NORTH CAROLINA
STATE BAR

The 2020 Lawyer's Handbook

The North Carolina State Bar Lawyer's Handbook 2020 (Abridged)

An official publication of the North Carolina State Bar containing the most frequently referenced rules of the North Carolina State Bar, annotated Rules of Professional Conduct, all ethics opinions adopted under the Rules and Superseded (1985) Rules, and trust account guidelines.

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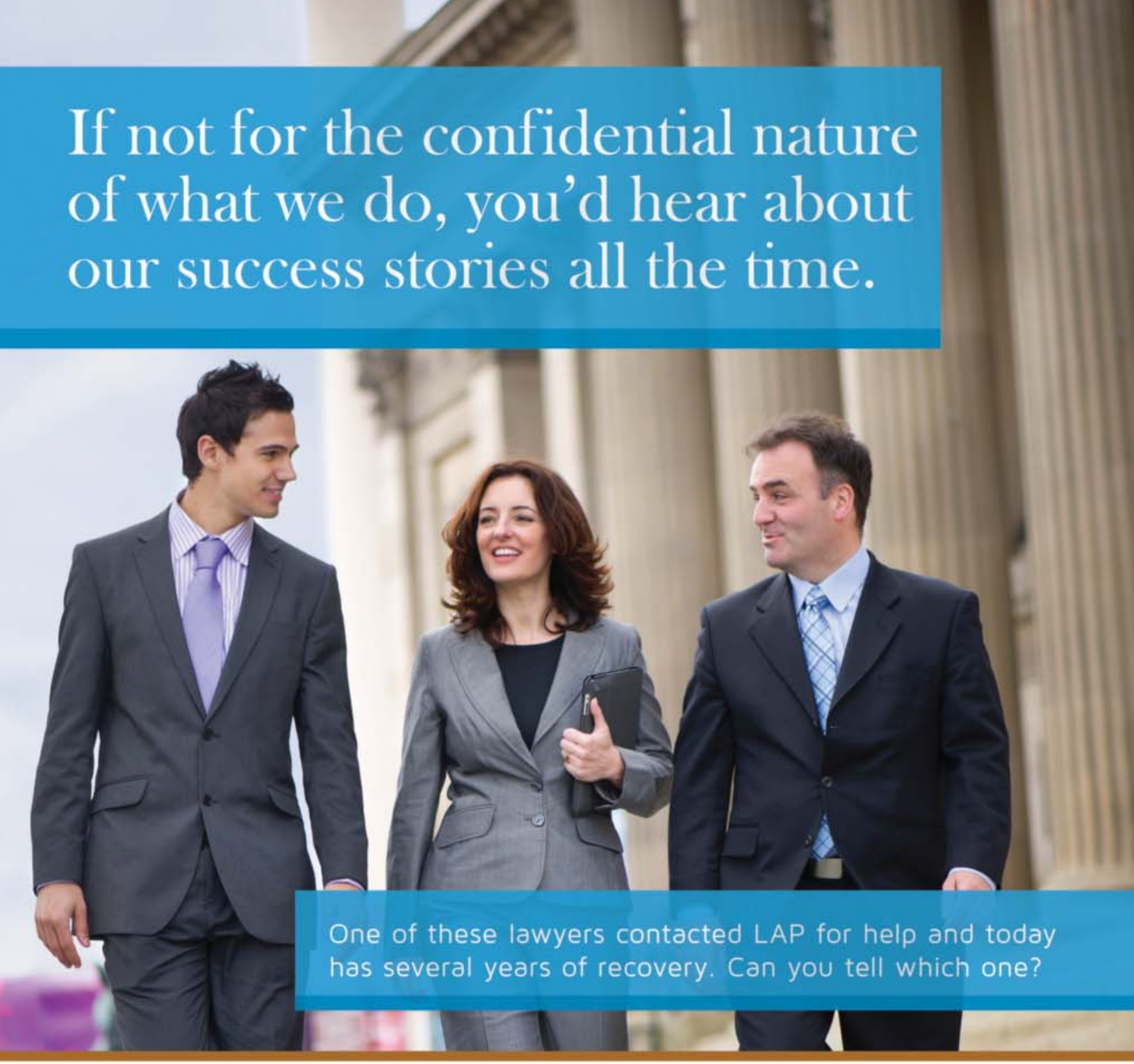

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Charlotte & West	Piedmont Area:	Raleigh & East:
(704) 910-2310	(919) 719-9290	(919) 719-9267

State Bar Contacts

North Carolina State Bar
PO Box 25908
Raleigh, NC 27611-5908
(919) 828-4620

Address Changes
Kelly Beck kbeck@ncbar.gov
Beth McLamb bmclamb@ncbar.gov
Adam Maner amaner@ncbar.gov

Administration
Alice Neece Mine amine@ncbar.gov
Peter Bolac pbolac@ncbar.gov
Joseph D. Cerone jcerone@ncbar.gov

Attorney-Client Assistance Program (receives complaints from clients)
Lee Ramos lramos@ncbar.gov
Courtney Pope cpope@ncbar.gov
Sandra L. Saxton ssaxton@ncbar.gov
Kerri Bianchi kbianchi@ncbar.gov
Diane Melching dmelching@ncbar.gov

Certificates of Good Standing
Kelly Beck kbeck@ncbar.gov
Beth McLamb bmclamb@ncbar.gov
Adam Maner amaner@ncbar.gov

Client Security Fund (reimbursement for client-victims of lawyer theft)
Maria Brown mbrown@ncbar.gov
Randy Ross rross@ncbar.gov

Continuing Legal Education
Debra Holland dholland@ncbar.gov
Emily Oakes eoakes@ncbar.gov
Phillip McWilliams pmcwilliams@ncbar.gov
Lori Nicolicchia lnicolicchia@ncbar.gov

Disciplinary Hearing Commission (DHC and final disciplinary orders)
Dottie Miani dmiani@ncbar.gov

District Bar Liaison
Nichole McLaughlin nmclaughlin@ncbar.gov

Ethics/Professional Responsibility
(answers inquiries about lawyer's own conduct)
Nichole McLaughlin nmclaughlin@ncbar.gov
Suzanne Lever slever@ncbar.gov
Brian Oten boten@ncbar.gov

Fee Dispute Resolution Program
Lee Ramos lramos@ncbar.gov
Kerri Bianchi kbianchi@ncbar.gov

Grievance
Heather Pattle hpattle@ncbar.gov

Investigations
Joseph J. Commisso jcommisso@ncbar.gov

IOLTA (Interest on Lawyers' Trust Accounts)
(919) 828-0477
(919) 821-9168 (Fax)
PO Box 25996
Raleigh, NC 27611-5996

General email: iolta@ncbar.gov
Shannon Azzi sazzi@ncbar.gov
Bethany Farrelly bfarrelly@ncbar.gov
Mary Irvine mirvine@ncbar.gov
Claire Mills cmills@ncbar.gov

Lawyer Assistance Program (a confidential program)
Robynn Moraites Robynn@nclap.org
Nicole Ellington Nicole@nclap.org
Candace Hoffman Candace@nclap.org
Cathy Killian Cathy@nclap.org
Delia Brown Delia@nclap.org
Susie Taylor Susie@nclap.org
Raleigh Office: (919) 719-9269
Charlotte Office: (704) 503-9695
nclap.org

Membership Records
Tammy Jackson tjackson@ncbar.gov

Office of Counsel (legal department)
Katherine Jean kjean@ncbar.gov
Heather Pattle hpattle@ncbar.gov

Paralegal Certification
Joy Belk jbelk@ncbar.gov
Aaliyah Pierce apierce@ncbar.gov
Brian Oten boten@ncbar.gov
Sheila Saucier ssaucier@ncbar.gov

Professional Organization Registrations
Adam Maner amaner@ncbar.gov

Pro Hac Vice Registration
Kelly Beck kbeck@ncbar.gov

Publications - Media Kits and Orders
Jennifer Duncan jduncan@ncbar.gov
Diane Melching dmelching@ncbar.gov

Specialization
Denise Mullen dmullen@ncbar.gov
Lanice Heidbrink lheidbrink@ncbar.gov
Brian Oten boten@ncbar.gov
Sheila Saucier ssaucier@ncbar.gov

Student Practice Certificates (for 3rd year law students)
Dottie Miani dmiani@ncbar.gov
Alice Neece Mine amine@ncbar.gov

Trust Account Random Audits
Anne Parkin aparkin@ncbar.gov

Trust Account Random Audit Corrections
Leanor Hodge lhodge@ncbar.gov
Jeff Lundgren jlundgren@ncbar.gov

