Shareholder D only if Attorney A represented Shareholder D in his individual capacity and his representation of Corporation B's bankruptcy estate will be adverse to Shareholder D's interests. If so, he may not represent the bankruptcy estate and the Trustee in the deposition or the lawsuit unless Shareholder D consents to the representation. *See* opinion #3 above. If, on the other hand, Attorney A never represented Shareholder D in his individual capacity, there is no conflict and Attorney A may appear on behalf of the bankruptcy estate and the Trustee at the deposition.

Inquiry #5:

What obligation does Attorney A have to report his knowledge of misconduct by Attorney X which knowledge was gained during discovery in the civil suit?

Opinion #5:

Rule 8.3(a) of the Revised Rules of Professional Conduct provides:

> [a] lawyer having knowledge that another lawyer has committed a violation of the Revised Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the North Carolina State Bar or the court having jurisdiction over the matter.

Subparagraph (c) of the rule states that the rule does not require disclosure of confidential client information.

If Attorney A has reportable knowledge of lawyer misconduct that is not confidential, or, if the knowledge is confidential, the Trustee does not object to its disclosure to the State Bar or the appropriate court, Attorney A should disclose the information to the appropriate body.

---

97 Formal Ethics Opinion 8

January 16, 1998

Representation of Developer and Buyer in Closing of a Residential Real Estate Transaction

Opinion examines the circumstances in which it is acceptable for the lawyer who regularly represents a real estate developer to represent the buyer and the developer in the closing of a residential real estate transaction.

Introduction:

This opinion supplements RPC 210 (April 4, 1997), an opinion on common representation in a typical residential real estate closing. This opinion addresses the issues that arise in common representation when the closing lawyer regularly represents a seller who is in the business of real estate development. The lawyer's financial interest in retaining the seller's business may present special problems. This opinion explains the conditions that must be met before a closing lawyer may proceed with common representation.

Inquiry #1:

Seller is in the business of buying residential lots and tracts of land, improving the lots and/or subdividing the land for residential or condominium development, and selling the improved lots and land. Seller frequently uses the services of Attorney to provide legal representation on various aspects of Seller's real estate transactions including, but not limited to, performing the base title work, preparing restrictive covenants, and drafting construction contracts.

Buyer entered into a contract with Seller to purchase a residential lot and house built by Seller. The contract was negotiated and executed without the involvement of Attorney. Seller wants Attorney to close the transaction. If Attorney closes the transaction, Attorney will provide legal services to Buyer including providing an opinion as to title and preparing the loan documents. May Attorney close the transaction and represent both Seller and Buyer?

Opinion #1:

Yes, provided Attorney reasonably believes that the common representation will not be adverse to the interests of either client, there is full disclosure of Attorney's prior representation of Seller, and Buyer consents to the common representation. *See* RPC 210 and Rule 2.2 of the Revised Rules of Professional Conduct.

In RPC 210, it is observed that:

> [i]f the interests of the buyer and seller of residential property are generally aligned and the lawyer determines that he or she can manage the potential conflict of interest between the parties, the lawyer may represent both the buyer and the seller in closing a residential real estate transaction with the consent of the parties.

Before concluding that common representation is permitted, the lawyer must consider "whether there is any obstacle to the loyal representation of both parties." RPC 210. Where a lawyer has a long-standing professional relationship with a seller and a financial interest in continuing to represent the seller, the lawyer must carefully and thoughtfully evaluate whether he or she will be able to act impartially in closing the transaction. The lawyer may proceed with the common representation only if the lawyer reasonably believes that his or her loyalty to the seller will not interfere with the lawyer's responsibilities to the buyer. Rule 2.2(a)(3). Also, the lawyer may not proceed with the common representation unless he or she reasonably believes that there is little likelihood that an actual conflict will arise out of the common representation and, should a conflict arise, the potential prejudice to the parties will be minimal. RPC 210 and Rule 2.2(a)(2).

If the lawyer reasonably believes the common representation can be managed, the lawyer must make full disclosure of the advantages and risks of common representation and obtain the consent of both parties before proceeding with the representation. Revised Rule 2.2(a)(1). This disclosure should include informing the seller that, in closing the transaction, the lawyer has equal responsibility to the buyer and, regardless of the prior representation of the seller, the lawyer cannot prefer the interests of the seller over the interests of the buyer. With regard to the buyer, the lawyer must fully disclose the lawyer's prior and existing professional relationship with the seller. This disclosure should include a general explanation of the extent of the lawyer's prior and current representation of the seller and a specific explanation of the lawyer's legal work, if any, on the property that is the subject of the transaction. The latter should include the disclosure of all legal work relating to the development of a subdivision if relevant.

Full disclosure to the seller and to the buyer must also include an explanation of the scope of the lawyer's representation. *See* RPC 210. In addition, the lawyer should explain that if a conflict develops between the seller and the buyer, the lawyer must withdraw from the representation of all parties and may not continue to represent any of the clients in the transaction. RPC 210 and Rule 2.2(c). For example, the lawyer may not take a position of advocacy for one party or the other with regard to the completion of the construction of the house, the escrow of funds for the completion of the construction, problems with title to the property, and enforcement of the warranty on new construction. Areas of potential conflict should be outlined for both parties prior to obtaining their separate consents to the common representation.

The disclosure required must be made prior to the closing of the transaction. The Revised Rules of Professional Conduct do not require the consents to be in writing. However, obtaining written consents is the better practice.

If common representation is permitted under the conditions outlined above, Attorney may perform legal services for both parties as necessary to close the transaction including offering an opinion as to title to the buyer. Either party may be charged for the lawyer's services as appropriate. *See* Rule 1.5.

Inquiry #2:

Would the answer to inquiry #1 be different if Attorney drafted the model purchase contract that Seller uses to market the lots and houses in the subdivision but Attorney did not participate in the final negotiation of any of the specific provisions of the purchase contract between Seller and Buyer?

Opinion #2:

No, Attorney may still close the transaction and represent both Buyer and Seller provided he can satisfy the conditions on common representation set forth in opinion #1 above.

Inquiry #3:

May Attorney engage in common representation of Buyer and Seller if Attorney memorialized the purchase agreement between Buyer and Seller by completing the written purchase contract without participating in the negotiation of any of its specific terms?

Opinion #3:

Yes, Attorney may represent both Buyer and Seller if he can satisfy the conditions on common representation set forth in opinion #1 above.

Inquiry #4:

The house and lot that Buyer has contracted to purchase from Seller are located in a subdivision that is being developed by Seller. As a result of his representation of Seller on matters relating to the development of the subdivision, Attorney is aware that Seller is having financial difficulties and may be unable to complete the promised amenities in the subdivision, including a swimming pool and tennis courts. Seller has instructed Attorney not to disclose this information. May Attorney represent both Seller and Buyer to close the transaction?

Opinion #4:

No. Rule 1.7(c) provides that:

> [a] lawyer shall have a continuing obligation to evaluate all situations involving potentially conflicting interests and shall withdraw from representation of any party he or she cannot adequately represent or represent without using the confidential information or secrets of another client or former client except as Rule 1.6 allows.

Rule 1.6(a) defines confidential client information as information learned during the course of representation of a client the disclosure of which would be detrimental to the interests of the client. The information regarding Seller's potential inability to complete the amenities in the subdivision is confidential information of Seller that Attorney may not disclose unless Seller consents. *See* Rule 1.6(c). However, to represent Buyer adequately, Attorney should disclose this information. In this situation, Attorney cannot reasonably conclude that his responsibilities to Seller will not interfere with his responsibilities to Buyer. *See* opinion #1 above. Attorney may not, therefore, accept the common representation.

Inquiry #5:

Completion of the amenities for the subdivision are not in question. However, Attorney prepared the base title for the subdivision and he is aware that there are some close questions on title to the lot under contract to Buyer. Although these matters may be insignificant, Attorney would normally disclose this information to Buyer. Seller has instructed Attorney not to disclose the information to Buyer. May Attorney represent Buyer and Seller to close the transaction?

Opinion #5:

No, unless Seller consents to the disclosure of the information. *See* opinion #2 above and Rule 1.6(c).

Inquiry #6:

Attorney analyzed his relationship with Seller and determined that he can impartially represent both Seller and Buyer in closing the sale of the house and lot to Buyer. Buyer and the lender chosen by Buyer have agreed to the basic terms of the mortgage loan (amount, security, interest rate, installment, and maturity) prior to the engagement of Attorney to close the transaction. May Attorney represent both the lender and Buyer, as well as Seller?

Opinion #6:

Yes. *See* RPC 210.

Inquiry #7:

Seller believes that it will result in savings of time and money if Attorney closes all of the sales in the subdivision. Seller would like to offer financial incentives to potential buyers to encourage them to use the closing services of Attorney. In particular, Seller would like to offer to pay all legal fees to close the transaction if the buyer agrees that Attorney will handle the closing. Seller asks Attorney if Attorney will close all sales for a pre-agreed fee. Seller also asks Attorney if Seller may include a provision in the contract to purchase in which Seller agrees to pay the legal fees if the buyer agrees that Attorney will close the transaction. May Attorney agree to participate in this arrangement?

Opinion #7:

Yes, if Attorney reasonably believes that the common representation can be handled impartially and the proper disclosure of the professional relationship between Seller and Attorney is made prior to the execution of the contract by the buyer. *See* Opinion #1 above.

---

97 Formal Ethics Opinion 9

January 16, 1998

Credit Card Chargebacks Against a Trust Account

Opinion rules that, provided steps are taken to safeguard the client funds on deposit in a trust account, a lawyer may accept fees paid by credit card although the bank's agreement to process such charges authorizes the bank to debit the lawyer's trust account in the event a credit card charge is disputed by a client.

Inquiry #1:

To accept charges paid by MasterCard and Visa credit cards, as well as other national credit cards, a lawyer must enter into a standard form "Merchant Agreement" with a bank in which the bank agrees to deposit credit card payments from cardholders electronically into the merchant's account with the bank subject to certain conditions. Among other conditions, such agreements typically permit the bank to debit a merchant's account for the discount fee, or the bank's charge to the merchant for advancing the credit card payments. In addition, such agreements typically permit the bank to "charge back" the merchant's bank account, without prior notice, in the amount of a prior payment by credit card which is subsequently disputed by the cardholder.[1] The dispute process is commenced when the cardholder notifies the credit card issuer that he disputes a charge shown on his statement. The merchant is notified of the dispute. Documentation of the charge is requested from the merchant. If the documentation is not deemed satisfactory or the merchant fails to respond, the bank may debit the disputed amount from the merchant's account with the bank without prior notice to the merchant.

Lawyers may accept payment of legal fees by electronic transfer and credit card. CPR 129 and RPC 247. However, RPC 247 requires a lawyer to arrange to have all credit card payments electronically deposited into the trust account if the lawyer's bank cannot or will not distinguish between the operating account, into which earned fees should be deposited, and the trust account, into which unearned fees should be deposited. To avoid the problem of commingling the funds of clients and the lawyer's funds, the opinion provides:

> [i]f a payment by electronic transfer of an earned fee cannot be distinguished by the bank from a payment by electronic transfer of an unearned fee, all payments by electronic transfer should be deposited into a lawyer's trust account and earned fees should be withdrawn from the trust account promptly. [Citing now repealed Rule 10.1(c).] The lawyer may also deposit into the trust account funds sufficient to pay the bank's service charges for electronic transfers. [Citing now repealed Rule 10.1(c)(1).] A ledger should be maintained for the service charges posted against such funds. [Citing now repealed Rule 10.2(c)(3).]

According to RPC 247, all payments of unearned fees and expenses must be deposited into a lawyer's trust account even if the payment is made by credit card. May a lawyer participate in a merchant agreement with a bank to honor credit card charges if the agreement gives the bank the authority to debit the lawyer's trust account for a chargeback without prior notice to the lawyer?

Opinion #1:

Yes, provided the lawyer takes appropriate steps to protect the funds of other clients on deposit in the trust account.

A lawyer who receives funds that belong to a client assumes the responsibilities of a fiduciary to safeguard those funds and to preserve the identity of the funds by depositing them into a designated trust account. Rule 1.15-1 of the Revised Rules of Professional Conduct and RPC 191. The responsibilities of a fiduciary include the duty to ensure that the funds of a particular client are used only to satisfy the obligations of that client and are not used to satisfy the claims of the lawyer's creditors or of other clients of the lawyer. RPC 191. Therefore, a lawyer may participate in a merchant agreement with a bank to honor the credit card payments of clients only if the funds of other clients on deposit in the lawyer's trust account will be protected against a chargeback.

To avoid the potential jeopardy to the funds of other clients on deposit in a trust account, the lawyer must first attempt to negotiate an agreement with the bank that requires the bank to debit an account other than the trust account in the event of a chargeback. Some banks will route chargeback debits (and the discount fee for credit card charges) against a firm's operating account. Some banks may require a merchant to maintain a separate demand deposit account in an amount sufficient to cover chargebacks. If a bank cannot or is unwilling to debit a separate account, (i.e., the bank requires all chargebacks to be debited from the account into which credit card payments are deposited), the lawyer must request that the bank arrange an inter-account transfer such that the lawyer's operating account, or other non-trust account, will be immediately debited in the event of a chargeback against the trust account and the money promptly deposited into the trust account to cover the chargeback. If the bank will not agree to debit another account or arrange for inter-account transfers, the lawyer must establish a trust account for the sole purpose of receiving advance payments by credit card. The lawyer must withdraw all payments to this trust account immediately and deposit them in the lawyer's "primary" trust account. In this way, the risk that a chargeback will impact the funds of other clients will be minimized.

Under all circumstances, a lawyer is ethically compelled to arrange for a payment (from his or her own funds or from some other source) to the trust account sufficient to cover the chargeback in the event that a chargeback jeopardizes the funds of other clients on deposit in the account.

Inquiry #2:

May a lawyer participate in a merchant agreement that grants the bank a security interest in the accounts that the lawyer maintains with the bank?

Opinion #2:

No, Rule 1.15-1(g) prohibits the use or pledge of funds in a trust account to obtain credit. If one or more of the accounts is a trust account, the lawyer may not participate in the agreement unless the trust account or accounts are specifically exempted from the grant of a security interest.

Inquiry #3:

If the nature of a lawyer's practice is such that all fees that the lawyer collects are earned at the time of collection, may the lawyer arrange for payments by credit card to be made directly to the lawyer's operating account?

Opinion #3:

Yes. Rule 1.15-1.

Endnotes

1. The Truth in Lending Act (§170, 15 USC §1666i) and Regulation Z (12 CFR §226.12(c)) contain provisions which preserve a cardholder's claim and defenses against a card issuer in certain circumstances. A cardholder is given a right to assert against the card issuer all claims (other than tort claims) and defenses arising out of the credit transaction that it would otherwise have against the merchant. Regulation Z does not provide any guidance as to the nature of the claims and defenses that may be asserted. Since it does give the cardholder the right to assert against the card issuer any claims and defenses available that would be available against the merchant, however, most merchant agreements provided for a "pass through" of the problem.

The power of a cardholder to reverse a credit card transaction is very broad. The following is the mandatory disclosure that must appear in the credit card agreement with a prospective cardholder:

> If you have a problem with the quality of property or services that you purchased with a credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on

the property or services. There are two limitations on this right:
(A) You must have made the purchase in your home state, if not within your home state, within 100 miles of your current mailing address; and
(B) The purchase price must have been more than $50.00.

These limitations do not apply if the card issuer owns or operates the merchant or if we mailed you the advertisement for the property or services (Regulation Z, App. G-3).

97 Formal Ethics Opinion 10

January 16, 1998

Undercover Officer Planted by Prosecutor in Cell of Represented Defendant

Opinion rules that a prosecutor may instruct a law enforcement officer to send an undercover officer into the prison cell of a represented criminal defendant to observe the defendant's communications with other inmates in the cell.

Inquiry:

Two or more criminal defendants are charged with criminal offenses and are in custody. The prosecutor would like to advise the investigating law enforcement officers to "plant" an undercover officer, posing as an inmate, in the cell with the defendants. The undercover officer would be instructed to listen to the defendants' discussions of their cases. However, the undercover officer would also be instructed not to enter into these discussions, not to ask the defendants any questions about their cases, and not to give the defendants any advice about their cases.

May the prosecutor instruct the investigating officers to plant an undercover officer in the prison cell?

Opinion:

Yes, provided the prosecutor also instructs the officers to conduct their listening activities within all applicable constitutional and statutory limitations and, where necessary, to explain those limitations to the officers. This opinion is limited to the conduct of prosecutors. *See* Rule 4.2(a) ("During the representation of a client, a lawyer 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...is authorized by law to do so.")

98 Formal Ethics Opinion 1

January 15, 1999

Disclosure of Adverse Evidence in a Social Security Disability Hearing

Opinion rules that a lawyer representing a client in a social security disability hearing is not required to inform the administrative law judge of material adverse facts known to the lawyer.

Inquiry:

Attorney represents Client, a claimant for social security disability benefits. Attorney files a request for an administrative hearing before a Social Security administrative law judge (ALJ). Social Security hearings before an ALJ are considered non-adversarial because no one represents the Social Security Administration at the hearing. However, prior to the hearing, the Social Security Administration develops a written record which is before the ALJ at the time of the hearing. In addition, the ALJ has the authority to perform an independent investigation of the client. s claim.

Prior to the hearing, Attorney writes to the claimant. s treating physician and asks for a letter stating the physician. s opinion about the claimant. s disability. In a responsive letter, the physician indicates that she believes that the claimant is not disabled. Does Attorney have to submit the adverse letter from the physician to the ALJ at the hearing?

Opinion:

No. Although it is a hallmark of good lawyering for an advocate to disclose adverse evidence and explain to the court why it should not be given weight, generally an advocate is not required to present facts adverse to his or her client.

Rule 3.3(d) of the Revised Rules of Professional Conduct provides, "[i]n an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." As one scholar notes, the disclosure "is required to correct the deficiencies of the adversary system." Wolfram, *Modern Legal Ethics* §12.7, at 678-679 (1986). Comment [14] to Revised Rule 3.3 also elucidates that full disclosure requirement in an ex parte proceeding is to assist the judge in making an impartial decision:

> Ordinarily, an advocate has the limited responsibility of presenting one side of the matter that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an *ex parte* proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an *ex parte* proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Nevertheless, a Social Security disability hearing should be distinguished from an *ex parte* proceeding such as an application for a temporary restraining order in which the judge must rely entirely upon the advocate for one party to present the facts. In a disability hearing, there is a "balance of presentation" because the Social Security Administration has an opportunity to develop the written record that is before the ALJ at the time of hearing. Moreover, the ALJ has the authority to make his or her own investigation of the facts. When there are no "deficiencies of the adversary system," the burden of presenting the case against a finding of disability should not be put on the lawyer for the claimant. *See* RPC 230.

98 Formal Ethics Opinion 2

January 15, 1998

Advising a Client to Evade Service of Process

Opinion rules that a lawyer may explain the effect of service of process to a client but may not advise a client to evade service of process.

Inquiry #1:

Husband is aware that Wife has retained a lawyer and intends to proceed with a domestic action. Husband retains Attorney X to represent him. At his initial conference with Attorney X, Husband tells Attorney X that he believes that Wife has filed an action against him. Attorney X asks if Husband has been served with a complaint. Husband tells him that he has not received a complaint and asks Attorney X to explain the effect of service of the complaint. Attorney X explains the different forms of service, speculates that Wife will attempt service through the sheriff's department, and informs Husband that he must be properly served with the complaint in order for Wife to prosecute her case. Husband asks whether Wife's case can go forward if the sheriff's department is unable to find him because he "disappears for awhile." Attorney X tells him that the case cannot proceed unless he is served.

Is it ethical for Attorney X to explain to Husband the legal effect of service of process?

Opinion #1:

Yes, a lawyer "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.4(b) of the Revised Rules of Professional Conduct. For example, Attorney X may explain to Husband that he has no legal obligation to volunteer to accept the complaint or to pick up the papers from the sheriff's department should the sheriff's office call to request his cooperation. Moreover, if Husband asks about evading service, Attorney X may discuss the consequences of this proposed course of conduct. *See, e.g.*, Rule 1.2(d) which permits a lawyer to discuss the legal consequences of any proposed course of conduct while prohibiting the lawyer from advising or assisting a client to engage in fraudulent conduct.

Inquiry #2:

May Attorney X explain ways to evade service of process to Husband? Such advice might include instructing Husband to tell the receptionist at his place of work to lie to deputy sheriffs about his whereabouts; to go out the back door if a deputy comes to Husband's work place or home; or to stay away from his residence.

Opinion #2:

No, such conduct is unethical for a number of reasons. First, service of

process is a necessary component of the judicial system and a lawyer is an officer of that system. Counseling a client in ways to evade service interferes with the judicial system and is, therefore, prejudicial to the administration of justice in violation of Rule 8.4(d). Second, a lawyer should not counsel a client to engage, or assist a client in conduct that the lawyer knows is fraudulent, in violation of Rule 1.2(d). Finally, advising a client to take evasive action solely for the purpose of delay is disrespectful of the rights of Wife in violation of Rule 4.4 which provides in part, "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to…delay…a third person…."

Inquiry #3:

May Attorney X advise his client to evade service of process provided he does not tell the client how to evade service?

Opinion #3:

No. See opinion #2 above.

Inquiry #4:

Is the prohibition on instructing a client to evade service applicable to the service of other court documents such as subpoenas?

Opinion #4:

Yes.

---

98 Formal Ethics Opinion 3

January 15, 1998

Adding Finance Charges to Past Due Client Accounts

Opinion rules that, subject to the requirements of law, a lawyer may add a finance charge to a client's account if the client fails to pay the balance when due as agreed with the client.

Inquiry #1:

Law Firm does not have a written fee agreement with its clients; however, all bills for services rendered to clients state that payment is due in full upon receipt. To date, Law Firm has not added a finance charge to any past due client accounts. Law Firm would like to begin assessing finance charges on the outstanding past-due accounts of selected clients. Law Firm plans to send each of these clients a notice stating that the client's past due account balance will be charged a finance charge of 1.5% per month effective 60 days from the date of notice if the account balance is not paid in full by that time.

There are two groups of clients who will be affected by the decision to add finance charges. The first group consists of clients who have outstanding account balances because they have never paid anything on their accounts and clients who, without obtaining the consent of Law Firm, send partial payments to Law Firm each month. The second group consists of clients who have made arrangements with Law Firm to make monthly partial payments on their accounts. Law Firm agreed to represent these clients knowing that the clients would not be able to pay their accounts in full each month.

May Law Firm add finance charges to the accounts of clients with past due balances who have not made partial payment arrangements with the firm?

Opinion #1:

Yes, provided Law Firm complies with Revised Rule 1.5(a) of the Revised Rules of Professional Conduct which prohibits a lawyer from entering into an agreement for, charging, or collecting an illegal fee. This means that finance charges on legal fees must comply with usury laws and any other applicable consumer credit laws.

N.C. Gen. Stat. §24-5(a) permits a creditor to charge simple interest at the legal rate on the principal owed after an account is contractually due. If a lawyer and a client did not agree in the oral or written fee contract at the beginning of the representation that interest on past due legal fees would be charged at a contract rate upon default, then interest may only be charged at the legal rate. *Id.* Similarly, if the lawyer and the client did not agree at the beginning of the representation when the account balance would be due and payable, the law provides that the account becomes due and payable in a reasonable time under the circumstances. No prior notice of the election to charge interest appears to be required under N.C. Gen. Stat. §24-5(a).

If a lawyer wants to charge up to 1.5% per month on the unpaid portion of the balance of the previous month, the lawyer must have an agreement to this effect with the client (whether the agreement is express, implied, or through course of dealing with the client), must comply with N.C. Gen. Stat. §24-11 which governs open-ended revolving credit charges, and must conform his or her conduct as a creditor to the requirements of any other applicable consumer credit laws.

Although not required by the Rules of Professional Conduct, it is preferable to put fee agreements with clients in writing at the beginning of the representation to resolve any misunderstanding about when the fees may be owed and to specify to a contractual certainty any finance charges that may be charged in the event that the client is delinquent in payments.

Inquiry #2:

Are there formal notice requirements before a law firm may add a finance charge to a past due client account?

Opinion #2:

The lawyer should comply with all legal requirements regarding notice of finance charges. In situations where the lawyer seeks only the interest permitted under N.C. Gen. Stat. §24-5(a), the answer is "no." In situations where there is an express agreement, implied agreement, or agreement by course of dealing between the lawyer and the client which gives the lawyer the right to charge a contract rate of interest, the answer is "no" unless the agreement otherwise provides for a notice requirement. *See* Opinion #1. The State Bar has no formal requirements for notice in this situation.

Inquiry #3:

May Law Firm assess a finance charge on the account balance of a client who made prior arrangements with the firm to pay less than the full amount due each month?

Opinion #3:

If the agreement (express, implied, or through course of dealing) with the client is interpreted as a comprehensive resolution of all outstanding amounts owed by the client (e.g., the law firm has elected to waive interest or finance charges to obtain payments on account), the answer is "no." Otherwise, finance charges may be assessed on the amount that is past due pursuant to (a) the legal rate under N.C. Gen. Stat. §24-5(a), or (b) any agreement between the client and Law Firm that has not been waived by prior conduct. Furthermore, subject to the laws on consumer credit and usury, Law Firm may seek to renegotiate the fee agreement and obtain the client's consent to add finance charges provided

> "the attorney may not abandon or threaten to abandon the client to cut the attorney's losses or to coerce an additional or higher fee. Any fee contract made or remade during the existence of the attorney-client relationship must be reasonable and freely and fairly made by the client having full knowledge of all material circumstances incident to the agreement."

Comment [3], Revised Rule 1.5.

Inquiry #4:

May Law Firm selectively assess late payment fees to some clients and not to others?

Opinion #4:

Yes, if such selectivity is not motivated by unlawful intent (e.g., racial or gender-based discrimination).

Inquiry #5:

Do clients with long-standing relationships with Law Firm, without past due account balances at present, require notice before Law Firm may begin assessing finance charges on their account balances when past due?

Opinion #5:

Unless there has been a course of dealing that creates an agreement between Law Firm and its long-standing clients that waives finance charges on the clients' past-due balances, Law Firm may seek interest as permitted by N.C. Gen. Stat. §24-5. *See* Opinion #1.

---

98 Formal Ethics Opinion 4

January 15, 1998

Publicity in Civil Trial

Opinion examines the restrictions on a lawyer's public comments about a pending civil proceeding in which the lawyer is participating.

Inquiry #1:

Attorney A represents a public school board of education (hereinafter "the Board"). Attorney B represents a minor and her parents who sued the Board in 1992 alleging negligent supervision by the Board's employees, resulting in the sexual assault of the minor at her school by another student. Plaintiffs also allege that when the minor reported the incident to a teacher's assistant, the minor was "chastised by the assistant." No one employed by the Board gave the minor medical attention, nor did any employee ever report the incident to the parents.

Four years after suit was filed, the trial court denied the Board's motion for summary judgment and motion to dismiss based upon sovereign immunity. The Board appealed denial of its sovereign immunity defense to the court of appeals. The court of appeals ruled that some but not all of the plaintiffs' claims were governed by sovereign immunity and remanded for trial. The decision of the court of appeals, including numerous factual allegations from the plaintiffs' complaint, was picked up by a news wire service. Thereafter, several news media ran the story from the wire service and printed or announced portions of the decision.

When local news media personnel began calling local school officials, the superintendent of the school system called Attorney A and asked how to respond to the inquiries. The superintendent and Attorney A decided a press release was the best way to respond to the news media. The school administration sent the release to those members of the news media who made inquiry about the case. The superintendent was concerned the public might conclude the schools in his system were unsafe and that school employees had ignored or hidden the alleged facts. The pertinent portions of the press release are as follows:

> 1) nothing in the court of appeals' decision means that any school employee has done anything wrong nor that the school system is liable to anyone. The questions before the court and the court's decision involve only technical legal issues related to insurance and sovereign immunity from suit.
>
> 2) the Board of Education and the employees of the school system are dedicated to the safety of all students, including the student involved in this case. From the time that the allegations in this case came to school employees' attention, every effort has been made to determine as fully as possible what happened and to attend to the student's needs in the most appropriate way.
>
> 3) after a very thorough investigation of the matter by the principal, the superintendent, and others, no credible evidence was discovered that the alleged assault had ever taken place. The Board of Education and all school employees have consistently and confidently affirmed that no assault took place.
>
> 4) if it is finally necessary to try this case before a jury, school officials are confident that the jury will determine that all employees involved in this matter acted properly and that there is no liability in this case for them or the school system.

Was this press release a violation of Revised Rule 3.6?

Opinion #1:

Revised Rule 3.6 provides, "[a] lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that the statement will materially prejudice an adjudicative proceeding in the matter." This rule was designed to preserve a right to a fair trial by avoiding trial by media, but at the same time it attempts to balance the legal right to free speech. Revised Rule 3.6, Comment [1]. There is no bright-line rule for determining when an extrajudicial statement is proper. In fact, this is a case of first impression.

Keeping in mind the purpose behind the rule, the question is whether there is a reasonable likelihood the above press release will *materially prejudice* an adjudicative proceeding. Several factors may assist in evaluating the potential for prejudice of an attorney's extrajudicial statements. First, Revised Rule 3.6(b) prohibits certain specified extrajudicial statements. This list is not exhaustive but does provide guidance as to the types of disclosures which would be prohibited. Second, any publicity involving information already available to the public, such as that contained in filed pleadings, discovery responses, affidavits, and previous witness testimony, is less likely to have a prejudicial effect on a subsequent court proceeding. *Annotated Model Rules of Professional Conduct* Rule 3.6 cmt., p. 352 (3rd ed. 1996). Third, extrajudicial statements concerning civil proceedings are generally not as strictly scrutinized as those regarding criminal proceedings. *Id.* Fourth, an attorney should be permitted some leeway in making a necessary response to protect a client from undue prejudicial effect of recent publicity not initiated by the attorney or his client. *Model Rules*, Rule 3.6(c). Fifth, whether the attorney intended a trial by media is also a significant factor. *Model Rules*, Rule 3.6 cmt. at 353.

In this case, the press release by the Board involved extrajudicial statements about a civil proceeding but none of the statements are specifically prohibited by Revised Rule 3.6(b). Moreover, because of the proceedings at the trial court level, much of the information contained in the press release was already in the public domain. For example, the denial of evidence to support the claim was present in the Board's answer to the complaint. Finally, the release was intended not to prejudice a court proceeding, but to counter adverse publicity about the Board. In light of these factors, the press release would not "materially prejudice an adjudicative proceeding" pursuant to Revised Rule 3.6.

Inquiry #2:

Does it matter that the release came from the Board rather than the attorney?

Opinion #2:

Revised Rule 3.6 does not impinge upon the constitutional right of clients to make extrajudicial statements concerning their case. The rule, however, does place restrictions on attorneys' extrajudicial speech and that of their agents. If the above press release had a reasonable likelihood of materially prejudicing an adjudicative proceeding, and the Board was merely used as conduit by the attorney to make prejudicial statements the attorney could not, then the attorney violated Revised Rule 3.6.

---

98 Formal Ethics Opinion 5

April 16, 1998

Disclosure of Client's Prior Driving Record

Opinion rules that a defense lawyer may remain silent while the prosecutor presents an inaccurate driving record to the court provided the lawyer and client did not criminally or fraudulently misrepresent the driving record to the prosecutor or the court and, further provided, that on application for a limited driving privilege, there is no misrepresentation to the court about the prior driving record.

Inquiry #1:

Client was charged with driving while impaired (DWI). Attorney A represented him at trial where Client was convicted. At the sentencing hearing, the prosecutor informed the court that Client had no record of prior convictions for DWI. Attorney A and Client were aware, however, that Client was convicted of DWI in federal court but the federal court failed to forward information regarding the conviction to the North Carolina Department of Motor Vehicles for inclusion in Client's driving record. Therefore, when the prosecutor checked the driving record, he found no record of the prior conviction. At the sentencing hearing, Attorney A and Client remained silent when the prosecutor informed the court that Client had no prior convictions for DWI. Neither Attorney A nor Client made any affirmative misrepresentations to the court about Client's driving record. The judge sentenced Client to punishment level three which can only be imposed if the court determines that the defendant has not been convicted of a prior DWI within the previous seven years.

Was it unethical for Attorney A to remain silent when he heard the prosecutor give erroneous information to the court?

Opinion #1:

No, it was not unethical for Attorney A to remain silent. The burden of proof was on the State to show that the defendant's driving record justified a more restrictive sentencing level. A defense lawyer is not required to volunteer

adverse facts when the prosecutor fails to bring them forward. The duty of confidentiality to the client is paramount provided the defense lawyer does not affirmatively misrepresent the facts to the court. See Rule 1.6(c) and Rule 3.3(a)(1) of the Revised Rules of Professional Conduct; CPR 313 (lawyer may not volunteer to the court confidential information about a client's prior convictions); and RPC 33 (lawyer may not reveal confidential information about a client's prior criminal record to the court but may not misrepresent the client's criminal record). Although Rule 3.3(a)(2) prohibits a lawyer from failing to disclose a material fact to a tribunal "when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client," this rule was not violated because Client's driving record was inaccurate through no fault of Client and Client did not criminally or fraudulently conceal the prior conviction from the prosecutor or the court.

Inquiry #2:

Client wants a limited driving privilege. To obtain the privilege, Client must petition the court by filing a form prepared by the Administrative Office of the Courts (AOC). To be eligible for a limited driving privilege under G.S. §20-179.3, the court must find that the defendant, within the preceding seven years, was not convicted of an offense involving impaired driving. Although the AOC form does not require the defendant to represent to the court that the defendant has no prior DWI convictions, the court must find, and so acknowledge on the form, that there is evidence that satisfies the statutory requirements for the issuance of a limited driving privilege.

Assuming that at no point in the process Attorney A or Client will be required to misrepresent Client's prior driving record to the court, may Attorney A petition the court for a limited driving privilege for Client?

Opinion #2:

No. Unlike the prior inquiry, in this situation the burden of showing eligibility for a limited driving privilege is on the defendant. By petitioning the court for the privilege, the defendant is making an implicit representation to the court that he has no prior convictions and is eligible for the privilege. Attorney A is aware that this is a false representation of a material fact and he may not participate in its presentation to a tribunal by filing the petition. Rule 3.3(a)(1).

98 Formal Ethics Opinion 6

April 16, 1998

Sale of a Law Firm to Lawyers Employed by the Firm

Opinion rules that the requirements set forth in Rule 1.17 relative to the sale of a law practice to a lawyer who is a stranger to the firm do not apply to the sale of a law practice to lawyers who are current employees of the firm.

Inquiry #1:

Founding Lawyers have practiced law together for many years. Each Founding Lawyer is a shareholder in A, B, & C Law Firm, P.A., a professional association (the "firm"). The firm employs Younger Attorneys who have expressed an interest in taking over the practice from Founding Lawyers. Younger Attorneys are not currently shareholders in the firm. Founding Lawyers anticipate retiring from the practice of law at different times over the ensuing years. They are interested in transferring the practice to Younger Attorneys and continuing to practice law as employees of the firm.

Founding Lawyers are considering two different ways of transferring the firm to Younger Attorneys. By the first method, Younger Attorneys would make sizable capital contributions to the firm in exchange for shares in the firm and the firm would, in turn, redeem the shares of Founding Lawyers. Under Rule 1.17(a) of the Revised Rules of Professional Conduct, a lawyer who sells a law practice is required to "[cease] to engage in the private practice of law in North Carolina." If the firm is transferred to Younger Attorneys by this method, will Founding Lawyers be required to cease to engage in the private practice of law in North Carolina?

Opinion #1:

No. Rule 1.17 applies to the sale of an entire law firm to a purchasing lawyer or law firm. The rule does not apply to the transfer of shares of a professional corporation to existing employees of the firm in exchange for capital contributions to the firm. As noted in Comment [15] to Rule 1.17, "[a]dmission to, or retirement from, a law partnership or professional association, retirement plans and similar arrangements…do not constitute a sale or purchase governed by the rule." The rule is intended to protect clients from breaches of confidentiality, conflicts of interests, and other abuses that may occur when a lawyer who is not a current member of a law firm purchases the good will of the law firm. Therefore, the sale of all of the shares of a professional association of lawyers to a lawyer who is not a member of the firm or a law firm that includes principals who are not members of the firm is subject to the requirements of the rule.

Inquiry #2:

In the second method of transferring the firm to Younger Attorneys under consideration, the Younger Attorneys will form a new professional association and own 100% of the stock of the new professional association. The new professional association will purchase substantially all of the assets of A,B &C Law Firm including the good will and the right to use the name of the firm. If the firm is transferred to Younger Attorneys by this method, will Founding Lawyers be required to cease to engage in the private practice of law in North Carolina?

Opinion #2:

No, see opinion #1 above. Although structured like a purchase of assets by a third party, the second method of transfer is essentially a retirement plan or "similar arrangement." As noted above, these are not governed by Rule 1.17. When the assets of a firm are purchased by a professional association of lawyers who are all current employees of the firm, there is no potential for harm to the interests of the clients of the firm due to conflicts of interests, breaches of confidentiality, or abuse of fee agreements.

Inquiry #3:

Is there any prohibition against the continued use of the firm's present name, regardless of the method of transfer used, as long as Founding Lawyers continue as employees of the professional association or, when they leave the firm, they retire from the practice of law in North Carolina?

Opinion #3:

Regardless of the method of transfer employed, there is no prohibition on the continued use of the firm's present name because "...there [is] a continuing succession in the firm's identity…." Rule 7.5, Comment [1]. *See also* "Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law," 7 NCAC 1E, Section .0100, Rule .0102(a)("The name of every professional corporation shall contain the surname of one or more of its shareholders or of one or more persons who were associated with its immediate corporate, individual, partnership, or professional limited liability company predecessor in the practice of law….") As noted in RPC 13, "[a] law firm may continue to include in the firm name that [sic] of a retired attorney who practiced with the firm up to the time of his retirement." However, the name of a retired principal in a firm "may be used in the name of a law firm only if the [principal] has ceased the practice of law."

Inquiry #4:

Founding Lawyers may finance the purchase of the firm by Younger Attorneys. Regardless of how the purchase is financed, after their retirement, Founding Lawyers want to provide advice and input to Younger Attorneys as to the conduct of the law practice. Will Founding Lawyers assistance to Younger Attorneys violate Rule 1.17(g)'s provision that "[t]he seller…shall have no say regarding the purchaser's conduct of the law practice"?

Opinion #4:

No. As noted in opinion #1 above, Rule 1.17 does not apply to the purchase of a law firm by lawyers who are currently members of the firm. Therefore, the prohibition in paragraph (g) of Rule 1.17 is also inapplicable.

98 Formal Ethics Opinion 7

April 16, 1998

Employment of Disbarred Lawyer

Opinion rules that a law firm may employ a disbarred lawyer as a paralegal provided the firm accepts no new clients who were clients of the disbarred lawyer's former firm during the period of misconduct; however, a disbarred lawyer may not

work as a paralegal at a firm where he was employed as a lawyer during the period of misconduct.

Inquiry #1:

Attorney A, a lawyer with ABC Law Firm, reported his professional misconduct to the North Carolina State Bar and voluntarily ceased the practice of law. The professional misconduct occurred while Attorney A was a member of ABC Law Firm. Approximately eighteen months later, after a complaint was filed with the Disciplinary Hearing Commission (DHC), Attorney A submitted to disbarment and surrendered his license. The DHC entered an order of disbarment effective as of the date Attorney A ceased the practice of law eighteen months earlier. Since the time that Attorney A discontinued the practice of law eighteen months ago, some of the people who were clients of ABC Law Firm when Attorney A practiced with the firm and engaged in professional misconduct ("former ABC clients") have sought legal representation from other law firms in the community. XYZ Law Firm has provided legal services to some former ABC clients and continues to be called upon to perform legal services for some former ABC clients. XYZ Law Firm proposed to employ Former Attorney A as a paralegal. May XYZ employ Former Attorney A as a paralegal, and continue to perform occasional legal services for former ABC clients if the clients first came to XYZ Law Firm for legal services prior to the employment of Former Attorney A as a paralegal?

Opinion #1:

Rule 5.5 (d) of the Revised Rules of Professional Conduct provides:

> A lawyer or law firm employing a disbarred or suspended lawyer as a law clerk or legal assistant shall not represent any client represented by the disbarred or suspended lawyer or by any lawyer with whom the disbarred or suspended lawyer practiced during the period on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

When a disbarred lawyer is employed by another law firm, the disbarred lawyer may attract clients from his former practice to the hiring law firm. As a consequence, it may be difficult for the disbarred lawyer to avoid the unauthorized practice of law with respect to these former clients. More problematic, however, is the possibility that the hiring law firm may be in collusion with the disbarred lawyer to employ the disbarred lawyer in exchange for the disbarred lawyer's delivery of his former clients to the hiring firm. If so, the firm is showing disrespect for the decision of the DHC and is encouraging unauthorized practice by the disbarred lawyer.

In the present situation, however, it is merely fortuitous that former clients of ABC Law Firm sought the legal services of XYZ Law Firm during the period prior to the employment of Former Attorney A as a paralegal. Therefore, provided all clients of XYZ Law Firm fully understand that the disbarred lawyer is not acting as an attorney but merely as a paralegal, and, provided further, that, after the employment of Former Attorney A, XYZ Law Firm accepts no new clients who were clients of ABC Law Firm during the period of Former Attorney A's misconduct, XYZ Law Firm may employ him as a paralegal. Care should also be taken to follow the recommendations in Comment [2] to Rule 5.5 relative to the supervision of a disbarred lawyer and related matters.

Inquiry #2:

May XYZ Law Firm employ Former Attorney A as a paralegal and perform legal services for former ABC clients if the clients come to XYZ Law Firm subsequent to the employment of Former Attorney A?

Opinion #2:

No. See opinion #1 above.

Inquiry #3:

If the answer to inquiry #1 or inquiry #2 is "no", would the answer change if XYZ Law Firm agrees to screen Former Attorney A from participation as a paralegal in the legal services provided to the former ABC clients?

Opinion #3:

No.

Inquiry #4:

Former Attorney B was disbarred following a hearing before the DHC. In its order of disbarment, the DHC found, among other things, that Former Attorney B engaged in unethical conduct by failing to supervise an employee for a period of approximately three months during a time when he was a partner in a law firm with his father, Attorney C. As a result of his failure to supervise, the employee misappropriated funds from the firm trust account.

May Attorney C employ Former Attorney B as a paralegal, law clerk, or some capacity other than a lawyer?

Opinion #4:

No. Rule 5.5(c) provides:

> A lawyer or law firm shall not employ a disbarred or suspended lawyer as a law clerk or legal assistant if that individual was associated with such lawyer or law firm at any time on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

The rule was adopted to prevent a disbarred lawyer from continuing to practice law as if no order of disbarment was entered. In Comment [3] to the rule, it is observed that it would be "practically impossible for the disciplined lawyer to confine himself or herself to activities not involving the actual practice of law if he or she were employed in his or her former office setting and obliged to deal with the same staff and clientele."

This inquiry is different from the preceding inquiries because the disbarred lawyer is proposing to work as a non-lawyer at a firm where he formerly worked as a lawyer. Under these circumstances, the existing relationships with staff and clients are more likely to undermine the prohibition on the unauthorized practice of law by the disbarred lawyer. Therefore, Attorney C may not employ Former Attorney B.

---

98 Formal Ethics Opinion 8

April 16, 1998

Participation in a Witness Closing

Opinion rules that a lawyer may not participate in a closing or sign a preliminary title opinion if, after reasonable inquiry, the lawyer believes that the title abstract or opinion was prepared by a non-lawyer without supervision by a licensed North Carolina lawyer.

Inquiry #1:

Lender is located in another state but provides home loans to North Carolina residents. Lender asks Attorney, a licensed North Carolina lawyer, to close a loan for certain borrowers. Lender indicates that the following services will be required from Attorney: (1) oversight of the execution of the loan documents; (2) acknowledgment by an appropriate witness of the signatures of the borrowers on the documents; (3) recordation of Lender's deed of trust; (4) copying the loan documents without review; and (5) disbursement of the loan proceeds. Lender procures title insurance from an out-of-state title insurance company which issues title insurance binders in reliance upon the notes of a title abstractor. Attorney suspects that the title search was done by a non-lawyer who was not supervised by a North Carolina lawyer.

This type of closing is sometimes called a "witness closing." May Attorney participate in the closing?

Opinion #1:

No. Rule 5.5(b) provides, "[a] lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." N.C. Gen. Stat. §84-2.1 defines "practice [of] law" as, among other things, "abstracting or passing upon titles." Attorney must make a reasonable inquiry concerning the preparation of the title search and/or the title opinion. If Attorney believes, after making this reasonable inquiry, that a non-lawyer abstracted the title and/or gave a title opinion on the property without the proper supervision of a licensed North Carolina attorney and this unauthorized practice will be furthered by Attorney's participation in the closing under the conditions prescribed by Lender, she may not participate in the closing. However, Attorney may participate in the closing if Attorney's reasonable inquiry indicates that the statute was not violated.

Inquiry #2:

What duty does Attorney have to the borrowers?

Opinion #2:

If Attorney's representation is not prohibited by Rule 5.5(b), Attorney's

duty to the borrowers is to ensure that her limited role in the closing is well understood and the borrowers agree to this limited role. *See* Rule 1.2(c). If she represents the borrowers, as well as Lender, she must competently represent their interests even if the objectives of her representation are limited. *See* Rule 1.1. Competent representation may include disclosure of any concerns that she may have about the preparation of the title opinion and the risks of relying upon the opinion. If Attorney does not represent the borrowers, they must be so advised and told that they should obtain separate legal counsel. *See* RPC 210. Attorney may represent the borrowers and Lender if she can do so impartially and without compromising the interests of any client. *Id.*

Inquiry #3:

What duty does Attorney have to Lender?

Opinion #3:

If Attorney's representation is not prohibited by Rule 5.5(b), Attorney must competently represent the interests of Lender. See Rule 1.1. Competent representation may include disclosure of any concerns that she may have about the preparation of the title opinion and the risks of relying upon the opinion.

Inquiry #4:

Title Insurance Company is located in another state but wants to write policies in North Carolina. Title Insurance Company contracts with a paralegal who is an independent contractor to search titles in North Carolina. Title Insurance Company asks Attorney to sign a preliminary opinion based upon the paralegal's abstract of title and/or preliminary opinion. Attorney has not reviewed the paralegal's title notes and did not supervise the paralegal's title research. May Attorney sign the preliminary opinion?

Opinion #4:

No, a lawyer has a duty to supervise any non-lawyer who assists her regardless of whether the non-lawyer is an employee of the lawyer, an independent contractor, or employed by another. Rule 5.3 and RPC 216. Execution of a preliminary title opinion that was prepared by an unsupervised non-lawyer is assisting the unauthorized practice of law in violation of Rule 5.5(b).

98 Formal Ethics Opinion 9

July 16, 1998

Charging for the Cost of Retrieving a Closed Client File

Opinion rules that a lawyer may charge a client the actual cost of retrieving a closed client file from storage, subject to certain conditions, provided the lawyer does not withhold the file to extract payment.

Inquiry:

May a lawyer charge a client for retrieving a closed file from storage?

Opinion:

A lawyer may charge a client the actual cost of retrieving a closed client file from storage subject to certain conditions.

RPC 209 requires a lawyer to keep a closed client file, on which no further representation is required, a minimum of six years unless the lawyer obtains the consent of the client to destroy the file or, after notice to the client, the client fails to retrieve the file. After six years pass, the lawyer may destroy the file without notifying the client provided the lawyer does not destroy any personal possessions or documents of the client.

To charge a client the actual cost of retrieving a closed file from storage, a lawyer must send a notice to the client at the client's last known address within a reasonable period of time after the matter is concluded and the file is closed. The notice should ask the client what the client wants the lawyer to do with the closed file. The options that may be given to the client are as follows: consent to the destruction of the file; agree that the lawyer will store the file with the understanding that the client will be charged the actual cost of retrieving the file from storage; or retrieve the file free of charge from the lawyer's office within a reasonable time after receipt of the notice. If the client directs the lawyer to mail the file, the lawyer may charge the shipping cost to client. If the client fails to respond to the notice, the lawyer must store the file for six years as required by RPC 209 and may recoup from the client the actual expense of retrieving the file at any time during the six year mandatory storage period.

The lawyer may not charge the client for photocopying the closed file (or any portion thereof) unless the client requests more than one copy of the file or a document in the file. The client may be charged for duplicate copies of the same document unless the lawyer retained the original document. RPC 178. Regardless of whether a notice was received by the client at the time that the representation was concluded, after a closed file is stored for six years and the lawyer is allowed to destroy the file without the client's consent, the lawyer may charge the client the actual cost of retrieving the file and making copies of the file or any document therein. At no time may a lawyer withhold originals or copies of documents or a file to extract payment of legal fees, retrieval costs, or copying costs; the lawyer has a claim for payment but he may not assert an interest in or lien against the file to secure payment.

98 Formal Ethics Opinion 10

July 16, 1998

Submission of Legal Bills to Audit Company at Request of Insurance Carrier

Opinion rules that an insurance defense lawyer may not disclose confidential information about an insured's representation in bills submitted to an independent audit company at the insurance carrier's request unless the insured consents.

Inquiry #1:

Law Firm is hired by Insurance Company to defend its insureds under its liability policies. Insurance Company requires great detail in Law Firm's bills for legal services and requires Law Firm to submit its bills directly to an outside audit company that is not affiliated with Insurance Company. The audit company makes all decisions about payment, nonpayment, or adjustment of Law Firm's bills. Bills are submitted on an interim basis during the pendency of the litigation and must contain detailed information about the legal services provided to the insured. May Law Firm submit its bills directly to the audit company rather than to Insurance Company?

Opinion #1:

Rules 1.6 and 1.7 provide in part:

Rule 1.6, Confidentiality of Information

(a)….

(b)….

(c) Except when permitted under paragraph (d), a lawyer shall not knowingly:

(1) reveal confidential information of a client;

(2)....

(3) use confidential information of a client for the advantage of the lawyer or a third person, unless the client consents after consultation.

(d) A lawyer may reveal:

(1) confidential information, the disclosure of which is impliedly authorized by the client as necessary to carry out the goals of the representation;

(2) confidential information with the consent of the client or clients affected, but only after consultation with them; ….

Rule 1.7, Conflict Of Interest: General Rule

(a)....

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation which shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) A lawyer shall have a continuing obligation to evaluate all situations involving potentially conflicting interests, and shall withdraw from the representation of any party the lawyer cannot adequately represent without using the confidential information of another client or a former client except as Rule 1.6 allows.

Bills for legal services are confidential and can, therefore, only be revealed with the consent of the client or clients affected, but only after consultation with them. Generally, there is no prohibition on submitting a client's legal bills to a third party for review at the client's request after consultation with the

client. However, a tripartite relationship exists when a liability insurance carrier employs and pays the lawyer to represent and defend its insured. While the lawyer owes some duty of loyalty to the insurance carrier, the insured, rather than the insurance carrier, is the lawyer's primary client. *See* RPC 56 and CPR 255. "The attorney's responsibility is to the court and client which he serves before the court," and an insurance company may not exercise such control over the lawyer that would unduly dilute the lawyer's responsibility to the court and the insured-client. CPR 326. The opinions cited here, while decided pursuant to the Code of Professional Responsibility and the Rules of Professional Conduct that were replaced by the Revised Rules of Professional Conduct now in effect, are consistent with current Rule 5.4(c) which provides that: "[a] lawyer shall not permit a person who recommends, engages, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

When the lawyer represents two clients, there is a delicate balance of the rights and duties owed by the lawyer to each client. With respect to the payment of legal fees, the interest of the insurance company and the insured are usually not the same. The insurance company usually has a paramount interest in controlling or reducing its defense costs, while the interest of the insured is generally to receive the best possible defense particularly if the claim may exceed the policy limits available for the insured's protection. Even when policy limits are adequate, the insured will not generally benefit from the release of any confidential information and the release of such information to a third party may constitute a waiver of the insured's attorney-client or work product privileges. Therefore, in general, by consenting, the insured agrees to release confidential information that could possibly (even if remotely) be prejudicial to her or invade her privacy without any return benefit.

While a client may consent in some instances, notwithstanding a conflict, as provided by Rule 1.7(b), the official comment to the rule states that the test of whether the client's consent is sufficient to waive a material limitation of the lawyer's responsibility, and whether the lawyer may properly ask a client to consent, is whether a "disinterested lawyer would conclude that the client should not agree." Rule 1.7, cmt.[5]. When the insured could be prejudiced by agreeing and gains nothing, a disinterested lawyer would not conclude that the insured should agree in the absence of some special circumstance. Therefore, the lawyer must reasonably conclude that there is some benefit to insured to outweigh any reasonable expectation of prejudice, or that the insured cannot be prejudiced by a release of the confidential information, before the lawyer may seek the informed consent of the insured after adequate consultation.

Some of the things that may be necessary for the lawyer to obtain, consider, and review in making this decision and consulting with the insured are:

(a) a copy of the agreement between the audit company and the insurance company;
(b) whether the audit company or the auditor may use or share the information with any other third party, including another insurance company;
(c) how the audit company controls access to the information;
(d) the level of security provided by the audit company;
(e) how the confidentiality of the information is maintained;
(f) the assurances given that the confidentiality of the information will be maintained; and
(g) the consequences for the client, if the release of confidential information waives the attorney-client or the work product privileges.

Inquiry #2:

Before divulging detailed information about the representation to the audit company, should Law Firm have the prior written consent of the insured?

Opinion #2:

While the client's written consent, when proper to seek such consent, is recommended, it is not required by the Revised Rules of Professional Conduct.

Inquiry #3:

May Insurance Company release the information in Law Firm's bills to the audit company without the consent of Law Firm or Insured?

Opinion #3:

The State Bar does not regulate insurance companies and, therefore, cannot prohibit an insurance company's release of information to third parties. However, if the lawyer is aware of this practice by the insurance company, the lawyer must inform the insurance company that she cannot represent an insured of the company if the company releases confidential information that the lawyer could not release in accordance with Opinion #1.

---

98 Formal Ethics Opinion 11

July 16, 1998

Editor's Note: See 99 Formal Ethics Opinion 8 for additional guidance.

The Lawyer as Escrow Agent

Opinion rules that the fiduciary relationship that arises when a lawyer serves as an escrow agent demands that the lawyer be impartial to both the obligor and the obligee and, therefore, the lawyer may not act as advocate for either party against the other. Once the fiduciary duties of the escrow agent terminate, the lawyer may take a position adverse to the obligor or the obligee provided the lawyer is not otherwise disqualified.

Inquiry #1:

Attorney A closed the sale of residential property by Seller to Buyer. Before closing, Attorney A notified Seller that he represented only the interests of Buyer. At the time of closing, it became apparent that there were certain repairs that still needed to be done to the house. Seller and Buyer agreed to place $2,000 of the purchase price in escrow until the repairs were completed by Seller at which time the money would be released to Seller. Attorney A agreed to act as escrow agent. The escrow agreement was not memorialized in writing. Seller made some repairs to the house and has demanded that Attorney A release the money to him. Buyer contends that the repairs were shoddy and incomplete and has instructed Attorney A not to release the money. What can Attorney A do?

Opinion #1:

Like the role of a lawyer serving as a trustee under a deed of trust, the responsibilities of and limitations on a lawyer acting as an escrow agent arise primarily from the lawyer's fiduciary relationship in serving as an escrow agent as opposed to any client-lawyer relationship. *See*, e.g., RPC 82 and Rule 1.15-1(b)(3) of the Revised Rules of Professional Conduct. The fiduciary relationship demands that the escrow agent be impartial to both the obligor and the obligee under the escrow agreement. Therefore, the lawyer/escrow agent may not act as an advocate for either party against the other in any dispute regarding the release of the escrowed funds. The lawyer must carry out the terms of the escrow agreement with regard to the release the escrowed funds upon the happening of the agreed contingency or the performance of the agreed condition. If the lawyer/escrow agent cannot determine whether the contingency has occurred or there has been performance—either because the terms of the escrow agreement are too vague or the parties have a factual dispute—he may not release the funds until both parties consent or there is a court order directing that the funds be released. RPC 66.

In the present situation, Attorney A must be impartial in carrying out the terms of the escrow agreement. If he is unable to determine that the condition for release of the funds has been met, he may not release the funds to either Buyer or Seller until they have reached an agreement between themselves or until there is a court order instructing Attorney A to release the funds to one party or the other. As long as he serves as escrow agent, Attorney A must be impartial and he may not be an advocate for Buyer even though Buyer was formerly his client.

Inquiry #2:

May Attorney A resign as escrow agent, turn the funds over to a third party, and represent Buyer in his dispute with Seller over the release of the escrowed funds?

Opinion #2:

Yes. Former service as an escrow agent does not disqualify a lawyer from assuming the role of advocate for one party in a dispute over escrowed funds. *Cf.* RPC 82 (former service as trustee under deed of trust does not disqualify a lawyer from assuming partisan role in foreclosure proceeding). Of course, in the present inquiry, because of his prior representation of Buyer at closing, Attorney A may only assume the role of advocate for Buyer. See Rule 1.7.

98 Formal Ethics Opinion 12

July 16, 1998

Ex Parte Communication with a Judge

Opinion sets forth the disclosures a lawyer must make to the judge prior to engaging in an ex parte communication.

Inquiry #1:

When may a lawyer communicate ex parte with a judge to request a continuance or discuss other administrative matters?

Opinion #1:

As noted in 97 Formal Ethics Opinion 3, the administration of justice or exigent circumstances may necessitate an *ex parte* oral communication with a judge to resolve a scheduling or administrative matter. If so, the lawyer may initiate an *ex parte* communication with the judge only after a good faith effort is made to notify the opposing lawyer. 97 Formal Ethics Opinion 3. Unlike the prohibition on *ex parte* communications "as to the merits of a matter" in Rule 7.10(b) of the superseded (1985) Rules of Professional Conduct, Rule 3.5(a) of the Revised Rules of Professional Conduct prohibits all *ex parte* communications with a judge except in the following situations: (1) in the course of official proceedings; (2) in writing, if the lawyer simultaneously delivers a copy of the writing to opposing counsel; (3) orally, upon adequate notice to the opposing counsel; or (4) as otherwise authorized by law. Because an *ex parte* communication may influence the outcome of a case, a lawyer should avoid such communications unless the opposing party receives adequate notice or the communication is allowed by law. *See* RPC 237 (citing statutes permitting *ex parte* communications in certain emergencies) and 97 Formal Ethics Opinion 3.

Inquiry #2:

Lawyer A has two different matters scheduled simultaneously in courts in different judicial districts. She has made several unsuccessful attempts to notify the opposing counsel in one matter that she needs to request a continuance from the judge. May Lawyer A request a continuance in an *ex parte* communication with the judge?

Opinion #2:

Yes, provided she fully informs the judge of the reason for her *ex parte* communication and she gives the judge an opportunity to determine whether he will hear the matter *ex parte*. The disclosures to the court should include the following: (1) that the lawyer is about to engage in an *ex parte* communication; (2) why it is necessary to speak to the judge *ex parte*; (3) the authority (statute, caselaw or ethics rule or opinion) that permits the *ex parte* communication; and (4) the status of attempts to notify the opposing counsel or the opposing party if unrepresented. If these disclosures are made, the judge can decide whether an *ex parte* discussion with the lawyer is appropriate.

Inquiry #3:

Do the limitations on *ex parte* communications with a judge apply equally to criminal defense counsel and to the lawyers in the district attorney's staff?

Opinion #3:

Yes.

98 Formal Ethics Opinion 13

July 23, 1999

Written Communications with a Judge or Judicial Official

Opinion restricts informal written communications with a judge or judicial official relative to a pending matter.

Inquiry:

Attorney A represents the employee in a workers' compensation case. Attorney X represents the employer and the insurance carrier. After the case was assigned to a deputy commissioner for hearing, Attorney A wrote to Attorney X regarding discovery disputes, medical treatment and examination of the employee, and alternative employment for the employee. The letter implied that Attorney X had engaged in improper conduct by communicating with an examining physician and failing to respond to discovery. The letter was copied to the deputy commissioner scheduled to hear the case.

Apart from the submission or filing of formal pleadings, motions, petitions, or notices, may a lawyer communicate in writing with a judge or other judicial official about a proceeding that is pending before the judge or judicial official?

Opinion:

A lawyer may communicate in writing with a judge or judicial official under the limited circumstances set forth below.

Rule 3.5(a)(3) of the Revised Rules of Professional Conduct regulates *ex parte* communications by a lawyer with a judge or other judicial official. The phrase "other judicial official," as used in the rule, includes, but is not limited to, the commissioners and deputy commissioners of the Industrial Commission.

On its face, Rule 3.5(a)(3) appears to permit unlimited written communications with a judge or other judicial official relative to a proceeding pending before the judge or judicial official provided a copy of the written communication is furnished simultaneously to the opposing party. The rule must be read, however, in conjunction with Rule 8.4(d) which prohibits conduct that is prejudicial to the administration of justice, and with comment [7] to Rule 3.5 which states:

> All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party.

The submission to a tribunal of formal written communications, such as pleadings and motions, pursuant to the tribunal's rules of procedure, does not create the appearance of granting undue advantage to one party. However, informal *ex parte* written communications, whether addressed directly to the judge or copied to the judge as in this inquiry, may be used as an opportunity to introduce new evidence, to argue the merits of the case, or to cast the opposing party or counsel in a bad light. To avoid the appearance of improper influence upon a tribunal, informal written communications with a judge or other judicial official should be limited to the following:

> 1) Written communications, such as a proposed order or legal memorandum, prepared pursuant to the court's instructions;
> 2) Written communications relative to emergencies, changed circumstances, or scheduling matters that may affect the procedural status of a case such as a request for a continuance due to the health of a litigant or an attorney;
> 3) Written communications sent to the tribunal with the consent of the opposing lawyer or opposing party if unrepresented; and
> 4) Any other communication permitted by law or the rules or written procedures of the particular tribunal.

98 Formal Ethics Opinion 14

January 15, 1999

Solicitation of Funds to Pay Client's Legal Fees

Opinion rules that a lawyer may participate in the solicitation of funds from third parties to pay the legal fees of a client provided there is disclosure to contributors and the funds are administered honestly.

Inquiry #1:

Client P was terminated from his position as an employee of the county. He filed an administrative appeal with the county as well as a lawsuit in federal court. In both proceedings, Client P seeks to recover attorneys' fees and costs in addition to damages. Client P is represented by Attorney A1 and Attorney A2 who practice with different law firms.

Attorney A1 and Attorney A2 helped Client P to establish a fund to defray Client P's legal expenses. To solicit donations to the fund, the following press release was submitted to the local paper for publication:

> Supporters of Client P have announced the establishment of a legal fund to assist Client P in his litigation against the county for wrongful dismissal from his job as an employee of the county.
>
> Sources close to the case indicate that to date, county officials have spent

$250,000 of taxpayers' money for legal expenses against Client P. Sources also state that officials may end up spending as much as $800,000 if the county does not settle the case. A high ranking county official has threatened to appeal the case for years.

Client P's attorney, unlike the county attorneys, has not been paid. Meanwhile, out-of-pocket costs for depositions, travel, court reporters, and the like continue to rise.

In order that the playing field may be leveled and "trial by ambush" may be avoided, Client P supporters are requesting that anyone who wishes to aid the legal efforts of Client P make a donation to the Client P Legal Defense Trust at ABC Bank.

The identity of those contributing to the trust will be protected and funds from the blind trust will be used solely to defray the legal defense of Client P in his efforts to oppose and redress the alleged illegal actions of a small group of county officials.

Donations may be mailed to or taken by any ABC Bank. Checks should be made to: Client P Legal Defense Fund Trust.

May a lawyer participate in the solicitation of funds from third parties to pay the legal expenses of a client?

Opinion #1:

The Revised Rules of Professional Conduct do not prohibit a lawyer from participating in a solicitation of third parties for funds to defray the legal expenses of a client provided the lawyer complies with Rule 1.8(f) which states:

> [a] lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client consents after consultation;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected as required by Rule 1.6.

Inquiry #2:

Does it matter that the lawyer agreed to solicit funds for a client in connection with or in lieu of a written fee agreement with the client?

Opinion #2:

No, provided the lawyer does not enter into an agreement for, charge, or collect an illegal or clearly excessive fee in violation of Rule 1.5(a).

Inquiry #3:

Would the answer to inquiry #1 be different if an award of attorneys' fees is sought as a part of the recovery in the pending litigation?

Opinion #3:

No, provided there is no misrepresentation or fraud in the lawyer's representations to prospective contributors to the fund or to the court at the time of the hearing on the request for attorneys' fees. *See* opinion #9 below.

Inquiry #4:

Is the lawyer responsible for ensuring that the funds collected from donors are used to defray the client's legal expenses?

Opinion #4:

Yes, if a lawyer participates in the solicitation of funds for a client's legal representation, the lawyer is responsible for the honest administration of those funds. Rule 8.4(c). If the lawyer personally receives any of the funds, the lawyer must deposit the funds into the lawyer's trust account and safekeep those funds in accordance with the requirements of Rule 1.15-1 and Rule 1.15-2.

Inquiry #5:

Is the lawyer liable to contributors if the funds are improperly administered or disbursed?

Opinion #5:

The question of the lawyer's liability to contributors is a legal question outside the purview of the Ethics Committee. However, to the extent that a lawyer engages in dishonest or fraudulent conduct in the management of the funds, or fails to comply with the trust account requirements set forth in Rule 1.15-1 and Rule 1.15-2, the lawyer may be subject to professional discipline.

Inquiry #6:

Is the lawyer responsible for ensuring the accuracy of the information contained in a press release relative to the solicitation of funds for a client's representation?

Opinion #6:

Yes, if a lawyer participates in the solicitation of funds for a client in this manner, the lawyer must ensure that the press release does not contain false or misleading communications. Rule 8.4(c); *see also* Rule 7.1.

Inquiry #7:

If the information contained in the press release is not accurate, is the lawyer potentially liable to the contributors for misrepresentation?

Opinion #7:

This is a legal question outside the purview of the Ethics Committee. However, to the extent that a lawyer engages in unethical conduct in the solicitation of funds to defray the legal expenses of a client, the lawyer may be subject to professional discipline.

Inquiry #8:

May a contributor to the fund remain anonymous if the contributor may be called as a witness in the case?

Opinion #8:

Yes, if the disclosure of the identity of a contributor is not otherwise required by law.

Inquiry #9:

If Client P prevails and attorneys' fees are awarded to Client P by the court, are Attorney A1 and Attorney A2 required to return the donations to the contributors to Client P's legal representation?

Opinion #9:

If necessary to avoid the collection of a clearly excessive fee in violation of Rule 1.5(a), the funds must be returned to the donors or otherwise disposed of in accordance with the representations made to prospective donors. To avoid misrepresentation at the time that donations are solicited, prospective donors must be informed of the intended disposition of any excess funds in the event that the client is successful on the claim for attorneys' fees. Rule 8.4(c). To avoid misrepresentation to the court at the time of the hearing on the request for attorneys' fees, there must be full disclosure to the court as to the existence of the legal representation fund and the disposition of any excess funds if the court awards attorneys' fees. See Rule 3.3(a).

Inquiry #10:

If Attorney A1 and Attorney A2 have a contingent fee agreement with Client P that provides that, in the event damages are collected as a result of the federal court action, Attorney A1 and Attorney A2 will receive a percentage of those damages as their fee. If Client P is successful at trial and receives both an award of damages as well as an award of attorneys' fees, are the lawyers obligated to reimburse the donors to Client P's legal fund?

Opinion #10:

See opinion #9.

---

98 Formal Ethics Opinion 15

January 15, 1999

The Year 2000 Problem and Lawyer Trust Accounts

Opinion rules that whether the year 2000 computer problem is being adequately addressed by a depository bank should be considered when selecting a depository bank for a trust account.

Inquiry:

Many older computer software and hardware systems record data and make calculations using only the last two digits of a year. Because computers with this limitation will interpret "00" as "1900,"[1] there may be serious system failures in numerous industries, including the banking industry, when the clock strikes midnight on December 31, 1999. The computer problems associated with the

approach of the next millennium are commonly referred to collectively as "the year 2000 problem."[2]

A lawyer has a fiduciary obligation to segregate and protect client funds by depositing them in a trust account with a North Carolina bank. Rule 1.15-1(d). What steps should a lawyer take to safeguard client funds in a trust account from potential loss due to a year 2000 problem at the depository bank for the lawyer's trust account?

Opinion:

A lawyer must exercise due care in selecting a depository bank including consideration of how the year 2000 problem is addressed by the bank.

Endnotes:

1. Most computer operating systems do not recognize "1900." Therefore, they will report the earliest possible date they support. This is usually January 1, 1980. *Dollars & Cents* at 4, American Society of Association Executives, (August 1998).

2. This is not intended to be a thorough explanation of the year 2000 problem. Lawyers are advised to research the problem thoroughly and to address in advance any potential malfunctions that may interrupt their practices.

98 Formal Ethics Opinion 16

January 15, 1999

Representation of Client Resisting an Incompetency Petition

Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

Inquiry #1:

Wife, who is elderly, was removed from the marital home. Husband, who is also elderly, contacted Attorney A because Husband did not understand why his wife was removed from the home. He asked Attorney A to investigate. Attorney A discovered that Wife was the subject of an involuntary incompetency proceeding. When Attorney A gained access to Wife, she indicated that she wanted Attorney A to represent her in resisting the involuntary incompetency petition. She repeatedly said that she wanted to go home to live with her husband.

Attorney A also learned that Husband was investigated by police relative to allegations of abuse and neglect of Wife. Attorney A met with Husband and told him that he could not represent Wife in resisting the incompetency petition and represent Husband in defending against an action in connection with Wife's care or treatment. Husband agreed that Attorney A's representation would be limited to representing Wife in resisting the incompetency petition and that Husband would be responsible for paying the legal fees for that representation. A written fee agreement memorializing this arrangement was executed. Although Wife was held in a hospital at this time, she continued to express unequivocally that she desired Attorney A to represent her.

When Attorney A visited Wife, he noticed abnormalities in her behavior but he also witnessed extended periods of apparent lucidity. She repeatedly told Attorney A she wanted to go home, that she did not want an appointed guardian, and that she did not want to be declared incompetent. Attorney A filed several motions in the incompetency proceeding, including a motion to remove the guardian and for a jury trial. At the incompetency hearing before the clerk, the attorney for the Department of Social Services (DSS) and the guardian ad litem who had been appointed for Wife by the clerk, contended that Attorney A had no "standing or authority" to pursue motions on behalf of Wife. They argued that Attorney A had a conflict of interest due to his initial representation of Husband and Husband's continued payment for the representation. The clerk found that Attorney A was without "standing or authority" to represent Wife and summarily denied all motions filed on Wife's behalf by Attorney A. Attorney A's motion to stay the incompetency proceeding was also denied.

During the incompetency hearing, Attorney A was not allowed to participate as counsel for Wife. Attorney A was called as a witness, however. Wife, when she testified, could not identify Attorney A as her lawyer. However, she expressed a desire to return home with her husband to avoid becoming a ward of the state. At the close of the evidence, the clerk declared Wife incompetent and appointed the director of DSS to be her legal guardian.

Thereafter Attorney A filed a notice of appeal seeking a trial *de novo* in superior court on the issues of right to counsel, incompetency, and right to a jury trial. The attorney for DSS now contends that Attorney A has no authority to represent Wife because she has been adjudicated incompetent and only her legal guardian may make decisions about her legal representation. The DSS lawyer now demands that Attorney A provide the guardian with a copy of every document in Wife's legal file.

Does Attorney A have a conflict of interest because he initially represented Husband?

Opinion #1:

No. The representation of Wife in the incompetency proceeding is not a representation that is adverse to the interest of Husband. Furthermore, Attorney A obtained the consent of Husband to represent only Wife in the incompetency proceeding. The exercise of Attorney A's independent professional judgment on behalf of Wife is not impaired by the prior representation of Husband. See Rule 1.7 and Rule 1.9.

Inquiry #2:

Does it matter that Husband pays for the representation of Wife?

Opinion #2:

No. Rule 1.8(f) of the Revised Rules of Professional Conduct permits a lawyer to accept compensation for representing a client from someone other than the client if the client consents after consultation; there is no interference with the lawyer's independent professional judgment or the attorney-client relationship; and the confidentiality of client information is protected.

Inquiry #3:

Wife has been declared incompetent by the state and a guardian appointed to represent her interests. Does Attorney A have to treat Wife as incompetent and defer to the decision of the guardian relative to the representation of Wife?

Opinion #3:

No. Wife is entitled to counsel of her own choosing particularly with regard to a proceeding that so clearly and directly affects her freedom to continue to make decisions for herself. Rule 1.14(a) provides as follows: "[w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." If Attorney A is able to maintain a relatively normal client-lawyer relationship with Wife and Attorney A reasonably believes that Wife is able to make adequately considered decisions in connection with her representation, Attorney A may continue to represent her alone without including the guardian in the representation. However, if Attorney A has reason to believe that Wife is incapable of making decisions about her representation and is indeed incompetent, the appeal of the finding of incompetency may be frivolous. If so, Attorney A may not represent her on the appeal. *See* Rule 3.1 (prohibiting frivolous claims and defenses).

Inquiry #4:

Once the guardian was appointed for Wife, did the guardian become Attorney A's client, or otherwise step into the shoes of Wife, such that Attorney A may only take directions from the guardian and not from Wife?

Opinion #4:

No. Rule 1.14(a) quoted above indicates that a lawyer may represent a client under a mental disability. The lawyer owes the duty of loyalty to the client and not to the guardian or legal representative of the client, particularly if the lawyer concludes that the legal guardian is not acting in the best interest of the client.

Inquiry #5:

Does Attorney A have to turn over Wife's legal file to Wife's appointed guardian?

Opinion #5:

No. When a guardian is appointed for a client, a lawyer may turn over materials in the client's file and disclose other confidential information to the guardian if the release of such confidential information is consistent with the purpose of the original representation of the client or consistent with the express instructions of the client. *See, e.g.*, RPC 206 (attorney for deceased

client may release confidential information to the personal representative of the estate). However, where, as here, the release of confidential information to a guardian is contrary to the purpose of the representation, the lawyer must protect the confidentiality of the client's information and may not release the legal file to the guardian absent a court order. *See* Rule 1.6(d)(3).

98 Formal Ethics Opinion 17

January 15, 1999

Compliance with Insurance Carrier's Billing Requirements and Guidelines

Opinion rules that a lawyer may not comply with an insurance carrier's billing requirements and guidelines if they interfere with the lawyer's ability to exercise his or her independent professional judgment in the representation of the insured.

Inquiry:

Law Firm represents Insurance Company and defends its insureds under its liability insurance policies. Insurance Company implemented a compliance review program that includes billing requirements and guidelines. The billing requirements and guidelines provide, among other things, that Insurance Company will not pay for the following: summer associate and law clerk time; research exceeding three hours per case (except with prior written approval); making deposition arrangements or arrangements for meetings or conference calls; intra-office conferencing and memoranda; trial preparation (i.e., preparation of jury instructions, motions in limine, trial notebooks, page/line deposition summaries, etc.) prior to the time a trial date is set; and working on any given day in excess of ten hours, regardless of the number of Insurance Company files on which the timekeeper is working, in the absence of identifiable extraordinary circumstances such as trial, lengthy depositions, and travel.

May the lawyers with Law Firm comply with the billing requirements and guidelines?

Opinion:

No, unless the insured consents after disclosure.

The insured, rather than the insurance carrier, is the lawyer's primary client. See RPC 56. Therefore, the lawyer must be free to exercise his or her independent professional judgment on behalf of the insured. Rule 1.8(f) of the Revised Rules of Professional Conduct provides as follows:

> [A] lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client consents after consultation;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of the client is protected as required by Rule 1.6.

Similarly, Rule 5.4(c) states: "A lawyer shall not permit a person who recommends, engages, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

The billing requirements and guidelines described in the inquiry are designed to regulate the allocation of time and resources to the representation of the insured and thereby reduce the cost of representation. However, such cost saving measures may restrain a lawyer's exercise of independent professional judgment when determining the tasks and services necessary to represent the insured competently. If the requirements and guidelines will restrain a lawyer's professional judgment in representing a particular insured, the lawyer is ethically prohibited from complying with the guidelines and restrictions. *See Informal Opinion of the Office of General Counsel of the Alabama State Bar* (June 16, 1998). However, a lawyer may comply with billing restrictions and guidelines if the insured consents to the cost saving measures after full disclosure of the benefits and risks involved. See Rule 1.2(c) (permitting a lawyer to limit the objectives of representation with client consent) and Rule 1.7(b) (permitting multiple representation with client consent).

98 Formal Ethics Opinion 18

January 15, 1999

Revealing Confidential Information to Parents of Minor Client

Opinion rules that a lawyer representing a minor owes the duty of confidentiality to the minor and may only disclose confidential information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation.

Inquiry #1:

Attorney A is defending Minor, who is 15 years old, against criminal charges. Minor is being tried as an adult. The State has offered Minor a plea to a reduced charge. Minor does not consent to the disclosure to his parents of any of the evidence against him or the plea offer. Is Attorney A required to disclose the information to Minor's parents?

Opinion #1:

Rule 1.14(a) of the Revised Rules of Professional Conduct requires a lawyer to "maintain a normal client-lawyer relationship with the client" although "[the] client's ability to make adequately considered decisions in connection with the representation is impaired...because of minority ...." Therefore, a lawyer owes the duty of confidentiality to a minor client and may not disclose confidential information to minor's parents unless there is an applicable exception in Rule 1.6(d) permitting disclosure. Rule 1.6(d)(3) permits a lawyer to reveal confidential client information when permitted by law or court order. A lawyer representing a minor may disclose confidential information to the minor's legal guardian, over the minor's objection, if the disclosure is necessary for the guardian to make a legally binding decision about the subject matter of the representation. See Rule 1.14, cmt. [3]. However, the lawyer may withhold confidential information from the legal guardian if the lawyer believes that the guardian is acting adversely to the interests of the child or the information is not necessary to make a decision about the representation.

In the present inquiry, Minor is being tried as an adult and the consent of Minor's parents is not necessary for Minor to make a legally binding decision about the plea agreement. Therefore, Attorney A must honor Minor's request and not disclose the information to Minor's parents.

Inquiry #2:

If Minor's parents are not his legal guardians but Minor instructs Attorney A to disclose the plea offer to his parent or parents, may Attorney A do so?

Opinion #2:

Yes, Rule 1.6(d)(2) permits a lawyer to disclose confidential information with the consent of the client.

98 Formal Ethics Opinion 19

April 23, 1999

Threats Involving the Criminal Justice System

Opinion provides guidelines for a lawyer representing a client with a civil claim that also constitutes a crime.

Inquiry:

Attorney A represents Client who is charged with criminal conspiracy to defraud Victim. Client was indicted on several counts and, because of his prior record, will likely receive active jail time. Attorney is negotiating a plea with the district attorney office. In the interim, Attorney Z, who represents the prosecuting witness, Victim, has conveyed to Attorney A the following proposal: Victim will not object to the plea arrangement and will stand mute at sentencing if Client will give Victim a confession of judgment in the corresponding civil action thereby agreeing to repay Victim pursuant to a payment schedule and Client's spouse will also execute an agreement to make payments to Victim. Victim and the district attorney's office acknowledge that spouse was not a part of the effort to defraud Victim and is not liable in any criminal prosecution or civil action.

Client is willing to enter into a confession of judgment for the full amount owing and agrees to a payment schedule that increases substantially once Client's spouse begins working. Client's spouse, however, does not want to enter into the contractual arrangement. If Client's spouse does not consent to this arrangement, Attorney Z has indicated that he will contact the district attorney's office to withdraw Victim's support for the plea. The district attorney's office is willing to enter into a plea only with the approval of Victim.

Does the conduct of Victim's attorney violate the Revised Rules of Professional Conduct?