Trust Account Support/Compliance
Leanor Hodge lhodge@ncbar.gov
Mary Lee mlee@ncbar.gov

Unauthorized Practice of Law
David Johnson djohnson@ncbar.gov
Joshua Walthall jwalthall@ncbar.gov

State Bar Officers

C. Colon Willoughby - President
McGuire Woods LLC
2700 Peachtree St.
Raleigh, NC 27608
(919) 755-6617

Barbara R. Christy - President-Elect
1500 Renaissance Plaza
230 N. Elm St., PO Box 21847
Greensboro, NC 27420
(336) 370-8800

Darrin D. Jordan - Vice-President
Whitley & Jordan
305 North Main Street
Salisbury, NC 28144
(704) 637-1111

Alice Neece Mine - Secretary/Treasurer
PO Box 25908
Raleigh, NC 27611-5908
(919) 828-4620

G. Gray Wilson - Past-President
110 Oakwood Drive, Suite 400
Winston-Salem, NC 27103
(336) 631-8866

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

North Carolina General Statutes, Chapter 84: Attorneys-at-Law: Selected Statutes . . . . . *G.S. Chap. 84*

27 NCAC Chapter 1

Subchapter A: Organization of the North Carolina State Bar . . . . . *Subchap. 1A*

For a complete listing of all Rules of the State Bar, see page 11-10

Public Service

Information About Legal Services

Maintaining the Integrity of the Profession

North Carolina General Statutes, Chapter 84
Attorneys-at-Law: Selected Statutes

§ 84-2.1. "Practice law" defined.

The phrase "practice law" as used in this Chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi judicial bodies, or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of the term, but shall be construed to include the foregoing particular acts, as well as all other acts within the general definition. The phrase "practice law" does not encompass the writing of memoranda of understanding or other mediation summaries by mediators at community mediation centers authorized by G.S. 7A 38.5 or by mediators of personnel matters for The University of North Carolina or a constituent institution.

§ 84-2.2. Exemption and additional requirements for Web site providers.

(a) The practice of law, including the giving of legal advice, as defined by G.S. 84-2.1 does not include the operation of a Web site by a provider that offers consumers access to interactive software that generates a legal document based on the consumer's answers to questions presented by the software, provided that all of the following are satisfied:

(1) The consumer is provided a means to see the blank template or the final, completed document before finalizing a purchase of that document.

(2) An attorney licensed to practice law in the State of North Carolina has reviewed each blank template offered to North Carolina consumers, including each and every potential part thereof that may appear in the completed document. The name and address of each reviewing attorney must be kept on file by the provider and provided to the consumer upon written request.

(3) The provider must communicate to the consumer that the forms or templates are not a substitute for the advice or services of an attorney.

(4) The provider discloses its legal name and physical location and address to the consumer.

(5) The provider does not disclaim any warranties or liability and does not limit the recovery of damages or other remedies by the consumer.

(6) The provider does not require the consumer to agree to jurisdiction or venue in any state other than North Carolina for the resolution of disputes between the provider and the consumer.

(7) The provider must have a consumer satisfaction process. All consumer concerns involving the unauthorized practice of law made to the provider shall be referred to the North Carolina State Bar. The consumer satisfaction process must be conspicuously displayed on the provider's Web site.

(b) A Web site provider subject to this section shall register with the North Carolina State Bar prior to commencing operation in the State and shall renew its registration with the State Bar annually. The State Bar may not refuse registration.

(c) Each Web site provider subject to this section shall pay an initial registration fee in an amount not to exceed one hundred dollars ($100.00) and an annual renewal fee in an amount not to exceed fifty dollars ($50.00). (2016-60, s. 2.)

§ 84-4. Persons other than members of State Bar prohibited from practicing law.

Except as otherwise permitted by law, it shall be unlawful for any person or association of persons, except active members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys at law, to appear as attorney or counselor at law in any action or proceeding before any judicial body, including the North Carolina Industrial Commission, or the Utilities Commission; to maintain, conduct, or defend the same, except in his own behalf as a party thereto; or, by word, sign, letter, or advertisement, to hold out himself, or themselves, as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor at law, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any person or association of persons except active members of the Bar, for or without a fee or consideration, to give legal advice or counsel, perform for or furnish to another legal services, or to prepare directly or through another for another person, firm or corporation, any will or testamentary disposition, or instrument of trust, or to organize corporations or prepare for another person, firm or corporation, any other legal document. Provided, that nothing herein shall prohibit any person from drawing a will for another in an emergency wherein the imminence of death leaves insufficient time to have the same drawn and its execution supervised by a licensed attorney at law. The provisions of this section shall be in addition to and not in lieu of any other provisions of this Chapter. Provided, however, this section shall not apply to corporations authorized to practice law under the provisions of Chapter 55B of the General Statutes of North Carolina.

§ 84-4.1. Limited practice of out of state attorneys.

Any attorney domiciled in another state, and regularly admitted to practice in the courts of record of and in good standing in that state, having been retained as attorney for a party to any civil or criminal legal proceeding pending in the General Court of Justice of North Carolina, the North Carolina Utilities Commission, the North Carolina Industrial Commission, the Office of Administrative Hearings of North Carolina, or any administrative agency, may, on motion, be admitted to practice in that forum for the sole purpose of appearing for a client in the proceeding. The motion required under this section shall be signed by the attorney and shall contain or be accompanied by:

(1) The attorney's full name, post office address, bar membership number, and status as a practicing attorney in another state.

(2) A statement, signed by the client, setting forth the client's address and declaring that the client has retained the attorney to represent the client in the proceeding.

(3) A statement that unless permitted to withdraw sooner by order of the court, the attorney will continue to represent the client in the proceeding until its final determination, and that with reference to all matters incident to the proceeding, the attorney agrees to be subject to the orders and amenable to the disciplinary action and the civil jurisdiction of the General Court of Justice and the North Carolina State Bar in all respects as if the attorney were a regularly admitted and licensed member of the Bar of North Carolina in good standing.

(4) A statement that the state in which the attorney is regularly admitted to practice grants like privileges to members of the Bar of North Carolina in good standing.

(5) A statement to the effect that the attorney has associated and is personally appearing in the proceeding, with an attorney who is a resident of this State, has agreed to be responsible for filing a registration statement with the North Carolina State Bar, and is duly and legally admitted to practice in the General Court of Justice of North Carolina, upon whom service may be had in all matters connected with the legal proceedings, or any disciplinary matter, with the same effect as if personally made on the foreign attorney within this State.

(6) A statement accurately disclosing a record of all that attorney's disciplinary history. Discipline shall include (i) public discipline by any court or lawyer regulatory organization, and (ii) revocation of any pro hac vice admission.

(7) A fee in the amount of two hundred twenty five dollars ($225.00), of which two hundred dollars ($200.00) shall be remitted to the State Treasurer for support of the General Court of Justice and twenty five dollars ($25.00) shall be transmitted to the North Carolina State Bar to regulate the practice of out of state attorneys as provided in this section.

Compliance with the foregoing requirements does not deprive the court of the discretionary power to allow or reject the application.

§ 84-4.2. Summary revocation of permission granted out of state attorneys to practice.

Permission granted under G.S. 84-4.1 may be summarily revoked by the General Court of Justice or any agency, including the North Carolina Utilities Commission, on its own motion and in its discretion.

§ 84-5. Prohibition as to practice of law by corporation.

(a) It shall be unlawful for any corporation to practice law or appear as an attorney for any person in any court in this State, or before any judicial body or the North Carolina Industrial Commission, Utilities Commission, or the Department of Commerce, Division of Employment Security, or hold itself out to the public or advertise as being entitled to practice law; and no corporation shall organize corporations, or draw agreements, or other legal documents, or draw wills, or practice law, or give legal advice, or hold itself out in any manner as being entitled to do any of the foregoing acts, by or through any person orally or by advertisement, letter or circular. The provisions of this section shall be in addition to and not in lieu of any other provisions of Chapter 84. Provided, that nothing in this section shall be construed to prohibit a banking corporation authorized and licensed to act in a fiduciary capacity from performing any clerical, accounting, financial or business acts required of it in the performance of its duties as a fiduciary or from performing ministerial and clerical acts in the preparation and filing of such tax returns as are so required, or from discussing the business and financial aspects of fiduciary relationships. Provided, however, this section shall not apply to corporations authorized to practice law under the provisions of Chapter 55B of the General Statutes of North Carolina.