Opinion:

Rule 7.5 of the superseded (1985) Rules of Professional Conduct, prohibited a lawyer from "present[ing], participat[ing] in presenting, or threaten[ing] to present criminal charges primarily to obtain an advantage in a civil matter." Rule 7.5 was deliberately omitted from the Revised Rules of Professional Conduct adopted on July 24, 1997. See Executive Summary of the Report of the Committee to Review the Rules of Professional Conduct in Materials for the North Carolina Supreme Court on the Proposed Revised Rules of Professional Conduct, N.C. State Bar, Raleigh, N.C., April 4, 1997. The absence of the rule from the Revised Rules of Professional Conduct does not mean, however, that all threats involving the criminal justice system are permitted nor does it mean that abuse of the legal system or extortion are condoned. *See* Rule 8.4 of the Revised Rules of Professional Conduct. A lawyer may present, participate in presenting, or threaten to present criminal charges to obtain an advantage in a civil matter if the criminal charges are related to the civil matter and the lawyer reasonably believes that the charges are well grounded in fact and warranted by law and, further provided, the lawyer's conduct does not constitute a crime under North Carolina law. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 363 (1992) and Rule 8.4(b).

Victim's civil claim for fraud against Client is related to the criminal charges against Client. If Attorney Z has a well-founded belief that both the civil claim and the criminal charges are warranted by the law and the facts, and Attorney Z has not attempted to exert or suggest improper influence over the criminal justice system, Attorney Z has not violated the Revised Rules of Professional Conduct by proposing that Victim will acquiesce to the plea agreement in exchange for a confession of judgment from Client. Moreover, it is not improper for Attorney Z to seek adequate security for Client's confession of judgment in the form of a promissory note from Client's spouse even though no civil or criminal claims are being made against Client's spouse.

Although the rule prohibiting threats of criminal prosecution to gain an advantage in a civil matter was omitted from the Revised Rules of Professional Conduct, a lawyer representing a client with a civil claim that also constitutes a crime should adhere to the following guidelines: (1) a threat to present criminal charges or the presentation of criminal charges may only be made if the lawyer reasonably believes that both the civil claim and the criminal charges are well-grounded in fact and warranted by law and the client's objective is not wrongful; (2) the proposed settlement of the civil claim may not exceed the amount to which the victim may be entitled under applicable law; (3) the lawyer may not imply an ability to influence the district attorney, the judge, or the criminal justice system improperly; and (4) the lawyer may not imply that the lawyer has the ability to interfere with the due administration of justice and the criminal proceedings or that the client will enter into any agreement to falsify evidence.

---

98 Formal Ethics Opinion 20

April 23, 1999

Disclosing Confidential Information about Debtor's Property after Discharge in Bankruptcy

Opinion rules that, subject to a statute prohibiting the withholding of the information, a lawyer's duty to disclose confidential client information to a bankruptcy court ends when the case is closed although the debtor's duty to report new property continues for 180 days after the date of filing the petition.

Inquiry #1:

Attorney A represented Client in a Chapter 7 Bankruptcy proceeding. The discharge has been entered and the case closed. Subsequently, Attorney A learned from Attorney B, Client's attorney in a domestic matter, that Client recently inherited a substantial sum of money. According to 11 U.S.C. § 541, property of the bankruptcy estate includes any property that the debtor acquires or becomes entitled to within 180 days of the date of filing the petition. 11 U.S.C. § 521 and Bankruptcy Rule 1007(h) require a debtor to report income or assets acquired through bequest, devise, or inheritance within the 180 days. Client's inheritance would be considered property of the estate, thus, triggering the reporting requirement. Client has not yet reported this income and the applicable time period has not lapsed. Although the case is closed, the trustee has one year to reopen the case and distribute assets. Attorney A has informed Client he has a duty to report his inheritance.

Is the information received from Attorney B confidential information under Rule 1.6?

Opinion #1:

Yes. Rule 1.6 defines confidential information as "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Although this definition may appear on its face to limit confidential information to information either received from the client or received during the course of the representation, the comment to the rule clarifies that "[t]he confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Rule 1.6, cmt. 5. In this case, the information, although received from another attorney, relates to Attorney A's representation of Client and was acquired at a time when Attorney A had undertaken to keep Client informed of his responsibilities regarding bankruptcy estate property.

Inquiry #2:

If Client refuses to report his inheritance, does Rule 3.3(a) require that Attorney A reveal this information to the court or bankruptcy administrator so that the case may be reopened?

Opinion #2:

No. Rule 3.3(a) imposes a duty of candor on an attorney appearing before a tribunal in a court of law or adjudicative proceeding. The rule, however, places a time limitation on an attorney's duty to disclose. Once a proceeding has concluded, Rule 3.3(a) ceases to govern attorney conduct; that is, the duty to disclose arises only during the proceedings and not thereafter. Rule 3.3(b). *See Annotated Model Rules of Professional Conduct Rule 3.3 cmt.* (3rd ed. 1996); Charles W. Wolfram, *Modern Legal Ethics* § 12.5.3, at 660 (1986). Here, the bankruptcy proceeding was closed. Notwithstanding a trustee's ability to reopen the case, in the Chapter 7 context, there currently is no case or proceeding triggering a duty to disclose under Rule 3.3.

Inquiry #3:

May Attorney A reveal information about Client's inheritance under Rule 1.6(d)?

Opinion #3:

Ordinarily, an attorney may not disclose confidential information of a client. Rule 1.6(c). Rule 1.6(d)(3) of the Revised Rules of Professional Conduct permits, but does not require, Attorney A to reveal the information to the appropriate authority when required by law.

A Chapter 7 estate is created upon the filing of the case and terminates upon closure of the case. Under a federal criminal statute relating to bankruptcy, 18 U.S.C. § 152, a person who

> knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, <u>any property belonging to the estate of a debtor</u> . . . shall be fined under this title, imprisoned not more than 5 years, or both. [emphasis added]

Because property of the estate includes property acquired by the debtor within 180 days of commencement of the case, Attorney A may determine that, under 18 U.S.C. § 152, he has a legal duty to reveal information regarding the Client's estate, and that there may be criminal consequences for his failure to do so. Other federal statutes including Title 11, Title 18, the Federal Rules of Bankruptcy Procedure (e.g. Rules 1007(h) and 1008), or local rules of Court should be consulted in this regard. This opinion is limited to the facts stated, in a Chapter 7 case, and may not apply in other bankruptcy contexts.

A lawyer should comply with a statute compelling disclosure of confidential information unless disclosure will substantially damage the interests of the client and there is a compelling legal interest of the client that may entitle the lawyer not to reveal the information. *See* RPC 175 ("a lawyer may be unwilling to comply with the child abuse reporting statute because he or she believes that compliance would deprive a client charged with a crime of the constitutional right to effective assistance of counsel"). Of course, before disclosing any

confidential information to the authorities, Attorney A should give Client the opportunity to comply with the disclosure requirement by informing Client of his ongoing duty to amend his schedules to reflect the inheritance, that he is subject to the penalties of perjury if he does not do so, and that Attorney A may reveal the information to the authorities if Client fails to do so.

99 Formal Ethics Opinion 1

April 23, 1999

Accepting a Referral Fee from an Investment Advisor

Opinion rules that a lawyer may not accept a referral fee or solicitor's fee for referring a client to an investment advisor.

Inquiry:

An investment advisory firm (the "investment advisor"), registered under the Investment Advisor's Act of 1940 (the "Advisor's Act") and qualified to provide investment advisory services in North Carolina under the North Carolina Securities Act, is contemplating a program in which the investment advisor will pay a referral or solicitor's fee to attorneys in North Carolina for referring clients to the investment advisor. The fee paid will be a percentage of the fee paid by the client to the investment advisor for investment advisory services. The investment advisor contemplates that the attorney's involvement will be limited to (1) providing clients with material describing the investment program, (2) introducing the client to the investment advisor's registered personnel and attending meetings at which the investment advisor's personnel explain the investment program to the client and assist the client in choosing the investment advisory services that best fit the client's needs, and (3) receiving copies of the client's periodic investment advisory statements.

The Securities and Exchange Commission has taken the position that persons providing solicitation services for a fee will not be required to register as an investment advisor under the Advisor's Act if the investment advisor who provides the services is in compliance with Rule 206(4)-3 (the "rule") of the Advisor's Act. The rule provides that a cash payment may be paid by the registered investment advisor to a solicitor if (1) the solicitor is not subject to a "statutory disqualification" under the Advisor Act and (2) the referral or solicitation fee is paid pursuant to a written agreement which describes the solicitor's activities and the compensation for those activities, contains a solicitor's understanding to perform those duties under the agreement consistent with the investment advisor's instructions and the Advisor's Act, and requires the solicitor, at the time of any solicitation, to provide the client with a copy of the investment advisor's brochure (a disclosure document containing background information about the investment advisor and the compensation to be paid) and a separate written disclosure document that sets out certain information about the investment advisor, the solicitor, and the arrangement. The investment advisor must receive from the client a signed and dated acknowledgment showing that the client received the separate written disclosure document and the investment advisor must make a bona fide effort to ascertain that the solicitor complied with the terms of the agreement between the parties.

The investment advisor and attorneys participating in the program will comply with the Advisor's Act and the North Carolina Securities Act. May a North Carolina attorney accept a referral fee or "solicitor's fee" from the investment advisor for referring clients to the investment advisor?

Opinion:

No. Although the law may permit such payments under certain circumstances, the Revised Rules of Professional Conduct impose a higher standard of conduct. A lawyer must exercise independent professional judgment on behalf of a client when referring a client to a third party for services related to the subject matter of the legal representation. *See* Rule 1.7(b). If a lawyer will receive a referral fee from the third party, the lawyer's professional judgment in making the referral is or may be impaired. Written disclosure to the client will not neutralize the potential for the lawyer's self-interest to impair his or her judgment. Other ethics opinions are consistent with this holding. CPR 241 rules that a lawyer who sells insurance should not sell insurance to clients for whom he has done estate planning. Similarly, RPC 238 permits a law firm to provide financial planning services provided no commission is earned by anyone affiliated with the firm.

99 Formal Ethics Opinion 2

April 23, 1999

Obtaining Medical Records

Opinion rules that a defense lawyer may suggest that the records custodian of plaintiff's medical record deliver the medical record to the lawyer's office in lieu of an appearance at a noticed deposition provided the plaintiff's lawyer consents.

Inquiry:

Plaintiff sustained severe facial injuries as a result of a single-vehicle automobile accident which occurred while Plaintiff was riding as a guest passenger in Defendant's automobile. The claim was not settled and suit was filed by Plaintiff's counsel, Attorney P.

Attorney D, counsel for Defendant, served the medical records custodians at the offices of Plaintiff's various treating physicians with notices of deposition. Attached to each deposition notice was a subpoena duces tecum requiring each records custodian to produce at the scheduled deposition a complete copy of Plaintiff's medical record. With each notice of deposition and subpoena was a letter from Attorney D advising the recipient that "in lieu of attendance at the deposition, a complete copy of the entire file on Plaintiff may be mailed to Attorney D's offices." The letter contained a list of documents to be mailed to Attorney D. Attorney P was unaware that the depositions were scheduled until he was served with copies of the notices. Plaintiff had not executed an authorization for Attorney D or Defendant to obtain her medical records.

Several of the medical records custodians mailed Attorney D copies of Plaintiff's medical records. Attorney D mailed copies of these medical records to Attorney P.

Is it appropriate for a lawyer to obtain medical records in this manner?

Opinion:

RPC 236 provides that it is unethical for a lawyer to mislead the custodian of documentary evidence as to the lawyer's authority to require the production of documents. *See* Rule 8.4(c) of the Revised Rules of Professional Conduct. A lawyer may obtain medical records in the manner described in this inquiry only if there is an agreement between the lawyers to waive the deposition and allow the medical records custodian to deliver the medical records directly to the opposing lawyer. See generally RPC 180 (after case is called for trial and physician is subpoenaed as witness, defense counsel may accept medical records in mail from physician) and Rule 45(c) of the North Carolina Rules of Civil Procedure.

99 Formal Ethics Opinion 3

April 23, 1999

Representation of Adverse Interests by Legal Services Lawyers

Opinion rules that lawyers in different field offices of Legal Services of North Carolina may represent clients with materially adverse interests provided confidential client information is not shared by the lawyers with the different field offices.

Inquiry:

Currently, Legal Services of North Carolina (LSNC) is a confederation of 12 individual nonprofit corporations serving 12 different geographic areas in North Carolina. There is also a separate corporation called Legal Services of North Carolina that distributes funding to the 12 nonprofit corporations and oversees the use of the funding in accordance with federal and state law. The mission of LSNC is to provide free legal representation to poor people in civil matters and thereby ensure access to justice and contribute to the stability of society. The types of cases handled by legal service programs include family (most involve domestic violence), housing, income maintenance, consumer, and employment law. Despite funding by a variety of sources and an attorney pay scale much lower than other government attorney pay scales, the ratio of staff attorneys to poor people throughout the state of North Carolina in 1996 was 1:15,000. Many clients with meritorious cases go unserved simply due to lack of resources.

The 12 individual nonprofit corporations will consolidate into one corporation effective January 1, 1999. Following consolidation, the central adminis-

trative office of the corporation will control general administrative, accounting, and purchasing functions, as well as oversee the use of federal and state funds by the local programs or field offices. The local programs will continue to serve their separate geographic areas. They will retain substantial autonomy particularly in the area of determining what cases to accept, representation of clients, and the employment of staff attorneys and other local employees. Each local field program will have its own board of trustees composed of local attorneys and client representatives. Each board will oversee the operation of its own local field program and determine the types of cases the local program may accept for representation. Each local program will continue to maintain its own individual client files. Confidential information contained in these client files is accessible to other local legal service programs only in rare cases such as co-representation or during peer review evaluations. Safeguards will be put in place to ensure that no conflict of interest exists in any case prior to the disclosure of confidential client information to an employee of another local program. Safeguards will also be put into place to ensure that the central administrative staff does not have access to confidential client information in cases in which different local programs represent clients with adverse interests.

Consolidation of the 12 individual nonprofit corporations raises the issue of whether lawyers employed in the separate local field programs constitute one law firm for the purpose of representing clients with materially adverse interests. Legal service clients do not have funds to pay for representation. Only a few lawyers are willing to take cases on a *pro bono* basis. If low income opponents in litigation live in different geographic service areas, one party will be forced in many cases to appear without representation if different legal service programs are allowed to represent only one party. Moreover, checking the client records of each of the 12 local programs for potential conflicts of interest among individual local programs will be costly and burdensome.

Given the physically different locations of the local field programs, the inaccessibility of confidential client information among the local field programs, and the potential lack of representation to some low income clients if representation of opposing parties is not permitted, may different local legal service programs represent clients with materially adverse interests after consolidation on January 1, 1999?

Opinion:

Yes, provided there is no sharing of confidential information of clients with adverse interests who are represented by different local programs.

Rule 1.10 of the Revised Rules of Professional Conduct imputes disqualifications to lawyers who are associated for the practice of law. Subparagraph (a) of the rule provides as follows: [w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9, or 2.2." The rule presumes that lawyers in a law firm, or other types of associations, have access to each others' confidential client information and share that information for the purpose of facilitating the representation of clients. Comment [1] to Rule 1.10 observes that the term "firm" "includes lawyers in a private firm, lawyers in the legal department of a corporation, or other organization, or lawyers in a legal services organization." But, the comment continues, "whether two or more lawyers constitute a firm within this definition can depend on the specific facts . . . . furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved." In comment [3], the application of the rule to lawyers in a legal service organization is considered more fully: "…lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved and on the specific facts of the situation."

As a matter of public policy, impediments to the legal representation of people of low income should be eliminated when the purposes of the Revised Rules of Professional Conduct-protection of client confidences and maintenance of a lawyer's independent professional judgment-are not adversely affected. As long as the local field programs of LSNC are physically separate and do not act as a single unit, the representation of adverse parties by different field offices will not impair the lawyers' duty of loyalty to their respective clients. Moreover, if client files are maintained separately and confidential client information is not shared, the duty of confidentiality will not be impaired. Legal service lawyers, unlike lawyers in a multiple office private law firm, do not have a common economic interest. Therefore, independent professional judgment will be maintained despite the representation of adverse parties by lawyers in different field offices. For these reasons, lawyers with the different local service programs of LSNC may represent clients with materially adverse interests subsequent to the consolidation provided confidential client information relative to the adverse parties is not shared by the different offices.

---

99 Formal Ethics Opinion 4

October 22, 1999

Seeking to Remove Co-executor of an Estate

Opinion holds that a lawyer for an estate may not seek to have one co-executor removed if the co-executor was acting within his official capacity.

Inquiry:

Several years before her death, Mother loaned $75,000 to Son A. A few years later, Mother signed a statement indicating that the loan had been settled. Mother died testate, leaving a will devising the bulk of her estate to her five children equally and naming her three sons, A, B, and C, co-executors. Letters testamentary were granted to Sons A, B, and C. Sons B and C hired Attorney X to assist with the administration of the estate. Sons B and C believe that the $75,000 given to Son A by Mother during her lifetime should be collected by the estate as a debt or treated as an advance to Son A. Attorney X filed a motion to have Son A's letters testamentary revoked and wrote a letter to Son A requesting repayment of the debt.

May Attorney X make a motion to remove Son A as a co-executor and pursue a claim against him?

Opinion:

No. RPC 137 states that "in accepting employment in regard to an estate, an attorney undertakes to represent the personal representative in his or her official capacity and the estate as an entity." After undertaking to represent all of the co-executors, a lawyer may not take action to have one co-executor removed.

---

99 Formal Ethics Opinion 5

July 23, 1999

Obtaining Canceled Deed of Trust Following Residential Real Estate Closing

Opinion rules that whether the lawyer for a residential real estate closing must obtain the cancellation of record of a prior deed of trust depends upon the agreement of the parties.

Inquiry #1:

Attorney A engages in a high volume real estate practice. She routinely handles closing transactions in which existing mortgage loans are paid. Attorney A follows a procedure in which the payoff check is directed to the owner and holder of the note with a cover letter that directs the owner and holder to mark the original note and the deed of trust securing the note "paid and satisfied in full" and requests that the original papers be returned to Attorney A's office. Upon receipt of the "paid and satisfied" papers, Attorney A delivers the papers to the appropriate county registry for cancellation. Attorney A includes in the payoff letter a reference to N.C.G.S. 45-36.3(a)(1) which requires that "the holder of the evidence of the indebtedness" shall "within sixty days discharge and release of record such document and forward the document to the grantor, trustor, or mortgagor."

Lenders routinely fail to comply with their duty to return paid loan documents. Although Attorney A sends at least two reminder letters to lenders who fail to cooperate, she does not bring a lawsuit against lenders to enforce the return of the loan documents. Is Attorney A required by the Revised Rules of Professional Conduct to continue diligently to try to obtain the loan documents including bringing a civil action against a lender if necessary?

Opinion #1:

Although Rule 1.3 of the Revised Rules of Professional Conduct states that "a lawyer shall act with reasonable diligence and promptness in representing the client," whether there is a duty to obtain paid loan documents from a lender depends upon the lawyer's agreement with the new lender and the borrower. The lawyer's engagement letter, the lender's loan closing instructions, and the

lawyer's representations to the clients establish the expectations of the clients. However, Rule 1.2(c) specifically permits a lawyer to limit the objectives of a representation with the client's consent. To avoid any misunderstanding, the lawyer must explain any limitations on her representation. Specifically, if she does not intend to obtain the cancellation of record of the paid deed of trust, she must so advise her clients.

Inquiry #2:

Does the procurement of an owner's title insurance policy relieve the lawyer of a duty to get the deed of trust canceled of record?

Opinion #2:

See opinion #1 above.

Inquiry #3:

If Attorney A collects a $25 "deed of trust cancellation fee," is she required to obtain the cancellation of the deed of trust before closing the file?

Opinion #3:

If a lawyer specifically charges for canceling the existing deed of trust on the property, the lawyer may not close the file until the deed of trust is canceled of record. The cancellation of the deed of trust should be pursued with reasonable diligence and promptness. *See* opinion #1 above.

Inquiry #4:

If Attorney A charges a "payoff processing fee," must she obtain the cancellation of record of the deed of trust before closing the file?

Opinion #4:

There is no practical distinction between a "deed of trust cancellation fee" and a "payoff processing fee." Regardless of what the fee is called, if a fee is charged, the client will expect the deed of trust to be canceled. *See* opinion #3 above.

Inquiry #5:

Is Attorney A required to disclose to the borrower that she will close the client's file after a certain period of time regardless of whether the prior deed of trust is canceled of record and that an uncancelled deed of trust may affect the marketability of title?

Opinion #5:

Attorney A must explain the limits of her representation sufficiently to allow the borrowers to make reasonably informed decisions about the representation. *See* opinion #1 above and Rule 1.4(b).

---

99 Formal Ethics Opinion 6

July 23, 1999

Ownership of Title Agency

Opinion examines the ownership of a title insurance agency by lawyers in North and South Carolina as well as the supervision of an independent paralegal.

Inquiry #1:

Certain lawyers, some licensed to practice in only North Carolina and some licensed to practice in both North and South Carolina, own and operate a title insurance agency that issues title policies for properties in both North and South Carolina. The lawyers who are licensed to practice in South Carolina provide title certification to the title agency for the purpose of writing title policies on South Carolina properties.

May a North Carolina lawyer own all or part of a title insurance agency that writes title policies on North Carolina property?

Opinion #1:

Yes, provided the lawyer does not give a title opinion to the title insurance company for which the title agency issues policies. *See* RPC 185.

Inquiry #2:

May North Carolina lawyers own all or part of a title insurance company that writes title policies in South Carolina?

Opinion #2:

Yes, if allowed by law.

Inquiry #3:

May North Carolina lawyers act as title insurance agents for a title insurance company owned by the same lawyers?

Opinion #3:

Yes, if allowed by law and subject to opinion #1 above.

Inquiry #4:

May lawyers licensed to practice in both North and South Carolina who own a title insurance agency that writes policies in both states provide title certifications to the agency for real estate located in South Carolina?

Opinion #4:

Yes, if allowed by law and the ethical code of South Carolina.

Inquiry #5:

The North Carolina lawyers provide title certification services for North Carolina real estate transactions. To undertake certification of title to real estate located outside of the lawyers' immediate community, the lawyers utilize independent title abstractors who are not licensed lawyers. Prior to utilizing the services of a title abstractor, the lawyers conduct an interview of each abstractor, evaluate his or her procedures and methods, determine his or her level of education and experience, and conduct a reference check to evaluate the abstractor's performance history. Is this level of supervision adequate under the Revised Rules of Professional Conduct?

Opinion #5:

No. RPC 216 requires a lawyer who is using the services of a non-lawyer independent contractor to search a title to take reasonable steps to ascertain that the non-lawyer is competent and, at all times that the non-lawyer is assisting the lawyer, to provide the non-lawyer with appropriate supervision and instruction regardless of the distance between the lawyer and non-lawyer. *See* Rule 5.3. The opinion also indicates that the lawyer may not issue a title opinion unless the opinion is based upon the lawyer's own independent professional judgment, competence, and personal knowledge of the relevant records and documentation. *See also* the *Guidelines for Use of Non-Lawyers in Rendering Legal Services* of the North Carolina State Bar (July 18, 1998, #10). [Note: this opinion assumes that the lawyer is not giving a title certification to the title agency owned by the lawyer. *See* G.S. §58-26-1(a).]

---

99 Formal Ethics Opinion 7

July 23, 1999

Advertising Jury Verdicts

Opinion rules that a law firm may not state in a direct mail letter that lawyers in the firm have obtained jury verdicts of specified amounts because the statement may create unjustified expectations about the results the lawyers can achieve.

Inquiry:

ABC Law Firm wants to include the following paragraph in its targeted direct letters to traffic accident victims:

> If you need a lawyer to represent you in connection with your recent accident, look no further. Our firm has obtained jury verdicts and settlements for individual clients in excess of $1,000,000.00. Although there is no guarantee of any recovery in your case, we will provide you with aggressive and comprehensive legal services to protect your rights and interests and maximize your chances of recovery.

May the statement regarding jury verdicts be included in the direct mail letters?

Opinion:

No. Rule 7.1 of the Revised Rules of Professional Conduct prohibits a lawyer from making a false or misleading communication about the lawyer's services. Paragraph (b) of the rule defines a false or misleading communication, in part, as a communication that "is likely to create an unjustified expectation about the results the lawyer can achieve…." Comment [1] to the rule specifies that the prohibition in paragraph (b) "would ordinarily preclude advertisements about the results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts…." A general representation about past results without additional information that puts the past results in context is misleading. In the direct mail letter in this inquiry, the statement that "there is no guarantee of any recovery in your case" is not sufficient to mitigate the unjustified expectations created by the advertisement

of jury verdicts proscribed by the comment to Rule 7.1.

99 Formal Ethics Opinion 8

October 22, 1999

Escrow Agreement Containing Waiver of Future Conflict

Opinion rules that a lawyer may represent all parties in a residential real estate closing and subsequently represent only one party in an escrow dispute provided the lawyer insures that the conditions for waiver of an objection to a possible future conflict of interest set forth in RPC 168 are satisfied.

Inquiry #1:

The fiduciary relationship that arises when a lawyer serves as an escrow agent is analyzed in 98 Formal Ethics Opinion 11. The opinion rules that a lawyer who represents the buyer in a residential real estate closing may serve as the escrow agent for funds for certain repairs to the house. If a dispute subsequently arises relative to the completion of the repairs and the right to receive the escrow, the lawyer may resign as escrow agent and represent the buyer in the dispute.

Assume that at the time the escrow is established, the buyer and the seller draft an escrow agreement. The agreement provides that in the event of a dispute over the disbursement of the escrow, the funds will be disbursed to another person who will act as escrow agent and the lawyer will represent the buyer in the escrow dispute. Does this arrangement violate the Revised Rules of Professional Conduct?

Opinion #1:

No, provided the funds are given to another individual who will serve as escrow agent. As noted in 98 Formal Ethics Opinion 11, the responsibilities of a lawyer acting as an escrow agent arise primarily from the lawyer's fiduciary relationship to both the obligor and obligee and not from a client-lawyer relationship. An escrow agent must be impartial to both the obligor and the obligee. If a dispute arises, the lawyer may not advocate for one of the parties until he resigns as escrow agent. The agreement contemplated in this inquiry satisfies this condition.

Inquiry #2:

The closing lawyer represents the buyer, the seller, and the lender in the closing after satisfying the conditions for multiple representation set forth in RPC 210. As in the preceding inquiry, the buyer and the seller enter into an agreement that appoints the closing lawyer escrow agent. The escrow agreement also provides that, in the event of a dispute, the funds will be given to another escrow agent and the closing lawyer will represent the buyer in the escrow dispute. May a lawyer participate in an arrangement in which one of the lawyer's clients agrees in advance to waive any objection to a possible future conflict of interest?

Opinion #2:

Yes, provided the conditions on waiver of a future conflict of interest set forth in RPC 168 are satisfied.

99 Formal Ethics Opinion 9

October 22, 1999

Lawyer's Obligation to Disburse Closing Funds

Opinion rules that a lawyer who represents the buyer in a real estate closing, and subsequently records the deed, may not withhold the funds for the purchase price from the seller upon the buyer's post-closing instruction.

Inquiry #1:

Attorney represented Small Corporation on the purchase of a lot from Development Company. After the closing, Attorney deposited the check for the purchase price in his trust account and recorded the deed at the register of deeds. When he returned from the courthouse, he received a telephone call from an official with Small Corporation who stated that Small Corporation did not want to purchase the lot anymore because company officials had just learned that a house with a basement could not be built on the lot. The corporate official instructed Attorney not to disburse any of the closing funds although the deed was already recorded and title vested in Small Corporation. Development Company, the seller, demanded the sale proceeds. What should Attorney do?

Opinion #1:

Comment [1] to Rule 1.2 of the Revised Rules of Professional Conduct states, "[t]he client has ultimate authority to determine the purposes to be served by legal representation within the limits imposed by law and the lawyer's professional obligations." Normally, a client's decision not to proceed with a transaction must be honored by the lawyer and, if necessary, the lawyer must restore the *status quo ante* by returning documents, property, or funds to the appropriate parties to the transaction. However, once a closing lawyer records the deed to property, the lawyer must comply with the conditions placed on the delivery of the deed by the seller. If the seller delivered the executed deed to the lawyer upon the condition that the deed would only be recorded if the purchase price was paid, the lawyer has fiduciary responsibilities to the seller even if the seller is not the lawyer's client. *See*, e.g., RPC 44 (conditional delivery of loan proceeds). If title has passed to the buyer, the lawyer must satisfy the conditions of the transfer of the property by disbursing the sale proceeds. The buyer must take appropriate legal action to have the sale rescinded.

Inquiry #2:

May Attorney represent Small Corporation in the subsequent action for rescission?

Opinion #2:

No. Rule 3.7(a) prohibits a lawyer from serving as a witness and an advocate in a trial proceeding. Moreover, Attorney's testimony may be detrimental to the interests of Small Corporation. If so, Attorney is also be barred from the representation because of the conflict of interest. Rule 3.7(b).

99 Formal Ethics Opinion 10

July 21, 2000

Communicating with Employee of Adverse Organization in a Criminal Investigation

Opinion rules that a government lawyer working on a fraud investigation may instruct an investigator to interview employees of the target organization provided the investigator does not interview an employee who participates in the legal representation of the organization or an officer or manager of the organization who has the authority to speak for and bind the organization.

Inquiry:

The Medicaid Investigations Unit of the North Carolina Department of Justice investigates Medicaid fraud by medical providers. Attorney A, an assistant attorney general, is assigned to the unit and provides advice to unit investigators and auditors.

Corporation is a provider of medical services to Medicaid recipients ("patients") who reside in group homes. Corporation owns several group homes. The staff of Corporation consists of a president, several directors of various areas, several coordinators, and billing, clerical, and secretarial staff. Each group home has a manager (called a "house manager") and six direct care aides (called "adaptive behavior trainers"). The house manager supervises the aides in the group home and sees that the policies of the corporation are followed. The aides provide direct care to the Medicaid patients. Neither the house managers nor the aides have the authority to establish policy for Corporation.

The Medicaid Investigations Unit is investigating an allegation that Corporation submitted claims to Medicaid for health care services that were never rendered. A unit investigator has interviewed former employees who state that they completed Medicaid claims for Corporation indicating that services were provided to patients when, in fact, no services were provided. There is no evidence that the employees obtained any direct monetary benefit from this activity other than the retention of their jobs. Former aides say that they were following orders from the house managers. Former house managers state that they were following orders from their superiors. Some former employees state that corporate officers or directors told employees to complete the false documentation or face termination from employment.

Attorney C, the lawyer for Corporation, informed Attorney A that he represents Corporation in all matters relative to the Medicaid fraud investigation.

The fraud investigator wants to interview the current house managers and aides, without notice and outside the presence of Attorney C, to ask them

whether they falsified records, whether they saw others falsify records, and whether they or others were ordered by supervisors to falsify records. The investigator will take the following steps before each such interview: (1) identify himself, (2) state that he is investigating possible criminal violations, (3) not interview any employee who participated substantially in the legal representation of Corporation, and (4) not elicit privileged communications between Corporation and Attorney C.

May Attorney A direct the investigator to proceed with informal interviews of the house managers and aides without the consent of Attorney C?

Opinion:

Yes.

Rule 4.2 of the Revised Rules of Professional Conduct prohibits communication about a client's case with another person who is represented in the matter unless the other lawyer consents or the communication is authorized by law. This prohibition extends to persons acting under the direction and control of a lawyer including investigators. Rule 5.3.

When the opposing party is an organization that is represented by counsel, the prohibition on informal communications applies to some employees and not to others. The Revised Rules encourage efficient, cost-effective informal discovery by prohibiting frivolous claims and defenses as well as the obstruction of another party's access to relevant evidence. Rules 3.1 and 3.4(f).

Comment [5] to the Rule 4.2 provides:

> After a lawyer for another person or entity has been notified that an organization is represented by counsel in a particular matter, this rule would prohibit communications by the lawyer concerning the matter with persons having managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

Examination of the public policy behind the rule sheds light on the comment. The "anti-contact rule," notes the ABA Committee on Ethics and Professional Responsibility in Formal Opinion 95-396 (1995), "provide[s] protection of the represented person against overreaching by adverse counsel, safeguard[s] the client-lawyer relationship from interference by adverse counsel, and reduce[s] the likelihood that clients will disclose privileged or other information that might harm their interests." In the context of the represented organization, these goals are furthered if informal communications with a managerial employee are prohibited when the employee's level of authority is such that the employee may participate in the representative relationship with the corporate lawyer or may be privy to privileged attorney-client communications. For example, 97 Formal Ethics Opinion 2 prohibits informal communications with an adjuster for an insurance company because an insurance adjuster is "privy to privileged communications with the legal counsel for the company and is generally involved in substantive conversations with the organization's lawyer regarding the representation of the organization."

Informal communication is also prohibited with an employee whose statement may constitute an admission on the part of the organization. This does not mean that informal communication is prohibited with any employee who may make a damaging statement about the corporation that would be admissible in evidence. Rather, the prohibition is limited to informal communications with employees who have the authority to speak for and bind the corporation. See RPC 67 (interpreting Rule 7.4 of the superseded (1985) Rules of Professional Conduct; opinion prohibits informal communications with corporate employees with managerial responsibility who are authorized to speak for the corporation).

The comment to Rule 4.2 also mentions a prohibition on informal communications with any person "whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability…." An acknowledged example of such a person is the employee who is involved in an automobile accident while driving the company truck. It is assumed that the interests of the organization and the tortfeasor-employee are sufficiently aligned to place the tortfeasor-employee within the protection of the anti-contact rule. In the instant inquiry, however, Attorney A may instruct the investigator to ask the house managers and aides whether they saw others falsify records and whether they were asked or instructed by superiors to falsify records.

---

99 Formal Ethics Opinion 11

January 21, 2000

Consent to Submission of Legal Bills to Audit Company

Opinion rules that an insurance defense lawyer may not submit billing information to an independent audit company at the insurance carrier's request unless the insured's consent to the disclosure, obtained by the insurance carrier, was informed.

Inquiry:

Law Firm ABC has a significant insurance defense practice. The members of the firm believe that in most cases they cannot ethically advise an insured client to consent to submission of the firm's legal bills to a third party auditor for the insurance carrier. The members of Law Firm ABC have advised their insurance company clients that they believe they are prohibited from disclosing this information pursuant to the requirements of 98 Formal Ethics Opinion 10.

98 Formal Ethics Opinion 10 ruled that an insurance defense lawyer may not disclose confidential information about an insured's representation in bills submitted to an independent audit company at the insurance carrier's request unless the insured consents.

Recently, Law Firm ABC began to receive assignments from XYZ Insurance Company. The assignments include a letter addressed to the insured from XYZ which reads as follows:

> Dear [insured]:
>
> ABC Law Firm has been hired by XYZ to represent you in the above referenced matter. XYZ's goal is to retain the best and most cost efficient attorneys to represent its insureds. For this reason we will be closely monitoring the effectiveness of the attorney retained.
>
> We also want to ensure that all legal fees incurred are fair. To that end, we would like to refer all law firm invoices in this matter to an independent review service, Law Audit Services (LAS). LAS reviews legal bills to ensure that they are in compliance with our billing guidelines, which our panel counsel have read and acknowledged. Because bills for legal services are confidential, we will need your written permission before referring them to LAS.
>
> We would appreciate your authorization by signing in the space provided below. You may return the authorization form to us in the postage paid envelope enclosed. Our attorneys have been instructed not to include any privileged information in their billing entries. We have included a very detailed confidentiality commitment in our contract with LAS.
>
> XYZ Insurance Company

When ABC Law Firm receives an assignment from XYZ, the file includes a copy of the consent letter signed by or on behalf of the insured. May the members of ABC Law Firm submit their bills for legal services rendered in defending the insured to XYZ's independent audit company?

Opinion:

No, the members of ABC Law Firm may not rely upon the consent obtained by XYZ from the insured unless the lawyer consults with the insured to confirm that the insured understands the meaning and effect of the consent.

Insurance Company is certainly entitled independently to seek and obtain the consent of its insureds to the disclosure of billing information to an independent audit company. However, Rule 1.6(c)(2) and 98 Formal Ethics Opinion 10 require a lawyer to evaluate the risk to the insured's interests and to consult with the insured if the insured's consent to disclosure is sought.

If a lawyer concludes that the original consent of the client, as obtained by the insurance company, was not informed consent, the lawyer must evaluate the risks to the insured's interests if the billing information is sent to the audit company. The lawyer must discuss any such risks with the insured. If the insured indicates that he or she would like to withdraw the consent, the attorney should refer the insured to the insurance carrier for further discussion. The lawyer may not represent either party to that discussion. Rule 1.7(a). If, after consultation, the client does not want to withdraw the consent, and the lawyer is satisfied that the consent is knowing, the lawyer may send billing information to the audit company as instructed by XYZ.

99 Formal Ethics Opinion 12

January 21, 2000

"Covering" a Bankruptcy Proceeding for Another Lawyer

Opinion rules that when a lawyer appears with a debtor at a meeting of creditors in a bankruptcy proceeding as a favor to the debtor's lawyer, the lawyer is representing the debtor and all of the ethical obligations attendant to legal representation apply.

Inquiry #1:

Attorney A represents Debtor, an individual, with respect to the filing of a voluntary petition pursuant to Chapter 7 of the Bankruptcy Code. The first meeting of creditors pursuant to Section 341 of the Bankruptcy Code is scheduled by the clerk. Debtor is required to attend and answer questions under oath as presented by the trustee in bankruptcy or any other parties. Shortly before the date of the meeting, Attorney A has a scheduling conflict. This prevents his attendance at the meeting of creditors. Rather than seek a continuance, and being of the opinion that the Section 341 meeting is fairly routine and ministerial in nature, Attorney A contacts Attorney B and asks Attorney B to "cover" for Attorney A at the meeting. Attorney B is neither a member nor an employee of Attorney A's law firm and there is no existing partnership relationship with Attorney A. Attorney B agrees to accommodate Attorney A.

Must Debtor's prior consent to the representation be obtained, and what steps, if any, must be taken to determine whether there are conflicts of interest?

Opinion #1:

Although assisting Attorney A may be euphemistically described as "covering" for Attorney A, if Attorney B appears with Debtor at the proceeding, Attorney B is representing Debtor. Such representation is subject to all of the ethical obligations set forth in the Revised Rules of Professional Conduct. The consent of the client to the representation by Attorney B must be obtained because the choice of legal counsel is the client's decision. *See* Rule 1.4(b). In addition, prior to representing any client, a lawyer must determine whether there are conflicts of interest. *See* Rule 1.7. Therefore, Attorney B must determine whether she has a conflict of interest in representing Debtor at the Section 341 meeting of creditors.

Inquiry #2:

To what extent must Attorney B review the file or otherwise become familiar with the assets, liabilities, exemptions, or pre-petition transfers of Debtor?

Opinion #2:

Even if a lawyer makes a limited appearance in a matter with the consent of the client pursuant to Rule 1.2(c), the lawyer must provide competent representation, which includes adequate preparation under the circumstances. *See* Rule 1.1(b).

Inquiry #3:

Is Attorney B making a general appearance in the proceeding for all purposes with respect to the representation of Debtor, or is Attorney B's involvement limited to a special appearance for the purpose described above?

Opinion #3:

Subject to the rules of the tribunal and with Debtor's consent, Attorney B may limit her appearance to the representation of Debtor in the Section 341 meeting of creditors. *See* Rule 1.2(c)

99 Formal Ethics Opinion 13

July 21, 2000

Supervision of Paralegal Closing a Residential Real Estate Transaction

Opinion rules that competent practice requires the presence of the closing lawyer at a residential real estate closing conference to explain the documents being executed, answer questions, and advocate for the client or clients. A non-lawyer may oversee the execution of documents outside the presence of the lawyer provided the closing lawyer provides adequate supervision and is present at the closing conference to complete the transaction.

Inquiry #1:

Paralegal is an in-house employee of Attorney A, a real estate lawyer. May Attorney A allow Paralegal to close a residential real estate purchase if Attorney A is not present at the closing?

Opinion #1:

No. A residential real estate closing, for purposes of this opinion, is defined as the entire series of events through which the ownership of property is transferred from one party to another party. One of the most important events in the typical transaction is the closing conference which occurs at the conclusion of the transaction when the documents are executed in the closing lawyer's office. The closing conference is the primary opportunity that the lawyer has to meet with the parties, to explain the closing documents, to define the client's rights and obligations, and to answer questions. More importantly, the closing conference may be the only opportunity that the lawyer has to intercede when the interests of the clients are threatened. Many, if not all, of these activities involve—and competent representation should require—the giving of advice and opinion upon the legal rights of the clients. The giving of such advice and opinion is the practice of law. *See* N.C.G.S. §84-2.1.

The duty to provide competent representation and the duty not to assist the unauthorized practice of law must be considered when supervising a non-lawyer. *See* Rule 1.1, Rule 5.3, Rule 5.5(b), and RPC 183. A non-lawyer does not have the requisite knowledge, skill, or authority to perform the critical advisory and advocacy roles necessary to provide competent representation in a residential real estate closing. Furthermore, a non-lawyer cannot give advice or opinion upon the legal rights of the client. Therefore, a non-lawyer may not close a residential real estate transaction.

Inquiry #2:

May Attorney A allow Paralegal to oversee the execution of the closing documents without Attorney A's presence in the room?

Opinion #2:

Yes, provided Attorney A is present at the closing conference to explain the documents, define the client's rights and obligations, answer questions, and advocate for the clients, and further provided, the clients are informed that Paralegal is not a lawyer. Paralegal must be instructed on the limitations of his or her role prior to the closing conference and Attorney A must maintain responsibility for the conduct and performance of Paralegal.

Rule 5.3(b) states that "a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer." Comment [1] to the rule adds the following:

> A lawyer should give such nonlawyers appropriate instruction and supervision concerning the ethical aspects of their employment…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.

99 Formal Ethics Opinion 14

January 21, 2000

Representing Insurance Carrier and Uncooperative Insured

Opinion rules that when an insured fails to cooperate with the defense, as required by the insurance contract, the insurance defense lawyer may follow the instructions of the insurance carrier unless the insured's lack of cooperation interferes with the defense or presenting an effective defense is harmful to the interests of the insured.

Inquiry #1:

Mr. and Ms. Inlaw were passengers in an automobile being driven by their daughter-in-law, Defendant, when an accident occurred. Mr. and Ms. Inlaw were both injured and brought an action against Defendant for their damages. Insurance Company assigned Attorney D to represent Defendant in the action. Defendant is either an insured under Insurance Company's liability insurance policy or is a third-party beneficiary of the policy.

The insurance policy provides that Insurance Company has the right to defend the action and to settle the lawsuit as it deems appropriate. The policy specifically requires Defendant to cooperate with Insurance Company in the defense of the lawsuit.

Insurance Company wants Attorney D to defend the suit to avoid or minimize the damages paid to the Inlaws. Defendant does not want a defense of the lawsuit that will jeopardize the Inlaws' recovery from Insurance Company.

May Attorney D defend the lawsuit effectively, as requested by Insurance Company, against the explicit instructions of Defendant?

Opinion #1:

A lawyer who is hired by an insurance carrier to defend one of its insureds (or a third-party beneficiary) represents both the insurer and the insured (or third-party beneficiary). *See* RPC 91, RPC 103, and RPC 172. However, when the insured has contractually surrendered control of the defense and of the authority to settle the lawsuit to the insurance carrier, the defense lawyer is generally obliged to accept the instructions of the insurance carrier in these matters. RPC 91.

Attorney D should advise Defendant of the conditions of representation set forth in the insurance policy and should encourage Defendant to consult with independent legal counsel as to the legal consequences of her failure to cooperate with the defense of the lawsuit.

Attorney D should also inform Defendant that he cannot represent her in a coverage dispute with Insurance Company because it would be a conflict of interest. Rule 1.7(a). He must advise her to employ independent legal counsel to provide representation in a coverage dispute. RPC 91.

If Defendant insists that Attorney D limit his defense, Attorney D must determine whether Defendant's lack of cooperation will interfere with his independent professional judgment. If so, he may seek to withdraw from the representation of both parties. Rule 1.7(b).

Inquiry #2:

May Attorney D's defense of the lawsuit include offering evidence and arguments that are contrary to the evidence Defendant would like to provide in support of the Inlaws' claims? For example, may Attorney D examine Defendant about her credibility and sympathies if she takes the witness stand?

Opinion #2:

Attorney D may offer evidence and arguments that are consistent with an effective defense but he may not act in a manner that is harmful to the interests of Defendant. *See generally* Rule 1.7. This means that he may not treat her as an adverse witness, publicly question her credibility, or humiliate her. Again, if Defendant's lack of cooperation interferes with an effective defense, Attorney D may seek to withdraw.

Inquiry #3:

May Attorney D disclose to Insurance Company information relative to Defendant's desire to offer no defense including statements, actions, and conduct that indicate that Defendant would like the Inlaws to be successful in the lawsuit?

Opinion #3:

No. Disclosure of this information to Insurance Company may be harmful to the interests of Defendant because Insurance Company may use this information to deny coverage to Defendant. Rule 1.6(a). Nevertheless, Attorney D may inform Insurance Company that Defendant has instructed him to take a substantially different approach on the defense than that requested by Insurance Company. He may also inform Insurance Company that he cannot represent Insurance Company in a coverage dispute, and he may advise Insurance Company to obtain independent counsel on this matter.

Inquiry #4:

If Attorney D withdraws from the representation of Defendant, and Insurance Company is allowed to defend in its own name, may Attorney D represent only Insurance Company in the defense of the action?

Opinion #4:

No, unless Attorney D's defense of Insurance Company does not require Attorney D to engage in defense tactics that are materially adverse to the interests of Defendant. Rule 1.9(a) prohibits a lawyer from representing a client whose interests are materially adverse to those of a former client in the same or a substantially related matter without the consent of the former client. A cross examination of Defendant in which Attorney D attempts to cast doubt on Defendant's credibility and to demonstrate bias on her part is prohibited. Attorney D is also prohibited from using confidential information of Defendant in the defense of Insurance Company without Defendant's consent. Rule 1.6(d).

Inquiry #5:

Is this ethics opinion binding as a matter of law?

Opinion #5:

Ethics opinions provide guidance to the members of the State Bar. Compliance with the opinions ensures that a lawyer's conduct complies with the Revised Rules of Professional Conduct. Like the Revised Rules of Professional Conduct, ethics opinions provide a structure for the regulation of the conduct of members of the State Bar but are not designed to be a basis for civil liability, to create a procedural weapon in litigation, or to create a right of enforcement by a party other than an appropriate disciplinary authority such as the North Carolina State Bar or the courts. *See* Comment [6] of Rule .02, "Scope."

---

99 Formal Ethics Opinion 15

October 20, 2000

Disclosure of Fraud of Former Bankruptcy Client

Opinion rules that a lawyer with knowledge that a former client is defrauding a bankruptcy court may reveal the confidences of the former client to rectify the fraud if required by law or if necessary to rectify the fraud.

Inquiry:

Client seeks advice from Attorney A on filing bankruptcy under either Chapter 7 or 13 of the bankruptcy code. During the course of the initial meeting, it becomes apparent to Attorney A that Client has substantial problems (e.g., preferential payments to friends or relatives, excessive equity in property, co-signed loans) that either preclude the filing of a Chapter 7 bankruptcy or significantly raise Client's anticipated monthly Chapter 13 payment. Attorney A describes in detail the problems Client's case presents. Client thanks Attorney A for his time and leaves his office.

Several weeks later, at the Section 341 First Meeting of Creditors, Attorney A learns that Client retained Attorney B to represent him and has filed a bankruptcy petition. Attorney A recalls that he previously determined that there were a number of obstacles to filing bankruptcy for Client. Attorney A believes that Client intentionally failed to reveal these problems to Attorney B.

What is Attorney A's obligation under these circumstances?

Opinion:

The information that Attorney A learned during his conference with Client is confidential client information that Attorney A may not disclose to third parties, including bankruptcy officials and Client's current lawyer, unless one of the exceptions to the duty of confidentiality found in Rule 1.6 of the Revised Rules of Professional Conduct applies. Two exceptions to the duty of confidentiality are relevant.

Rule 1.6(d)(3) permits Attorney A to reveal Client's confidences if required to do so by law. A number of bankruptcy statutes require disclosure of debtor's assets and liabilities and other financial information. 18 U.S.C. §152, a federal criminal statute, imposes criminal penalties on "a person who knowingly and fraudulently conceals…any property belonging to the estate of a debtor…." Rule 1.6(d)(3) merely determines whether a lawyer is permitted to disclose confidential information, not whether the lawyer is compelled to do so by law. Whether a lawyer has a duty to disclose confidential information under the circumstances described above is a matter to be determined under 18 U.S.C. §152 and other relevant law. The determination of that legal issue is beyond the scope of this opinion. *See* 98 Formal Ethics Opinion 20.

Rule 1.6(d)(5) permits a lawyer to reveal confidential information of a client to the extent that the lawyer reasonably believes necessary to rectify the consequences of a client's criminal or fraudulent act "in the commission of which the lawyer's services were used." Mere suspicion that Client is committing a fraud on the court is not sufficient to trigger this exception to the duty of confidentiality. However, if Attorney A knows that Client is committing a fraud on the court and that his services were used to perpetrate the fraud, he may reveal confidential information of his former client as necessary to rectify the fraud.

If Attorney A knows that the bankruptcy petition is fraudulent and he decides to take action to rectify the fraud, Attorney should reveal confidential information of Client only to the extent necessary. The first step is a letter to his former client requesting that Client take action to rectify the fraud. If this is unsuccessful, disclosure to Client's current lawyer is permitted under Rule 1.6(d)(5). Attorney A should inform Attorney B that he will notify the bankruptcy administrator if no action is taken to rectify the fraud or he does not receive a response from Attorney B. If Attorney B fails to respond or fails to alleviate Attorney A's concerns, Attorney A may notify the bankruptcy administrator.

99 Formal Ethics Opinion 16

April 14, 2000

Presentation of Consent Judgment Containing False Information

Opinion rules that a lawyer may not participate in the presentation of a consent judgment to a court if the lawyer knows that the consent judgment is based upon false information.

Inquiry:

Attorney represents Husband in an action filed by Wife for child support and other relief. The parties entered into a consent order giving Wife custody of the minor child, with Husband paying child support.

Sometime thereafter, Husband moved out of state and changed employment. Husband informed Attorney that his income was substantially reduced and he wanted Attorney to file a motion to modify the child support obligation. Attorney filed a motion seeking to reduce the child support obligation. Opposing counsel offered Attorney an opportunity to resolve the matter by consent, but required documentation of Husband's current wages. Attorney received a copy of Husband's current pay stub, which included income year to date, and forwarded it to Wife's attorney. Wife's attorney sent a proposed consent judgment to Attorney, which Attorney forwarded to Husband for his signature. Husband called Attorney and indicated he had signed the document. During the course of that conversation, Husband stated he had a tax attorney working on his tax returns. Husband further indicated his tax counsel was attempting to conceal other income, which Husband had received, but of which he had neglected to inform Attorney. Husband felt relieved that Wife had been misinformed as to his true income.

Attorney has now received the signed proposed consent judgment from Husband. It has not yet been signed by either attorney. Attorney believes Husband's deliberate misrepresentation of the true nature of his income is an attempt to perpetrate a fraud on the court. Thus far, Husband has not been asked under oath, either in a formal court proceeding or during discovery for this motion, to disclose his complete income.

What should Attorney do?

Opinion:

Attorney may not participate in presenting the consent judgment to the court if it is based upon false income information. See Rules 3.3(a)(1) and (a)(4). In the first instance, Attorney must try to persuade Husband to rectify the situation by disclosing his true income to the opposing party. Rule 3.3, cmt. [5]. If Husband refuses, Attorney must inform Husband he cannot participate in presenting false information to a court and must withdraw from the representation. Rule 3.3, cmt. [10]. Attorney should also inform Husband that if he presents the consent judgment on his own or through other counsel, Attorney has the discretion to make disclosure to the court or opposing counsel as necessary, because Husband used his services to perpetrate a fraud on the court. Rule 1.6(d)(5); *see also* Rule 3.3, cmt. [10].

2000 Formal Ethics Opinion 1

April 14, 2000

Advertising a Verdict Record

Opinion rules that, in the absence of a full explanation, advertising a lawyer's or a law firm's record in obtaining favorable verdicts is misleading and prohibited.

Inquiry:

Law Firm is setting up a site or "web page" on the world wide web. The web page will provide information about the law firm and the members of the firm. May Law Firm include the following paragraph in its web page?

The attorneys in Law Firm's medical malpractice group have been enormously successful, consistently obtaining verdicts and settlements for their clients that are among the largest reported North Carolina verdicts and settlements each year. Most medical negligence cases involve complex scientific issues and are vigorously defended. Settlements generally only occur after litigation has ensued and all sides have fully explored the issues through discovery. We have collected all of the verdicts we have obtained, although some verdicts have been collected only after we have been successful not only at trial, but also on appeal. Our past successes should not be construed as a representation that we will be successful with any particular case in the future, and not every case in which we have been involved has resulted in a favorable outcome. The medical malpractice group has successfully represented clients in cases of infant mortality and morbidity, eye injury, paralysis, infectious disease, loss of limb, general surgery, physical disability, medication errors, and wrongful death. The medical malpractice group has also successfully defended University Medical Center and its physicians against medical malpractice actions. Finally, the medical malpractice group has successfully represented clients before the North Carolina Supreme Court and Court of Appeals and, in some instances, has been instrumental in shaping North Carolina law.

Opinion:

A web page, like any other communication or advertisement about a lawyer's or a law firm's services, must be truthful and not misleading. Rule 7.1 of the Revised Rules of Professional Conduct and RPC 239. Generally, statements about a lawyer's or a law firm's record in obtaining favorable verdicts is considered a prohibited communication in that such statements may create "unjustified expectations about the results the lawyer can achieve" in violation of Rule 7.1(b). However, if the information is provided in context, the potential for this information to mislead a reader may be avoided. 99 Formal Ethics Opinion 7. To put a verdict record in context, information about the lawyer's or the law firm's record must include disclosure of the following: the lawyer's or firm's history of obtaining unfavorable, as well as favorable, verdicts and settlements; the lawyer's or firm's success in actually collecting favorable verdicts; the types of cases handled and their complexity; whether liability and/or damages were contested; and whether the opposing party or parties were represented by legal counsel. In addition, the verdict record must disclose the period of time examined. Finally, the communication must include a statement that the outcome of a particular case cannot be predicated upon a lawyer's or a law firm's past results.

If information to be disclosed is voluminous, the communication may state that a list of all cases handled by the lawyer or law firm during a disclosed time period, including the required background information and explanation, will be mailed free of charge upon request. However, the availability of such a mailing does not relieve the lawyer or the law firm of the obligation to provide a context in an advertisement or communication if it contains any reference to a verdict record.

In the instant inquiry, Law Firm's web page appropriately discloses that most of its cases were defended, that the cases involved complex medical issues, that all verdicts obtained were collected, and that past success is not a predictor of future success in any particular case.

However, subjective statements, such as references to Law Firm as "enormously successful" and "consistently obtaining verdicts and settlements" as well as the statement that Law Firm's verdicts and settlements are "among the largest reported in North Carolina each year," are misleading. Although Law Firm has made an effort to avoid creating unjustified expectations, the web page does not provide enough explanation of Law Firm's record to avoid misleading a visitor to the website. Providing a complete record by mail, disclosing the number of cases handled each year, the number of favorable and unfavorable settlements obtained, and the time frame examined, are necessary to bring the web page into compliance with the requirements of the Revised Rules of Professional Conduct.

2000 Formal Ethics Opinion 2

January 19, 2001

Representation of Remaining Spouse After Filing Joint Chapter 13

Bankruptcy Petition

Opinion rules that a lawyer who represented a husband and wife in a joint Chapter 13 bankruptcy case may continue to represent one of the spouses after the other spouse disappears or becomes unresponsive, unless the attorney is aware of any fact or circumstance which would make the continued representation of the remaining spouse an actual conflict of interest with the prior representation of the other spouse.

Inquiry:

Attorney represented Husband and Wife in filing a joint Chapter 13 bankruptcy petition. Husband disappeared, leaving Wife responsible for the entire Chapter 13 payment plan. Wife called Attorney to inform him that Husband had disappeared and Wife did not believe that she could make the payments alone. She asked Attorney for his advice. Attorney believes that it would be best for Wife if she stopped making the payments. The case would be put on for dismissal and notice sent by the court to both spouses. If Husband does not respond to the notice of dismissal, the court will dismiss the plan as to Husband. Attorney can then modify the plan for Wife to include only the debts for which Wife is liable. If Attorney cannot assist Wife in this way, Wife will have to hire another lawyer at an added expense to her. May Attorney continue to represent Wife?

Opinion:

Rule 1.7 (a) prohibits Attorney from representing a client if the representation of that client will be, or is likely to be, directly adverse to another client, unless Attorney reasonably believes the representation will not adversely affect the interest of the other client, and that client consents.

The mere fact that Attorney continues to represent Wife in the absence of Husband does not present an actual conflict. If the Chapter 13 case is dismissed because of the inability of Wife to comply with the current plan, there will not be a discharge and both parties will remain liable for individual and joint debts. If Husband does not get a discharge from the debts, he will remain liable on his debts. However, this outcome will not be changed by the fact that the Wife receives a discharge after a plan modification. In fact, to the extent Wife pays on joint debts in a modified Chapter 13 plan, Husband benefits from the reduction in the amount for which he remains liable.

There are circumstances under which representation of Wife to discharge (while Husband does not receive a discharge) is a conflict, such as instances in which Wife attempts to discharge marital debts, which are the subject of equitable distribution, alimony, or child support claims. In addition, if Husband communicated confidential information to Attorney, Attorney may not use that information to the advantage of Wife or the disadvantage of Husband. Rule 1.9(c). If competent representation of Wife requires the use of the information, Attorney may not continue to represent Wife.

Attorneys who undertake joint representation of a husband and wife in Chapter 13 cases should discuss with potential clients the potential conflicts that might arise in the three to five years of the plan's duration. Given the potential for conflicts, attorneys are encouraged to obtain a waiver of future conflicts from both spouses. *See* Rule 1.7(a)(2) and RPC 168 (waiver of objection to possible future conflict of interest). Waivers of future conflicts must be in writing. RPC 168. In the absence of such a waiver, the Bankruptcy Court, which has an ongoing supervisory role in the attorney-client relationship (11 U.S.C. §329; Rule 2016(b), F.R.Bkr.P.), may authorize the continued representation of Wife after notice and a hearing.

It should be recognized that if a potential conflict becomes an actual conflict, and the zealous representation of the remaining spouse requires acting contrary to the interest of the disappeared spouse, the Attorney must withdraw from the representation of Wife. Rule 1.7(c).

2000 Formal Ethics Opinion 3

July 21, 2000

Responding to Inquiries Posted on a Message Board on the Web

Opinion rules a lawyer may respond to an inquiry posted on a web page message board provided there are certain disclosures.

Inquiry:

P Law Firm represents Company, a telecommunications switch manufacturing company. Company's website includes a web page that is designed to appeal to emerging service providers including local exchange carriers and Internet service providers. The website is accessible to anyone with Internet access.

The web page includes a link to a message board. Visitors to the message board are invited to post questions. The message board is not interactive. Responses to inquiries are not posted immediately. Company has asked professionals from several disciplines to monitor the message board regularly and to provide responses to the posted inquiries that are within their respective areas of expertise. Company asked P Law Firm to monitor the message board for inquiries concerning the telecommunications regulatory law. Company will pay P Law Firm a fee for monitoring the message board and providing responses to inquiries posted there.

Company's web page will identify P Law Firm as the law firm responding to inquiries relative to regulatory matters. P Law Firm will limit the scope of its responses to federal law. The following disclaimer will appear on the message board:

> Members of the telecommunications practice of P Law Firm provide responses to regulatory questions posted to the Message Board. Responses are limited to matters of federal law and decisions of the Federal Communications Commission. Responses posted should not be considered as legal opinions or as providing conclusive answers to specific legal problems.

May lawyers with P Law Firm respond to inquiries on Company's message board?

Opinion:

Yes, it is not a violation of the Revised Rules of Professional Conduct for a lawyer to respond to inquiries posted on an Internet message board provided the lawyer clarifies the nature of the lawyer's relationship with the person or company making the inquiry and the limits of the information that the lawyer is providing.

Participation in a message board is not improper solicitation, prohibited by Rule 7.3(a), because there is no direct communication, by telephone or in-person, with the individuals or companies making the inquiries. Moreover, the lawyers with P Law Firm are not making the initial contact and they do not know that the inquirer is in need of legal services in a particular matter until the lawyers retrieve an inquiry from the message board. Therefore, the message board does not have to include an advertising disclaimer such as the one required by Rule 7.3(c) for targeted direct mail.

Limiting responses to inquiries involving federal law should avoid the unauthorized practice of law in jurisdictions where the P Law Firm lawyers are not licensed to practice law. It is assumed a lawyer with an active law license from any state may practice federal telecommunications law. However, to avoid the possibility of misleading a user of the message board, a lawyer responding to an inquiry should state the jurisdictions where he or she is licensed to practice law. *See* Rule 7.1(a) and RPC 241.

If, as the result of responding to an inquiry, a client-lawyer relationship is created between an inquirer to the message board and a lawyer with P Law Firm, the lawyers with the firm will be required to comply with the duties to a client set forth in the Revised Rules of Professional Conduct including maintaining client confidences and avoiding conflicts of interest. If the lawyers from P Law Firm do not want to create a client-lawyer relationship with a party using the message board, the message board and any subsequent communications with an inquirer must clearly and specifically state that no client-lawyer relationship is created by virtue of the communication. Even so, substantive law will determine whether a client-lawyer relationship is created. See Cmt. [3], 0.2 Scope, Revised Rules. As an example, a disclaimer might state the following:

> Although a response is provided to the specific question, there may be other facts and law relevant to the issue. The questioner should not base any decision on the answer and specifically understands and agrees that no client-lawyer relationship has been established between a lawyer with P Law Firm and the inquirer.

As a precautionary step, visitors to the web page should be warned not to include any confidential or proprietary information in an inquiry posted on the web page.

Finally, if the lawyers responding to the inquiries posted on the message

board are influenced or affected by the fact that P Law Firm represents Company and Company is paying P Law Firm to respond to the inquiries on the message board, the relationship between P Law Firm and Company must be disclosed to those using the message board to avoid misrepresentation. See generally Rule 7.1.

2000 Formal Ethics Opinion 4

January 19, 2001

Acknowledging a Finance Company's Interest in a Client's Recovery

Opinion rules that a lawyer may sign a statement acknowledging a finance company's interest in a client's recovery subject to certain conditions.

Inquiry #1:

Attorney represents Plaintiff in a personal injury action. Plaintiff needed money for living expenses. In exchange for a cash advance, Plaintiff entered into an agreement with Finance Company whereby the company received a partial interest in any recovery Plaintiff might obtain in the personal injury action. Repayment of Finance Company is contingent upon Plaintiff's recovery by settlement or judgment. The interest Finance Company holds in the potential recovery is a fixed dollar amount but Attorney is familiar with other agreements in which a finance company is granted a percentage of the recovery. The agreement does not give Finance Company any right to control or direct the lawsuit. Attorney has no contractual relationship with Finance Company.

Plaintiff provided Attorney with a copy of the agreement with Finance Company and requested Attorney sign a statement acknowledging that Attorney received a copy of the assignment and agreeing to remit payment to Finance Company, pursuant to Plaintiff's agreement, from any recovery realized for Plaintiff. May Attorney sign the statement?

Opinion #1:

Although a lawyer may find a client's assignment of the proceeds of a personal injury recovery to a lender to be repugnant, this may be the only way for an indigent client to obtain the funds necessary for living expenses during the pendency of the client's claim and lawsuit. Therefore, a lawyer may cooperate subject to the requirements of the Revised Rules of Professional Conduct and the dictates of competent representation.

In *Charlotte-Mecklenburg Hosp. v. First Georgia Insurance Co.*, 340 N.C. 88, __S.E.2d ___ (1995), the North Carolina Supreme Court held that an assignment of the proceeds of a personal injury claim to a medical provider to pay for medical services was valid and could be enforced. The Court found that the statement in the assignment authorizing any one having notice of the assignment to pay the assignee "should alleviate any doubt that the assignment required the defendants [an insurance company and insurance adjusting company] to pay the assigned money to the [assignee]."

Although the Ethics Committee cannot interpret the law, a lawyer who receives notice of an assignment of the proceeds of a personal injury claim should take care to examine the applicable law to determine if the assignment is valid and enforceable. If the assignment appears to be illegal or otherwise unenforceable, the lawyer may not acknowledge or honor the assignment. See, e.g., Rule 1.2(d). Moreover, competent representation dictates that the lawyer provide the client with legal advice about the client's recourses or refer the client to appropriate legal counsel. Rule 1.1.

Rule 1.15-2(h) generally requires a lawyer to disburse settlement proceeds in accordance with the client's instructions.

> The only exception to this rule arises when the medical provider has managed to perfect a valid physician's lien. In such a situation the lawyer is relieved of any obligation to pay the subject funds to his or her client, and may pay the physician directly if the claim is liquidated, or retain in his or her trust account any amounts in dispute pending resolution of the controversy.

RPC 69.

Assuming that Attorney determines that assignment in this inquiry is valid (or, if the law is not clear, Attorney believes that the assignment is probably valid) and the effective equivalent of a contractual lien on the recovery proceeds, Attorney may sign an acknowledgment of the assignment subject to certain conditions.

A lawyer must exercise independent professional judgment on behalf of the client. See Rule 1.7 and comment. If Attorney's ability to represent Plaintiff will be compromised by the extent of Finance Company's interest in the outcome of the case, Attorney should not participate in the arrangement and he should counsel the client on the risks to the representation. Attorney must also preserve the right to re-examine the legality and enforceability of the assignment.

A lawyer may not participate in an agreement that commits the lawyer to act in a way that is adverse to the client's interests. See Rule 1.7. In addition, a lawyer is prohibited from making a false statement of material fact or law to a third person. Rule 4.1. Therefore, Attorney's written acknowledgment must disclose that, if it is subsequently determined that the assignment does not create a valid lien on the recovery proceeds, Attorney must disburse the recovery funds as instructed by Plaintiff. The acknowledgment must also disclose that, even where Finance Company obtains a valid lien on the recovery proceeds, in the event Plaintiff disputes that the debt is owed (or disputes the amount of the debt), Attorney may hold the disputed funds in his or her trust account until the dispute is resolved, a court orders the release of the funds, or Attorney interpleads the funds.

Finally, RPC 228 prohibits a lawyer from executing an agreement to indemnify the tortfeasor's liability insurance carrier against the unpaid liens of medical providers. At the time the claim is resolved, Attorney must refuse to execute an indemnification agreement for any unpaid lien of Finance Company as well as the unpaid liens of medical providers.

Inquiry #2:

May Attorney remit payment to Finance Company if there is a recovery?

Opinion #2:

Ordinarily, Attorney must disburse the recovery proceeds according to the instructions of Plaintiff. If Plaintiff instructs Attorney to pay Finance Company at the time of disbursement, Attorney must comply with this instruction. *See* opinion #1 above. If Plaintiff instructs Attorney to pay the money to Plaintiff instead of Finance Company, Attorney may ignore this instruction only if there is a valid lien against the proceeds or other valid legal assignment of the rights in the proceeds. If Attorney determines that the assignment is valid (or arguably valid) and creates a lien against the proceeds, Attorney may remit payment to Finance Company only if Plaintiff concedes that the debt is owed. If Plaintiff contests the debt, or the amount of the debt, Attorney must avoid the conflict between the interest of the client and interest of Finance Company. *See* Rule 1.7. Attorney should hold the disputed funds in the trust account until the dispute is resolved, a court orders disbursement, or Attorney interpleads the funds to the court.

Inquiry #3:

May Attorney refer a client to Finance Company?

Opinion #3:

Yes, if Attorney is satisfied that the company's financing arrangement is legal, Attorney receives no consideration from Finance Company for making the referral, and, in Attorney's opinion, the referral is in the best interest of the client.

Inquiry #4:

May Attorney disclose confidential client information about Plaintiff's claim to assist Finance Company in evaluating the claim? May Attorney provide Finance Company with an opinion on the value of the claim?

Opinion #4:

A lawyer may disclose confidential client information, such as an opinion as to the value of a claim, with a client's consent. Rule 1.6(d)(2). However, given the potential risk that disclosure to a third party, such as Finance Company, may waive the client-lawyer privilege with regard to the information, Attorney should counsel Plaintiff about the potential risk in order that the client's consent to disclosure will be informed.

2000 Formal Ethics Opinion 5

July 21, 2000

Nonrefundable Advance Fees

Opinion rules that a lawyer may not tell a client that any fee paid prior to the rendition of legal services is "nonrefundable" although, by agreement with the client, a lawyer may collect a flat fee for legal services to be rendered in the future and treat the fee as earned immediately upon receipt subject to certain conditions.

Inquiry:

The North Carolina State Bar frequently receives complaints from clients who have entered into fee agreements that require lump sum payments in advance of the provision of legal services. Such fees are frequently described as "nonrefundable" in the fee agreement. Typically, the lawyer collects the fee from the client for legal work that is to be done in the future and deposits the money in the firm's operating account instead of the trust account. The fee may be paid for a certain number of hours of the lawyer's services or it may be a flat fee for a particular legal service such as obtaining a divorce. The State Bar usually receives a complaint when the client-lawyer relationship is terminated prematurely, before the legal services are rendered in full, and the lawyer declines to refund any of the advance payment to the client.

Although 97 Formal Ethics Opinion 4 clarifies some of the issues relating to advance or "prepaid" fees, this opinion provides additional guidance to lawyers who desire to collect a flat fee for services at the beginning of a representation.

Opinion:

A lawyer may charge and collect a fee prior to providing legal representation to a client. However, the Revised Rules of Professional Conduct require that the lawyer do three things with regard to every fee: (1) refrain from entering into an agreement for, charging, or collecting a fee that is clearly excessive; (2) deal honestly with the client; and (3) put all client funds in a trust account. *See* Rule 1.5(a), Rule 8.4(c), and Rule 1.15-1.

Given these ethical considerations, a lawyer may treat an advance payment of a fee as the lawyer's money, and deposit the money in the lawyer's own account or the lawyer's firm account, only if the client agrees that payment may be treated as earned by the lawyer when it is paid. *See* RPC 158. 97 Formal Ethics Opinion 4 states that there are only two types of fees paid at the beginning of the representation that may be deposited directly into the lawyer's or the firm's operating account: a "true" general retainer[1] and a flat fee. A flat fee is a fee paid for specified legal services to be completed for the designated amount of money regardless of the amount of time required of the lawyer to complete the services. *See* 97 Formal Ethics Opinion 4.

Although a flat fee may be deposited into an operating account at the beginning of the representation, when the client-lawyer relationship ends, if the fee is clearly excessive in light of the services actually rendered, the portion of the fee that makes the total payment clearly excessive must be returned to the client. As stated in 97 Formal Ethics Opinion 4, "[w]hether a fee is described to a client as 'nonrefundable' or no mention is made as to whether the fee is refundable, if a particular collected fee is clearly excessive under the circumstances, the portion of the fee that is excessive must be refunded."

The duty to refund any portion of a fee that is clearly excessive exists regardless of the type of fee that was paid. This means that there is always a possibility that a lawyer will have to refund some or all of any type of advance fee, if the client-lawyer relationship ends before the contemplated services are rendered. At the conclusion of the representation, the lawyer must review the entire representation and determine whether, in light of the circumstances, a refund is necessary to avoid a clearly excessive fee. *See* Rule 1.5(b).

The possibility that a refund to the client will be required means that no fee is truly "nonrefundable." To call such a payment a "nonrefundable fee" is false and misleading in violation of Rule 7.1. Moreover, the designation of the fee as "nonrefundable" in the fee agreement has a chilling effect on the client's right to terminate the representation at anytime. A lawyer may refer to such a fee as a "prepaid flat fee." The lawyer may also reach an agreement with the client that some or all of the fee may be forfeited under certain conditions but only if the amount so forfeited is not clearly excessive in light of the circumstances and all such conditions are reasonable and fair to the client. *See*, e.g., Rule 1.8(a).

Since it is difficult for clients to understand when a prepaid flat fee is earned upon receipt, and proof of such understanding may be required in subsequent proceedings, it is recommended that the lawyer obtain the client's consent in a written fee agreement. *See*, e.g., Rule 1.5(c) and Rule 1.8(a).

Endnotes:

1. An advance payment for legal services must be distinguished from a true "nonrefundable retainer." As explained in RPC 50, a nonrefundable retainer is "consideration for the exclusive use of the lawyer's services in regard to a particular matter…." It is later explained in the opinion that

> [r]etainers and advance payments should be carefully distinguished. In its truest sense, a retainer is money to which an attorney is immediately entitled and should not be placed in the attorney's trust account. A 'retainer' which is actually a deposit by the client of an advance payment of a fee to be billed on an hourly basis is not a payment to which the attorney is immediately entitled. It is really a security deposit and should be placed in the trust account. As the attorney earns the fee, the funds should be withdrawn from the account.

2000 Formal Ethics Opinion 6

October 20, 2000

Implying Early Settlement in Television Advertisement

Opinion rules that a television advertisement for legal services that implies that an insurance company will settle a claim more quickly because the advertised lawyer represents the claimant is misleading.

Inquiry:

Lawyer A desires to air an advertisement on television. In the advertisement, two individuals who appear to be defense counsel for an insurance company, are seated at a table, having the following conversation:

> Senior Lawyer: How do you suggest we handle this claim?
> (Disclaimer appears on screen: Dramatization by actors. No specific results implied.)
> Junior Lawyer: It's a large claim, serious auto accident. We could try to deny it or delay to see if they'll crack.
> Senior Lawyer: Who's the lawyer representing the victim?
> Junior Lawyer: Lawyer A.
> (Metallic sound effect; logo of Lawyer A's firm appears.)
> Senior Lawyer: Lawyer A? Let's settle this one.

Voice over by actor: North Carolina insurance companies know the name Lawyer A. If you've been injured in an auto accident…tell them you mean business.

Does the advertisement comply with the Revised Rules of Professional Conduct? Is the advertisement misleading?

Opinion:

Rule 7.1, Communications Concerning a Lawyer's Services, sets forth the essential requirement for all advertising by lawyers. The rule states:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
> (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
> (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or
> (c) Compares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated.

The advertisement in this inquiry intentionally creates the impression that the insurance company, and its lawyers, are anxious to settle a claim brought by Lawyer A solely because of his reputation. It implies that the decision to settle the claim is based upon the representation of the claimant by Lawyer A without regard for the strength of the claim or the evidence. Thus, the commercial is likely to create an unjustified expectation about results that the lawyer can achieve. Also, it misrepresents the importance of the myriad of factors that are taken into consideration by an insurance company, or its lawyers, when deciding whether and for how much a claim should be settled. Therefore, the advertisement does not comply with the Revised Rules of Professional Conduct.

2000 Formal Ethics Opinion 7

October 20, 2000

Charging a Legal Fee for Participation in the Fee Dispute Resolution Program

Opinion rules that a lawyer may not charge the client a legal fee for the time required to participate in the State Bar's fee dispute resolution program.

Inquiry:

Rule 1.5(f) of the Revised Rules of Professional Conduct requires a lawyer with a fee dispute with a client to participate in the North Carolina State Bar's program of fee dispute resolution. The rule provides as follows:

> (f) Any lawyer having a dispute with a client regarding any fee for legal services must: (1) make reasonable efforts to advise his or her client of the existence of the North Carolina State Bar's program of fee dispute resolution at least 30 days prior to initiating legal proceedings to collect the disputed fee; and (2) participate in good faith in the fee dispute resolution process if the client submits a proper request.

Client filed a fee dispute petition with the State Bar. Client's lawyer, Attorney A, sent his written response to the State Bar. Attorney A also added $1,150 to Client's bill for the time and expense associated with drafting the response to the fee dispute petition. May Attorney A charge Client for the time expended in preparing a response to a fee dispute petition or otherwise participating in the fee resolution program of the State Bar?

Opinion:

No. Participation in the fee dispute resolution program is not a legal service that the lawyer provides to the client. Rather, Rule 1.5(f) mandates participation in the program if requested by a client. Moreover, the rule mandates that a lawyer participate in good faith. The program minimizes the adverse effects of fee disputes with clients and helps to prevent the filing of grievances against lawyers. Participation is a professional responsibility that advances the interests of the public and the Bar, and it is improper for a lawyer to charge a client for the time expended to participate. See also 27 N.C.A.C 1D, Section .0702 ("The State Bar shall implement a fee dispute resolution program....which shall be offered to clients and their lawyers at no cost").

2000 Formal Ethics Opinion 8

January 19, 2001

Lawyer as Notary Public

Opinion rules that a lawyer acting as a notary must follow the law when acknowledging a signature on a document.

Inquiry #1:

Prior to 1999, Attorney H represented the co-executors of the SL Estate. During the administration of the SL Estate, Attorney H failed to prepare a deed to convey certain real property located in South Carolina to a trust that was created by SL. In October 1999, this oversight was detected and Attorney H agreed to reopen the estate. On October 28, 1999, the co-executors delivered to Attorney H's office the original petition requesting the estate to be reopened. The co-executors had signed the petition but neglected to have their signatures notarized. Thereafter, Attorney H notarized the petition himself, although he had not witnessed either of the co-executors sign the document and neither had acknowledged his signature on the petition to Attorney H. Attorney H was familiar with both co-executors' signatures, however, and the co-executors did in fact sign the petition.

N.C. Gen. Stat. §10A-3(1) provides that "acknowledgment" of a signature on a document is "a notorial act in which a notary certifies that a signer, whose identity is personally known to the notary or proven on the basis of satisfactory evidence, has admitted, in the notary's presence, having signed a document voluntarily." It is believed that this provision of Chapter 10A is widely ignored. Did Attorney H's conduct violate the Revised Rules of Professional Conduct?

Opinion #1:

Yes, compliance with the law is the most basic requirement of professional responsibility. Although convenience and "common practice" might suggest shortcuts are appropriate, a lawyer serving as a notary must comply with the legal requirements for proper acknowledgment of a document. *See* Rule 8.4(a) and (d).

Inquiry #2:

Would the answer to inquiry #1 be different if Attorney H merely directed an employee to notarize the document instead of doing it himself?

Opinion #2:

No. *See* Rule 8.4(a) prohibiting a lawyer from violating the Revised Rules of Professional Conduct through the acts of another.

2000 Formal Ethics Opinion 9

January 19, 2001

Combining an Accounting Practice and a Law Practice

Opinion explores the situations in which a lawyer who is also a CPA may provide legal services and accounting services from the same office.

Introduction:

This opinion does not constitute authorization for the operation of a multidisciplinary partnership or professional association in which legal fees might be shared with a non-lawyer or legal services might be provided by an employee of a corporation other than a professional corporation or a non-lawyer proprietor.

Inquiry #1:

Attorney is a certified public accountant. He would like to open an office from which he will offer both legal services and accounting services. May he do so and, if he may, may he offer the services through one business entity?

Opinion #1:

Attorney may offer both accounting services and legal services from the same office and he may operate as one business provided he complies with the regulations of the State Board of Certified Public Accountant Examiners (G.S. Chapter 93) and with the North Carolina Revised Rules of Professional Conduct. *See* RPC 238 and RPC 201.

Inquiry #2:

May the signage for Attorney's office and his letterhead indicate that both accounting and legal services are provided through Attorney's business? May both services have the same telephone number?

Opinion #2:

Yes. *See, e.g.,* RPC 201.

Inquiry #3:

May Attorney offer legal services to his accounting clients and vice versa?