To further clarify the foregoing provisions of this section as they apply to corporations which are authorized and licensed to act in a fiduciary capacity:

(1) A corporation authorized and licensed to act in a fiduciary capacity shall not:

a. Draw wills or trust instruments; provided that this shall not be construed to prohibit an employee of such corporation from conferring and cooperating with an attorney who is not a salaried employee of the corporation, at the request of such attorney, in connection with the attorney's performance of services for a client who desires to appoint the corporation executor or trustee or otherwise to utilize the fiduciary services of the corporation.

b. Give legal advice or legal counsel, orally or written, to any customer or prospective customer or to any person who is considering renunciation of the right to qualify as executor or administrator or who proposes to resign as guardian or trustee, or to any other person, firm or corporation.

c. Advertise to perform any of the acts prohibited herein; solicit to perform any of the acts prohibited herein; or offer to perform any of the acts prohibited herein.

(2) Except as provided in subsection (b) of this section, when any of the following acts are to be performed in connection with the fiduciary activities of such a corporation, said acts shall be performed for the corporation by a duly licensed attorney, not a salaried employee of the corporation, retained to perform legal services required in connection with the particular estate, trust or other fiduciary matter:

a. Offering wills for probate.

b. Preparing and publishing notice of administration to creditors.

c. Handling formal court proceedings.

d. Drafting legal papers or giving legal advice to spouses concerning rights to an elective share under Article 1A of Chapter 30 of the General Statutes.

e. Resolving questions of domicile and residence of a decedent.

f. Handling proceedings involving year's allowances of widows and children.

g. Drafting deeds, notes, deeds of trust, leases, options and other contracts.

h. Drafting instruments releasing deeds of trust.

i. Drafting assignments of rent.

j. Drafting any formal legal document to be used in the discharge of the corporate fiduciary's duty.

k. In matters involving estate and inheritance taxes, gift taxes, and federal and State income taxes:

1. Preparing and filing protests or claims for refund, except requests for a refund based on mathematical or clerical errors in tax returns filed by it as a fiduciary.

2. Conferring with tax authorities regarding protests or claims for refund, except those based on mathematical or clerical errors in tax returns filed by it as a fiduciary.

3. Handling petitions to the tax court.

l. Performing legal services in insolvency proceedings or before a referee in bankruptcy or in court.

m. In connection with the administration of an estate or trust:

1. Making application for letters testamentary or letters of administration.

2. Abstracting or passing upon title to property.

3. Handling litigation relating to claims by or against the estate or trust.

4. Handling foreclosure proceedings of deeds of trust or other security instruments which are in default.

(3) When any of the following acts are to be performed in connection with the fiduciary activities of such a corporation, the corporation shall comply with the following:

a. The initial opening and inventorying of safe deposit boxes in connection with the administration of an estate for which the corporation is executor or administrator shall be handled by, or with the advice of, an attorney, not a salaried employee of the corporation, retained by the corporation to perform legal services required in connection with that particular estate.

b. The furnishing of a beneficiary with applicable portions of a testator's will relating to such beneficiary shall, if accompanied by any legal advice or opinion, be handled by, or with the advice of, an attorney, not a salaried employee of the corporation, retained by the corporation to perform legal services required in connection with that particular estate or matter.

c. In matters involving estate and inheritance taxes and federal and State income taxes, the corporation shall not execute waivers of statutes of limitations without the advice of an attorney, not a salaried employee of the corporation, retained by the corporation to perform legal services in connection with that particular estate or matter.

d. An attorney, not a salaried employee of the corporation, retained by the corporation to perform legal services required in connection with an estate or trust shall be furnished copies of inventories and accounts proposed for filing with any court and proposed federal estate and North Carolina inheritance tax returns and, on request, copies of proposed income and intangibles tax returns, and shall be afforded an opportunity to advise and counsel the corporate fiduciary concerning them prior to filing.

(b) Nothing in this section shall prohibit an attorney retained by a corporation, whether or not the attorney is also a salaried employee of the corporation, from representing the corporation or an affiliate, or from representing an officer, director, or employee of the corporation or an affiliate in any matter arising in connection with the course and scope of the employment of the officer, director, or employee. Notwithstanding the provisions of this subsection, the attorney providing such representation shall be governed by and subject to all of the Rules of Professional Conduct of the North Carolina State Bar to the same extent as all other attorneys licensed by this State.

§ 84-5.1. Rendering of legal services by certain nonprofit corporations.

(a) Subject to the rules and regulations of the North Carolina State Bar, as approved by the Supreme Court of North Carolina, a nonprofit corporation, tax

exempt under 26 U.S.C. § 501(c)(3), organized or authorized under Chapter 55A of the General Statutes of North Carolina and operating as a public interest law firm as defined by the applicable Internal Revenue Service guidelines or for the primary purpose of rendering indigent legal services, may render such services provided by attorneys duly licensed to practice law in North Carolina, for the purposes for which the nonprofit corporation was organized. The nonprofit corporation must have a governing structure that does not permit an individual or group of individuals other than an attorney duly licensed to practice law in North Carolina to control the manner or course of the legal services rendered and must continually satisfy the criteria established by the Internal Revenue Service for 26 U.S.C. § 501(c)(3) status, whether or not any action has been taken to revoke that status.

(b) In no instance may legal services rendered by a nonprofit corporation under subsection (a) of this section be conditioned upon the purchase or payment for any product, good, or service other than the legal service rendered.

§ 84-7.1. Legal clinics of law schools and certain law students and lawyers excepted.

The provisions of G.S. 84-4 through G.S. 84-6 shall not apply to any of the following:

(1) Any law school conducting a legal clinic and receiving as its clientage only those persons unable financially to compensate for legal advice or services rendered and any law student permitted by the North Carolina State Bar to act as a legal intern in such a legal clinic.

(2) Any law student permitted by the North Carolina State Bar to act as a legal intern for a federal, State, or local government agency.

(3) Any lawyer licensed by another state and permitted by the North Carolina State Bar to represent indigent clients on a pro bono basis under the supervision of active members employed by nonprofit corporations qualified to render legal services pursuant to G.S. 84-5.1. This provision does not apply to a lawyer whose license has been suspended or revoked in any state. (2011-336, s. 5.)

§ 84-8. Punishment for violations.

(a) Any person, corporation, or association of persons violating any of the provisions of G.S. 84 4 through G.S. 84 6 or G.S. 84 9 shall be guilty of a Class 1 misdemeanor.

(b) No person shall be entitled to collect any fee for services performed in violation of G.S. 84 4 through G.S. 84 6, G.S. 84 9, or G.S. 84 10.1.

§ 84-10.1. Private cause of action for the unauthorized practice of law.

If any person knowingly violates any of the provisions of G.S. 84-4 through G.S. 84-6 or G.S. 84-9, fraudulently holds himself or herself out as a North Carolina certified paralegal by use of the designations set forth in G.S. 84-37(a), or knowingly aids and abets another person to commit the unauthorized practice of law, in addition to any other liability imposed pursuant to this Chapter or any other applicable law, any person who is damaged by the unlawful acts set out in this section shall be entitled to maintain a private cause of action to recover damages and reasonable attorneys' fees and other injunctive relief as ordered by court. No order or judgment under this section shall have any effect upon the ability of the North Carolina State Bar to take any action authorized by this Chapter. (2011-336, s. 7; 2016-60, s. 3.)

§ 84-15. Creation of North Carolina State Bar as an agency of the State.

There is hereby created as an agency of the State of North Carolina, for the purposes and with the powers hereinafter set forth, the North Carolina State Bar.

§ 84-16. Membership and privileges.

The membership of the North Carolina State Bar shall consist of two classes, active and inactive.

The active members shall be all persons who have obtained a license or certificate, entitling them to practice law in the State of North Carolina, who have paid the membership dues specified, and who have satisfied all other obligations of membership. No person other than a member of the North Carolina State Bar shall practice in any court of the State except foreign attorneys as provided by statute and natural persons representing themselves.

Inactive members shall be:

(1) All persons who have obtained a license to practice law in the State but who have been found by the Council to be not engaged in the practice of law and not holding themselves out as practicing attorneys and not occupying any public or private positions in which they may be called upon to give legal advice or counsel or to examine the law or to pass upon, adjudicate, or offer an opinion concerning the legal effect of any act, document, or law.

(2) Persons allowed by the Council solely to represent indigent clients on a pro bono basis under the supervision of an active member employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1.

All active members shall be required to pay annual membership fees, and shall have the right to vote in elections held by the district bar in the judicial district in which the member resides. If a member desires to vote with the bar of some district in which the member practices, other than that in which the member resides, the member may do so by filing with the Secretary of the North Carolina State Bar a statement in writing that the member desires to vote in the other district; provided, however, that in no case shall the member be entitled to vote in more than one district.

§ 84-17. Government.

The government of the North Carolina State Bar is vested in a council of the North Carolina State Bar referred to in this Chapter as the "Council." The Council shall be composed of a variable number of councilors equal to the number of judicial districts plus 16, the officers of the North Carolina State Bar, who shall be councilors during their respective terms of office, and each retiring president of the North Carolina State Bar who shall be a councilor for one year from the date of expiration of his term as president. Notwithstanding any other provisions of the law, the North Carolina State Bar may borrow money and may acquire, hold, rent, encumber, alienate, lease, and otherwise deal with real or personal property in the same manner as any private person or corporation, subject only to the approval of the Governor and the Council of State as to the borrowing of money and the acquisition, rental, encumbering, leasing and sale of real property. The Council shall be competent to exercise the entire powers of the North Carolina State Bar in respect of the interpretation and administration of this Article, the borrowing of money, the acquisition, lease, sale, or mortgage of property, real or personal, the seeking of amendments to this Chapter, and all other matters. There shall be one councilor from each judicial district and 16 additional councilors. The additional councilors shall be allocated and reallocated by the North Carolina State Bar every six years based on the number of active members of each judicial district bar according to the records of the North Carolina State Bar and in accordance with a formula to be adopted by the North Carolina State Bar, to insure an allocation based on lawyer population of each judicial district bar as it relates to the total number of active members of the State Bar.

A councilor whose seat has been eliminated due to a reallocation shall continue to serve on the Council until expiration of the remainder of the current term. A councilor whose judicial district is altered by the General Assembly during the councilor's term shall continue to serve on the Council until the expiration of the term and shall represent the district wherein the councilor resides or with which the councilor has elected to be affiliated. If before the alteration of the judicial district of the councilor the judicial district included both the place of residence and the place of practice of the councilor, and if after the alteration of the judicial district the councilor's place of residence and place of practice are located in different districts, the councilor must, not later than 10 days from the effective date of the alteration of the district, notify the Secretary of the North Carolina State Bar of an election to affiliate with and represent either the councilor's district of residence or district of practice.

In addition to the councilors, there shall be three public members not licensed to practice law in this or any other state who shall be appointed by the Governor. The public members may vote and participate in all matters before the Council to the same extent as councilors elected or appointed from the various judicial districts.

§ 84-18. Terms, election and appointment of councilors.

(a) Except as set out in this section, the terms of councilors are fixed at three years commencing on the first day of January in the year following their election. A year shall be the calendar year. No councilor may serve more than three successive three year terms but a councilor may serve an unlimited number of three successive three year terms provided a three year period of nonservice intervenes in each instance. Any councilor serving a partial term of 18 months or more is considered to have served a full term and shall be eligible to be elected to only two successive three year terms in addition to the partial term. Any councilor serving a partial term of less than 18 months is eligible to be elected to three successive three year terms in addition to the partial term. This paragraph shall not apply to officers of the State Bar.

The secretary of a judicial district bar shall notify the secretary treasurer of the State Bar in writing of any additions to or deletions from the delegation of councilors representing the district within 90 days of the effective date of the change. No new councilor shall assume a seat until official notice of the election has been given to the secretary treasurer of the State Bar.

Any active member of the North Carolina State Bar is eligible to serve as a councilor from the judicial district in which the member is eligible to vote.

(b) The Council may promulgate rules to govern the election and appointment of councilors. The election and appointment of councilors shall be as follows:

Each judicial district bar shall elect one eligible North Carolina State Bar member for each Council vacancy in the district. Any vacancy occurring after the election, whether caused by resignation, death, reconfiguration of the district by the General Assembly, or otherwise shall be filled by the judicial district bar in which the vacancy occurs. The appointment shall be for the unexpired portion of the term and shall be certified to the Council by the judicial district bar. Any appointed councilor shall be subject to the terms set forth in subsection (a) of G.S. 84-18.

(c) Public members shall serve three year terms. No public member shall serve more than two complete consecutive terms. The Secretary of the North Carolina State Bar shall promptly inform the Governor when any seat occupied by a public member becomes vacant. The successor shall serve the remainder of the term. Any public member serving a partial term of 18 months or more is considered to have served a full term and is eligible to be elected to only one additional three year term in addition to the partial term. Any public member serving a partial term of less than 18 months is eligible to be elected to two successive three year terms in addition to the partial term.

§ 84-18.1. Membership and fees of district bars.

(a) The district bar shall be a subdivision of the North Carolina State Bar subject to the general supervisory authority of the Council and may adopt rules, regulations and bylaws that are not inconsistent with this Article. A copy of any rules, regulations and bylaws that are adopted, along with any subsequent amendments, shall be transmitted to the Secretary Treasurer of the North Carolina State Bar.

(b) Any district bar may from time to time by a majority vote of the members present at a duly called meeting prescribe an annual membership fee to be paid by its active members as a service charge to promote and maintain its administration, activities and programs. The fee shall be in addition to, but shall not exceed, the amount of the membership fee prescribed by G.S. 84-34 for active members of the North Carolina State Bar. The district bar may also charge a late fee, which shall not exceed fifteen dollars ($15.00), for the failure to pay judicial district bar dues on time. The district bar shall mail a written notice to every active member of the district bar at least 30 days before any meeting at which an election is held to impose or increase mandatory district bar dues. Every active member of a district bar which has prescribed an annual membership fee shall keep its secretary treasurer notified of his correct mailing address and shall pay the prescribed fee at the time and place set forth in the demand for payment mailed to him by its secretary treasurer. The name of each active member of a district bar who is more than 12 full calendar months in arrears in the payment of any fee shall be furnished by the secretary treasurer of the district bar to the Council. In the exercise of its powers as set forth in G.S. 84-23, the Council shall thereupon take disciplinary or other action with reference to the delinquent as it considers necessary and proper.

§ 84-19. Judicial districts definition.

For purposes of this Article, the term "judicial district" refers to prosecutorial districts established by the General Assembly and includes the High Point Superior Court District as described under G.S. 7A 41(b)(13). The term "district bar" means the bar of a judicial district as defined by this section.

§ 84-21. Organization of Council; publication of rules, regulations and bylaws.

(a) The Council shall adopt the rules pursuant to G.S. 45A 9.

(b) The rules and regulations adopted by the Council under this Article may be amended by the Council from time to time in any manner not inconsistent with this Article. Copies of all rules and regulations and of all amendments adopted by the Council shall be certified to the Chief Justice of the Supreme Court of North Carolina, entered by the North Carolina Supreme Court upon its minutes, and published in the next ensuing number of the North Carolina Reports and in the North Carolina Administrative Code: Provided, that the court may decline to have so entered upon its minutes any rules, regulations and amendments which in the opinion of the Chief Justice are inconsistent with this Article.

§ 84-22. Officers and committees of the North Carolina State Bar.

The officers of the North Carolina State Bar and the Council shall consist of a president, president elect, vice president and an immediate past president, who shall be deemed members of the Council in all respects. The president, president elect and vice president need not be members of the Council at the time of their election. There shall be a secretary treasurer who shall also have the title of executive director, but who shall not be a member of the Council. All officers shall be elected annually by the Council at an election to take place at the annual meeting of the North Carolina State Bar. The regular term of all officers is one year. The Council is the judge of the election and qualifications of its members.

In addition to the committees and commissions as may be specifically established or authorized by law, the North Carolina State Bar may have committees, standing or special, as from time to time the Council deems appropriate for the proper discharge of the duties and functions of the North Carolina State Bar. The Council shall determine the number of members, composition, method of appointment or election, functions, powers and duties, structure, authority to act, and other matters relating to each committee. Any committee may, at the discretion of the appointing or electing authority, be composed of Council members or members of the North Carolina State Bar who are not members of the Council, or of lay persons, or of any combination.

§ 84-23. Powers of Council.

(a) The Council is vested, as an agency of the State, with the authority to regulate the professional conduct of licensed lawyers and State Bar certified paralegals. Among other powers, the Council shall administer this Article; take actions that are necessary to ensure the competence of lawyers and State Bar certified paralegals; formulate and adopt rules of professional ethics and conduct; investigate and prosecute matters of professional misconduct; grant or deny petitions for reinstatement; resolve questions pertaining to membership status; arbitrate disputes concerning legal fees; certify legal specialists and paralegals and charge fees to applicants and participants necessary to administer these certification programs; determine whether a member is disabled; maintain an annual registry of interstate and international law firms doing business in this State; and formulate and adopt procedures for accomplishing these purposes. The Council may do all things necessary in the furtherance of the purposes of this Article that are not otherwise prohibited by law.