Opinion #3:

Yes, provided Attorney fully discloses his self-interest in making a referral to himself and the referral is in the best interest of the client. *See* Rule 1.7(b).

Inquiry #4:

May advertisements for Attorney's services (including yellow page listings and business cards) indicate that Attorney offers both legal and accounting services?

Opinion #4:

Yes, subject to any requirements of the State Board of Certified Public Accountant Examiners. Rule 7.1.

Inquiry #5:

Attorney may decide to join an existing accounting practice as a CPA. If so, may Attorney operate a separate legal practice within his office in the accounting firm?

Opinion #5:

Yes, this arrangement is not distinct from the arrangement allowed in RPC 201 in which a lawyer/real estate agent operated a separate law practice within the offices of a real estate brokerage. Nevertheless, such an arrangement presents serious obstacles to the fulfillment of a lawyer's professional responsibility. Preserving the confidentiality of client information and records is virtually impossible in such a setting. Client information must be isolated and concealed from all of the employees of the CPA firm. *See* Rule 1.6. In addition, Attorney must avoid conflicts of interest between the interests of his legal clients and the interests of the clients of the CPA firm. *See* Rules 1.7 and 1.9. There may be no sharing of legal fees with the CPA firm in violation of Rule 5.4(a) which prohibits a lawyer from sharing legal fees with a non-lawyer. Finally, Attorney

must maintain a separate trust account for the funds of his law clients pursuant to Rule 1.15 et seq.

Inquiry #6:

Under the facts in inquiry #5, may Attorney offer legal services to his accounting clients and vice versa?

Opinion #6:

Yes, if there is full disclosure of the lawyer's self-interest in making the referral and Attorney reasonably believes that he is exercising independent professional judgment on behalf of his legal clients in making such a referral. However, direct solicitation of legal clients is prohibited under Rule 7.3 although it may be permitted by the regulations for certified public accountants. Rule 7.3(a) does permit a lawyer to engage in in-person or telephone solicitation of professional employment if the lawyer has a "prior professional relationship" with a prospective client. If a prior professional relationship was established with a client of the accounting firm, Attorney may call or visit that person to solicit legal business.

Inquiry #7:

May Attorney share a telephone number with accounting firm?

Opinion #7:

Yes, if the confidences of legal clients can be preserved and clients are not confused about the relationship of Attorney's law practice to the accounting firm. *See* RPC 201.

Inquiry #8:

May advertisements for Attorney's law practice (including yellow page listings and business cards) indicate that Attorney also offers accounting services? May advertisements for the CPA firm or under the accounting heading of the yellow pages indicate that Attorney is also a lawyer and offers legal services?

Opinion #8:

Advertisements may not imply that legal services are offered by the accounting firm in violation of the statutes prohibiting the unauthorized practice of law and Rule 5.5 which prohibits a lawyer from assisting in the unauthorized practice of law. *See* G.S. 84-4 and 84-5. Nevertheless, advertisements for Attorney's law practice may include truthful information regarding Attorney's CPA license. Attorney's business cards may truthfully state that he is a lawyer and a CPA. *See* Rule 7.1. No opinion is expressed on the separate requirements of the State Board of Certified Public Accountant Examiners.

2000 Formal Ethics Opinion 10

July 27, 2001

Appearance of Non-Lawyer Employee at Calendar Call

Opinion rules that a lawyer may have a non-lawyer employee deliver a message to a court holding calendar call, if the lawyer is unable to attend due to a scheduling conflict with another court or other legitimate reason.

Inquiry:

Attorney A is a criminal defense lawyer in a solo practice. He frequently has cases on the calendar simultaneously in juvenile court, district court, superior court, and administrative court. When a client's case is in court for a routine calendar call or an administrative status calendar call, Attorney A would like to send a non-lawyer member of his staff to the hearing to report to the court on his whereabouts and scheduling conflict. May Attorney A do so without violating the prohibition on assisting the unauthorized practice of law?

Opinion:

Yes, provided the nonlawyer employee is merely providing the court with information and does not request or argue for a particular action by the court.

Rule 5.5(b) prohibits a lawyer from assisting a person who is not a member of the bar in the performance of any activity that constitutes the unauthorized practice of law. G.S. § 1-11 provides that, "A party may appear either in person or by attorney in actions or proceedings in which he is interested." G.S. §84-4 permits only licensed North Carolina lawyers "to appear as attorney or counselor at law in any action or proceeding before any judicial body." *See also* G.S. §§84-2.1, 84-4, and 84-36. Nevertheless, when a lawyer has a conflicting commitment to appear in another court or when another legitimate conflict prohibits a lawyer's appearance in court for a client, the lawyer may send a nonlawyer employee to the court to inform the court of the situation. This is not assisting in the unauthorized practice of law.[1] In response to information about a lawyer's availability, the court may, on its own motion, determine that a continuance or other action is appropriate.

A lawyer should rely on a nonlawyer to notify the court of a scheduling conflict only when necessary. Moreover, Rule 5.3 requires a lawyer who supervises a non-lawyer assistant to make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer. If a nonlawyer is present in court to provide information about the lawyer's scheduling conflict, the duty of supervision includes insuring that the assistant complies with court rules on decorum and attire.

Endnote

1. See *People v. Alexander*, 202 N.E. 2d 841 (Appellate Court of IL. 1964): "We agree with the trial judge that clerks should not be permitted to make motions or participate in other proceedings which can be considered as 'managing' the litigation. However, if apprising the court of an employer's engagement or inability to be present constitutes the making of a motion, we must hold that clerks may make such motions…without being guilty of the unauthorized practice of law."

2000 Formal Ethics Opinion 11

January 19, 2001

Disclosure of Confidential Corporate Information by Former In-house Counsel

Opinion rules that a lawyer who was formerly in-house legal counsel for a corporation must obtain the permission of a court prior to disclosing confidential information of the corporation to support a personal claim for wrongful termination.

Inquiry #1:

Corporation C employed Attorney A who reported to the General Counsel of the corporation. Before Attorney A was hired, Corporation C entered into a settlement with the United States Government whereby Corporation C agreed to pay the federal government $900,000 for failure to rebate money to the government for service contracts. Corporation C also agreed to establish a compliance program.

While employed by Corporation C, Attorney A was assigned to establish and monitor the compliance program. Attorney A discovered that the compliance program was not being honored. The comptroller of the corporation also advised Attorney A that the corporation was involved in another scheme to defraud the government of $38 million through improper billings. Attorney A was informed that the chief financial officer and the chief executive officer of Corporation C were aware of the fraud scheme. Attorney A informed the General Counsel of the fraud scheme and that the compliance program was being violated. Two weeks later, Attorney A was fired. He was offered three months salary as severance pay if he signed a separation agreement containing a confidentiality provision and a covenant not to sue. Attorney A refused to sign the agreement.

Attorney A has documents from Corporation C that reveal the scheme to defraud the federal government. May Attorney A disclose these documents, as well as other information of Corporation C that he gained while he was an employee, to the US Attorney in order that the government might pursue a false claims action against Corporation C?

Opinion #1:

Yes, Attorney A may reveal confidential information of his former employer and client, Corporation C, if such information concerns the intention of Corporation C to commit a crime and the information necessary to prevent the crime. Rule 1.6(d)(4). This is the only exception to the duty of confidentiality that is applicable here. To the extent that the confidential information relates to past conduct, it may not be disclosed to the US Attorney.

Inquiry #2:

May Attorney A reveal information and documents of Corporation C to establish a claim for wrongful termination in his own lawsuit against Corporation C?

Opinion #2:

No, unless an exception to the duty of confidentiality applies and a court permits the disclosure of the confidential information.

Although Rule 1.6(d)(6) permits a lawyer to reveal confidential client infor-

mation "to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client….," Comments [18] and [19] to Rule 1.6 clarify that this exception is generally intended to enable the lawyer to defend his or her representation of a client or to prove legal services were rendered in an action to collect a fee.

Public policy favors a client's right to terminate the client-lawyer relationship for any reason and at any time without adverse consequence to the client. Rule 1.16, Comment [4]. If confidential information may be revealed whenever an in-house corporate lawyer's employment is terminated, a chilling effect on a corporation's right to terminate its legal counsel at will may ensue. Nevertheless, there is also a public policy, recognized by the courts of North Carolina in a number of recent decisions, against the termination of an employee for refusing to cooperate in the illegal or immoral activity of his or her employer. Because of this public policy, the courts, in a few limited situations, have allowed an employee to go forward with a wrongful termination claim as an exception to the employment-at-will doctrine.

The Ethics Committee cannot make a definitive ruling in the light of the competing public policies illustrated in this inquiry—one favoring the protection of client confidences and the right to counsel of choice and the other condemning the termination of an employee for refusing to participate in wrongful activity. The exception in Rule 1.6(d)(6) is broad enough to include a wrongful termination action. Nevertheless, even when there is an exception permitting disclosure of confidential information, the comment to Rule 1.6 states that:

> the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Rule 1.6, cmt. [19]. Given the competing public policies described above, a lawyer may reveal no client confidences in a complaint for wrongful termination except as necessary to put the opposing party on notice of the claim. Prior to disclosing any other confidential information of the former employer and client, the lawyer must obtain a ruling from a court of competent jurisdiction authorizing the lawyer to reveal confidential information of the former client, and even then may only reveal such confidential information as is necessary to establish the wrongful termination claim. Requesting in camera review of the confidential information the plaintiff intends to proffer to establish the wrongful termination claim would be an appropriate procedure for obtaining the court's ruling. There may be other similarly appropriate procedures.

Inquiry #3:

May Attorney A reveal information and documents of Corporation C to establish a claim under the False Claims Act in his own lawsuit against Corporation C?

Opinion #3:

No, unless a court rules that the information may be revealed to pursue the claim. Rule 1.6(d)(3) permits a lawyer to reveal confidential information when required by a court order. This would appear to be the only exception to the duty of confidentiality that permits a lawyer to disclose confidential information in order to make a third party or "qui tam" claim under the False Claims Act. In this inquiry, there are also competing public policies favoring disclosure on the one hand and confidentiality on the other. The Ethics Committee again defers to the ruling of a court of competent jurisdiction to determine the extent to which Attorney A may reveal confidential client information in order to establish a claim under the False Claims Act. Attorney A may reveal no client confidences in a complaint asserting a claim under the False Claims Act except as necessary to put the opposing party on notice of the claim. Thereafter, Attorney A may only reveal confidential client information as permitted by a court order.

2001 Formal Ethics Opinion 1

April 27, 2001

Petition to Court for Attorney's Fee When Client is Member of Legal Services Plan

Opinion rules that, in a petition to a court for an award of an attorney's fee, a lawyer must disclose that the client paid a discounted hourly rate for legal services as a result of the client's membership in a prepaid or group legal services plan.

Inquiry:

Attorney represented the plaintiffs in a dispute involving the interpretation of restrictive covenants for a subdivision. Suit was filed and the plaintiffs ultimately prevailed in an appeal to the North Carolina Supreme Court. The restrictive covenants provide that in the event of a litigated dispute, the prevailing party is entitled to recover costs and reasonable attorney's fees.

The attorney's fee agreement with the plaintiffs provides that Attorney's hourly rate will be $59.00 per hour. This rate is one-half of Attorney's customary rate at the time the representation commenced in 1995. A discount was given to the plaintiffs because they subscribe to a prepaid or group legal services plan that benefits enrollees who pay a monthly premium. Attorney is one of the lawyers for the plan. As such, his firm receives a monthly payment from the plan administrator of $1.50 to $2.00 per client enrolled in the plan. This provides the firm with about $1,200.00 to $1,400.00 in income per month.

Attorney's usual fee petition to a court includes an affidavit with the following information: a breakdown of the time expended and the legal services rendered for the client; a summary of the client's costs; a statement on Attorney's expertise in the area of practice; and a description of the difficulty of the matter. It does not usually include a description of the fee arrangement with the client.

Attorney believes that disclosure of his fee arrangement with the plaintiffs in this case would violate the duty of confidentiality he owes to the plaintiffs. He also believes that the opposing party should not benefit from the plaintiffs' foresight in subscribing to a legal services plan.

May Attorney file a petition for legal fees in the current case that does not disclose the discounted hourly rate charged to the plaintiffs but instead recites Attorney's full hourly rate at the time the representation of the plaintiffs commenced?

Opinion:

Rule 3.3(a)(2) requires a lawyer to disclose material facts to a court when necessary to avoid assisting in a fraudulent act by the client. Although Attorney and the plaintiffs may have no intent to defraud the opposing party, the effect may be the same if the court does not have all of the facts necessary to make a fair and informed decision about an award of legal fees. *See, e.g.,* 98 Formal Ethics Opinion 5 (to petition court for a limited driving privilege, prior driving record must be disclosed even if disclosure is adverse to client). The fee petition must recite the discounted hourly rate actually charged to the clients but it may also explain to the court that the clients purchased a prepaid or group legal services plan in order to obtain the discount. Attorney may then argue to the court that the opposing party should not reap the benefit of the plaintiffs' foresight and that Attorney's usual hourly rate is a reasonable amount upon which to calculate the award of legal fees. If the plaintiffs do not consent to the disclosure of this information about the fee arrangement in the petition, Attorney may disclose only that the plaintiffs were charged $59.00 per hour for his services. He may not imply or infer that the plaintiffs were charged more.

2001 Formal Ethics Opinion 2

April 27, 2001

Contracting with Management Firm to Administer Law Office

Opinion rules that there is no prohibition on a law firm entering into a contract with a management firm to administer the firm provided the lawyers in the firm can fulfill their ethical duties including the duty to exercise independent professional judgment, the duty to protect and safe keep client property, and the duty to maintain client confidences.

Inquiry:

Law Firm wants to enter into a contract with a management company that will oversee the day-to-day administration of the firm. Among other things, the company will employ all of the non-lawyer employees of the firm. The company will be responsible for the hiring and training of employees. The company will also provide all accounting, marketing, human resources, and information-technology systems for the firm. The firm's only employees will be the lawyers. The company will execute confidentiality agreements with the law firm and all employees of the company will also sign confidentiality agree-

ments.

May Law Firm enter into this business relationship?

Opinion:

There is nothing in the Revised Rules of Professional Conduct that prohibits such a business relationship *per se*. However, a law firm may not relinquish control of the firm in a manner that gives a nonlawyer the power or authority to direct or control the professional activities of the lawyers in the firm. *See* Rule 5.4. Moreover, the delegation of administration of the firm to an outside company does not relieve the lawyers in the firm from their professional responsibilities to maintain the confidences of clients and to safe-keep the property of clients. *See* Rules 1.6 and 1.15. These duties may be more difficult to fulfill when using an independent management firm and when the nonlawyers in the firm are employees of the management firm and not the law firm. With regard to client confidences, the lawyers also have a duty to insure that the use of an outside management firm does not compromise a client's right to assert the attorney-client privilege to prevent the disclosure of confidential client information in a court proceeding.

Maintaining independent professional judgment also means that the lawyers in the firm may not split legal fees with the management company. *See* Rule 5.4(a). If the management company is allowed to share in the fees of the firm, especially by compensation based upon a percentage of the revenue of the firm, the management company may attempt to maximize its earnings to the detriment of the representation of clients. *Restatement (Third) of the Law Governing Lawyers* §10 Com. b. Nevertheless, if a financial arrangement can be worked out with the management company for a flat fee or other means of payment that is not tied to profits, the rules are not intended to prevent, as stated in the *Restatement*, "new and useful ways of providing legal services or [make] sure that nonlawyers do not profit indirectly from legal services in circumstances and under arrangements presenting no significant risk of harm to clients or third persons." *Id.*

2001 Formal Ethcis Opinion 3

April 27, 2001

Disbursement for Tort Claim Settlement Upon Deposit of Funds Provisionally Credited to Trust Account

Opinion rules that a lawyer may settle a tort claim by making disbursements from a trust account in reliance upon the deposit of funds provisionally credited to the account if the deposited funds are in the form of a financial instrument that is specified in the Good Funds Settlement Act, G.S. Chap. 45A.

Inquiry #1:

Attorney regularly represents individuals with personal injury claims. When an insurance company check for $5000 or more is paid in settlement of a client's claim, the check is deposited into the trust account of Attorney's firm. No disbursements are made to the client, or to third parties on behalf of the client, until the funds are actually collected because RPC 191 limits the disbursements that can be made against provisional credit. RPC 191 prohibits a lawyer from making disbursements from a trust account unless the funds are actually on deposit in the account or, if the depository institution grants provisional credit, unless the financial instrument deposited into the account is one of the ones specified in the Good Funds Settlement Act, G.S. Chap. 45A (the "Act").

Attorney believes that RPC 191 should not apply to disbursements from a trust account for a personal injury settlement because the Act is specifically limited to the settlement of residential real estate transactions. *See* G.S. §45A-2. Attorney believes that the limitations of RPC 191 create a hardship on his firm and the client because the client has to come to the firm's office to endorse the settlement check and, after the check clears the bank, return to the firm to collect the disbursement. This may have an adverse effect on a client's credit and delay repairs to or replacement of an automobile if there is also a property damage settlement. It also costs Attorney additional time to meet with the client twice.

Is RPC 191 applicable to personal injury settlements? If so, is there an exemption for personal injury settlements or checks from insurance companies licensed to do business in North Carolina?

Opinion #1:

RPC 191 is applicable to all disbursements from a trust account against financial instruments that are not irrevocably credited to the account upon deposit although the Good Funds Settlement Act was adopted by the General Assembly only to regulate the settlement of residential real estate transactions. The rationale for the opinion is found in the following excerpt from the opinion:

> Notwithstanding the fact that some of the forms of funds designated in the Act are not irrevocably credited to the lawyer's trust account at the time of deposit, the risk of noncollectibility is so slight that a lawyer's disbursement of funds from a trust account in reliance upon the deposit into the account of provisionally credited funds in these forms shall not be considered unethical. However, a closing lawyer should never disburse against any provisionally credited funds unless he or she reasonably believes that the underlying deposited instrument is virtually certain to be honored when presented for collection. A lawyer may immediately disburse against collected funds, such as cash or wired funds, and may immediately make disbursements from his or her trust account in reliance upon provisional credit extended by the depository institution for funds deposited into the trust account in one or more of the forms set forth in G.S. §45A-4.

The disbursement of funds from a trust account by a lawyer in reliance upon provisional credit extended upon the deposit of an item into the trust account which does not take one of the forms prescribed in the Act constitutes professional misconduct, regardless of whether the item is ultimately honored or dishonored.

The exception allowed in RPC 191 to the duty to disburse only against collected funds in a trust account is purposefully narrow to limit the potential for disbursements against instruments that are subsequently dishonored. If an instrument is subsequently dishonored, it puts at risk all client funds on deposit in the trust account. The relatively minor inconvenience of waiting for a check to clear the bank is offset by the protection that disbursement against collected funds provides to all clients with funds deposited in the trust account. The General Assembly, as a matter of public policy, has determined that the items set forth in the Good Funds Settlement Act are sufficiently reliable to exempt these items from the safeguard of waiting to collect the funds but the Ethics Committee of the State Bar does not have the authority to expand the exemption.

Inquiry #2:

When Attorney settles a property damage claim on a client's vehicle, he asks the insurance company to put only the name of the client on the settlement check. Attorney believes that this is the only way that the check can be given directly to the client. If the check is made out to both the client and the law firm, Attorney deposits the check into the trust account and waits until the check is collected before disbursing the entire amount of the check to the client. The delay before disbursement can be a serious inconvenience to a client who needs an automobile for transportation.

If an insurance check is made out jointly to the law firm (or Attorney) and the client, may Attorney endorse the check and give the check to the client without depositing it first into the trust account?

Opinion #2:

When funds belonging presently or potentially to a lawyer are received in combination with funds belonging to a client, or other persons, the funds must be deposited in tact into the trust account. *See* Rule 1.15-2(g). However, if all of the funds represented by a check from a third party belong to the client or the lawyer is prepared to forgo being paid for his legal services from the check proceeds (and bill the client instead), the check may be endorsed directly to the client without being deposited into the trust account.

2001 Formal Ethics Opinion 4

October 19, 2001

Supervision of Paralegal Closing a Residential Real Estate Refinancing

Opinion rules that competent legal representation of a borrower requires the presence of the lawyer at the closing of a residential real estate refinancing. A nonlawyer may oversee the execution of documents outside the presence of the lawyer provided the lawyer adequately supervises the nonlawyer and is present at the clos-

ing conference to complete the transaction.

Inquiry:

99 Formal Ethics Opinion 13 rules that competent practice requires the presence of the closing lawyer at a residential real estate closing conference to explain the documents being executed, answer questions, and advocate for the client. A nonlawyer employee of the lawyer may oversee the execution of documents outside of the lawyer's presence; however, the closing lawyer must adequately supervise the nonlawyer and must be present at some time during the closing conference to complete the transaction.

When a homeowner refinances his or her residential property, there is a potential for harm to the interest of the homeowner from high interest rates, dissipation of equity, and refinancing pitfalls such as prepayment penalties and balloon notes. May a lawyer allow a nonlawyer employee to close a residential real estate refinancing if the lawyer is not present at the closing?

Opinion:

No. As with an initial purchase of residential property, the closing of a refinancing of residential property is the primary opportunity that a lawyer has to meet with the borrower, explain the refinancing documents, define the borrower's rights and obligations, and answer questions. These activities are the practice of law because the lawyer gives legal advice and opinion on the rights of the borrower. *See* 99 FEO 13. Therefore, competent representation requires that the closing lawyer must be present at the closing. Nevertheless, a lawyer may permit a nonlawyer employee to oversee the execution of the financing documents outside of the lawyer's presence. Nothing in this opinion is intended to infringe upon a lender's right to represent itself as provided in *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962).

2001 Formal Ethics Opinion 5

July 27, 2001

LAP Support Groups and the Duty to Report Misconduct

Opinion rules that disclosures made during a LAP support group meeting are confidential and not reportable to the State Bar under Rule 8.3.

Inquiry:

The Lawyer Assistance Program (LAP) of the North Carolina State Bar has the following three purposes: (1) to protect the public by assisting lawyers and judges who are professionally impaired by reason of substance abuse, addiction, or debilitating mental condition; (2) to assist impaired lawyers and judges in recovery; and (3) to educate lawyers and judges concerning the causes of and remedies for such impairment. 27 N.C.A.C. 1D, Rule .0601. To assist lawyers who are professionally impaired because of depression or another debilitating mental condition, LAP organizes support groups for impaired lawyers sometimes called "accountability groups." At a meeting of one of these groups, impaired lawyers share their experiences in an effort to support each other's recovery. A designated representative of LAP is present and facilitates each meeting of a group.

The therapeutic purpose of the group is to hold each member accountable and to encourage honesty and openness. However, Rule 8.3(a) of the Revised Rules of Professional Conduct provides "A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the North Carolina State Bar or the court having jurisdiction over the matter." If a participant in a support group is worried that he or she may be making a reportable disclosure, it will prevent the honesty and openness that is necessary to the therapeutic purpose of the group. It would be equally counter-productive for a lawyer who is listening to another participant's disclosures to be concerned that he or she may have to report the lawyer to the State Bar.

Does a lawyer who is participating in a LAP accountability group have to report the conduct of another lawyer in the group to the North Carolina State Bar if the other lawyer discloses conduct that is reportable under Rule 8.3(a)?

Opinion:

No. To promote the purposes of the LAP program, the exception to reporting found in Rule 8.3(c) is extended to communications during a meeting of an accountability group. Rule 8.3(c) states that the disclosure rule does not require disclosure of confidential information. Under Rule 1.6(b), confidential information includes "information received by a lawyer then acting as an agent of a lawyer's or judge's assistance program approved by the North Carolina State Bar or by the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered." Since a representative of LAP is present at each meeting of an accountability group, the duty of confidentiality extends to all communications to the representative during the meeting as well as to any communication among the members of the support group during the meeting.

2001 Formal Ethics Opinion 6

July 27, 2001

Multiple Representation of Claims for Workers' Compensation Death Benefits

Opinion examines when a lawyer has a conflict of interest in representing various family members on claims for a deceased employee's workers' compensation death benefits.

Inquiry #1:

Worker was fatally injured in a work related accident covered under the Workers' Compensation Act. At the time of Worker's death, he was married to Wife #2 who has two children from a previous marriage (the "stepchildren"). Worker had two children of his own from his first marriage ("Worker's children"). Wife #2 and Worker also had one child together (the "joint child"). All of the children are under 18 years of age. Only the joint child is under 10 years of age.

Liability is admitted and the only issue before the Industrial Commission is the determination of the beneficiaries of the workers' compensation benefits payable by reason of Worker's death. Under the Workers' Compensation Act, the death benefits are divided equally among all the beneficiaries and then paid out over at least 400 weeks. N.C.G.S. §97-38. Every additional beneficiary entitled to compensation reduces the compensation payable to any individual beneficiary. A minor child who is under 10 years of age will receive compensation until the child reaches 18 years of age even if that is longer than 400 weeks. Compensation payments are usually made payable to a surviving spouse for the use and benefit of minor children of the surviving spouse. Once a surviving minor child turns 18 years old, compensation is paid directly to the child. A stepchild of a deceased employee qualifies as a dependent only if the child was substantially dependent upon the deceased employee at the time of death. Whether a stepchild was substantially dependent upon the deceased employee may be disputed.

Wife #2 asked Attorney A to represent all of the following claimants to the death benefits: Wife #2; the guardians ad litem for Worker's children; the stepchildren; and the joint child. May Attorney A represent Worker's children and stepchildren simultaneously?

Opinion #1:

Worker's children will maximize their shares of the death benefits by excluding Worker's stepchildren from the distribution. Attorney A cannot represent the interests of Worker's children unless he advocates against the compensation of Worker's stepchildren. Such a direct conflict of interest is prohibited under Rule 1.7(a).

Attorney A may not ask the guardians ad litem for Worker's children to consent to the conflict of interest because, as stated in Comment [5] to Rule 1.7, "When a disinterested lawyer would conclude that the client should not agree to representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."

Inquiry #2:

Wife #2 asked Attorney A to represent her, Worker's stepchildren, and the joint child of the marriage of Wife #2 and Worker. The two stepchildren are over age 10 and will continue to receive benefits after turning 18 years old. While they are minors, they will live with their mother and any benefits they receive will likely be paid to Wife #2 to support the household. Similarly, any compensation payable to the joint child of the marriage will be paid to Wife #2 to support the child. May Attorney A represent Wife #2, the stepchildren, and the joint child?

Opinion #2:

Attorney A may represent Wife #2 and her own children from her first marriage or Attorney A may represent Wife #2 and the joint child of her marriage to Worker. It is assumed that Wife #2 will receive the benefits payable to all of these children during their minority if they reside with Wife #2 and, therefore, Wife #2 and these children have a common economic interest. Moreover, Wife #2 is financially responsible for her children until they reach age 18. *See* RPC 123.

Nevertheless, Attorney A may not represent the stepchildren and the joint child of the marriage simultaneously. The interest of the stepchildren of Worker and the joint child of the marriage are opposed because the joint child has an interest in maximizing the benefits payable by eliminating the claims of the two stepchildren on the basis that the two stepchildren were not substantially dependent on Worker at the time of his death. Even though the compensation to the two stepchildren might initially be payable to Wife #2 to run the household, once the two stepchildren are emancipated, they will receive compensation directly. Therefore, their interests are adverse to that of the joint child of the marriage. *See* Rule 1.7(a).

2001 Formal Ethics Opinion 7

October 19, 2001

Financial Assistance to Client

Opinion prohibits a lawyer from advancing the cost of a rental car to a client even though the car will be used, on occasion, to transport the client to medical examinations.

Inquiry:

Attorney A represents Client on a personal injury claim. Client requires medical treatment as a result of the injuries he sustained but lacks a means of transportation to and from medical appointments. May Attorney A advance money to client to pay for a rental car?

Opinion:

No. Rule 1.8(e) prohibits a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation "except the lawyer may advance court costs and expenses of litigation, including medical examinations and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such costs and expenses." A transportation expense that directly arises from the prosecution of a client's case may be advanced to a client. In general, however, money for a rental car to be used over an extended period of time is a living expense even if the rental car may be used, on occasion, to transport a client to medical exams and treatment necessitated by the injury giving rise to the litigation. A lawyer may advance money to a client only to pay for the actual costs of transportation associated with the litigation or medical examinations. Such expenses may include an occasional cab or bus fare and, when reasonable in light of the distance to be traveled, the cost of a rental car for one trip or the cost of an airplane fare.

2001 Formal Ethics Opinion 8

October 19, 2001

Lawyer's Presence at Residential Real Estate Closing

Opinion rules that competent practice requires the physical presence of the lawyer at a residential real estate closing conference.

Inquiry:

In 99 Formal Ethics Opinion 13, the Ethics Committee of the North Carolina State Bar ruled that a lawyer may not permit a paralegal to close a residential real estate transaction but the paralegal may oversee the execution of closing documents outside the presence of the lawyer. May a lawyer close a residential real estate transaction without being physically present in the closing conference room if the lawyer remains in contact with the client and the lawyer's paralegal by telephone and is available, by phone, to answer the client's questions and to instruct and supervise the paralegal?

Opinion:

No. The lawyer must be physically present at the closing conference and may not be present through a surrogate such as a paralegal. *See* 99 Formal Ethics Opinion 13. This opinion establishes a bright line and removes any ambiguity about the requirements of 99 Formal Ethics Opinion 13.

2001 Formal Ethics Opinion 9

October 19, 2001

Sale of Financial Products to Legal Client

Opinion rules that, although a lawyer may recommend the purchase of a financial product to a legal client, the lawyer may not receive a commission for its sale.

Inquiry #1:

Attorney owns a small financial planning firm that he started prior to entering law school. Through this firm, Attorney provides investment advice, invests in securities (including stock mutual funds, and bonds) and sells insurance. Attorney maintains Series 7, 63, and 65 licenses, a NC health and life insurance license, and a NC real estate license.

Attorney is starting a legal practice. As part of his legal practice, Attorney hopes to provide estate-planning services to his clients. He would like to incorporate his legal practice into his financial planning business and provide his clients with turnkey service. Attorney believes that a quality financial plan often requires estate and tax planning and that clients will benefit from working with an attorney/financial advisor because they will receive advice from someone with experience in both legal and financial matters who provides a comprehensive approach to the management of their financial assets.

For example, Attorney will use credit shelter trusts and irrevocable life insurance trusts, business planning, tax planning, and appropriate investment products to meet the needs of the client. Attorney believes that if a client desires a single person to manage his or her entire financial situation, then these integrated services should be made available. Although there may be an increased incentive to promote the use of insurance products or other investment products if the attorney also benefits from the sale of these products, Attorney believes there is minimal difference over a period of time between charging commissions and charging hourly fees for financial planning services.

2000 Formal Ethics Opinion 9 permits an attorney who is also a CPA to refer legal clients to himself as a CPA. Attorney believes that because many accounting firms are now offering securities as part of their services, this opinion impliedly permits attorney/CPA's, who have a Series 6 license, to offer financial products and charge a fee or commission from the sale of these products.

May Attorney, with appropriate disclosures to and consent from the client, provide his estate-planning clients with financial planning services, which may include the sale of financial products, if Attorney will receive a fee or commission from the sale of such products?

Opinion #1:

No. Rule 1.8(b) of the Rules of Professional Conduct provides as follows:

> During or subsequent to legal representation of a client, a lawyer shall not enter into a business transaction with a client for which a fee or commission will be charged in lieu of, or in addition to, a legal fee, if the business transaction is related to the subject matter of the legal representation, any financial proceeds from the representation, or any information, confidential or otherwise, acquired by the lawyer during the course of the representation.

This rule prevents an attorney from taking advantage of financial information received from a client during the legal relationship. If the attorney learns through confidential communications that the client has received money, the attorney may not profit from the sale of a financial product to the client. Comment [2] to Rule 1.8 specifically admonishes an attorney who is also a securities broker or insurance agent not to "endeavor to sell securities or insurance to a client when the lawyer knows by virtue of the representation that such client has received funds suitable for investment." *But see* RPC 238 (permitting a law firm to offer financial products to clients so long as no fee or commission is earned by the lawyer or law firm on the sale of such products).

Rule 1.8(b), however, does not prevent an attorney from providing law-related services to a legal client, so long as the attorney fully discloses his self-interest in the referral and the referral is in the best interest of the client. 2000 Formal Ethics Opinion 9 was not intended to and does not create an exception to Rule 1.8(b). That opinion allows an attorney to provide accounting services to his legal clients. Nothing in the opinion specifically permits an attor-

ney/CPA, who holds an appropriate license, to sell securities or other products to a client and profit from the sale. An attorney may, however, provide accounting, financial planning, or other law-related services to a client and charge a fee for rendering those services. An attorney may also provide financial products to the client, but may not profit from the sale of those products by charging either an additional fee or a commission.

Inquiry #2:

If a third party insurance salesman or financial advisor refers a client to Attorney after recommending that the client purchase a financial product from the third party, does Attorney have an ethical duty to tell the client that there are financial products available that can be purchased without paying a commission to the third party (e.g., "no load" insurance policies and mutual funds)?

Opinion #2:

Yes, if Attorney determines from all of the facts and circumstances known to him that it is in the client's best interest to consider the "no-load" options and the disclosure to the client is within the scope of Attorney's engagement.

2001 Formal Ethics Opinion 10

January 18, 2002

Restrictions on Right to Practice

Opinion prohibits a lawyer from entering into an employment agreement with a law firm that includes a provision reducing the amount of deferred compensation the lawyer will receive if the lawyer leaves the firm and engages in the private practice of law within a 50-mile radius of the firm's offices.

Inquiry:

Law Firm would like to enter into employment agreements with the principals of the firm. It is proposed that the employment agreement contain a provision dealing with deferred compensation. The provision reduces the amount of deferred compensation payable to a shareholder if the shareholder decides to leave the firm. Deferred compensation is reduced by 75% if the departing shareholder engages in "competitive activity" within a 50-mile radius of Law Firm's offices. Stated in its entirety, the provision provides as follows:

> If Employee's employment is terminated by Employee under Section 2.2(e) hereof, and Employee, following such termination of employment, engages in a competitive activity as hereinafter defined, the Deferred Credit, as above determined, shall be reduced by 75%. This reduction of the Deferred Credit is necessitated because of the loss of goodwill and earnings capacity of the Corporation caused by the employee's action. As used herein "competitive activity" means the employee's engaging in the private practice of law, other than in employment by the Corporation, within a 50-mile radius of the principal offices of Corporation within a two-year period following termination of employment.

Does this provision comply with the Revised Rules of Professional Conduct?

Opinion:

No. Rule 5.6(a) of the Revised Rules of Professional Conduct prohibits a lawyer from participating in a partnership or employment agreement with another lawyer or law firm that restricts the right of a lawyer to practice after the termination of the relationship created by the agreement except as a condition to payment of retirement benefits. The purpose of the rule, as explained in Comment [1], is to encourage professional autonomy of lawyers and to facilitate the freedom of clients to choose a lawyer. In Ethics Decision 2000-6, the Ethics Committee held that a provision of a law firm employment agreement that made the payment of a client's account with a law firm a condition precedent to a departing lawyer's receipt of compensation from the client after leaving the firm is a violation of Rule 5.6(a). In the same ethics decision, the Ethics Committee held that an employment agreement with a law firm "must not create a financial disincentive that discourages or prevents a departing lawyer from representing a client from the former firm if the client chooses to follow the lawyer." The Ethics Committee also found that a provision of the same employment agreement that limited the departing lawyer's financial compensation for representation in contingency cases to a specified hourly rate for work done for a client after the lawyer left the firm was a violation of Rule 5.6.

The proposed provision set forth in the inquiry above clearly creates a specific financial disincentive for a lawyer to engage in the private practice of law in the same community in which there are likely to be clients who will want to continue to be represented by the lawyer after departing Law Firm. This will inhibit the right of clients to be represented by their chosen lawyer. This disincentive is a violation of Rule 5.6(a) and is prohibited.

2001 Formal Ethics Opinion 11

January 18, 2002

Disbursements to Medical Providers in Absence of Medical Lien

Opinion rules that when a client authorizes a lawyer to assure a medical provider that it will be paid upon the settlement of a personal injury claim, the lawyer may subsequently withhold settlement proceeds from the client and maintain the funds in her trust account, although there is no medical lien against the funds, until a dispute between the client and the medical provider over the disbursement of the funds is resolved.

Inquiry:

Attorney settled Client's personal injury claim. Client is now demanding Attorney disburse all proceeds to her, even though there are outstanding medical bills to be paid. For two medical providers, Client signed written assignments of proceeds in the amount of the providers' bills. For one of these providers, Attorney also signed a "letter of protection," with Client's knowledge and authorization, in which Attorney represented that the provider's bill would be paid from the proceeds of any settlement or liquidated judgment. If Client insists that all of the settlement proceeds be paid to her, what should Attorney do?

Opinion:

Rule 1.15-2(m) generally requires a lawyer to disburse settlement proceeds in accordance with the client's instructions.

> The only exception to this rule arises when the medical provider has managed to perfect a valid physician's lien. In such a situation the lawyer is relieved of any obligation to pay the subject funds to his or her client, and may pay the physician directly if the claim is liquidated, or retain in his or her trust account any amounts in dispute pending resolution of the controversy.

RPC 69. A number of ethics opinions hold that settlement funds belong to the client who has the right to determine how to disburse the funds unless there is a valid lien against the funds. *See* RPC 69, RPC 75, and RPC 125. Thus, if Client instructs Attorney to pay the proceeds to Client rather than the medical providers, Attorney may ignore this instruction if there is a valid lien against the proceeds or other valid legal assignment of the rights in the proceeds. *See* Revised 2000 FEO 4. Attorney must determine whether the assignments given by Client to the medical providers are valid and whether they create liens against the proceeds. If Attorney determines that liens are created, she may hold the funds in her trust account or pay the providers, over the client's objections, if the providers' claims are liquidated. If the assignments do not create valid liens against the proceeds and no representation of payment was made to the medical provider, then Attorney must give the settlement proceeds to Client.

The ethics opinions have not previously addressed a lawyer's professional responsibility when, in the absence of a valid medical lien or assignment, a client instructs a lawyer to disregard a "letter of protection" or some other specific representation to a medical provider that it will be compensated, in whole or in part, from settlement proceeds or a liquidated judgment. This opinion clarifies when a lawyer may withhold settlement funds from a client in this situation. To the extent that this opinion is inconsistent with previous opinions of the Ethics Committee, the prior opinions are overruled.

When a lawyer makes a representation to a third party with the knowledge and authorization of a client, the representation should be honored. *See* Rule 4.1 which prohibits a lawyer, in the course of representing a client, from knowingly making a false statement of material fact or law to a third party. However, between the time that a medical provider is told that it will be paid and the time that settlement or judgment proceeds are received, a dispute may arise between the client and the medical provider over the medical bill, or the client may decide to defer payment of the medical provider and instruct the lawyer

not to pay the medical provider. In the absence of a liquidated medical lien against the funds, the lawyer may not unilaterally decide whether the funds rightfully belong to the medical provider or to the client. Therefore, the lawyer may hold the portion of proceeds allegedly owed to the medical provider in her trust account until the impasse between the client and the provider is resolved by agreement of the parties, by court order, or by interpleading the funds to the court. *See* G.S. §1A-1, Rule 22. To insure that medical providers are not mislead, any "letter of protection" or other assurance of payment given to a medical provider must explain that the lawyer will hold disputed settlement funds in the trust account in the event the client subsequently instructs the lawyer not to pay the medical provider.

2001 Formal Ethics Opinion 12

October 19, 2001

Affixing Excess Tax Stamps on a Recorded Deed

Opinion rules that a closing lawyer may not counsel or assist a client to affix excess excise tax stamps on an instrument for registration with the register of deeds.

Inquiry #1:

The excise tax stamps affixed to a recorded instrument of conveyance or deed are based upon the sales price for the property reported to the register of deeds. See GS §105-228.32. Therefore, the purchase price for real property can be calculated from the tax stamps on the deed. Appraisers, developers, real estate agents, and lenders rely upon the tax stamps to evaluate the purchase price of real property. If excess tax stamps are affixed to a deed, the higher value reflected by the tax stamps may deceive third parties. For example, a developer sells a lot to a buyer for a certain purchase price but gives the buyer a credit at closing. The lawyer closing the transaction obtains tax stamps for the deed based upon the higher price recited in the purchase agreement even though the actual consideration paid by the buyer is less. To encourage sales of other lots in the development at inflated prices, the developer claims that he sold the lot for the inflated price reflected in the tax stamps.