(b) The Council or any committee of the Council, including the Client Security Fund and the Disciplinary Hearing Commission or any committee of the Commission, may subpoena financial records of any licensed lawyers, lawyers whose licenses have been suspended, or disbarred lawyers, relating to any account into which client or fiduciary funds have been deposited.

(c) The Council may publish an official journal concerning matters of interest to the legal profession.

(d) The Council may acquire, hold, rent, encumber, alienate, lease, and otherwise deal with real or personal property in the same manner as any private person or corporation, subject only to the approval of the Governor and the Council of State as to the acquisition, rental, encumbering, leasing and sale of real property. The Council may borrow money upon its bonds, notes, debentures, or other evidences of indebtedness sold through public or private sale pursuant to a loan agreement or a trust agreement or indenture with a trustee, with such borrowing either unsecured or secured by a mortgage on the Council's interest in real or personal property, and engage and contract with attorneys, underwriters, financial advisors, and other parties as necessary for such borrowing, with such borrowing and security subject to the approval of the Governor and the Council of State. The Council may utilize the services of the Purchase and Contract Division of the Department of Administration to procure personal property, in accordance with the provisions of Article 3 of Chapter 143 of the General Statutes. However, the Council shall: (i) submit all proposed contracts for supplies, materials, printing, equipment, and contractual services that exceed one million dollars ($1,000,000) authorized by this subsection to the Attorney General or the Attorney General's designee for review as provided in G.S. 114 8.3; and (ii) include in all contracts to be awarded by the Council under this subsection a standard clause which provides that the State Auditor and internal auditors of the Council may audit the records of the contractor during and after the term of the contract to verify accounts and data affecting fees and performance. The Council shall not award a cost plus percentage of cost agreement or contract for any purpose.

§ 84-28. Discipline and disbarment.

(a) Any attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of the Council under such rules and procedures as the Council shall adopt as provided in G.S. 84-23.

(b) The following acts or omissions by a member of the North Carolina State Bar or any attorney admitted for limited practice under G.S. 84-4.1, individually or in concert with any other person or persons, shall constitute misconduct and shall be grounds for discipline whether the act or omission occurred in the course of an attorney client relationship or otherwise:

(1) Conviction of, or a tender and acceptance of a plea of guilty or no contest to, a criminal offense showing professional unfitness;

(2) The violation of the Rules of Professional Conduct adopted and promulgated by the Council in effect at the time of the act;

(3) Knowing misrepresentation of any facts or circumstances surrounding any complaint, allegation or charge of misconduct; failure to answer any formal inquiry or complaint issued by or in the name of the North Carolina State Bar in any disciplinary matter; or contempt of the Council or any committee of the North Carolina State Bar.

(c) Misconduct by any attorney shall be grounds for:

(1) Disbarment;

(2) Suspension for a period up to but not exceeding five years, any portion of which may be stayed upon reasonable conditions to which the offending attorney consents;

(3) Censure - A censure is 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 members of the public, but the protection of the public does not require suspension of the attorney's license;

(4) Reprimand - A reprimand is a written form of discipline more serious than an admonition issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct, but the protection of the public does not require a censure. A reprimand is generally reserved for cases in which the attorney's conduct has caused harm or potential harm to a client, the administration of justice, the profession, or members of the public; or

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

Any order disbarring or suspending an attorney may impose reasonable conditions precedent to reinstatement. No attorney who has been disbarred by the Disciplinary Hearing Commission, the Council, or by order of any court of this State may seek reinstatement to the practice of law prior to five years from the effective date of the order of disbarment. Any order of the Disciplinary Hearing Commission or the Grievance Committee imposing an admonition, reprimand, censure, or stayed suspension may also require the attorney to complete a reasonable amount of continuing legal education in addition to the minimum amount required by the North Carolina Supreme Court.

(d) Any attorney admitted to practice law in this State, who is convicted of or has tendered and has had accepted, a plea of guilty or no contest to, a criminal offense showing professional unfitness, may be disciplined based upon the conviction, without awaiting the outcome of any appeals of the conviction. An order of discipline based solely upon a conviction of a criminal offense showing professional unfitness shall be vacated immediately upon receipt by the Secretary of the North Carolina State Bar of a certified copy of a judgment or order reversing the conviction. The fact that the attorney's criminal conviction has been overturned on appeal shall not prevent the North Carolina State Bar from conducting a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

(d1) An attorney who is disciplined as provided in subsection (d) of this section may petition the court in the trial division in the judicial district where the conviction occurred for an order staying the disciplinary action pending the outcome of any appeals of the conviction. The court may grant or deny the stay in its discretion upon such terms as it deems proper. A stay of the disciplinary action by the court shall not prevent the North Carolina State Bar from going forward with a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

(e) Any attorney admitted to practice law in this State who is disciplined in another jurisdiction shall be subject to the same discipline in this State: Provided, that the discipline imposed in the other jurisdiction does not exceed that provided for in subsection (c) above and that the attorney was not deprived of due process in the other jurisdiction.

(f) Upon application by the North Carolina State Bar, misconduct by an attorney admitted to practice in this State may be restrained or enjoined where the necessity for prompt action exists regardless of whether a disciplinary proceeding in the matter of the conduct is pending. The application shall be filed in the Superior Court of Wake County and shall be governed by the procedure set forth in G.S. 1A 1, Rule 65.

(g) Any member of the North Carolina State Bar may be transferred to disability inactive status for mental incompetence, physical disability, or substance abuse interfering with the attorney's ability to competently engage in the practice of law under the rules and procedures the Council adopts pursuant to G.S. 84-23.

(h) There shall be an appeal of right by either party from any final order of the Disciplinary Hearing Commission to the North Carolina Court of Appeals. Review by the appellate division shall be upon matters of law or legal inference. The procedures governing any appeal shall be as provided by statute or court rule for appeals in civil cases. A final order which imposes disbarment or suspension for 18 months or more shall not be stayed except upon application, under the rules of the Court of Appeals, for a writ of supersedeas. A final order imposing suspension for less than 18 months or any other discipline except disbarment shall be stayed pending determination of any appeal of right.

(i) The North Carolina State Bar may invoke the process of the General Court of Justice to enforce the powers of the Council or any committee to which the Council delegates its authority.

(j) The North Carolina State Bar may apply to appropriate courts for orders necessary to protect the interests of clients of missing, suspended, disbarred, disabled, or deceased attorneys.

The senior regular resident judge of the superior court of any district wherein a member of the North Carolina State Bar resides or maintains an office shall have the authority and power to enter orders necessary to protect the interests of the clients, including the authority to order the payment of compensation by the member or the estate of a deceased or disabled member to any attorney appointed to administer or conserve the law practice of the member. Compensation awarded to a member serving under this section awarded from the estate of a deceased member shall be considered an administrative expense of the estate for purposes of determining priority of payment.

§ 84-28.1. Disciplinary hearing commission.

(a) There shall be a disciplinary hearing commission of the North Carolina

State Bar which shall consist of 20 members. Twelve of these members shall be members of the North Carolina State Bar, and shall be appointed by the Council. The other eight shall be citizens of North Carolina not licensed to practice law in this or any other state, four of whom shall be appointed by the Governor, two by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120 121, and two by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120 121. The Council shall designate one of its appointees as chair and another as vice chair. The chair shall have actively practiced law in the courts of the State for at least 10 years. Except as set out herein, the terms of members of the commission are set at three years commencing on the first day of July of the year of their appointment. The Council, the Governor, and the General Assembly respectively, shall appoint members to fill unexpired terms when vacancies are created by resignation, disqualification, disability or death, except that vacancies in appointments made by the General Assembly may also be filled as provided by G.S. 120 122. No member may serve more than a total of seven years or a one year term and two consecutive three year terms: Provided, that any member or former member who is designated chair may serve one additional three year term in that capacity. No member of the Council may be appointed to the commission.

(b) The disciplinary hearing commission of the North Carolina State Bar, or any committee of the disciplinary hearing commission, may hold hearings in discipline, incapacity and disability matters, make findings of fact and conclusions of law after these hearings, enter orders necessary to carry out the duties delegated to it by the Council, and tax the costs to an attorney who is disciplined or is found to be incapacitated or disabled.

(b1) The disciplinary hearing commission of the North Carolina State Bar, or any committee thereof, acting through its chairman, shall have the power to hold persons, firms or corporations in contempt as provided in Chapter 5A.

(c) Members of the disciplinary hearing commission shall receive the same per diem and travel expenses as are authorized for members of State commissions under G.S. 138 5.

§ 84-28.2. Persons immune from suit.

Persons shall be immune from suit for all statements made without malice, and intended for transmittal to the North Carolina State Bar or any board, committee, officer, agent or employee thereof, or given in any investigation or proceedings, pertaining to alleged misconduct or disability or to reinstatement of an attorney. The protection of this immunity does not exist, however, as to statements made to others not intended for this use.

§ 84-29. Evidence and witnesses.

In any investigation of charges of professional misconduct or disability or in petitions for reinstatement, the Council and any committee thereof, and the disciplinary hearing commission, and any committee thereof, may administer oaths and affirmations and shall have the power to subpoena and examine witnesses under oath, and to compel their attendance, and the production of books, papers and other documents or writings deemed by it necessary or material to the inquiry. Each subpoena shall be issued under the hand of the secretary treasurer or the president of the Council or the chair of the committee appointed to hear the charges, and shall have the force and effect of a summons or subpoena issued by a court of record, and any witness or other person who shall refuse or neglect to appear in obedience thereto, or to testify or produce the books, papers, or other documents or writings required, shall be liable to punishment for contempt either by the Council or its committee or a hearing committee of the disciplinary hearing commission through its chair pursuant to the procedures set out in Chapter 5A of the General Statutes, but with the right to appeal therefrom. Depositions may be taken in any investigations of professional misconduct as in civil proceedings, but the Council or the committee hearing the case may, in its discretion, whenever it believes that the ends of substantial justice so require, direct that any witness within the State be brought before it. Witnesses giving testimony under a subpoena before the Council or any committee thereof, or the disciplinary hearing commission or any committee thereof, or by deposition, shall be entitled to the same fees as in civil actions.

In cases heard before the Council or any committee thereof or the disciplinary hearing commission or any committee thereof, if the party shall be convicted of the charges, the party shall be taxed with the cost of the hearings: Provided, however, that the bill of costs shall not include any compensation to the members of the Council or committee before whom the hearings are conducted.

§ 84-30. Rights of accused person.

Any person who shall stand charged with an offense cognizable by the council or any committee thereof or the disciplinary hearing commission or any committee thereof shall have the right to invoke and have exercised in his favor the powers of the council or any committee, in respect of compulsory process for witnesses and for the production of books, papers, and other writings and documents, and shall also have the right to be represented by counsel.

§ 84-32. Records and judgments and their effect; restoration of licenses.

(a) In cases heard by the disciplinary hearing commission or any committee thereof, the proceedings shall be recorded by a certified court reporter and an official copy of all exhibits introduced into evidence shall be made and preserved in the office of the secretary-treasurer. Final judgments of suspension or disbarment shall be entered upon the judgment docket of the superior court in the district wherein the respondent resides or practices law, and also upon the minutes of the Supreme Court of North Carolina; and the judgment shall be effective throughout the State.

(b) Whenever any attorney desires to voluntarily surrender his license, the attorney must tender the license and a written resignation to the Council. The Council, in its discretion, may accept or reject the tender. If the tender is accepted, the Council shall enter an order of disbarment. A copy of any order of disbarment shall be filed with the clerk of the superior court of the county where the respondent resides, maintains an office, or practices law and also upon the minutes of the Supreme Court of North Carolina. The judgment shall be effective throughout the State.

(c) Whenever any attorney has been deprived of the attorney's license by suspension or disbarment, the Council or the disciplinary hearing commission or the secretary-treasurer may, in accordance with rules and regulations prescribed by the Council, restore the license upon due notice being given and satisfactory evidence produced of proper reformation of the suspended or disbarred attorney and of satisfaction of any conditions precedent to restoration.

(d) The Council has jurisdiction to determine any petition seeking the reinstatement of the license of any attorney disbarred or suspended by any court in its inherent power when requested by the court. The proceeding shall be governed by the rules and regulations adopted by the Council. The disbarred or suspended attorney shall satisfy all conditions precedent to reinstatement generally imposed upon attorneys disbarred or suspended by the disciplinary hearing commission or the Council, as well as any conditions imposed by the court. Under no circumstances shall an attorney disbarred by a court or by the North Carolina State Bar be reinstated prior to five years from the effective date of the order of disbarment. (1933, c. 210, s. 15; 1935, c. 74, s. 2; 1953, c. 1310, s. 4; 1959, c. 1282, s. 2; 1975, c. 582, s. 10; 1983, c. 390, s. 5; 1995, c. 431, s. 23.)

§ 84-32.1. Confidentiality of records.

(a) All documents, papers, letters, recordings, electronic records, or other documentary materials, regardless of physical form or characteristic, in the possession of the State Bar or its staff, employees, legal counsel, councilors, and Grievance Committee advisory members concerning any investigation, inquiry, complaint, disability, or disciplinary matter in connection with the State Bar Grievance Committee, the State Bar's Trust Accounting Supervisory Program, or any audit of an attorney trust account shall not be considered public records within the meaning of Chapter 132 of the General Statutes.

(b) All documents, papers, letters, recordings, electronic records, or other documentary materials containing or reflecting the deliberations of the Disciplinary Hearing Commission in disciplinary or disability matters shall not be considered public records within the meaning of Chapter 132 of the General Statutes.

(c) Notwithstanding any other provision of this section, any record, paper,

or other document containing information collected and compiled by or on behalf of the State Bar that is admitted as evidence in any hearing before the Disciplinary Hearing Commission, or any court or tribunal, shall be a public record within the meaning of Chapter 132 of the General Statutes unless it is admitted into evidence under seal by order of the Disciplinary Hearing Commission, or the court or tribunal in which the proceeding is held.

(d) All documents, papers, letters, recordings, electronic records, or other documentary materials in the possession of the State Bar or its staff, employees, legal counsel, and Lawyer Assistance Program volunteers, relating in any way to a member's participation or prospective participation in the Lawyer Assistance Program, including, but not limited to, any medical, counseling, substance abuse, or mental health records, shall not be considered public records within the meaning of Chapter 132 of the General Statutes. Neither the State Bar nor any person acting under the authority of the State Bar or of the Lawyer Assistance Program shall be required to produce or testify regarding the contents or existence of such documents. (2011-267, s. 5.)

§ 84-34. Membership fees and list of members.

Every active member of the North Carolina State Bar shall, prior to the first day of July of each year, pay to the secretary-treasurer an annual membership fee in an amount determined by the Council but not to exceed three hundred dollars ($300.00), and every member shall notify the secretary-treasurer of the member's correct mailing address. Any member who fails to pay the required dues by the last day of June of each year shall be subject to a late fee in an amount determined by the Council but not to exceed thirty dollars ($30.00). All dues for prior years shall be as were set forth in the General Statutes then in effect. The membership fee shall be regarded as a service charge for the maintenance of the several services authorized by this Article, and shall be in addition to all fees required in connection with admissions to practice, and in addition to all license taxes required by law. The fee shall not be prorated: Provided, that no fee shall be required of an attorney licensed after this Article shall have gone into effect until the first day of January of the calendar year following that in which the attorney was licensed; but this proviso shall not apply to attorneys from other states admitted on certificate. The fees shall be disbursed by the secretary-treasurer on the order of the Council. The secretary-treasurer shall annually, at a time and in a law magazine or daily newspaper to be prescribed by the Council, publish an account of the financial transactions of the Council in a form to be prescribed by it. The secretary-treasurer shall compile and keep currently correct from the names and mailing addresses forwarded to the secretary-treasurer and from any other available sources of information a list of members of the North Carolina State Bar and furnish to the clerk of the superior court in each county, not later than the first day of October in each year, a list showing the name and address of each attorney for that county who has not complied with the provisions of this Article. The name of each of the active members who are in arrears in the payment of membership fees shall be furnished to the presiding judge at the next term of the superior court after the first day of October of each year, by the clerk of the superior court of each county wherein the member or members reside, and the court shall thereupon take action that is necessary and proper. The names and addresses of attorneys so certified shall be kept available to the public. The Secretary of Revenue is hereby directed to supply the secretary-treasurer, from records of license tax payments, with any information for which the secretary-treasurer may call in order to enable the secretary-treasurer to comply with this requirement.

§ 84-34.2. Specific statutory authority for certain fees.

In addition to fees the Council is elsewhere authorized to charge and collect, the Council may charge and collect the following fees in amounts determined by the Council:

(1) A reinstatement fee for any attorney seeking reinstatement from inactive status, administrative suspension, or suspension for failure to comply with the annual continuing legal education requirements.

(2) A registration fee and annual renewal fee for an interstate or international law firm.

(3) An attendance fee for continuing legal education programs that may include a fee to support the Chief Justice's Commission on Professionalism.

(4) A late fee for failing to file timely the continuing legal education annual report form, for failure to pay attendance fees, or failure to complete the annual continuing legal education requirements.

(5) An administrative fee for any attorney against whom discipline has been imposed.