May a lawyer who closes a real estate transaction have the register of deeds affix more tax stamps to the deed than are warranted by the actual consideration paid for the property?

Opinion #1:

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 8.4(c). Members of the public regularly rely upon the information about the price of real property that can be derived from tax stamps on recorded instruments. Therefore, a lawyer may not counsel or help a client to put excess tax stamps on an instrument when it is recorded with the register of deeds because such conduct involves dishonesty and misrepresentation. See also Rule 1.2(d) (prohibiting a lawyer from counseling a client to engage in conduct that the lawyer knows is fraudulent).

Inquiry #2:

May a lawyer draft for a client a purchase agreement for real property wherein the purchase price recited in the written agreement is greater than the actual consideration the parties have orally agreed will be exchanged at closing?

Opinion #2:

No. *See* opinion #1.

2001 Formal Ethics Opinion 14

January 18, 2002

Using CD-ROM Digital Check Images for Trust Account Records

Opinion rules that retaining a CD-ROM with digital images of trust account checks that is provided by the depository bank satisfies record-keeping requirements for trust accounts.

Inquiry:

Rule 1.15-3(a)(2) of the Revised Rules of Professional Conduct provides that a lawyer must keep minimum records for a trust account that include either original canceled checks or "printed digital images thereof furnished by the bank." C Bank, Inc. currently provides to its customers a CD-ROM that contains digital images of the fronts and backs of checks. Once downloaded to a computer, the check images can be viewed on a computer monitor and printed. There are protections against recording on or tampering with the digital images on the CD-ROM. If tampering or counterfeiting of the digital images is suspected, the images or printed copies thereof can be compared to the original check images retained by C Bank, Inc. C Bank, Inc. can provide the canceled checks to lawyers but prefers to provide the CD-ROM.

Some lawyers with trust accounts at C Bank are concerned that the CD-ROM does not satisfy Rule 1.15-3(a)(2). If a lawyer receives only the CD-ROM, is the lawyer in compliance with the record keeping requirements of Rule 1.15-3(a)(2)?

Opinion:

The CD-ROM satisfies the record keeping requirements of Rule 1.15-3(a)(2) because digital images of the checks can be retrieved from the CD-ROM and printed when necessary. (The CD-ROM also satisfies the minimum records requirements for dedicated trust accounts and fiduciary accounts set forth in Rule 1.15-3(b)(2).) *See also* G.S. §66-322(e) and G.S. §66-323.

EDITOR'S NOTE:

"RPC" denotes an ethics opinion that was adopted prior to July 24, 1997 under the superseded (1985) Rules of Professional Conduct. "FEO" denotes a "Formal Ethics Opinion" adopted after July 24, 1997 under the Revised Rules of Professional Conduct. See the editor's note before the Revised Rules, *supra*, for background on the adoption of the Revised Rules and a discussion of the effect of the adoption of the Revised Rules on ethics opinions adopted under the superseded Rules (1985).

ACADEMIC DEGREES
Advertising and solicitation, see ADVERTISING AND SOLICITATION
Doctor designation, use by lawyer with Juris Doctor degree RPC 5

ADVANCING FUNDS TO CLIENTS
See also COSTS AND EXPENSES OF REPRESENTATION
Bail bond RPC 173
Class action RPC 124
Criminal fines RPC 76
Recording costs RPC 47
Rental car, 01 FEO 7

ADVERTISING AND SOLICITATION
See also INTERNET, MAILINGS
Bankruptcy, television advertising RPC 161
"Best lawyers," characterization as in advertising for lawyer referral service RPC 135
Brochure RPC 98
Cold calls to solicit professional employment RPC 20
Comparison of size of firm RPC 20
Corporate officers or employees, soliciting professional employment from RPC 6
Departing lawyer, solicitation of clients by lawyers remaining with firm RPC 200
Directory on Internet, participating in RPC 241
Distribution of advertising material by brokerage firm RPC 98
Doctor designation, use by lawyer with Juris Doctor degree RPC 5
Dramatizations in television advertisement RPC 164, 00 FEO 6
Fees, solicitation of from third parties 98 FEO 14
Hotel hospitality suite, law firm hosting RPC 146
Intermediary used to solicit prospective client RPC 20
Internet
-advertising on RPC 239, RPC 241, 00 FEO 1, 00 FEO 3
-responding to inquiries on message board on 00FEO 3
Jury verdict record, advertising of on Web page, 00 FEO 1
Jury verdicts 99 FEO 7
Lawyer referral services, see LAWYER REFERRAL SERVICES
Legal directories, see LEGAL DIRECTORIES
Letterhead, see LETTERHEAD
Mailings
-address of lawyer required on direct mail 97 FEO 6
-incorporators of business, letter soliciting business must contain advertising disclosure RPC 242
-limitations on mailings to persons known to need legal services in a particular matter RPC 98
Newcomers listed by Chamber of Commerce, solicitation of RPC 26
Partner in partnership, soliciting professional employment from RPC 6
Prior professional relationship with prospective client RPC 98
Remote call forwarding telephone number RPC 217
Seminars on law for members of public RPC 36, RPC 98
Solicitation
-departing lawyer's clients, guidelines for lawyers remaining with firm RPC 200
-guidelines for lawyer leaving a firm RPC 98
Specialization, see SPECIALIZATION
Telephone number listing, misrepresentation of local presence RPC 217
Telephoning, free legal information, recorded telephone message from for-profit company, participation in RPC 115
Television
-bankruptcy advertisements RPC 161
-dramatizations RPC 164
-misrepresentation in ad by implying early settlement 00 FEO 6
Verdict record, advertising 00 FEO 1
Web page, see ADVERTISING, Internet

ALIMONY
Fee agreement, obtaining interest in client's support payments RPC 187
Past due alimony, collection of RPC 2

ALTERNATIVE DISPUTE RESOLUTION
Arbitration, partner as arbitrator RPC 138
Fee agreement condition, see FEE AGREEMENTS
Mandatory arbitration of fee disputes, see FEE AGREEMENTS and FEES

ARBITRATION
See ALTERNATIVE DISPUTE RESOLUTION

ATTORNEY GENERAL STAFF LAWYERS
See GOVERNMENT LAWYERS

AUTOMOBILE ACCIDENT REPRESENTATION
See INSURANCE REPRESENTATION

BANKRUPTCY PRACTICE
Advertising on television RPC 161
Corporation in bankruptcy, representation of bankruptcy estate and trustee in civil action 97 FEO 7
Disclosing confidential information about debtor's property after chapter 7 case is closed
98 FEO 20
Foreclosure, trustee on deed of trust filing motion to set aside automatic stay RPC 46
Joint representation of of spouses in Chapter 13, effect of disappearance of one spouse 00 FEO 2
Trustee on deed of trust, resignation to represent lender seeking removal of automatic stay RPC 90

BILLING
See FEE AGREEMENTS, FEES, COSTS AND EXPENSES OF REPRESENTATION

BUSINESS ACTIVITIES
See also MULTIDISCIPLINARY PRACTICE
Accounting practice and law practice combined 00 FEO 9
Financial planning services RPC 238
Financial products, sale to legal client of 01 FEO 9
Law related services RPC 238
Real estate brokerage RPC 49, RPC 201

CANDOR TOWARD TRIBUNAL
Adverse evidence, disclosure in disability hearing before Social Security administrative law judge RPC 230, 98 FEO 1
Client perjury in deposition RPC 203
Consent judgment, submission to court that includes false information 99 FEO 16
Client identity, disclosure of see DISCLOSURE OF CLIENT IDENTITY
Fee petition, attorney must disclose discounted hourly rate 01 FEO 1

CHILD SUPPORT
Contingent fees RPC 2
Fee agreement, obtaining interest in client's support payments RPC 187
Past due amounts, collection of RPC 2, RPC 155

CITY COUNCILMAN, LAWYER SERVING AS
See PUBLIC OFFICIAL, LAWYER SERVING AS

CIVILITY
See PROFESSIONALISM AND COURTESY

CLIENT FUNDS AND PROPERTY
See also FEES, FILES OF CLIENT
Abandoned funds RPC 89, RPC 149, RPC 226
Assignment of interest in settlement proceeds to finance company 00 FEO 4
Cashing check for client RPC 4
Disbursement
-of client funds without client's consent prohibited RPC 75
-of tort claim settlement upon deposit of provisionally credited funds 01 FEO 3
-to medical providers in absence of lien 01FEO 11
Files, see FILES OF CLIENT
Financing litigation 00 FEO 04
Purchasing money order for client RPC 4
Recording costs, depositing client's funds for RPC 47
Trust accounts, see TRUST ACCOUNTS

COLLECTIONS
See also FEES
Collection agency, use permitted RPC 7

COMMUNICATION WITH ADVERSE PARTIES
See also COMMUNICATIONS WITH WITNESSES
Agent of lawyer, instructing fraud investigator to interview employees of opposing party 99 FEO 10
Attorney general staff lawyer representing state on death sentence appeal, receipt of letter from defendant RPC 233
Child represented by GAL and attorney advocate RPC 249
Child who is prosecuting witness in criminal case RPC 61
Corporate legal counsel appearing in case as corporate manager RPC 128
Criminal representation
-interviewing codefendants RPC 93
-investigation by prosecution, interviewing employees of corporate target 99 FEO 10
District attorney with represented criminal defendant RPC 30
Elected officials RPC 132, RPC 202
Employees of represented opposing party RPC 67, 99 FEO 10
Former employees of represented opposing party RPC 81, 97 FEO 2
Government employees RPC 132
Guardian ad litem, communication with child represented by attorney advocate and RPC 249
Insurance litigation, see INSURANCE REPRESENTATION
Letter from represented criminal defendant, receipt by member of attorney general's staff RPC 233
Opposing parties, communications between RPC 119
Public records, communication with adverse government official who is custodian of RPC 219
Settlement negotiations, communications between opposing parties RPC 119
Undercover officer planted in jail cell of represented criminal defendant 97 FEO 10
Unrepresented adverse party, see PRO SE REPRESENTATION
Unrepresented uninsured motorist, communication with after uninsured motorist carrier has elected to defend in the name of defendant RPC 193

COMMUNICATION WITH JUDGES
Administrative and scheduling matters, ex parte communications with judge about 97 FEO 3
Attorney general staff lawyer RPC 122
Disability hearing before Social Security administrative law judge, withholding adverse evidence in RPC 230, 98 FEO 1
Elected official with adjudicatory authority RPC 132
Ex parte communications
-administrative or scheduling matter 97 FEO 3
-disclosures to judge prior to 98 FEO 12
-*ex parte* order, seeking RPC 237
-proposed order, submission to judge 97 FEO 5
-written communications 98 FEO 13

COMMUNICATION WITH JURORS
Questionnaire, sending to prospective jurors RPC 214

COMMUNICATION WITH WITNESSES
See also COMMUNICATION WITH ADVERSE PARTIES
Child molestation victim RPC 61
Employees of represented opposing party RPC 67, 99 FEO 10
Former employees of represented opposing party RPC 81, 97 FEO 2
Government employees RPC 132
Lawyer for witness, consent required RPC 87
Pathologist who performed autopsy on plaintiff's decedent RPC 184
Physician providing treatment in Workers' Compensation case RPC 224
Physician who treated opposing party RPC 162, RPC 180
Prosecuting witness in criminal action, seeking cooperation on plea agreement and settling civil claim against defendant RPC 225
Prosecuting witness in criminal case RPC 61
Subpoena containing misrepresentations RPC 236

CONFIDENTIALITY
See also DISCLOSURE (IN GENERAL)
Authorization to disclose, see DISCLOSURE (IN GENERAL)
Cellular telephone, communication of confidential information on RPC 215
Child abuse and neglect, reporting RPC 120, RPC 175
Client assets, disclosure of, see BANKRUPTCY PRACTICE
Client Identity, see DISCLOSURE OF CLIENT IDENTITY
Corporate client, disclosure of information by former in-house counsel to support wrongful discharge claim 00 FEO 11
Contagious disease of client RPC 117
Cordless telephone, communication of confidential information on RPC 215
Deceased client, disclosure of confidential information to personal representative of estate RPC 206
Driving record, withholding and disclosing information about in court 98 FEO 5
Electronic mail, communication of confidential information by RPC 215
Employee of lawyer, see EMPLOYEES OF LAWYERS
Erroneous deed benefiting client RPC 12
Estates, see ESTATES
Evidence of crime RPC 221
Fees, disclosure of information about insured's representation in bills submitted to insurer's auditor 98 FEO 10, 99 FEO 11
Former employee of lawyer, see EMPLOYEES OF LAWYERS
Fraud upon tribunal by former client 99 FEO 15
Implied authorization to disclose, see DISCLOSURE (IN GENERAL)
IRS Form 1099 disclosure RPC 23
Insured, disclosure of information about representation in bills submitted to insurer's auditor 98 FEO 10
LAP support groups 01 FEO 5
Minor client, disclosure of confidential information to parents 98 FEO 18
Mistake in closing documents RPC 12
Multiple representation RPC 153
Prospective client, duty to RPC 246
Real estate transaction, see REAL ESTATE TRANSACTIONS
Recycling waste paper RPC 133
Settlement agreement RPC 179
Spouses, receipt of confidential information from prohibits subsequent representation of spouse in domestic action RPC 32

Waste paper, disposal of RPC 133
Wrongful termination claim of former in-house counsel, disclosure of employer's information to support 00 FEO 11

CONFLICTS OF INTEREST
See also IMPUTED DISQUALIFICATION, MULTIPLE REPRESENTATION
Administrator, see PERSONAL REPRESENTATIVES OF ESTATES
Advisory committee for hospital, service on RPC 100
Attorney general staff lawyers, see GOVERNMENT LAWYERS
Bankruptcy, representation of remaining spouse in joint Chapter 13 petition after other spouse disappears 00 FEO 2
Board of trustees of nonprofit hospital, lawyer's service on, bringing suit against hospital RPC 160
Bureau of Indian Affairs, prosecutor for representing criminal defendants in state and federal court RPC 72
Business transaction with client, sale of financial products as 01 FEO 9
Disclaimer of client-lawyer relationship in advance does not prevent conflict RPC 244
District attorneys, see PROSECUTORS
Divorce, see DIVORCE
Domestic relations, see DOMESTIC RELATIONS
Escrow agreement, waiver of future conflict 99 FEO 8
Estate, see ESTATES
Estate planning, joint representation of husband and wife RPC 229
Execution sale, purchase of client's property at RPC 24
Executor, see PERSONAL REPRESENTATIVES OF ESTATES
Former clients, see FORMER CLIENTS
Former employee of opposing counsel, effect of hiring, see EMPLOYEES OF LAWYERS
Future conflicts of interest RPC 168
Government lawyers, see GOVERNMENT LAWYERS
Guardian of minor child
-child/father conflict of interest RPC 163
-lump sum settlement, representation of parents individually and as guardians RPC 109
Incompetency proceeding, representation of respondent when spouse is former client 98 FEO 16
Indemnifying liability carrier for unpaid liens of medical providers RPC 228
Insurance representation, see INSURANCE REPRESENTATION
Joint representation in bankruptcy, representation of remaining spouse after other spouse disappears 00 FEO 2
Judge as client, appearance before 97 FEO 1
Lawyer as witness, see WITNESS, LAWYER AS
Legal services lawyers, representation of adverse interests by 99 FEO 3
Minor client
-appointment of guardian, child/father conflict of interest RPC 163
-lump sum settlement, representation of parents individually and as guardians RPC 109
-representation in court approval of settlement while paid by insurer RPC 167
-representation of parent and minor child RPC 123
Payment by third party
-representation of minor in court approval of settlement while paid by insurer RPC 167
Pilot and passenger in private airplane crash, simultaneous representation RPC 28
Police organization, simultaneous representation of criminal defendants RPC 60
Prosecutors, see PROSECUTORS
Prospective client, duty of confidentiality may prevent adverse representation RPC 246
Public defenders, see PUBLIC DEFENDERS
Public official as client, appearance before public body on which client serves RPC 143
Real estate transactions, see REAL ESTATE TRANSACTIONS
Referral fees, acceptance of from investment advisor 99 FEO 1
Relatives
-married clients, pilot and passenger in private airplane crash RPC 28
-married lawyers RPC 11
Representing condominium association against unit owner RPC 97
School board, representation on criminal forfeitures RPC 54
Settlement
-multiple representation, parent and child RPC 109
Waiver of objection to future conflict RPC 168
Workers' compensation, see WORKERS' COMPENSATION

CONTINGENT FEES
Alimony, see ALIMONY
Child Support, see CHILD SUPPORT
Definition of RPC 158
Fixed amount for representation and costs, forfeiture to lawyer of amount in excess of costs RPC 149, RPC 158
Flat fee including costs and fine RPC 158
Hourly rate charge in addition to RPC 235
Medical payments insurance, contingent and sliding fees for collection of RPC 35, RPC 174
Medical insurance reimbursement and gross recovery, collecting fee on both RPC 231
Settlements, see SETTLEMENTS
Structured settlements RPC 141

CORPORATE REPRESENTATION
See also COMMUNICATION WITH ADVERSE PARTIES, COMMUNICATION WITH WITNESSES
Conflicts of interest
-representing condominium association against unit owner RPC 97
In-house counsel
-disclosure of confidential information by to support personal claim against former employer 00 FEO 11
-other clients, representation of while serving as in-house counsel RPC 9, RPC 151
Wrongful termination claim of in-house counsel 00 FEO 11

COSTS AND EXPENSES OF REPRESENTATION
See also ADVANCING FUNDS TO CLIENTS
Advancing costs
-class action RPC 124
-medical records, release to client RPC 79
- rental car 01 FEO 7
Court reporting service, selection of RPC 102
Fixed charge for representation and costs RPC 149
Litigation expenses
-advance payment of RPC 51
-financing of by client's assignment of prospective settlement proceeds 00 FEO 4
-loan to personal injury client RPC 80
Storage of file and retrieval, charging client for 98 FEO 9
Trust accounts, see TRUST ACCOUNTS

COUNTY ATTORNEYS
See GOVERNMENT LAWYERS

COUNTY COMMISSIONER, LAWYER SERVING AS
See PUBLIC OFFICIAL, LAWYER SERVING AS

COURT-APPOINTED LAWYERS
See also PUBLIC DEFENDERS
Capital case, lawyer's lack of competence RPC 199
Indigent client offers payment, responsibilities when RPC 52
Substitution of counsel RPC 58

COURTESY
See PROFESSIONALISM AND COURTESY

CREDITORS OF CLIENT
Finance company, secured interest in settlement proceeds of 00 FEO 4
Liens
-disbursement of settlement proceeds to pay RPC 125
-medical providers' liens, payment without client's consent RPC 75
- medical providers, payment in absence of lien 01 FEO 11
Settlement funds
-payment of medical providers from RPC 69
-withholding from client in absence of medical lien 01 FEO 11

CRIMINAL REPRESENTATION
See also PROSECUTORS
Calendar call, paralegal appearing for lawyer 00 FEO 10
Capital case
-court-appointed lawyer's lack of competence RPC 199
-stand-by defense counsel RPC 198
Communications by government investigators with employees of corporate target 99 FEO 10
Driving record, disclosure of 98 FEO 5
Evidence of crime, taking possession of RPC 221
Government lawyer's oversight of investigator's communications with employees of corporate target 99 FEO 10
Plea agreements
-disclosure of material terms RPC 152
-waiver of allegation of ineffective assistance of counsel RPC 129
-waiver of allegation of prosecutorial misconduct RPC 129
-waiver of appellate and post-conviction rights RPC 129
Prosecuting witness, seeking cooperation on plea agreement and settling civil claim against defendant RPC 225
Stand-by defense counsel in capital case RPC 198

DECEASED LAWYERS
Files of clients RPC 16

DISABLED CLIENT
Guardian, seeking appointment of guardian for client RPC 157
Incompetent client
--seeking appointment of guardian RPC 157
Incompetency proceeding
--representation of respondent in 98 FEO 16

DISBARRED LAWYER
Employment of 98 FEO 7

DISCHARGE OF LAWYER
Files of client, see FILES OF CLIENT

DISCLOSURE (IN GENERAL)
See also CANDOR TOWARD TRIBUNAL, CONFIDENTIALITY, DISCLOSURE OF CLIENT IDENTITY
Adverse evidence, withholding in disability hearing RPC 230, 98 FEO 1
Authorization to disclose confidential information RPC 12
Child abuse, reporting to county department of social services RPC 120, RPC 175
Client assets, disclosure of after chapter 7 bankruptcy case is closed 98 FEO 20
Contagious disease of client, reporting to public health authority RPC 117
Death of client during settlement negotiations RPC 182
Deceased client, disclosure of confidential information of RPC 206
Disability hearing, withholding adverse medical evidence, RPC 230
Driving record, disclosure of on application for limited driving privilege 98 FEO 5
Estate, confidential information of, see ESTATES
Files, material in, see FILES OF CLIENT
Fraud upon tribunal
-by former client 99 FEO 15
-in consent judgment based on false information from client 99 FEO 16
Implied authorization to disclose confidential information RPC 12
Legal malpractice, rebuttal of client's assertions in action against liability carrier that employed lawyer RPC 62
Liability carrier for lawyer, disclosure of client information to in anticipation of claim RPC 77
Minor client, disclosure of confidential information to parents 98 FEO 18
Receipt of inadvertently disclosed documents from opposing party RPC 252
Recorded conversations, see RECORDED CONVERSATIONS
Subpoena to witness RPC 236
Wrongful termination claim, disclosure of corporate information to support 00 FEO 11

DISCLOSURE OF CLIENT IDENTITY
Demand letter RPC 21
False identity, client testifying under RPC 33
Liability carrier for lawyer, disclosure of client's identity to in anticipation of claim RPC 77

DISQUALIFICATION
See also CONFLICTS OF INTEREST
Imputed disqualification, see IMPUTED DISQUALIFICATION
Instructing client to consult other lawyers to disqualify RPC 181
Multiple representation, see MULTIPLE REPRESENTATION
Prosecutors, see PROSECUTORS
Public officials, see PUBLIC OFFICIALS
Witness, lawyer as, see WITNESS, LAWYER AS

DISTRICT ATTORNEYS
See PROSECUTORS

DIVISION OF FEES BETWEEN LAWYERS
Referral Fees RPC 205
Retirement benefits RPC 13

DIVORCE
See DOMESTIC RELATIONS

DOMESTIC RELATIONS
Alimony, see ALIMONY
Child custody, see CHILD CUSTODY
Child support, see CHILD SUPPORT
Confidentiality, see CONFIDENTIALITY
Conflicts of interest
-former client, representation of spouse in action against former domestic relations client RPC 42
-partner's former firm represented opposing party RPC 45
Estate planning, joint representation of husband and wife RPC 229
Fee agreement, obtaining interest in client's support payments to secure fee RPC 187
Fee agreement, promissory note secured by interest in marital property as fee payment RPC 186
Former client
-representation of spouse in action against former domestic relations client RPC 42
Imputed disqualification, see IMPUTED DISQUALIFICATION
Income, presentation of consent judgment based on false information about received from client 99 FEO 16
Instructing client to consult with other lawyers to disqualify RPC 181
Spouses, receipt of confidential information from prohibits subsequent representation of spouse in domestic action RPC 32

DUTY TO REPORT
Ed. Note: This heading refers to the reporting of lawyer misconduct unless otherwise indicated.
Child abuse perpetrated by client to department of social services RPC 120, RPC 175
District attorney's duty to report defense lawyer RPC 30

Fraudulent general warranty deed, reporting lawyer's preparation of RPC 17
LAP support groups, no duty to report 01 FEO 5
Mental health professional, sexual impropriety, agreement not to report to appropriate licensing authority RPC 159
Release of settlement proceeds without satisfying conditions precedent RPC 127
Remedial measures by lawyer irrelevant to reporting requirement RPC 17
Settlement with lawyer prohibiting disclosure of misconduct RPC 84

EMPLOYEES OF LAWYERS
See also NONLAWYERS
Bail Bondsman RPC 1
Bonus RPC 147
Contracting with management firm to administer law office 01 FEO 2
Confidentiality, effect of hiring former employee of opposing counsel RPC 176
Depositions, role of paralegal in RPC 183
Disbarred lawyer 98 FEO 7
Division of fees, percentage bonus as RPC 147
Former employee of opposing counsel, hiring RPC 74, RPC 176
Gifts from court reporting service RPC 102
Independent contractor, using services of RPC 216, 99 FEO 6
Investigator RPC 1
Management firm, contracting with to administer law office 01 FEO 2
Negotiating with claims adjustors RPC 70
Part-time employees RPC 1
Secretary who is also real estate agent RPC 88
Supervision of
-conflicts of interest RPC 102
-independent paralegal searching real estate titles 99 FEO 6
- employee negotiating with claims adjustors RPC 70
- paralegal appearing at calendar call 00 FEO 10
-paralegal closing a residential real estate transaction 99 FEO 13, 01 FEO 4, 01 FEO 8
Title abstract services RPC 29, 99 FEO 6
Witness in litigation RPC 19, RPC 213

EMPLOYEES OF OPPOSING COUNSEL
See EMPLOYEES OF LAWYERS

ESCROW ACCOUNTS
See also TRUST ACCOUNTS
Conflict of interest absent, representation of party after resignation as escrow agent 98 FEO 11
Disbursement of escrowed funds, dispute over RPC 66
Dispute over disbursement, representation of one party pursuant to waiver of future conflict 99 FEO 8
Guidelines for maintaining RPC 66
Real estate transactions
-disbursement of escrowed funds RPC 66
Resignation as escrow agent to represent obligor or obligee 98 FEO 11

ESTATES
Administrators, see PERSONAL REPRESENTATIVES OF ESTATES
Confidential information of deceased client, disclosure to personal representative RPC 206
Confidential information, disclosure to substitute personal representative RPC 195
Conflicts of interest
-defending former personal representative against claim brought by estate RPC 137
-personal representative, representing in individual and official capacities RPC 22
-seeking to remove co-executor of an estate 99 FEO 4
Decedent's confidential information, disclosure to personal representative RPC 206
Executors, see PERSONAL REPRESENTATIVES OF ESTATES
Financial products, sale to client as part of estate plan 01 FEO 9
Identity of client, lawyer represents estate as entity and personal representative in official capacity RPC 137
Multiple representation RPC 144
Personal representatives, see PERSONAL REPRESENTATIVES OF ESTATES
Spouses, joint representation in estate planning RPC 229
Witness, lawyer as RPC 142

EX PARTE COMMUNICATIONS
See COMMUNICATIONS WITH JUDGES
See also COMMUNICATIONS WITH ADVERSE PARTIES, COMMUNICATIONS WITH WITNESSES

FAMILY LAW
See ALIMONY, CHILD SUPPORT, DOMESTIC RELATIONS

FEE AGREEMENTS
See also CONTINGENT FEES, FEES, RETAINER AGREEMENTS
Alternative dispute resolution, requiring in fee dispute RPC 107
Nonrefundable retainers, see RETAINER AGREEMENTS
Renegotiation, increase in hourly rate RPC 166
Security for fee, see FEES
Settlements, see SETTLEMENTS
Support payments of domestic client, obtaining interest in to secure legal fee RPC 187

FEES
See also COLLECTIONS, CONTINGENT FEES, DIVISION OF FEES BETWEEN LAWYERS, FEE AGREEMENTS
Acceptance of referral fee from investment advisor 99 FEO 1
Advance payment of RPC 50, RPC 158, 97 FEO 4, 00 FEO 5
Arbitration of fee dispute, purpose of mandatory requirement RPC 222
Assignment of client's judgment as payment or security for fee RPC 134
Collection of
-collection agency, use permitted RPC 7
Court petition for, disclosure of discounted legal fees in 01 FEO 1
Credit card, payment by 97 FEO 9
Division of fee with lawyer for referral RPC 148
Division of fees with nonlawyer
-percentage bonus paid to employee RPC 147
Electronic transfer, payment of fees by RPC 247
Fee agreement, see FEE AGREEMENTS
Fee dispute resolution program of the State Bar, charging for time expended to participate in 00 FEO 7
Finance charge on 98 FEO 3
Flat fees 97 FEO 4, 00 FEO 5
Insurer's billing guidelines, compliance with 98 FEO 17
Judgment, assignment of as payment for legal fee RPC 134
Medical payments insurance, prohibition on contingent and sliding fees for collection of RPC 35, RPC 174
Minor plaintiff, court approval of settlement, compensation of minor's lawyer paid by carrier RPC 167
Mixed fee based on hourly rate and contingent fee RPC 235
Nonrefundable fees RPC 158, 00 FEO 5
Nonrefundable retainers, see RETAINER FEES
Proceeds from client's medical payments insurance and gross recovery, collecting fee on both RPC 231
Recovering legal fees from opposing party RPC 196
Referral fees, see DIVISION OF FEES BETWEEN LAWYERS
Refund of
-advance fee RPC 158, 00 FEO 5
-client's appeal bond, application to fees RPC 37
-flat fee 97 FEO 4, 00 FEO 5
-prepaid fee RPC 106
Reused work product, billing for RPC 190

Security for fee
-confession of judgment RPC 222
-promissory note and deed of trust in domestic case RPC 186
Sliding fee for collecting proceeds from insured's medical payments liability insurance RPC 174
Solicitation of, from third parties 98 FEO 14
Third party payors 98 FEO 14

FILES OF CLIENT
Access to by lawyer who departs firm RPC 227
Co-party, release of file to RPC 245
Correspondence with insurance carrier, surrendering copies to insured RPC 92
Deceased lawyer's files RPC 16
Disposing of closed files, guidelines RPC 16, RPC 209
Documents, releasing original documents to client upon termination of representation RPC 169
Electronic storage of RPC 234
Guardian, release of client's file to 98 FEO 16
Medical records obtained during case evaluation, unconditional release to client upon termination of representation RPC 79
Multiple representation
-delivery of file upon termination of representation RPC 178
-delivery of information entrusted to lawyer by other client RPC 153
New lawyer hired by client, providing information to RPC 153
Original documents, delivery to client RPC 178
Photocopies of documents in file, lawyer's responsibility for cost upon termination of representation RPC 169, RPC 178
Storage of and retrieval, charging client for 98 FEO 9
Termination of representation
-delivery of file to client RPC 178
-photocopies of documents in file, lawyer's responsibility for cost upon termination of representation RPC 169
Title notes, releasing to client RPC 169, RPC 227

FORECLOSURES
Bankruptcy, see BANKRUPTCY
Trustee, lawyer as
-filing motion to set aside automatic stay in bankruptcy RPC 46
-preparing work-out agreement RPC 90
-resignation to represent lender RPC 90
-responsibilities and limitations on,
comprehensive guidelines RPC 82
-service as after representing seller RPC 3
-suing former debtor after foreclosure is complete RPC 64

FORMER CLIENTS
Ed. Note: This heading refers primarily to conflicts of interest.
See also FILES OF CLIENT
Borrower in real estate transaction, service as trustee in foreclosure against RPC 3
Escrow dispute, waiver of future conflict 99 FEO 8
Estate, defending former personal representative against claim brought by estate RPC 137
File, delivery of information entrusted to lawyer by other client RPC 153
Medical malpractice claim against RPC 27
Multiple representation, see MULTIPLE REPRESENTATION

GOVERNMENT LAWYERS
Attorney general staff lawyers
-judicial consultations prohibit representation in appeal RPC 122
-representation of adverse interests RPC 55
Board of education, representation on criminal forfeitures RPC 54
Communications with judges RPC 122
Conflicts of interest
-appellate representation of county does not prohibit suit against county on unrelated matters RPC 131
-attorney general staff lawyers RPC 55
-county attorney acting as guardian ad litem in child abuse case RPC 14
-school board, representation on criminal forfeitures RPC 54
-sheriff's department, representation prohibits representation of criminal defendants RPC 73
District attorneys, see PROSECUTORS
Imputed disqualification
-representation of sheriff's department disqualifies other members of firm from representing criminal defendants RPC 73
Law firm for county, partner's election to board of county commissioners does not disqualify RPC 130
Oversight of investigation and communications with employees of corporate target 99 FEO 10
Public officials, see PUBLIC OFFICIAL, LAWYER SERVING AS

GUARDIANS
Conflicts of interest, see CONFLICTS OF INTEREST
Disabled clients, see DISABLED CLIENTS
Incompetent client, see DISABLED CLIENTS
Minors, child/father conflict of interest RPC 163
Revealing confidential information to parents of minor client 98 FEO 18

IMPUTED DISQUALIFICATION
Attorney general staff lawyer RPC 122
Firm member's service on board of trustees of nonprofit hospital, filing suit against hospital RPC 160
Former partner jointly represented spouses, subsequent representation of spouse in domestic action RPC 32
Government lawyers, see GOVERNMENT LAWYERS
Legal services lawyers, representation of adverse interests by 99 FEO 3
Partner's former firm represented opposing party RPC 45
Partner serving as public official, see PUBLIC OFFICIAL, LAWYER SERVING AS

INCOMPETENT CLIENT
See DISABLED CLIENT

INDIGENT PERSONS
Court-appointed lawyers, see COURT-APPOINTED LAWYERS
Pro se representation, see PRO SE REPRESENTATION

IN-HOUSE COUNSEL
See CORPORATE REPRESENTATION

INSURANCE REPRESENTATION
Arbitration, in-house legal counsel for carrier, representation of insured RPC 151
Audited legal bills, disclosure of information about insured's representation in bills submitted to insurer's auditor 98 FEO 10, 99 FEO 11
Billing guidelines of insurance carrier 98 FEO 17
Communication with adverse insurance carrier RPC 39
Communication with adverse party RPC 15
Communication with defendant/insured in personal injury action prior to carrier's appointment of lawyer to represent RPC 194
Conflicts of interest
-audited legal bills 98 FEO 10
-bad faith action against insurer for failure to pay liability claim, simultaneous representation of insured and claimant RPC 207
-billing, compliance with carrier's requirements and guidelines 98 FEO 17
-demanding carrier settle within policy limits on behalf of insured RPC 91
-dismissal of insured's counterclaim RPC 103
-indemnifying liability carrier for unpaid liens of medical providers RPC 228
-in-house counsel for carrier, representation of insured and carrier

RPC 151
-insured's compulsory counterclaim, representation on RPC 172
-minor plaintiff, court approval of settlement, compensation of minor's lawyer paid by carrier RPC 167
-personal injury victim and medical insurance carrier with subrogation agreement, simultaneous representation RPC 170
-plaintiff's offer to limit insured's liability in exchange for admission of liability RPC 112
-plaintiff's offer to limit insured's liability in exchange for consent to amend complaint RPC 111
-suing insured while defending other persons insured by same carrier RPC 56
-underinsured motorist carrier, representation of carrier in name of underinsured motorist RPC 110
-underinsured motorist carrier, representation of insured, carrier, and same carrier relative to underinsured motorist coverage carried by plaintiff RPC 177
-uninsured motorist carrier, representation of insured, carrier, and same carrier relative to uninsured motorist coverage carried by plaintiff RPC 154
Correspondence with carrier, surrendering copies to insured RPC 92
Declaratory judgment action
-representation of carrier and insured as coplaintiffs RPC 59, RPC 151
-representation of insured during pendency of carrier's declaratory judgment action against insured RPC 140
Duty to insured RPC 92
Fees
-contingent and sliding fees for collecting proceeds from insured's medical payments liability insurance RPC 35, RPC 174
-disclosure of information about insured's representation in bills submitted to insurer's auditor 98 FEO 10, 99 FEO 11
Interpleader, in-house legal counsel for carrier filing action for allocation of settlement proceeds RPC 151
Medical payments insurance,
-prohibition on contingent and sliding fees for collection of RPC 35, RPC 174
-proceeds from policy and gross
recovery, collecting fee on both RPC 231
Minor, representation of in court approval of settlement RPC 167
Multiple representation
-in-house legal counsel for carrier, representation of insured and carrier RPC 151
-representation of carrier and insured in declaratory judgment action RPC 59
-representation of insured, carrier, and same carrier relative to underinsured motorist coverage carried by plaintiff RPC 177
-representation of insured, carrier, and same carrier relative to uninsured motorist coverage carried by plaintiff RPC 154, RPC 177
-representation of insured during pendency of carrier's declaratory judgment action against insured RPC 140
-representation of personal injury victim and medical insurance carrier with subrogation agreement RPC 170
Subrogation claim, in-house legal counsel for carrier, representation of carrier and insured RPC 151
Uncooperative insured, following carrier's instructions while representing 99 FEO 14
Uninsured and underinsured motorist coverage
-communication with represented defendant by lawyer for underinsured motorist carrier RPC 110
-communication with unrepresented defendant after uninsured motorist carrier has elected to defend in the name of defendant RPC 193
-in-house legal counsel for carrier, appearing as attorney for uninsured motorist to defend UIM claim RPC 151
-representation of insured, carrier, and same carrier relative to uninsured motorist coverage carried by plaintiff RPC 154
-underinsured motorist, UIM action pending, withdrawal of lawyer appointed by motorist's liability carrier upon payment of policy limits RPC 156
-uninsured motorist, withdrawal from representation of RPC 8
Waiver of affirmative defense by insured, insured's consent required RPC 118

INTERNET
See also ADVERTISING AND SOLICITATION
Advertising RPC 239, RPC 241, 00 FEO 1, 00 FEO 3
Directory of lawyers, participating in RPC 241
Jury verdict record, advertising on Web page 00 FEO 1

INVESTIGATORS
See also EMPLOYEES OF LAWYERS
Hiring bail-bondsman as part-time investigator RPC 1

JUDGES
See also, COMMUNICATIONS WITH JUDGES
Client, appearance before judge who is 97 FEO 1

JURORS
Questionnaire, sending to prospective jurors RPC 214

LAW FIRMS
See also MULTIDISCIPLINARY PRACTICE, PARTNERSHIPS, PROFESSIONAL CORPORATIONS
Advertising or holding out as RPC 116
Bona fide law firm, holding out as practicing in RPC 116
Disqualification imputed to members, see IMPUTED DISQUALIFICATION
Dissolution, responsibilities of lawyers upon RPC 48
Management firm, contracting with to administer law office 01 FEO 2
Name of firm
-retired lawyers, see RETIRED LAWYERS
Sale of 98 FEO 6
Sharing office space and expenses, question of bona fide partnership RPC 116

LAW RELATED SERVICES
Rules of Professional Conduct govern lawyer's conduct with respect to provision of RPC 238

LAWYER AS WITNESS
See WITNESS, LAWYER AS

LAWYER CLIENT RELATIONSHIP
Client's decision-making authority
-exclusive authority to settle RPC 145
-plaintiff's offer to limit insured's liability in exchange for consent to amend complaint RPC 111
-settlement funds, disbursement of RPC 125
"Covering" a court proceeding as a favor to another lawyer, client-lawyer relationship arising from 99 FEO 12
Disclaimer of, communications via internet message board requires 00 FEO 3
Execution of adoption pleadings prepared by another as accommodation for social service agency RPC 139
Financial institutions RPC 121
Incompetent client, see DISABLED CLIENTS
Limiting objectives of representation RPC 240
Waiver of affirmative defense, client's consent required RPC 118

LAWYER REFERRAL SERVICES
Advertising
-characterization of participating lawyers as the "best" RPC 135
-requirements RPC 135
Participation

-in general RPC 10
-more than one lawyer required RPC 94

LEGAL AID AGENCIES
See also INDIGENT PERSONS
Pro se representation, see PRO SE REPRESENTATION
Representation of adverse interests by lawyers with Legal Services of NC 99 FEO 3

LEGAL ASSISTANTS
See EMPLOYEES OF LAWYERS

LEGAL DIRECTORIES
Internet directory RPC 241
Out-of-state lawyers working in North Carolina law firm RPC 68

LIENS
See CREDITORS OF CLIENT

LETTERHEAD
"Corresponding lawyer," listing out-of-state lawyer as RPC 31
Nonlawyers RPC 126
Out-of-state lawyers RPC 25