§ 84-36. Inherent powers of courts unaffected.

Nothing contained in this Article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys.

§ 84-37. State Bar may investigate and enjoin unauthorized activities.

(a) The Council or any committee appointed by it for that purpose may inquire into and investigate any charges or complaints of (i) unauthorized or unlawful practice of law or (ii) the use of the designations, "North Carolina Certified Paralegal," "North Carolina State Bar Certified Paralegal," or "Paralegal Certified by the North Carolina State Bar Board of Paralegal Certification," by individuals who have not been certified in accordance with the rules adopted by the North Carolina State Bar. The Council may bring or cause to be brought and maintained in the name of the North Carolina State Bar an action or actions, upon information or upon the complaint of any person or entity against any person or entity that engages in rendering any legal service, holds himself or herself out as a North Carolina certified paralegal by use of the designations set forth in this subsection, or makes it a practice or business to render legal services that are unauthorized or prohibited by law. No bond for cost shall be required in the proceeding.

(b) In an action brought under this section, the final judgment if in favor of the plaintiff shall perpetually restrain the defendant or defendants from the commission or continuance of the unauthorized or unlawful act or acts. A temporary injunction to restrain the commission or continuance of the act or acts may be granted upon proof or by affidavit, that the defendant or defendants have violated any of the laws applicable to unauthorized or unlawful practice of law or the unauthorized use of the designations set forth in subsection (a) of this section or any other designation implying certification by the State Bar. The provisions of law relating generally to injunctions as provisional remedies in actions shall apply to a temporary injunction and the proceedings for temporary injunctions.

(c) The venue for actions brought under this section shall be the superior court of any county in which the relevant acts are alleged to have been committed or in which there appear reasonable grounds that they will be committed in the county where the defendants in the action reside, or in Wake County.

(d) The plaintiff in the action shall be entitled to examine the adverse party and witnesses before filing complaint and before trial in the same manner as provided by law for examining parties.

(e) This section shall not repeal or limit any remedy now provided in cases of unauthorized or unlawful practice of law. Nothing contained in this section shall be construed as disabling or abridging the inherent powers of the court in these matters.

(f) The Council or its duly appointed committee may issue advisory opinions in response to inquiries from members or the public regarding whether contemplated conduct would constitute the unauthorized practice of law.

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 of the North Carolina State Bar are published officially in the North Carolina Reports and in Title 27 of the North Carolina Administrative Code. These rules were adopted by the North Carolina State Bar Council and approved by the North Carolina Supreme Court pursuant to N.C.G.S. §84-21. The rules that follow are codified in Chapter 1 of Title 27 of the NC Administrative Code; they govern the administration of the State Bar, including such things as the organization of the State Bar Council, membership and dues requirements, procedures for the discipline of lawyers, and the regulation of organizations practicing law. They also contain the procedures for the various programs of the North Carolina State Bar, including the client security fund, continuing legal education, specialization, IOLTA (interest on lawyers' trust accounts), and the Lawyer Assistance Program. The Rules of Professional Conduct, which are codified in Chapter 2 of Title 27 of the NC Administrative Code, follow the governing rules.

A "History Note" after each rule sets forth the statutory authority for the rule. In 1994 all State Bar rules in existence were reorganized and renumbered for accurate placement in the North Carolina Administrative Code. To accomplish this task, the Supreme Court approved the readoption of the rules on December 8, 1994. Therefore, "Readopted Effective December 8, 1994" appears after many of the rules. For subsequent history, the date upon which a new rule or amendment to a rule was approved by the Supreme Court is listed after "Amendments Approved by the Supreme Court." There may be multiple dates upon which a particular rule was amended.

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

(1) The inactive members shall include:

(A) 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, and

(B) those persons granted emeritus pro bono status by the council and allowed to represent indigent clients on a pro bono basis under the supervision of active members working for nonprofit corporations organized pursuant to Chapter 55A of the General Statutes of North Carolina for the sole purpose of rendering legal services to indigents.

(2) Inactive members of the North Carolina State Bar may not practice law, except as provided in this rule for persons granted emeritus pro bono status, 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:

(A) Nonpracticing

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

(B) Retired

This subcategory includes those members who are retired from the practice of law and who no longer hold themselves out as practicing attorneys. A retired member must hold himself or herself out as a "Retired Member of the North Carolina State Bar" or by some similar designation, provided such designation clearly indicates that the attorney is "retired."

(C) 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.

(D) 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.

(E) Administrative suspensions

This subcategory includes those members who have been suspended from the practice of law, pursuant to the procedure set forth in Rule .0903 of subchapter 1D, for failure to fulfill the obligations of membership.

(F) Emeritus pro bono status

This subcategory includes those members who are permitted by the council to represent indigent persons under the supervision of active members who are employed by nonprofit corporations duly authorized to provide legal services to such persons. This status may be withdrawn by the council for good cause shown pursuant to the procedure set forth in Rule .0903 of subchapter 1D.

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

Amendments Approved by the Supreme Court: March 6, 2008; March 6, 2014

.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.

(c) Updating Membership Information.

Each year before July 1, every member shall provide or verify the member's current name, mailing address, and e-mail address.

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

Amendments Approved by the Supreme Court: December 7, 1995; October 7, 2010

.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 petition 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

Amendments Approved by the Supreme Court: September 7, 1995; December 7, 1995; March 7, 1996

.0204 Good Standing Definition and Certificates

(a) Definition

A lawyer who is an active member of the North Carolina State Bar and who is not subject to a pending administrative or disciplinary suspension or disbarment order or an order of suspension that has been stayed is in good standing with the North Carolina State Bar. An administrative or disciplinary suspension or disbarment order is "pending" if the order has been announced in open court by a state court of competent jurisdiction or by the Disciplinary Hearing Commission, or if the order has been entered by a state court of competent jurisdiction, by the Council or by the Disciplinary Hearing Commission but has not taken effect. "Good standing" makes no reference to delinquent membership obligations, prior discipline, or any disciplinary charges or grievances that may be pending.

(b) Certificate of Good Standing for Active Member

Upon application and payment of the prescribed fee, the Secretary of the North Carolina State Bar shall issue a certificate of good standing to any active member of the State Bar who is in good standing and who is current on all payments owed to the North Carolina State Bar. A certificate of good standing will not be issued unless the member pays any delinquency shown on the financial records of the North Carolina State Bar including outstanding judicial district bar dues. If the member contends that there is good cause for non-payment of some or all of the amount owed, the member may subsequently demonstrate good cause to the Administrative Committee pursuant to the procedure set forth in Rule .0903(e)(1) of subchapter 1D of these rules. If the member shows good cause, the contested amount shall be refunded to the member.

(c) Certificate of Good Standing for Inactive Member

Upon application, the Secretary of the North Carolina State Bar shall issue a certificate of good standing to any inactive member of the State Bar who was in good standing at the time that the member was granted inactive status and who is not subject to any disciplinary order or pending disciplinary order. The certificate shall state that the member is inactive and is ineligible to practice law in North Carolina.

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

Adopted by the Supreme Court: March 8, 2012

Section .0300 Permanent Relinquishment of Membership in the State Bar

.0301 Effect of Relinquishment

(a) Order of Relinquishment. Pursuant to the authority of the council to resolve questions pertaining to membership status as specified in N.C. Gen. Stat. 84-23, the council may allow a member of the State Bar to relinquish his or her membership in the State Bar subject to the conditions set forth in this section. Upon the satisfaction of those conditions, the council may enter an order declaring that the individual is no longer a member of the State Bar and no longer has the privileges of membership set forth in N.C. Gen. Stat. 84-16 and in the rules of the State Bar.

(b) Requirements to Return to Practice of Law. If an individual who has been granted relinquishment of membership desires to return to the practice of law in the state of North Carolina, he or she must apply to the North Carolina Board of Law Examiners and satisfy all of the requirements to obtain a license to practice law in the state of North Carolina as if for the first time.

(c) Prohibition on Representations. Effective upon the date of the order of relinquishment, the former licensee is prohibited from representing that he or she is

(1) a lawyer in North Carolina,

(2) licensed to practice law in North Carolina,

(3) able to provide legal services in North Carolina, or

(4) a member of the North Carolina State Bar.

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

Adopted by the Supreme Court: September 24, 2015

.0302 Conditions for Relinquishment

A member of the State Bar may petition the council to enter an order of relinquishment. An order of relinquishment shall be granted if the petition demonstrates that the following conditions have been satisfied:

(a) Unresolved Complaints. No open, unresolved allegations of professional misconduct are pending against the petitioner in any jurisdiction.