LIMITED REPRESENTATION
"Covering" a court proceeding as a favor to another lawyer, client-lawyer relationship arising from 99 FEO 12
Disclaimer of client-lawyer relationship in advance RPC 244
Property damage claim, declining to represent plaintiff although representing plaintiff on related personal injury claim RPC 240

LOANS
See also ADVANCING FUNDS TO CLIENTS
Costs and expenses of litigation, see COSTS AND EXPENSES OF REPRESENTATION
Personal injury client, lending money to RPC 80

MAILINGS
See also ADVERTISING AND SOLICITATION
Incorporators of business, letter soliciting representation must contain advertising disclosure RPC 242
Newcomers on list of Chamber of Commerce RPC 26

MEDIATION
See ALTERNATIVE DISPUTE RESOLUTION

MEDICAL EXPENSES
See CREDITORS OF CLIENT

MISCONDUCT
Affixing excess tax stamps on recorded deed 01 FEO 12
Duty to report misconduct of lawyer, see DUTY TO REPORT
Notary public, compliance with applicable laws when acting as 00 FEO 8
Obtaining medical records 99 FEO 2
Subpoena, misuse of RPC 236
Threats involving the criminal justice system 98 FEO 19

MULTIDISCIPLINARY PRACTICE
See also BUSINESS ACTIVITIES, LAW FIRMS
Accounting and legal services offered by same firm 00 FEO 9
Financial products, sale to legal client 01 FEO 9

MULTIPLE REPRESENTATION
Bankruptcy, joint representation of husband and wife in Chapter 13 00 FEO 2
Claimants in personal injury case RPC 251
Confidentiality
-disclosure of information entrusted to lawyer by other client RPC 153
Estate matters, see ESTATES
File of client, delivery upon termination of representation RPC 178
Insurance representation, see INSURANCE REPRESENTATION
Parent and child RPC 109, RPC 123
Real estate transactions, see REAL ESTATE TRANSACTIONS
Spouses for estate planning RPC 229
Workers' compensation death benefits, representing multiple claimants for 01 FEO 6

NONLAWYERS
See also EMPLOYEES OF LAWYERS
Hiring bail-bondsman as part-time investigator RPC 1
Independent title abstractor, using services of RPC 216
Paralegal,
- appearing at calendar call for lawyer 00 FEO 10
- supervision of residential real estate closing by 99 FEO 13, 01 FEO 4, 01 FEO 8
Letterhead, see LETTERHEAD
Prosecutor's administrative assistant, supervision of plea negotiations by RPC 152
Real estate closing, paralegal's role in 99 FEO 13
Social service agency, execution of adoption papers as accommodation for RPC 139
Supervision of an independent paralegal 99 FEO 6

NOTARY PUBLIC
Lawyer as
-notarizing documents in proceedings in which lawyer appears RPC 136
-compliance with applicable laws 00 FEO 8

OF COUNSEL DESIGNATION
Guidelines for designation RPC 34, RPC 85
Out-of-state lawyer RPC 25, RPC 34
Out-of-town lawyer RPC 85

OUT-OF-STATE LAWYERS
Legal directory listing, see LEGAL DIRECTORIES
Letterhead, see LETTERHEAD

PARALEGALS
See EMPLOYEES OF LAWYERS

PARTNERSHIPS
See also LAW FIRMS
Advertising or holding out as RPC 116
Sharing office space and expenses RPC 116

PAYMENT
See FEE AGREEMENTS, FEES

PERJURY
Client perjury in deposition, response to RPC 203
Criminal representation
-false identity, client testifying under RPC 33
Disclosure of client's criminal record RPC 33
Driving record, withholding information about 98 FEO 5

PERSONAL INJURY REPRESENTATION
Advancing funds to client, see ADVANCING FUNDS TO CLIENTS
Automobile accident representation, see INSURANCE REPRESENTATION
Communications with adverse parties, see COMMUNICATIONS WITH ADVERSE PARTIES
Communications with witnesses, see COMMUNICATIONS WITH WITNESSES
Contingent fees, see CONTINGENT FEES
Disbursement of settlement funds
-upon deposit of funds provisionally credited to trust account 01 FEO 3

-see also CREDITORS OF CLIENT
Insurance representation, see INSURANCE REPRESENTATION
Medical records, obtaining by subpoena 99 FEO 2
Multiple representation, see MULTIPLE REPRESENTATION

PERSONAL REPRESENTATIVES OF ESTATES
Confidential information, disclosure to substitute personal representative RPC 195
Conflicts of interest
-co-executor, seeking to remove 99 FEO 4
-former personal representative, defending against claim brought by estate formerly represented by lawyer RPC 137
-personal representative, representing in individual and official capacities RPC 22

PHYSICIANS
See also CREDITORS OF CLIENT

PREPAID LEGAL SERVICES
Disclosure in fee petition 01 FEO 1
Participation in
-plan owned by member of lawyer's family RPC 71
Solicitation RPC 71

PROFESSIONAL CORPORATIONS
See LAW FIRMS

PROFESSIONALISM AND COURTESY
Calendar call, responsibility to lawyer who fails to appear RPC 208
Default, notifying opposing lawyer prior to obtaining an entry of RPC 212
Receipt of inadvertently disclosed documents from opposing party RPC 252
Recording conversation with opposing counsel RPC 171

PROSECUTORS
See also CRIMINAL REPRESENTATION
Communication with unrepresented person charged with a traffic infraction RPC 189
Conflicts of interest
-school board, service on RPC 95
Dismissal of charges against incarcerated person, duty to notify appropriate authorities RPC 197
Investigation oversight, communication with employees of corporate target during 99 FEO 10
Nonlawyer assistant, see NONLAWYERS
Plea agreement and negotiation
-charitable contribution as condition of RPC 204
-disclosure of material terms RPC 152
-waiver of allegation of prosecutorial misconduct RPC 129
-waiver of appellate and post-conviction rights RPC 129
Scheduling cases, using discretion of prosecutor to coerce a plea agreement RPC 243
Undercover officer planted in jail cell of represented criminal defendant 97 FEO 10

PRO SE REPRESENTATION
Communications with unrepresented prospective defendant in personal injury action RPC 194
Confession of judgment, preparation for unrepresented adverse party RPC 165
Indigent persons, assistance from legal aid agency RPC 114
Prosecutor, communication with unrepresented person charged with traffic infraction RPC 189
Stand-by defense counsel in capital case, duties of RPC 198
Uninsured motorist, communication with after uninsured motorist carrier has elected to defend in name of defendant RPC 193
Unrepresented insured, communication with to present settlement demands RPC 15
Unrepresented prospective defendant in personal injury action, communications with RPC 194

PUBLIC DEFENDERS
Conflicts of interest
-codefendants RPC 65
-school board, service on RPC 105
Funds of client RPC 4
Multiple representation RPC 65

PUBLIC OFFICIAL, LAWYER SERVING AS
Conflicts of interest
-partner's suit against governing body upon which lawyer serves RPC 53
-suing nonprofit hospital when partner serves on board of trustees RPC 160
Defense of criminal defendants while serving as county commissioner RPC 63
District attorney, see PROSECUTORS
Disqualification of lawyer/commissioner from representation of criminal defendants RPC 73
Election to county board of commissioners of partner of firm that represents county, effect RPC 130
Government employee, lawyer as, see GOVERNMENT LAWYERS
Imputed disqualification
-defense of criminal defendants while partner is serving as county commissioner RPC 63, RPC 73
Prosecutor, see PROSECUTORS
School board, representation of while serving as county commissioner RPC 63

PUBLICITY, TRIAL
Civil trial 98 FEO 4

REAL ESTATE TRANSACTIONS
Affixing excess tax stamps on recorded deed 01 FEO 12
Approved attorney lists of lenders RPC 57
Brokerage owned by lawyers RPC 49
Closings
-disbursements against provisional credit RPC 191
-disbursements, following lender's instructions RPC 44
-mortgage brokerage owned by lawyers, closing transactions brokered by RPC 248
- presence of attorney 99 FEO 13, 01 FEO 4, 01 FEO 8
-recording before disbursement upon lender's instructions RPC 44
-recording costs, payment for deposited in trust account RPC 47
-supervising paralegal 99 FEO 13, 01 FEO 4, 01 FEO 8
-upon deposit of loan check that lender's agreement purports to make certified RPC 232
-witness closings 98 FEO 8
Conditional delivery of trust account checks to real estate agent before depositing loan proceeds and recording RPC 44, RPC 78
Confidentiality, client's lien affidavit RPC 113
Conflicts of interest
-borrower and lender, representation of both in residential transaction RPC 210
-borrower's lawyer rendering opinion to lender RPC 101, RPC 121, RPC 210
-buyer and developer, representation of both in residential transaction 97 FEO 8
-buyer and seller, representation of both in residential transaction RPC 210, 97 FEO 8
-closing transaction brokered by agency with which lawyer is a realtor RPC 201
-closing transaction brokered by relative of closing lawyer RPC 188
-closing transaction brokered by secretary who is also real estate agent RPC 88

-developer who is regular client, representation of buyer in residential transaction 97 FEO 8
-mortgage brokerage owned by lawyers, closing transactions brokered by RPC 248
-real estate brokerage owned by lawyers, closing transactions brokered by RPC 49
-rendering title opinion to title insurance company when lawyer owns stock in title insurance agency RPC 185
-rendering title opinion upon property in which lawyer has a beneficial interest RPC 83
Deed of trust, obtaining cancellation from lender after payoff 99 FEO 5
Disbursement against provisional credit to trust account RPC 86, RPC 191
Disbursement of closing funds after buyer instructs not to disburse 99 FEO 9
Earnest money, receipt prior to closing RPC 86
Escrow accounts, see ESCROW ACCOUNTS
Foreclosures, see FORECLOSURES
HUD Settlement Statement, misrepresentation of disbursements on RPC 86
Independent title abstractor, using services of RPC 216
In-house counsel to lender, preparation of closing documents by RPC 40
Lender, exclusive representation of RPC 40, RPC 41
Lender's preparation of closing documents RPC 41
Mortgage brokerage owned by lawyers, representation as closing agent or to certify title prohibited RPC 248
Paralegal, supervising in residential closing 99 FEO 13
Obtaining canceled deed of trust following residential real estate closing 99 FEO 5
Provisional credit to trust account upon deposit of lender check, disbursement against RPC 86, RPC 191
Realtor/lawyer, closing transactions brokered by agency with which lawyer is a realtor RPC 201
Secretary who is also real estate agent RPC 88
Seller, closing lawyer's representation of and receipt of fee from RPC 86
Tax stamps, affixing excess stamps on recorded deed 01 FEO 12
Title agency, ownership of 99 FEO 6
Title notes
-access to by lawyer who departs firm RPC 227
-releasing to client RPC 169, RPC 227
Title search
-tacking onto existing title insurance policy RPC 99
-title abstract service RPC 29
Trust account, disbursement against provisional credit to RPC 86, RPC 191

RECORDED CONVERSATIONS
Illegal tape recording, use in trial RPC 192, RPC 220
Opposing counsel, recording conversation with RPC 171

RESTRICTIVE COVENANTS
Employment agreement restricting right to practice 01 FEO 10
Settlement agreement conditioned upon restriction on lawyer's representation of similarly situated claimants RPC 179

RETAINER AGREEMENTS
See RETAINER FEES

RETAINER FEES
Nonrefundable retainers RPC 50, RPC 158, 97 FEO 4, 00 FEO 5

RETIRED LAWYERS
Division of fees with, see DIVISION OF FEES BETWEEN LAWYERS
Name of firm RPC 13
Restricting practice, agreement with RPC 12

SECRETARIES
See EMPLOYEES OF LAWYERS

SERVICE OF PROCESS
Evade, advising a client to 98 FEO 2

SETTLEMENTS
Client's exclusive authority to settle RPC 145
Conditions imposed upon
-agreement not to report sexual misconduct of mental health professional to licensing authorities RPC 159
-conditional delivery of settlement proceeds, lawyer's duty upon receipt of proceeds RPC 127
-employment agreement with lawyer, lawyer's approval of client's settlement RPC 145
-restriction on lawyer's representation of similarly situated claimants against opposing party RPC 179
-settlement with lawyer prohibiting disclosure of lawyer's misconduct RPC 84
Conflicts of interest
-minor plaintiff, court approval of settlement, compensation of minor's lawyer paid by carrier RPC 167
Contingent fee, structured settlement RPC 141
Creditors of client, see CREDITORS OF CLIENT
Decision-making authority of client, disbursement of settlement proceeds RPC 125
Disbursing proceeds
- as directed by client RPC 69
-upon deposit of funds provisionally credited to trust account 01 FEO 3
-see also, CREDITORS OF CLIENT
Disclosure of client's death during negotiations RPC 182
Lien, withholding settlement proceeds to pay RPC 69, RPC 125
Lump sum settlement, representation of parent and child RPC 109
Medical providers' liens, payment of RPC 69, RPC 125
Misconduct, duty to report
-agreement not to report sexual misconduct of mental health professional to licensing authorities RPC 159
-check disbursement in violation of agreement RPC 127
Negotiation of, communication with adverse party, see COMMUNICATIONS WITH ADVERSE PARTIES
Sealing settlement agreement involving municipality, cooperation of plaintiff's attorney RPC 179
Structured settlement, contingent fee RPC 141
Threats involving the criminal justice system 98 FEO 19

SOLICITATION
See ADVERTISING AND SOLICITATION

SPECIALIZATION
Advertising specialty RPC 43
Designation of RPC 43

TEMPORARY LAWYERS
Contracting with lawyers from independent placement service RPC 38
Leasing lawyers from nonlawyer company RPC 104

TRIAL CONDUCT AND PRACTICE
Calendar call,
-paralegal appearing for lawyer at 00 FEO 10
- responsibility to opposing lawyer who fails to appear RPC 208
Default, notifying opposing lawyer prior to obtaining an entry of RPC 212
Frivolous claim, resisting incompetency petition as 98 FEO 16
Judge who is client, appearance before 97 FEO 1
Obtaining medical records 99 FEO 2
Offensive tactics, avoiding at calendar call RPC 208
Publicity in civil trial 98 FEO 4
Subpoena process, misuse of RPC 236, 99 FEO 2
Threats involving criminal justice system 98 FEO 19

TRUST ACCOUNTS
See also CLIENT FUNDS AND PROPERTY, ESCROW ACCOUNTS
Abandoned funds RPC 89, RPC 149, RPC 226
Advance payments deposited in trust account
-fees RPC 50, RPC 158
-litigation costs RPC 51
-recording costs RPC 47
Bank, selection of and Y2K considerations 98 FEO 15
Business account, linking for purpose of determining interest or service charges RPC 150
Cashing check for client RPC 4
Chargebacks from credit card payments, protection against 97 FEO 9
Client's funds for costs, depositing in RPC 47, RPC 51
Commingling by bank for interest accrual or service charge assessment RPC 150
Conditional delivery of trust account checks before depositing loan proceeds RPC 78
Costs, deposited in RPC 158
Credit card, accepting fees paid by 97 FEO 9
Digital records for 01 FEO 14
Escheat of abandoned funds RPC 89, RPC 149
Nonrefundable retainer fees RPC 50
Out-of-state trust accounts RPC 96
Provisional credit, disbursement against RPC 86, RPC 191, FEO 3
Purchasing money order for client RPC 4
Real estate closing, disbursement against provisional credit RPC 191
Records
-documenting the handling of trust funds RPC 86
-retaining CD-ROM with digital images of trust account checks 01 FEO 14
Selecting a bank, Y2K considerations 98 FEO 15
Settlement funds, disbursement without consent of client prohibited RPC 75

TRUSTEES
See also FORECLOSURE
Foreclosure, lawyer as trustee, see FORECLOSURES

UNAUTHORIZED PRACTICE OF LAW
Disbarred lawyer, employment in law office 98 FEO 7
Insurance company, representation of insured and others by lawyer who is employee of, guidelines RPC 151
Paralegal
- appearing at calendar call for lawyer 00 FEO 10
- closing residential real estate transaction for lawyer 99 FEO 13, 01 FEO 4, 01 FEO 8
Real estate closing, participation in when title prepared by another 98 FEO 8

UNDERINSURED MOTORIST
See INSURANCE REPRESENTATION

UNINSURED MOTORIST
See INSURANCE REPRESENTATION

WEB PAGE
See ADVERTISING AND SOLICITATION

WITHDRAWAL FROM REPRESENTATION
Client's disappearance, withdrawal upon RPC 223
Uninsured motorist represented by lawyer retained by insurance carrier RPC 8

WITNESSES
See COMMUNICATIONS WITH WITNESSES

WITNESS, LAWYER AS
Employee of lawyer as witness, see EMPLOYEES OF LAWYERS
Estate matters RPC 142
Opposing party, witness for RPC 207
Withdrawal, in criminal case RPC 221

WORKERS' COMPENSATION
Communications with adverse party RPC 67
Communication with treating physician RPC 224
In-house legal counsel for carrier, representation of carrier and insured RPC 151
Multiple representation of claims for death benefits 01 FEO 6

Everything You Always Wanted to Know About Trust Accounting, But Were Afraid to Ask

Trust Accounts - What Are They and How Many Do You Need?

(Questions 1-5)

1. What is a trust account?

A trust account is a bank account maintained incident to a lawyer's law practice in which the lawyer holds funds received in a fiduciary capacity on behalf of or belonging to a client. Rule 1.15-1(1).

2. Who must have a trust account?

Any lawyer who receives funds in a fiduciary capacity in the context of his or her law practice must have access to or maintain a trust account. The lawyer must have access to or establish a trust account before receiving such funds. Rule 1.15-2(a), (b), and (c).

3. Are there restrictions concerning the kinds of institutions where trust accounts may be maintained?

Yes. Trust accounts may only be maintained at federally or North Carolina chartered banks, savings and loan associations, or credit unions. Unless the client specifically provides written direction to the contrary, the bank at which a trust account is maintained must be in North Carolina. With the written consent of the client, a trust account dedicated to only one client's funds (see Rule 1.15-1(c)) may be maintained at a bank outside of North Carolina or at a financial institution other than a bank inside or outside of North Carolina. Rule 1.15-2(e).

4. How many trust accounts does a lawyer need?

Generally speaking, a lawyer needs only one trust account to handle monies received in trust which are either nominal in amount or held for a short period of time. Within this common account, the funds of many clients may be commingled so long as adequate records are kept to identify the funds of each client. Rule 1.15-2.

5. Does each lawyer in a firm need a separate trust account?

No. Each lawyer in a firm may ethically use a common account so long as adequate records are maintained. However, multiple accounts are permissible. A lawyer may personally maintain several trust accounts if he or she desires. Rule 1.15-2.

May a Trust Account Bear Interest?

(Questions 6-9)

6. What sort of bank account must be maintained?

Since a lawyer has an ethical obligation to pay or deliver client funds promptly as instructed by the client, trust accounts are generally demand accounts with check writing privileges. Because trust funds are typically nominal in amount or held for only a short period of time, there is no general requirement that the trust account be interest-bearing. Rule 1.15-2(m).

7. Does a lawyer ever have an obligation to maintain an interest-bearing trust account?

Yes. If, because of the size of the deposit or the length of time the deposited funds are to be held, a prudent person acting in a fiduciary capacity would be expected to invest the funds, a lawyer receiving money under such circumstances would have a corresponding obligation to deposit the funds in an interest-bearing account. Such an account is called a "dedicated trust account." Rule 1.15-1(c). The dedicated trust account in which such funds are deposited should be separate from the lawyer's general trust account. Any interest generated would be the property of the client. Rule 1.15-2(p).

8. What sort of account should a lawyer serving as a personal representative maintain?

A lawyer who is serving as trustee, guardian, attorney in fact, or personal representative should usually maintain a separate, specially denominated account called a "fiduciary account." Rule 1.15-1(e). Generally speaking, a fiduciary account should be interest-bearing since the deposited funds are generally held in trust for significant periods of time. Rule 1.15-2(c), (p).

9. Is it ever appropriate for a lawyer to use an interest-bearing trust account as his or her general trust account?

Yes. Lawyers wishing to participate in the State Bar's IOLTA program may maintain general trust funds in interest-bearing checking accounts. The interest earned on such accounts is remitted by the depository bank directly to the IOLTA Board of Trustees, which subsequently distributes the funds in the form of grants to persons or entities for various public purposes in accordance with the rules of the IOLTA program. Rules 1.15-2(p) and 1.15-4.

How Do You Label a Trust Account?

(Question 10)

10. How should a trust account be identified?

A trust account must be clearly labeled and designated as a "trust account," and all checks drawn on the account must be so identified. For instance, an appropriate title for the account might be "The Trust Account of John Smith" or "Smith, Jones & Williams Trust Account." An example of a properly labeled trust account check is found in Appendix Item E. Each account in which funds are held by a lawyer pursuant to the lawyer's service as a trustee, guardian, personal representative, attorney in fact, or escrow agent must be appropriately labeled as a fiduciary account unless such funds are held in a trust account. Rule 1.15-1(c), (e), (h), (l).

What Goes in the Trust Account?

(Questions 11-14)

11. How does a lawyer know what funds should be deposited in the trust account?

The general rule is that every receipt of money from a client or for a client which will be used or delivered on the client's behalf should be placed in the trust account or a fiduciary account if the funds are received by a lawyer while serving as a professional fiduciary. This includes funds received by the lawyer as an escrow agent. Rule 1.15-2(b) and (c), and Comment following Rule 1.15-3.

12. What about funds received by the lawyer as a fiduciary outside the context of his or her law practice?

The trust account rules are not applicable in cases where the lawyer handles money for a business, religious, civic, or charitable organization as an officer, employee, or other official of that organization. The lawyer's only professional obligation regarding such funds is to deal honestly. Rule 1.15-1(d) and (m); Rule 1.15-2(c). Comment following Rule 1.15-3.

13. What about funds received by a lawyer acting as a court-appointed fiduciary or pursuant to appointment in some specific trust instrument?

A lawyer serving in such a fiduciary role must segregate fiduciary property from his or her personal property, maintain the minimum financial records required for a fiduciary account, and instruct any financial institution in which fiduciary property is held to notify the North Carolina State Bar of any negotiable instruments drawn on the account which are presented for payment against insufficient funds. Rules 1.15-1(e) and (f); Rule 1.15-2(c),(e),(f),(k); Rule 1.15-3.

14. Is it appropriate to deposit items other than cash or cash equivalents

in the trust account?

Generally speaking, any negotiable instrument may be deposited in a trust account whether or not it represents collected funds. Unless specifically permitted by law, the Rules of Professional Conduct or definitive interpretations thereof, no withdrawal should be made with respect to any deposited item until the funds represented by that item are collected. Rules 1.15-1(i) and 1.15-2(g).

What Does Not Go in the Trust Account?

(Questions 15-16)

15. May a lawyer deposit his or her own funds in a trust account?

No funds belonging to the lawyer may be deposited in the trust account except such funds as are necessary to open or maintain the account, pay service charges, and funds belonging in part to a client and in part presently or potentially to the lawyer, such as where a deposited item represents both the client's recovery and the lawyer's fee. In such a case, the portion of the funds belonging to the lawyer must be withdrawn from the trust account as soon as the lawyer becomes entitled to the funds unless the right of the lawyer to receive that portion is disputed by the client, in which event the disputed portion must remain in the trust account until the dispute is resolved. Rule 1.15-2(f).

16. Should retainers be deposited in the trust account?

Strictly speaking, no. A retainer in its truest sense is money paid to the lawyer to reserve the exclusive use of the lawyer's services for a particular time or in regard to a particular matter. Since a retainer is deemed earned when paid, it immediately becomes the property of the lawyer and as such must not be deposited in the trust account. True retainers must be distinguished from fees paid in advance which are intended to be held by the lawyer as security deposits against work which is yet to be performed. Since a lawyer has an ethical obligation to refund the unearned portion of any fee paid in advance upon discharge or withdrawal, such funds are not considered property of the lawyer and must be held in the trust account until they are earned. Rule 1.15-2(a); Comment following Rule 1.15-3; and Rule 1.16(d).

What Records Are Required?

(Questions 17-22)

17. What are the minimum record keeping requirements for trust and fiduciary accounts maintained at a bank?

Any attorney maintaining a trust account or a fiduciary account at a bank must keep the following records:

1. A record of receipts. This can be a journal, file of receipts, file of deposit slips, or a collection of checkbook stubs. The record of receipts must list the source, client, and date of the receipt of all deposited funds. Rule 1.15-3(a)(1). Examples of properly composed deposit slips are appended as Appendix Items A and B.
2. All canceled instruments drawn on the account or printed digital images thereof. Rule 1.15-3(a)(2).
3. All instructions or authorizations to transfer, disburse, or withdraw funds from the account. Rule 1.15-2(a)(3).
4. All bank statements or documents received from the bank regarding the account. Rule 1.15-3(a)(4).
5. For a general trust account, a ledger containing a record for each person or entity from whom or for whom funds were received which shall accurately maintain the current balance of funds held for that person or entity. Rule 1.15-3(a)(5). See Appendix Items C and D.
6. All records required by law. Rule 1.15-3(a)(6).

18. What are the minimum record keeping requirements for a dedicated trust account or a fiduciary account maintained at a financial institution other than a bank?

1. A record of all depository receipts or deposit slips for the account listing the source and date of receipt. Rule 1.15-3(b)(1).
2. A copy of all cancelled instruments drawn on the account or printed digital images of such instruments. Rule 1.15-3(b)(2).
3. All instructions or authorizations to transfer, disburse, or withdraw funds from the account. Rule 1.15-3(b)(3).
4. All statements or documents received from the financial institution regarding the account. Rule 1.15-3(b)(4).
5. All records required by law. Rule 1.15-3(b)(5).

19. How does this work in practice?

It can be very simple. For a trust account maintained at a bank, all that is really required is a checkbook, a ledger card for each client, and a file for correspondence from the bank. When properly maintained, all the information required for deposits and disbursements can be recorded on the checkbook stub. The only other record that must be generated by the lawyer is a ledger card for each client describing each transaction involving the client's funds and carrying a running balance. Rule 1.15-3(a).

20. How long must these records be kept?

A lawyer must retain trust account and fiduciary account records for a period of six years following the completion of the transactions which generated the records. Rule 1.15-3(f).

21. Can trust account and fiduciary account records be kept on computer?

Yes, if the records are retrievable in hard copy or in digital form for the required six-year period. Rule 1.15-3(f).

22. How often must the records for a general trust account be reconciled?

A lawyer must reconcile the general trust account balance at least quarterly with the statements provided by the bank. At a minimum, this is intended to ensure that the running balances kept for each client equal the total funds on deposit, exclusive of funds belonging to the lawyer, which have been properly deposited in the account. Rule 1.15-3(c). Examples of trust account reconciliation formats are attached as Appendix Items F and G.

What Disbursements Are Appropriate?

(Questions 23-28)

23. May a lawyer unilaterally decide to use funds held in trust to pay his or her legal fees or the claims of other creditors?

As the client's agent and fiduciary, the lawyer has an obligation to pay or deliver the funds in accordance with the client's most recent instructions. Unless the lawyer is authorized by the client to pay a particular charge or claim, the lawyer may not disburse trust funds for those purposes. Rule 1.15-2(m).

24. What if the lawyer has an interest in funds received in settlement of a claim or in satisfaction of a judgment?

All receipts of trust funds must be deposited into the trust account intact. If an instrument represents funds belonging in part to the client and in part to the lawyer, the portion belonging to the lawyer must be withdrawn when the lawyer becomes entitled to the funds unless the right of the lawyer to receive the portion of the funds is disputed by the client. In that case the disputed portion must remain in the trust account until the dispute is resolved. Rules 1.15-2(f)(2) and (g).

25. What happens if a client directs a lawyer not to pay medical bills incident to the settlement of a tort claim?

Generally, the lawyer must follow the client's most recent directions. Unless the health care provider in question has perfected a statutory lien against the funds in the hands of the lawyer, the lawyer must handle the settlement proceeds as directed by the client. RPC 75. *But see* 01 FEO 11.

26. Is it ever proper for a lawyer to make disbursements from the trust account with respect to funds represented by a deposited instrument which has not yet been collected?

Prior to the adoption of RPC 191 in October 1995, a lawyer was permitted to issue trust account checks against funds which, although uncollected, were provisionally credited to the lawyer's trust account by the financial institution in which the trust account was maintained. RPC 191 still

allows lawyers to disburse provisionally credited but uncollected funds from the trust account, but only in consequence of trust account deposits in the form of cash, wired funds, or certain types of negotiable instruments specified in the Good Funds Settlement Act, G.S. 45A. It is further provided that disbursements against such provisionally credited funds should be made only where the lawyer reasonably believes that the underlying deposited instrument is virtually certain to be honored when presented for collection, and the lawyer has sufficient assets or credit to fund any outstanding trust account checks issued in regard to a provisionally credited item which may be dishonored.

27. What should a lawyer do if he or she properly disburses against a provisionally credited instrument which is ultimately dishonored?

RPC 191 provides that the lawyer, upon learning that a deposited instrument has been dishonored, must act immediately to protect the property of the lawyer's other clients by personally paying the amount of the failed deposit or by securing or arranging for payment from sources available to the lawyer other than the trust funds of other clients. A lawyer should take care not to disburse against uncollected funds in situations where the lawyer's assets or credit would be insufficient to fund the trust account checks in the event that a provisionally credited item is dishonored.

28. May a lawyers disburse against provisionally credited items in cases other than real estate closings?

RPC 191 specifically provides that it applies to transactions other than real estate conveyances.

What If a Trust Account Check Bounces?

(Questions 29-30)

29. What should a lawyer do if his or her trust account check bounces?

Theoretically, of course, this should never happen. As a practical matter, however, mistakes do happen and bank errors or administrative snafus within the lawyer's own office can result in an instrument's being returned for insufficient funds. If a trust account check is dishonored, the lawyer should immediately ascertain the nature of the problem and promptly correct it, even if this requires a deposit of the lawyer's own funds. Under no circumstances should the lawyer allow the trust funds of another client to be used impermissibly. Finally, the lawyer should immediately document the problem and any corrective action taken in a memorandum for his or her own files.

30. Must a report be made to the State Bar?

Every lawyer must instruct his or her bank to notify the State Bar when any check drawn on a trust account or a fiduciary account is presented for payment against insufficient funds. That being the case, a lawyer who overdraws a trust account or a fiduciary account may soon expect to be contacted by a representative of the State Bar who will informally request an explanation of the problem. Once it is verified that an innocent mistake caused the shortage or apparent shortage in the account, the inquiry will be concluded and no further action will be taken. If, however, no adequate explanation is immediately forthcoming, a grievance file will be established and a formal investigation initiated. Rule 1.15-2(k). See Appendix Item K for a copy of the bank directive form.

How Should Accountings Be Handled?

(Questions 31-33)

31. How often should a lawyer provide an accounting to a client for the client's trust funds?

An accounting must be provided to the client upon the completion of the disbursement of the client's funds and at such other times as may be reasonably requested by the client. If trust funds are retained for more than one year, the lawyer must provide annual accountings. All accountings must be in writing. Rule 1.15-3(d).

32. How often should a lawyer provide an accounting for fiduciary funds received in connection with the lawyer's service as a professional fiduciary such as a personal representative or a trustee?

Inventories and accountings of fiduciary funds received in connection with professional fiduciary services must be given to the clerk of court, or other appropriate judicial official, as required by law. If an annual or more frequent account is not required by law, a written accounting of all transactions concerning the fiduciary funds must be given to the beneficial owners, or their representative, at least annually and upon the termination of the lawyer's services. Rule 1.15-2(e).

33. Do accountings for funds in a trust account have to be in a particular form?

No. It is often possible to satisfy the accounting requirement by providing copies of documents generated during the representation, such as a settlement statement describing disbursements incident to the resolution of a tort claim or a HUD-1 statement describing the disbursement of the proceeds of sale in a real property transaction. In addition, the accounting requirement can generally be satisfied by providing the client with a copy of a properly maintained ledger card which describes all receipts and disbursements of the client's funds. An example of a client ledger card is found in Appendix Item D. Sample accounting forms are attached in Appendix Items I and J.

What Should Be Done With Unclaimed Trust Funds?

(Question 34)

34. Suppose a lawyer holds funds in a general trust account and does not know either the identity or the location of the owner of those funds. What should be done with the money?

Under such circumstances, the lawyer must first make a diligent attempt to determine the identity and location of the owner of the funds in order that an appropriate disbursement might be made. If the lawyer is unsuccessful in ascertaining the identity and location of the owner of the funds, the lawyer should consider whether the funds must be escheated to the state of North Carolina. Pending escheat, such funds should be held and accounted for in the lawyer's trust account. Rule 1.15-2(q).

Is There Help Available?

(Question 35)

35. Does the State Bar offer assistance concerning trust account maintenance?

Yes. Just call the State Bar office at 919/828-4620. If you need ethics advice, ask for Alice Neece Mine who is assistant executive director and counsel to the Ethics Committee, or Deanna Brocker, assistant ethics counsel. If you need technical support, ask for Bruno DeMolli, staff auditor. The North Carolina State Bar's Trust Account Handbook, which provides greater detail on managing a trust account, can be purchased from the Bar by calling the telephone number recited above. You can also access the handbook directly on the State Bar's web site, www.ncstatebar.org. Just click on "Trust Account Guidelines" in the menu on the home page.

Appendix A - Example of Deposit Slip for One Client

Deposits for Same Client

This deposit concerns a real estate closing.

The source of the $100.00 and $250.00 which are personal funds of client need not be further identified, although you may want to indicate money order, certified check, etc. It would also be acceptable in this example to write Client A's name across the deposit slip once and only identify the source of the $1,500 and $10,800 deposits (i.e. NCNB and Wachovia) since all deposits pertain to Client A.

PLEASE ENDORSE ALL CHECKS

DATE 6-3 19 88

CHECKS AND OTHER ITEMS ARE RECEIVED FOR DEPOSIT SUBJECT TO THE RULES AND REGULATIONS OF THIS INSTITUTION.

PLEASE LIST EACH CHECK SEPARATELY

	DOLLARS	CENTS
Client A CURRENCY	100	00
COINS		
CHECKS		
1 NCNB		
2 Client A	1,500	00
3		
4 Wachovia		
5 Client A	10,800	00
6		
7		
8 Client A	250	00
9		
10		
11		
12		
13		
14		
15		
16		
17		
FRONT SIDE TOTAL		
REVERSE SIDE TOTAL		
TOTAL DEPOSIT	12,650	00

USE REVERSE SIDE FOR ADDITIONAL LISTING OR ATTACH TAPE

BB&T

BRANCH BANKING AND TRUST COMPANY
RALEIGH NORTH CAROLINA 27611

⑆053101121⑆

TRUST ACCOUNT

Appendix B - Example of Deposit Slip for Multiple Clients

Multiple Deposits for Various Clients

The $50 and $100 deposits were personal funds of Clients B and D, respectively. The $15,000 was received on behalf of Client C's personal injury settlement. Sixty thousand dollars ($60,000) was deposited for Client E's real estate closing.

PLEASE ENDORSE ALL CHECKS

DATE 6-3 19 88

CHECKS AND OTHER ITEMS ARE RECEIVED FOR DEPOSIT SUBJECT TO THE RULES AND REGULATIONS OF THIS INSTITUTION.

DOLLARS CENTS

A cash withdrawal from a deposit into the trust account is not permitted.

Note: A lawyer may elect to create a dedicated interest bearing trust account (Revised Rule 1.15-7(c)) for those funds of a client which, in his/her good faith judgment, are other than nominal in amount or are expected to be held for other than a short period of time. Funds deposited in an interest bearing trust account must be available for withdrawal upon request and without delay.

LEDGER CARD

Source of deposit or purpose of disbursement: (Clients Name)

Trust funds received | Trust funds disbursed | Paid by attorney on behalf of client | Check # | Attorney fees | Running balance

CASE OR FILE NO.

DATE	NAME	MEMO	TRUST FUNDS RECEIVED	TRUST FUNDS DISBURSED	COSTS RECOVERED	COSTS ADVANCED	DATE BILLED	CH. REC. CASE NO.	FEES RECEIVED	FEES CHARGED	FEE BALANCE	BALANCES OWED TO ME: TRUST BALANCE	BALANCES OWED TO ME: COSTS ADVANCED BALANCE
3/3	Court Cost					30 00	1			100 00	100 00		30 00
3/9	Joe Who-deposit		500 00				2					500 00	
3/12	Will Do Good (Attorney fees/cost)			130 00			3	101			-0-	370 00	-0-
		This form of ledger card can be used					4						
		to record trust account postings as					5						
		well as advances to the client from					6						
		the OFFICE account relative to					7						
		contemplated or pending litigation.					8						
		Attorney fees can also be posted					9						
		on this form.					10						
							11						
							12						
							13						
							14						
							15						
							16						
							17						
							18						
							19						
							20						
							21						
							22						
							23						

CLIENTS LEDGER

Appendix D - Example of Ledger Card with Postings

Ledger Card

Source of Deposit or purpose of Disbursement | Check # | Amount Disbursed | Amount Deposited | Running Balance

NAME YOUR CLIENT — ACCOUNT NO.

ADDRESS — SHEET NO.

DATE	ITEMS	FOLIO	DEBITS	CREDITS	DR. OR CR.	BALANCE
Jan 3	All State Insurance Co.			2171 2 00		2171 2 00
6	What's Up Construction	101	1325 2 00			
6	Hi Motors	102	1200 00			
6	What's His Name MD	103	420 00			
6	Your Client	104	1202 69			
6	Memorial Hospital	105	4383 26			
6	Who's Furniture Co.	106	1254 05			— 0 —

Some attorneys provide a copy of the ledger card to the clients as a written accounting of the receipt and disbursement of the client's funds.

If the client comes to the office, he or she is requested to sign or initial and date the original card, or a computer hard copy, and a copy is provided to the client. Otherwise, the copy is mailed with a cover memo or letter, with a copy retained on file.

Appendix E - Example of Trust Account Check

DeMOLLI & WARREN P.A.
TRUST ACCOUNT
RALEIGH, NC 27606

122
66-25
531

July 4 2001

PAY TO THE ORDER OF XYZ Mortgage Company $ 73,091.00

Seventy-three thousand ninety-one & 00/100 DOLLARS

NCNB National Bank of North Carolina
Raleigh, NC 27601

FOR (Client's Name)

⑆053100258⑆ 0122

Rule 1.15-3(a)(2) of the Revised Rules of Professional Conduct requires that all instruments drawn on the general trust account indicate the client balance from which a payment is drawn. Therefore, any check written from the trust account must have client reference data on the check. The client's name or identification number may appear on the check stub, check register, journal, etc.; however, this information must also appear on the check. If a trust account software program or a check-writing program cannot record this reference data on the check, it should be manually recorded.

If one check is drawn to include payment of fees or cost reimbursement for more than one client the check should indicate the respective individual payments.

The purpose for the disbursement may be indicated after the client's name (i.e., fees, cost reimbursement, etc.).

Appendix F - Example of Reconciliation (Manual)

Trust Account Reconciliation

There are two steps in reconciling the trust account.

Step 1. Determine current bank balance

Bank statement dated 4/94
Bank statement balance $9,702.20
Plus monthly service charge.....0
Plus outstanding deposits 800.00
Less interest earned.....31.62
Less outstanding checks.....2,029.14
Current bank balance.....$8,441.44
Check stub/Journal balance.....$8,441.44

Step 2. Determine trust account balance by adding the current balance from each trust account ledger.

1/93 Client - A.....$4,000.00
4/93 Client - B.....89.90
5/93 Client - C.....683.10
9/93 Client - D.....277.65
1/94 Client - E.....3,300.00
Attorney funds to service account.....90.79
Trust account balance.....$8,441.44

In this example, the trust account balance and bank balance, after reconciliation, are the same. Should the trust account balance be greater than the bank balance, the difference must be immediately deposited into the trust account by the attorney/firm. If it is subsequently discovered that an accounting error was made (not an erroneous disbursement of funds) the funds initially deposited to cover the error should be withdrawn. If funds are erroneously disbursed and no deposit is made to the trust account to cover the disbursement, other clients' funds are used by the bank to cover the erroneous disbursement. This is not permitted.

Note: The date next to the client's name represents when the funds were deposited into the trust account or when the last written accounting was provided to the client. This date acts as a control to the bookkeeper in meeting 12-month written accounting requirements. If periodic billing statements are provided to the client indicating disbursements and current balance in the trust account, the 12-month period would commence at the date of the last billing. This reconciliation indicates a written annual accounting should have been provided to Clients A and B and an accounting is due Client C.

Appendix G - Example of Reconciliation (Computer)

Proofing Receipts and Disbursements Register

A. Proofing Receipts and Disbursements Register for Statement/Clear Date 08-31-94

Trust Account: THB/Real Estate Trust Date 09-2-94
Page 9
(XX) Computer Account Balance as of 08-31-94.....$230,837.28
Less Outstanding Deposits on 08-31-94.....249,109.86
Plus Outstanding checks on 08-31-94.....424,094.51

Statement Beginning Balance Should Read.....$248,596.67
Statement Ending Balance Should Read.....$405,821.93

B. The Honest Bank

08/31/94
Statement Date
1
Page No.
299 CH
Statement Period
33 Days

Commercial Now Checking Account Statement.....
Previous Statement 7-29-94, Balance of.....$ 248,596.67
26 Deposits and other Credits Totaling.....1,607,924.10
302 Checks and other Debits Totaling.....1,450,698.84
Current Balance as of Statement Date.....$405,821.93

C.

Date 09-2-94
File Balances & Ledgers With Balances As of 08-31-94
Page 1
File ID/Client-Matter/Explanation-Purpose Balance/Remind
DeMolli.....$285.00
Warren.....170,409.24
Etc. xxx,xxx,xx
(XXX) Report Total(s)/Balance.....$230,837.28

Trust Account Reconciliation/Disbursements Register

Computer software programs generated reconciliations vary by program, but will compute some form of reconciliation. Appendix G is but one form of computer generated reconciliation which indicates what the bank statement ending balance and the computer (trust) account balance should equal (Example-A).

The ending bank balance as computed by the program is verified by the bank statement (Example-B) and the account balance coincides with the total of current client balances for that date (Example-C.) When reconciling the trust account, examples A & C must be generated on the same date, otherwise the computer balance (XX) may not equal the total of client balances (XXX).

Rule 1.15-3(c) of the Revised Rules of Professional Conduct requires the trust account be reconciled quarterly. If you are unable to retrieve a hard copy of the reconciliation report at a later date, a hard copy should be printed at the time of reconciliation.

Appendix H - Depositing a Mix of Trust and Nontrust Funds

Example 1:

An attorney advises a client that a domestic matter will involve an attorney fee of $150.00, as agreed up front, a recording fee of $30.00, and a sheriff fee of $4.00, totaling $184.00.

Alternative (a): The client presents the attorney with a check for $184.00. The check is deposited into the trust account. A check for $150.00 is then disbursed to the attorney and the remaining fees are paid when required (*See* RPC-51).

Alternative (b): The client pays with two checks, one for $150.00 and another for $34.00. The $34.00 check is deposited into the trust account. The $150.00 is deposited in the firm operating account or otherwise paid to the lawyer.

Alternative (c): The client pays in cash. Thirty-four dollars ($34.00) is deposited into the trust account. The cash is deposited in the firm operating account or otherwise paid to the lawyer.

If the attorney previously advanced the recording and sheriff fees, all funds received from the client would in each instance be deposited into the office account.

If, however, a check submitted by a client contains any funds that are to be used to pay client expenses in the future, the check must be deposited into the trust account intact. Some attorneys ask the bank to split a client's check at the time of deposit (the cost portion is deposited in the trust account and the fee portion is deposited in the office account). This violates Revised Rule 1.15-2(g).

Appendix I - Example of Zero Balance Written Accounting

Attorney/Firms Name
Address
Accounting for Funds in Trust
1/10/2001

Client: Joe Whoever

Receipts

Date	Source	Amount
1/3/2001	All State Ins.	$21,712.00
Total Receipts:		$21,712.00

Disbursements:

Date	Recipient	Purpose	Amount
1/6/2001	What's Up Construction	Roof Repair	$13,252.00
1/6/2001	Hi Motors	Car Repair	$1,200.00
1/6/2001	What's His Name, MD	Medical Expenses	$4,803.26
1/6/2001	Joe Whomever	Payment	$1,202.69
1/6/2001	Who's Furniture Co.	Furniture Payment	$1,254.05
Total Disbursements:			**$21,712.00**
Balance:			**$0.00**

This accounting of the receipt and disbursement of your funds in the trust account is provided as required by the rules of the North Carolina State Bar.

(Attorney)

Note: A copy of the client's ledger may be included with a letter or memo stating: A copy of your trust account ledger is being provided indicating the receipt and disbursement of your funds in the trust account.

Appendix J - Example of Annual Written Accounting

Lawyer/Firm Letterhead

Mr./Mrs./Ms.
Address
City, State Zip

Re: Annual Accounting of Funds Held in Trust Account

Dear

I am writing to advise you that this office holds in trust the sum of _____ on your behalf. This information is being furnished to you as required by the Rules of the North Carolina State Bar.

This is a periodic accounting and no action is required on your part. However, if this report is incorrect, please contact this office immediately.

An accounting of your trust account record is available at any time.

Very truly yours,

Note: If there has been accounting activity for the client in the trust account during the twelve (12) month period the following sentence can be added: Please note enclosed copy of your ledger indicating the receipt and disbursement of your funds by this office.

The format indicated in Appendix I may also be considered.

Appendix K - Bank Directive

Bank Directive

The following form is provided to assist lawyers to comply with Rule 1.15-2(k). A copy of the completed form, as submitted to the bank, should be retained with the records for each trust or fiduciary account.

NOTICE AND AUTHORIZATION

To: _____
Financial Institution

Pursuant to Revised Rule 1.15-2(k), (formerly Rule 10.2(f)), of the North Carolina State Bar Revised Rules of Professional Conduct you are hereby authorized and directed to transmit immediate notice to the Executive Director of the North Carolina State Bar of any check drawn on the trust account(s) or fiduciary accounts listed below which is presented for payment against insufficient funds.

Acct. No. _____ Acct. Name _____
Acct. No. _____ Acct. Name _____
Acct. No. _____ Acct. Name _____

This the _____ day of _____, 200_____.

_____
Signature

NC State Bar
Post Office Box 25908
Raleigh, NC 27611

Exemption from Random Audit

The form printed below has been approved by the North Carolina State Bar Council for use by attorneys seeking exemption from random audit. In order to be exempt, an attorney and his accountant must make the indicated certifications and the attorney must submit the completed form to the Secretary of the State Bar. The period required covered by the audit is 12 months. Exemptions are good for 15 months from the date the audit period was concluded.

Certificate of Voluntary Audit

To: The Secretary of the North Carolina State Bar

Re: Trust Account(s) of _____, Attorney/Firm

Bank _____, Account Number _____

Bank _____, Account Number _____

(List additional accounts on a separate page)

The undersigned attorney hereby certifies personally and on behalf of any attorneys affiliated with his firm, whose names are listed and attached hereto, that the above account(s) is the only trust account(s) to which such attorney(s) has had access during the past year and, further, with respect to transactions occurring during the past year, that the following statements are true:

1) The trust account(s) is labeled as a trust account.
2) No funds belonging to the undersigned attorney, his law firm or any member thereof have been deposited or left in the trust account(s) except as permitted by Rule 1.15-2(f) of the Revised Rules of Professional Conduct.
3) Neither the undersigned attorney nor any member of his law firm has received any interest or other personal benefit from the funds of clients held in trust.
4) The trust account(s) and all subaccounts are in balance and have been reconciled with all bank statements received during the period in question.
5) No checks have been presented for payment against insufficient funds.
6) Notice concerning checks presented for payment against insufficient funds has been given to each bank pursuant to Revised Rule 1.15-2(k).
7) The trust account(s) has been maintained in accordance with the minimum record keeping requirements of Rule 1.15-3 of the Revised Rules of Professional Conduct.

This the _____ day of _____ 200 _____.

_____
Attorney/Firm

by _____

Sworn to and subscribed to before me this the _____ day of _____, 200 _____.

_____
Notary Public

The undersigned certified public accountant hereby certifies that on _____, 200 _____, having first become familiar with amended Rules 1.15-1, 1.15-2 & 1.15-3 of the North Carolina State Bar Revised Rules of Professional Conduct, s/he conducted a limited procedural audit of the above trust account(s) relative to transactions occurring during the past year, made inquiries of the subject attorneys and their employees and conducted such tests of the account(s) as were deemed appropriate and necessary to ascertain compliance with those provisions of the above rules dealing with the handling of funds on behalf of clients. Based upon the foregoing, the undersigned is of the opinion that the subject attorney(s) is in substantial compliance with those provisions. This audit was conducted for the following 12 month period: _____ 200 _____ to _____ 200 _____.

This the _____ day of _____ 200 _____.

_____
Certified Public Accountant

by _____

Sworn to and subscribed to before me this the _____ day of _____, 200 _____.

_____
Notary Public

Amended May 4, 2000 /

Questions and Answers about IOLTA

Q. What is IOLTA?

The North Carolina State Bar Plan for Interest on Lawyers' Trust Accounts ("IOLTA") was established in 1984 by the North Carolina State Bar and the North Carolina Supreme Court to generate income from lawyers' trust accounts in order to fund programs for the public's benefit.

Q. Does participation in IOLTA affect my current trust account practices?

No. Participation in IOLTA will not affect a lawyer's current trust account practices. The depository bank will calculate and remit all accumulated interest, less service charges, directly to IOLTA. Participation in IOLTA will never affect the principal balance of the account. Of course, lawyers still retain complete discretion to determine whether a trust deposit is of sufficient size or duration to justify placement in a separate interest bearing account.

Q. How are service charges on IOLTA accounts handled?

The IOLTA program pays normal service charges on all IOLTA accounts. All participating banks are instructed to deduct such charges from accumulated interest due IOLTA. IOLTA does not pay for service charges resulting from NSF notification, stop payment charges, or check printing charges. However, IOLTA will pay a one time check printing charge if, in order to participate, a lawyer must obtain a new trust account number, close an existing account that can not be converted to IOLTA, and open a new trust account.

Q. How are clients informed of a lawyer's IOLTA participation?

In 1988, the North Carolina Supreme Court approved the posting of a Client Notice Certificate in order to inform clients of a lawyer's participation. IOLTA provides Client Notices to participating attorneys at no charge.

Q. What are the tax consequences of IOLTA participation?

According to the Internal Revenue Service, IOLTA participation imposes no tax consequences to the client or the lawyer. See Revenue Ruling 81-209. Each IOLTA account will bear the tax identification number of the IOLTA Board of Trustees to ensure that all accumulated interest is reported as income of the IOLTA program.

Q. Does participation in IOLTA deprive clients of any funds to which they are entitled?

No. Trust moneys of the type to which IOLTA applies (nominal in amount or expected to be held for a short duration) have traditionally been deposited in trust accounts that do not earn interest. The North Carolina State Bar now allows such accounts to earn interest for the benefit of the IOLTA program.

Q. Will my IOLTA decision carry any consequences in regards to the State Bar Random Audit of Trust Accounts or any other aspect of the State Bar's grievance and disciplinary activities?

No. IOLTA is administered and staffed independently from the random audit program and grievance and disciplinary activities of the State Bar.

Q. How do I join IOLTA?

Complete and sign the IOLTA Decision Form and return it to the IOLTA office. The IOLTA staff will contact your bank to have your trust account established as an IOLTA account. The IOLTA Decision Form may be obtained by calling the telephone number listed below. or by visiting the State Bar's website, www.ncstatebar.org, and selecting "Forms" from the main menu.

Q. What if my bank does not participate in IOLTA?

Complete the IOLTA Decision Form. The IOLTA staff will contact your bank to explain the program and determine if they will participate. IOLTA will notify you of your bank's decision.

Q. How are IOLTA funds used?

The North Carolina State Bar and the North Carolina Supreme Court allows IOLTA funds to be used, after administrative expenses, to fund grants under the following four categories:

1. providing civil legal aid to indigents;
2. enhancement and improvement of grievance and disciplinary procedures for lawyers;
3. development and maintenance of a fund for student loans for legal education on the basis of need; and
4. such other programs designed to improve the administration of justice as may be proposed by the IOLTA Board of Trustees and approved by the North Carolina Supreme Court.

For more information about IOLTA, please contact our office. We are here to serve you.

IOLTA
208 Fayetteville Street Mall

Subchapter A: Organization of the North Carolina State Bar

Section .0100 Functions
.0101 Purpose
.0102 Division of Work
.0103 Cooperation with Local Bar Association Committees
.0104 Organization of Local Bar Associations
.0105 Annual Program
.0106 Reports Made to Annual Meeting
Section .0200 Membership - Annual Membership Fees
.0201 Classes of Membership
.0202 Register of Members
.0203 Annual Membership Fees; When Due
Section .0300 Election and Succession of Officers2
.0301 Officers
.0302 Eligibility for Office
.0303 Term of Office
.0304 Elections
.0305 Nominating Committee
.0306 Vacancies and Succession
.0307 Removal from Office
Section .0400 Duties of Officers
.0401 Compensation of Officers
.0402 President
.0403 President-Elect, Vice-President, and Immediate Past President
.0404 Secretary
Section .0500 Meetings of the North Carolina State Bar
.0501 Annual Meetings
.0502 Special Meetings
.0503 Notice of Meetings
.0504 Quorum
.0505 Parliamentary Rules
Section .0600 Meetings of the Council
.0601 Regular Meetings
.0602 Special Meetings
.0603 Notice of Called Special Meetings
.0604 Quorum at Meeting of Council
Section .0700 Standing Committees of the Council
.0701 Standing Committees and Boards
Section .0800 Election and Appointment of State Bar Councilors
.0801 Purpose
.0802 Election - When Held; Notice; Nominations
.0803 Election - Voting Procedures
.0804 Procedures Governing Elections by Mail
.0805 Vacancies
.0806 Bylaws Providing for Geographical Rotation or Division of Representation
Section .0900 Organization of the Judicial District Bars
.0901 Bylaws
Section .1000 Model Bylaws For Use by Judicial District Bars
.1001 Name
.1002 Authority and Purpose
.1003 Membership
.1004 Officers
.1005 Councilor
.1006 Annual Membership Fee
.1007 Meetings
.1008 District Bar Finances
.1009 Prohibited Activities
.1010 Committees
.1011 Board of Directors or Executive Committee
.1012 Amendment of the Bylaws
Section .1100 Office of the North Carolina State Bar
.1101 Office
Section .1200 Filing Papers with and Serving the North Carolina State Bar
.1201 When Papers Are Filed Under These Rules and Regulations
Section .1300 Seal
.1301 Form and Custody of Seal

Subchapter B: Discipline and Disability Rules

Section .0100 Discipline and Disability of Attorneys
.0101 General Provisions
.0102 Procedure for Discipline
.0103 Definitions
.0104 State Bar Council: Powers and Duties in Discipline and Disability Matters
.0105 Chairperson of the Grievance Committee: Powers and Duties
.0106 Grievance Committee: Powers and Duties
.0107 Counsel: Powers and Duties
.0108 Chairperson of the Hearing Commission: Powers and Duties
.0109 Hearing Committee: Powers and Duties
.0110 Secretary: Powers and Duties in Discipline and Disability Matters
.0111 Grievances: Form and Filing
.0112 Investigations: Initial Determination
.0113 Proceedings before the Grievance Committee
.0114 Formal Hearing
.0115 Effect of a Finding of Guilt in Any Criminal Case
.0116 Reciprocal Discipline & Disability Proceedings
.0117 Surrender of License While Under Investigation
.0118 Disability Hearings
.0119 Enforcement of Powers
.0120 Notice to Member of Action and Dismissal
.0121 Notice to Complainant
.0122 Appointment of Counsel to Protect Clients' Interests When Attorney Disappears, Dies, or Is Transferred to Disability Inactive Status
.0123 Imposition of Discipline; Findings of Incapacity or Disability; Notice to Courts

.0124 Obligations of Disbarred or Suspended Attorneys
.0125 Reinstatement
.0126 Address of Record
.0127 Disqualification Due to Interest
.0128 Trust Accounts; Audit
.0129 Confidentiality
.0130 Disciplinary Amnesty in Illicit Drug Use Cases
Section .0200 Rules Governing Judicial District Grievance Committees
.0201 Organization of Judicial District Grievance Committees
.0202 Jurisdiction & Authority of District Grievance Committees
.0203 Meetings of the District Grievance Committees
.0204 Procedure Upon Institution of a Grievance
.0205 Record Keeping
.0206 Miscellaneous
.0207 Conflicts of Interest
.0208 Letter to Complainant Where Local Grievance Alleges Fee Dispute Only
.0209 Letter to Complainant Where Local Grievance Alleges Fee Dispute and Other Violations
.0210 Letter to Complainant Where District Committee Recommends Finding of No Probable Cause
.0211 Letter to Respondent Where District Committee Recommends Finding of Probable Cause
.0212 Letter to Complainant Where District Committee Recommends Finding of Probable Cause
.0213 Letter to Complainant Acknowledging Grievance
.0214 Letter to Investigating Attorney Assigning Grievance
.0215 Letter to Complainant from Investigating Attorney
.0216 Letter of Notice to Respondent Attorney
.0217 Letter Transmitting Completed File to North Carolina State Bar

Subchapter C: Rules Governing the Board of Law Examiners and the Training of Law Students

Section .0100 Board of Law Examiners
.0101 Election
.0102 Examination of Applicants for License
.0103 Admission to Practice
.0104 Approval of Rules and Regulations of Board of Law Examiners
.0105 Approval of Law Schools
Section .0200 Rules Governing Practical Training of Law Students
.0201 Purpose
.0202 Definitions
.0203 Eligibility
.0204 Certification as Legal Intern
.0205 Supervision
.0206 Activities
.0207 Use of Student's Name

Subchapter D: Rules of the Standing Committees of the North Carolina State Bar

Section .0100 Procedures for Ruling on Questions of Legal Ethics
.0101 Definitions
.0102 General Provisions
.0103 Informal Ethics Advisories and Ethics Advisories
.0104 Formal Ethics Opinions and Ethics Decisions
Section .0200 Procedures for the Authorized Practice Committee
.0201 General Provisions
.0202 Procedure
.0203 Definitions
.0204 State Bar Council - Powers and Duties
.0205 Chairperson of the Authorized Practice Committee - Powers and Duties
.0206 Authorized Practice Committee - Powers and Duties
.0207 Counsel - Powers and Duties
.0208 Suing for Injunctive Relief
Section .0300 Disaster Response Plan
.0301 The Disaster Response Team
.0302 General Policy and Objectives
.0303 Report on Results
Section .0400 Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases
.0401 Authority
.0402 Determination of Indigency
.0403 Waiver of Counsel
.0404 Appointment of Counsel
.0405 Withdrawal by Counsel
.0406 Procedure for Payment of Compensation
Section .0500 Model Plan for Appointment of Counsel for Indigent Defendants in Certain Criminal Cases
.0501 Purpose
.0502 Applicability
.0503 Lists of Attorneys
.0504 Committee on Indigent Appointments
.0505 Placement of Attorneys on List
.0506 Appointment Procedure (Noncapital Cases)
.0507 Appointments in Capital Cases
.0508 Appellate Appointments
.0509 Administration
.0510 Miscellaneous
Section .0600 Rules Governing the Lawyer Assistance Program
.0601 Purpose
.0602 Authority
.0603 Operational Responsibility
.0604 Size of Board
.0605 Appointment of Members; When; Removal
.0606 Term of Office and Succession
.0607 Appointment of Chairperson
.0608 Appointment of Vice-Chairperson
.0609 Source of Funds
.0610 Meetings

.0611 Annual Report
.0612 Powers and Duties of the Board
.0613 Confidentiality
.0614 Referral to the Grievance Committee
.0615 Regional Chapters
.0616 Suspension for Impairment, Reinstatement
.0617 Consensual Suspension
.0618 Agents of the State Bar
.0619 Judicial Committee
.0620 Rehabilitation Contracts for Lawyers Impaired by Substance Abuse
.0621 Evaluations for Substance Abuse, Alcoholism, and/or other Chemical Addictions
.0622 Grounds for Compelling an Evaluation
.0623 Failure to Comply with an Order Compelling an Evaluation

Section .0700 Procedures for Fee Dispute Arbitration
.0701 Purpose and Implementation
.0702 Jurisdiction
.0703 Coordinator of Fee Dispute Resolution
.0704 Reserved
.0705 Selection of Mediators
.0706 Processing Requests for Fee Dispute Resolution
.0707 Mediation Proceedings
.0708 Finalizing the Agreement
.0709 Record Keeping
.0710 District Bar Fee Dispute Resolution

Section .0800 Reserved

Section .0900 Procedures for Administrative Committee
.0901 Transfer to Inactive Status
.0902 Reinstatement from Inactive Status
.0903 Suspension for Nonpayment of Membership Fees, Late Fee, Client Security Fund Assessment, or Assessed Costs
.0904 Reinstatement After Suspension for Failure to Pay Fees or Assessed Costs

Section .1000 Rules Governing Reinstatement Hearings Before the Administrative Committee
.1001 Reinstatement Hearings
.1002 Review and Order of Council

Section .1100 Reserved

Section .1200 Reserved

Section .1300 Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts (IOLTA)
.1301 Purpose
.1302 Jurisdiction: Authority
.1303 Operational Responsibility
.1304 Size of Board
.1305 Lay Participation
.1306 Appointment of Members; When; Removal
.1307 Term of Office
.1308 Staggered Terms
.1309 Succession
.1310 Appointment of Chairperson
.1311 Appointment of Vice-Chairperson
.1312 Source of Funds
.1313 Fiscal Responsibility
.1314 Meetings
.1315 Annual Report
.1316 Severability

Section .1400 Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar
.1401 Purpose; Definitions
.1402 Jurisdiction: Authority
.1403 Operational Responsibility
.1404 Size of Board
.1405 Lay Participation
.1406 Appointment of Members; When; Removal
.1407 Term of Office
.1408 Staggered Terms
.1409 Succession
.1410 Appointment of Chairperson
.1411 Appointment of Vice-Chairperson
.1412 Source of Funds
.1413 Fiscal Responsibility
.1414 Meetings
.1415 Annual Report
.1416 Appropriate Uses of the Client Security Fund
.1417 Applications for Reimbursement
.1418 Processing Applications
.1419 Subrogation for Reimbursement
.1420 Authority Reserved by the Supreme Court

Section .1500 Rules Governing the Administration of the Continuing Legal Education Program
.1501 Purpose and Definitions
.1502 Jurisdiction: Authority
.1503 Operational Responsibility
.1504 Size of Board
.1505 Lay Participation
.1506 Appointment of Members; When; Removal
.1507 Term of Office
.1508 Staggered Terms
.1509 Succession
.1510 Appointment of Chairperson
.1511 Appointment of Vice-Chairperson
.1512 Source of Funds
.1513 Fiscal Responsibility
.1514 Meetings
.1515 Annual Report
.1516 Powers and Duties of the Board
.1517 Scope and Exemptions
.1518 Continuing Legal Education Program
.1519 Accreditation Standards
.1520 Accreditation of Sponsors and Programs
.1521 Credit Hours

.1522 Annual Report
.1523 Noncompliance
.1524 Reinstatement
.1525 Reserved
.1526 Effective Date
.1527 Regulations
Section .1600 Regulations Governing the Administration of the Continuing Legal Education Program
.1601 Organization
.1602 General Course Approval
.1603 Accredited Sponsors
.1604 Accreditation of Prerecorded Programs and Live Programs Broadcast to Remote Locations by Telephone, Satellite, or Video Conferencing Equipment
.1605 Computation of Credit
.1606 Fees
.1607 Special Cases and Exemptions
.1608 General Compliance Procedures
.1609 Noncompliance Procedures
.1610 Authority For Appeals
Section .1700 The Plan of Legal Specialization
.1701 Purpose
.1702 Jurisdiction: Authority
.1703 Operational Responsibility
.1704 Size of Board
.1705 Lay Participation
.1706 Appointment of Members; When; Removal
.1707 Term of Office
.1708 Staggered Terms
.1709 Succession
.1710 Appointment of Chairperson
.1711 Appointment of Vice-Chairperson
.1712 Source of Funds
.1713 Fiscal Responsibility
.1714 Meetings
.1715 Annual Report
.1716 Powers and Duties of the Board
.1717 Retained Jurisdiction of the Council
.1718 Privileges Conferred and Limitations Imposed
.1719 Specialty Committees
.1720 Minimum Standards for Certification of Specialists
.1721 Minimum Standards for Continued Certification of Specialists
.1722 Establishment of Additional Standards
.1723 Suspension or Revocation of Certification as a Specialist
.1724 Right to Hearing and Appeal to Council
.1725 Areas of Specialty
.1726 Certification Standards of the Specialties of Bankruptcy Law, Estate Planning and Probate Law, Real Property Law, Family Law, and Criminal Law
Section .1800 Hearing and Appeal Rules of the Board of Legal Specialization
.1801 Reconsideration of Applications, Failure of Written Examinations and Appeals
.1802 Denial of Continued Certification as a Specialist
.1803 Suspension or Revocation of a Specialist's Certification
.1804 Appeal to the Council
.1805 Judicial Review
.1806 Additional Rules Pertaining to Hearing and Appeals
Section .1900 Rules Concerning the Accreditation of Continuing Legal Education for the Purposes of the Board of Legal Specialization
.1901 General Provisions
.1902 Definitions
.1903 Accreditation Standards for Lecture-Type CLE Activities
.1904 Computation of Hours of Instruction
.1905 Alternatives to Lecture-Type CLE Course Instruction
.1906 Accreditation of Courses
.1907 Accreditation of Sponsor
.1908 Showing by Applicants
Section .2000 Rules of the Board of Legal Specialization for Approval of Independent Certifying Organizations
.2001 Policy Statement
.2002 General Procedure
.2003 Factors to be Considered in Reviewing Certifying Organizations
.2004 Standards for Approval of Certifying Organizations
.2005 Application Procedure
.2006 Effect of Approval of a Certifying Organization by the Board of Legal Specialization
Section .2100 Certification Standards for the Real Property Law Specialty
.2101 Establishment of Specialty Field
.2102 Definition of Specialty
.2103 Recognition as a Specialist in Real Property Law
.2104 Applicability of Provisions of the North Carolina Plan of Legal Specialization
.2105 Standards for Certification as a Specialist in Real Property Law
.2106 Standards for Continued Certification as a Specialist
.2107 Applicability of Other Requirements
Section .2200 Certification Standards for the Bankruptcy Law Specialty
.2201 Establishment of Specialty Field
.2202 Definition of Specialty
.2203 Recognition as a Specialist in Bankruptcy Law
.2204 Applicability of Provisions of the North Carolina Plan of Legal Specialization
.2205 Standards for Certification as a Specialist in Bankruptcy Law
.2206 Standards for Continued Certification as a Specialist
.2207 Applicability of Other Requirements
Section .2300 Certification Standards for the Estate Planning and Probate Law Specialty
.2301 Establishment of Specialty Field
.2302 Definition of Specialty
.2303 Recognition as a Specialist in Estate Planning and Probate Law

.2304 Applicability of Provisions of the North Carolina Plan of Legal Specialization
.2305 Standards for Certification as a Specialist in Estate Planning and Probate Law
.2306 Standards for Continued Certification as a Specialist
.2307 Applicability of Other Requirements

Section .2400 Certification Standards for the Family Law Specialty
.2401 Establishment of Specialty Field
.2402 Definition of Specialty
.2403 Recognition as a Specialist in Family Law
.2404 Applicability of Provisions of the North Carolina Plan of Legal Specialization
.2405 Standards for Certification as a Specialist in Family Law
.2406 Standards for Continued Certification as a Specialist
.2407 Applicability of Other Requirements

Section .2500 Certification Standards for the Criminal Law Specialty
.2501 Establishment of Specialty Field
.2502 Definition of Specialty
.2503 Recognition as a Specialist in Criminal Law
.2504 Applicability of Provisions of the North Carolina Plan of Legal Specialization
.2505 Standards for Certification as a Specialist
.2506 Standards for Continued Certification as a Specialist
.2507 Applicability of Other Requirements

Section .2600 Certification Standards for the Immigration Law Specialty
.2601 Establishment of Specialty Field
.2602 Definition of Specialty
.2603 Recognition as a Specialist in Immigration Law
.2604 Applicability of Provisions of the North Carolina Plan of Legal Specialization
.2605 Standards for Certification as a Specialist in Immigration Law
.2606 Standards for Continued Certification as a Specialist
.2607 Applicability of Other Requirements

Section .2700 Certification Standards for the Workers' Compensation Law Specialty
.2701 Establishment of Specialty Field
.2702 Definition of Specialty
.2703 Recognition as a Specialist in Workers' Compensation Law
.2704 Applicability of Provisions of the North Carolina Plan of Legal Specialization
.2705 Standards for Certification as a Specialist in Workers' Compensation Law
.2706 Standards for Continued Certification as a Specialist
.2707 Applicability of Other Requirements

Subchapter E: Regulations for Organizations Practicing Law

Section .0100 Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law
.0101 Authority, Scope, and Definitions
.0102 Name of Professional Corporation or Professional Limited Liability Company
.0103 Registration with the North Carolina State Bar
.0104 Management and Financial Matters
.0105 General and Administrative Provisions
.0106 Forms

Section .0200 Registration of Interstate and International Law Firms
.0201 Registration Requirement
.0202 Conditions of Registration
.0203 Registration Fee
.0204 Certificate of Registration
.0205 Effect of Registration

Section .0300 Rules Concerning Prepaid Legal Services Plans
.0301 Registration Requirement
.0302 Registration Site
.0303 Requirement to File Amendments
.0304 Advertising of State Bar Approval Prohibited
.0305 Annual Registration
.0306 Registration Fee
.0307 Index of Registered Plans
.0308 State Bar May Not Approve or Disapprove Plans
.0309 State Bar Jurisdiction
.0310 Definition of Prepaid Plan

Section .0400 Rules for Arbitration of Internal Law Firm Disputes
.0401 Purpose
.0402 Submission to Arbitration
.0403 Jurisdiction
.0404 Administration
.0405 Uniform Arbitration Act
.0406 List of Arbitrators
.0407 Selection of Arbitrators
.0408 Fees and Expenses
.0409 Confidentiality
.0410 Authority to Adopt Amendments and Regulations

Subchapter F: Foreign Legal Consultants

Section .0100 Foreign Legal Consultants
.0101 Applications
.0102 Application Form
.0103 Requirements for Applicants
.0104 Burden of Proving Moral Character and General Fitness
.0105 Failure to Disclose
.0106 Investigation by Counsel
.0107 Recommendation of Membership & Fees Committee
.0108 Appeal from Committee Decision
.0109 Hearing Procedure
.0110 Review and Order of Council
.0111 Application Fees; Refunds; Returned Checks
.0112 Permanent Record
.0113 Denial; Reapplication

If you know someone who needs help, you have plenty of PALS to call.

Help for substance abuse problems is available for you, your family, and co-workers through the Lawyer Assistance Program's PALS Committee. All inquiries, questions, and conferences are privileged and held in strictest confidence between the member and the lawyer pursuant to Rule 1.6 of the Revised Rules of Professional Conduct.

Don Carroll, LAP/PALS Director, 1-800-720-PALS

Region I-Wilmington/Greenville/Hertford

Jeffery R. Baker
Wilmington, NC
Office: 910-763-3448
jibaker@isaac.net

Ray C. Blackburn
Hampstead, NC
Office: 910-270-2022

Marvin K. Blount III
Greenville, NC
Office: 252-752-6000
Mblount3@thebloutnlawfirm.com

Walter G. Edwards Jr.
Hertford, NC
Office: 252-426-7387
wedwards@inteliport.com

Alan Hall
Wilmington, NC
Office: 910-794-4497

Kenneth B. Hatcher
Wilmington, NC.
Office: 910-763-0305
khblaw@wilmington.net

Jana S. Lucas
Wilmington, NC
Office: 910-763-7760
jabaluca@wilmington.net

Janet M. Lyles
Beaufort, NC
Office: 252-728-4080
dmlpalaw@mail.clis.com

Sue E. Make
Wilmington, NC
Office: 910-343-9920
suemake@aol.com

John R. Newton
Wilmington, NC
Office: 910-762-8743
cne@wilmington.net

Raymond P. O'Keefe
Kure Beach, NC
Office: 910-458-6959

Region II - Triangle - Raleigh/Durham/Chapel Hill

Grainger R. Barrett
Fayetteville, NC
Office: 910-678-7762
gbarrett@co.cumberland.nc.us

Thomas W. Brown
Chapel Hill, NC
Office: 336-716-6547
tbrown@wfubmc.edu

William B. Bystrynski
Raleigh, NC
Office: 919-881-2111
bbystrynski@kirby-holt.com

John M. Constantinou
Durham, NC
Office: 919-683-1302
Lawgroup1@aol.com

William B. Crews Jr.
Southern Pines, NC
Office: 910-692-2642
crowdr@utinet.net

David G. Crockett
Southern Pines, NC
Office: 910-692-9771

Paul B. Edmundson Jr.
Goldsboro, NC
Office: 919-735-1374

Gene R. Edmundson
Oxford, NC
Office: 919-693-7087

N.Victor Farah
Raleigh, NC
Office: 919-833-1283
nvf@jernlaw.com

Sheryl T. Friedrichs
Youngsville, NC
Office: 919-556-6241
friedrichs@worldnet.att.net

Barbara Garlock
Cary, NC
Office: 919-303-9700
bgarlock@mindspring.com

Christopher B. Godwin
Fayetteville, NC
Office: 910-483-3858
ctlgod@hotmail.com

Donald J. Harris
Raleigh, NC
Office: 919-546-8788
dharris@harriswinfield.com

Margie K. Harris
Raleigh, NC
Office: 919-546-8788
mwh@harriswinfield.com

G. Nicholas Herman
Chapel Hill, NC
Office: 919-929-3905
gnherman@broughlawfirm.com

Tom Holt
Chapel Hill, NC
Office: 919-942-0062
tholt@bhspa.com

George W. Hughes
Raleigh, NC
Office: 919-828-4470

Michael J. Jacula
Wake Forest, NC
Office: 919-554-1270
yatzula@worldnet.att.net

Benner Jones III
Fayetteville, NC
Office: 910-485-5171
Benmarq1@aol.com

John C. Livingston
Raleigh, NC
Office: 919-832-0006
jlivingvmi@aol.com

John W. Mann
Raleigh, NC
Office: 919-755-8700
John_mann@shmm.com

Randolph B. Monchick
Raleigh, NC
Office: 919-715-4876
Randy.b.monchick@aoc.state.nc.us

Kathleen I. Ojala
Durham, NC
Office: 919-401-4203
Kathleen_ojala@med.unc.edu

Newton G. Pritchett Jr.
Raleigh, NC
Office: 919-716-6074
rvnprit@mail.jus.state.nc.us

Earle R. Purser
Raleigh, NC
Office: 919-831-2607

Walter E. Ricks III
Durham, NC
Office: 919-688-4336
Wrick6@aol.com

Thomas W. Steed Jr.
Raleigh, NC
Office: 919-829-5805
Tsteed8822@aol.com

Isaac L. Thorp
Raleigh, NC
Office: 919-881-2111
ithorp@kirby-holt.com

Ray C. Vallery
Fayetteville, NC
Office: 910-323-1996
RayVallery@prodigy.net

Region III-Triad Area-Greensboro/High Point/Lexington

Fred P. Baggett
High Point, NC
Office: 336-883-3301
fred.baggett@ci.high-point.nc.us

Konrad K. Fish
Greensboro, NC
Office: 336-333-9229

Neill A. Jennings Jr.
Greensboro, NC
Office: 336-275-6314
najennings@msn.com

P. Bryden Manning
Graham, NC
Office: 336-226-1976
pbmanning@aol.com

Steven A. McCloskey
Winston-Salem, NC
Office: 336-773-1010
smcc2702@cs.com

David G. Powell
Yanceyville, NC
Office: 336-694-4439
dgpowellatty@cs.com

Charles F. Royster III
Burlington, NC
Office: 336-524-0183
chuckr@netpath.net

Region IV-Charlotte/Asheville/Gastonia

William O. Austin
Cornelius, NC
Office: 704-892-4098

Michael A. Bailey
Charlotte, NC
Office: 704-333-8612
mabailey20@aol.com

Judge Lisa C. Bell
Charlotte, NC
Office: 704-358-6201
LBell88@aol.com

Thomas R. Bell Jr.
Asheville, NC
Office: 828-252-0682
belltjr@aol.com

Judge W. Robert Bell
Charlotte, NC
Office: 704-347-7800
Bellwr@bellsouth.net

Allen W. Boyer
Charlotte, NC
Office: 704-372-8876
allenboyer@aol.com

Reid G. Brown
Waynesville, NC
Office: 828-456-5381

John Byrd
Rutherfordton, NC
Office: 828-286-0100

Patricia B. Edmondson
Charlotte, NC
Office: 704-334-0891
Pedmond8@bellsouth.net

Richard T. Feerick
Charlotte, NC
Office: 704-370-3221
Rtfeerick@att.net

Adam M. Fetterman
Asheville, NC
Office: 828-258-0994
Lawmanjr1@excite.com

Michael H. Griffin
Shelby, NC
Office: 704-482-0975

Judge George R. Hodges
Charlotte, NC
Office: 704-350-7500
Hodges@ncbankruptcy.org

Clifton W. Homesley
Mooresville, NC
Office: 704-664-1127
chomesley@alltel.com

Judge Philip F. Howerton Jr.
Charlotte, NC
Office: 704-350-7500
phil@carolina.rr.com

Mark L. Jenkins
Waynesville, NC
Office: 828-452-1454

Bruce L. Kaplan
Boone, NC
Office: 828-264-7652
Blkaplan@skybest.com

Paul A. Kohut
Charlotte, NC
Office: 704-332-1181
pkohut@jahlaw.com

Judge James E. Lanning
Charlotte, NC
Office: 704-347-7800
jim1@infi.net

Judge C. Jerome Leonard Jr.
Charlotte, NC
Office: 704-376-2620
cjdcjl@aoc.state.nc.us

Ashe Lockhart
Charlotte, NC
Office: 704-342-2500
alockhart@lockharthoffman.com

Joe S. Major III
Charlotte, NC
Office: 704-375-2932

Robert E. Martin
Charlotte, NC
Office: 704-379-5248
rmartin@carolinas.org

Thomas F. Moore Jr.
Charlotte, NC
Office: 704-376-2798
Tomolaw@carolina.rr.com

Albert M. Neal Jr.
Canton, NC
Office: 828-648-8240

Scott D. Neumann
Brevard, NC
Office: 828-884-6575
Neumann_law@citcom.net

Ronald T. Osborn
Charlotte, NC
Office: 704-563-9346 x 1185
yoron1@msn.com

John J. Parker III
Charlotte, NC
Office: 704-375-2100
jparker@charlotte.infi.net

Steve E. Philo
Franklin, NC
Office: 828-524-6377
sphilo@smnet.net

Rachel Pickard
Gastonia, NC
Office: 704-867-5341
rpick55@aol.com

Jerry D. Reed
Charlotte, NC
Office: 704-365-5100
reedlaw@carolina.rr.com

Patrick M. Reily
Cedar Mountain, NC
Office: 828-966-9649
Preily7777@aol.com

W. Terry Sherrill
Charlotte, NC
Office: 704-442-5533
wterrsherr@aol.com

William L. Sitton Jr.
Charlotte, NC
Office: 704-373-0751
wlsitton@rosenman.com

Henry L. Sloan III
Charlotte, NC
Office: 704-364-0906

Keith M. Stroud
Charlotte, NC
Office: 704-333-3456
kmstroud@aol.com

Peter J. Underhill
Charlotte, NC
Office: 704-366-1518
punderhill@carolina.rr.com

Paul B. Welch III
Brevard, NC
Office: 828-884-9452
pblaw@citcom.net