(b) No Financial Obligation to State Bar. The petitioner has paid all membership fees, Client Security Fund assessments, late fees, and costs assessed by the North Carolina State Bar or the Disciplinary Hearing Commission, and all fees, fines, and penalties owed to the Board of Continuing Legal Education.

(c) Wind Down of Law Practice. The petitioner has completed the wind down of his or her law practice in compliance with the procedure for winding down the law practice of a suspended or disbarred lawyer set forth in paragraphs (a), (b), and (e) of Rule .0128 of Subchapter 1B and with any other condition on the wind down of a law practice imposed by state, federal, and administrative law. The petition must describe the wind down of the law practice with specificity.

(d) Acknowledgment. The petitioner acknowledges the following: the State Bar's authority to take the actions described in Rule .0303 of this section; that the sole mechanism for regaining active membership status with the State Bar is to apply to the North Carolina Board of Law Examiners for admission and to satisfy all of the requirements to obtain a license to practice law in the state of North Carolina as if for the first time; and that he or she is not entitled to confidentiality under Rule .0133 of Subchapter 1B of any information relating to professional misconduct received by the State Bar after the date of the entry of the order of relinquishment.

(e) Address. The petition includes a physical address at which the State Bar can communicate with the petitioner.

(f) Notarized Petition. The petition is signed in the presence of a notary and notarized.

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

Adopted by the Supreme Court: September 24, 2015

.0303 Allegations of Misconduct Received by the State Bar On or After the Date of Relinquishment

(a) Post Relinquishment Action by State Bar. Relinquishment is not a bar to the initiation or investigation of allegations of professional misconduct and shall not prevent the State Bar from prosecuting a disciplinary action against the former licensee for any violation of the Rules of Professional Conduct that occurred prior to the date of the order of relinquishment.

(b) Procedure for Investigation. Allegations of misconduct shall be investigated pursuant to the procedures set forth in Section .0100 of Subchapter 1B.

(c) Release of Information from Investigation. Information from the investigation of allegations of misconduct shall be retained in the State Bar's records and may be released by the State Bar as required by law or as necessary to protect the interests of the public. Release may be made to, but is not limited to, the North Carolina Board of Law Examiners, any professional licensing authority, or any law enforcement or regulatory body investigating the former licensee.

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

Adopted by the Supreme Court: September 24, 2015

Section .0500 Meetings of the North Carolina State Bar

.0501 Annual Meetings

The annual meeting of the North Carolina State Bar shall be held at such time and place within the state of North Carolina as the council may determine.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: April 5, 2018

.0502 Special Meetings

(a) A special meeting of the North Carolina State Bar may be called to address specific subjects as follows:

(1) upon direction of the council; or

(2) upon delivery to the secretary of a written request by no fewer than 25% of the active members of the North Carolina State Bar setting forth the subject(s) to be addressed.

(b) At a special meetings, only subjects specified in the notice shall be addressed.

(c) Any special meeting of the North Carolina State Bar will be held at such time and place within the state of North Carolina as the council or president

may determine.

History Note: Statutory Authority G.S. 84-23; G.S. 84-33
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: April 5, 2018

.0503 Notice of Meetings

(a) Notice of any meeting of the North Carolina State Bar shall be given by the secretary by posting a notice at the State Bar headquarters and on the State Bar website or as otherwise directed by the council. Notice shall also be provided as required by N.C. Gen. Stat. § 143-318.12 and by any other statutory provision regulating notice of public meetings of agencies of the state.

(b) Notice of the annual meeting will be given at least 30 days before the meeting. Notice of any special meeting will be given at least 48 hours before the meeting or as otherwise required by law.

History Note: Statutory Authority G.S. 84-23; G.S. 84-33
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: April 5, 2018

.0504 Quorum

At any annual or special meetings of the North Carolina State Bar those active members of the North Carolina State Bar present shall constitute a quorum. There shall be no voting by proxy or by absentee ballot.

History Note: Statutory Authority G.S. 84-23; G.S. 84-33
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: April 5, 2018

.0505 Parliamentary Rules

Proceedings at any meeting of the North Carolina State Bar shall be governed by Roberts' Rules of Order.

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

Section .0600 Meetings of the Council

.0601 Regular Meetings

Regular meetings of the council shall be held each year in January, April, and July, at such times and places as the council may determine. A regular meeting of the council shall also be held each year in conjunction with the annual meeting of the North Carolina State Bar at the location of the annual meeting. Any regular meeting may be adjourned from time to time as a majority of members of the council present may determine.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: June 1, 1995; April 5, 2018

.0602 Special and Emergency Meetings

(a) A special meeting of the council may be called to address specified subjects as follows:

(1) by the president in his or her discretion; or

(2) by a written request, delivered to the secretary, by eight councilors setting forth the subject(s) to be addressed at the meeting. The secretary will schedule a special meeting to be held no more than 30 days after receipt of the request.

(b) An emergency meeting of the council may be called by the president to address circumstances that require immediate consideration by the council.

(c) In the event of incapacity or recusal of the president, the president elect or the vice president may call a special or emergency meeting. In the event of incapacity or recusal of the president elect or the vice president, the immediate past president or secretary may call a special or emergency meeting. In the event of incapacity or recusal of all officers, any member of the council who has served at least two terms may call a special or emergency meeting.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: April 5, 2018

.0603 Notice of Meetings

(a) Notice of any regular meeting of the council will be given by the secretary by posting a notice at the State Bar headquarters and on the State Bar website or as otherwise directed by the council. Notice of any regular meeting will also be provided as required by N.C. Gen. Stat. § 143-318.12 and any other statutory provision regulating notice of public meetings of agencies of the state. Unless otherwise required by law, the secretary will issue notice of any regular meeting of the council at least 30 days before the meeting.

(b) The secretary will issue notice of any special meeting of the council at least 48 hours before the meeting, or as otherwise required by law. Notices of any special meeting will be sent to each councilor by email, or other electronic means intended to be individually received by each councilor, to the most recent address of record provided to the State Bar by each councilor for such communications. Notice will be given to any councilor who has not provided an email address, or other electronic means to receive notices, by regular mail. Notice may be sent, but is not required to be sent, by any means authorized for service under the Rules of Civil Procedure.

(c) The secretary will issue reasonable notice of any emergency meeting in a manner consistent with the purpose of the meeting. Such notice may be given through any appropriate means by which each councilor may receive notice on an expedited basis, including telephone, email, or other electronic means.

(d) The notice for any council meeting shall set forth the day, hour, and location of the meeting.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: April 5, 2018

.0604 Quorum

At a meeting of the council the presence of 10 councilors shall constitute a quorum. There shall be no voting by proxy or by absentee ballot.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: April 5, 2018

.0605 Manner of Meeting of Council

The council will assemble at the time and place provided in the meeting notice. Attendance at a special or emergency council meeting may be by electronic means such as audio or video conferencing. Attendance at a regular council meeting by electronic means may be authorized for an individual councilor in the discretion of the president.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court April 5, 2018

.0606 Parliamentary Rules

Proceedings at any meeting of the council shall be governed by Roberts' Rules of Order.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court April 5, 2018

Section .0700 Standing Committees of the Council

.0701 Standing Committees and Boards

(a) Standing Committees. Promptly after his or her election, the president shall appoint members to the standing committees identified below to serve for one year beginning January 1 of the year succeeding his or her election. Members of the committees need not be councilors, except to the extent expressly required by these rules, and may include non-lawyers. Unless otherwise directed by resolution of the council, all members of a standing committee, whether councilors or non-councilors, shall be entitled to vote as members of the standing committee or any subcommittee or panel thereof.

(1) Executive Committee. It shall be the duty of the Executive Committee to receive reports and recommendations from standing committees, boards, and special committees; to nominate individuals for appointments made by the council; to make long range plans for the State Bar; and to perform such other duties and consider such other matters as the council or the president may designate.

(2) Ethics Committee. It shall be the duty of the Ethics Committee to study the rules of professional responsibility currently in effect; to make recommendations to the council for such amendments to the rules as the committee deems necessary or appropriate; to study and respond to questions

that arise concerning the meaning and application of the rules of professional conduct; to issue opinions in response to questions of legal ethics in accordance with the provisions of Section .0100 of Subchapter 1D of these rules; to consider issues concerning the regulation of lawyers' trust accounts; and to perform such other duties and consider such other matters as the council or the president may designate.

(3) Grievance Committee. It shall be the duty of the Grievance Committee to exercise the disciplinary and disability functions and responsibilities set forth in Section .0100 of Subchapter 1B of these rules and to make recommendations to the council for such amendments to that section as the committee deems necessary or appropriate. The Grievance Committee shall sit in subcommittees as assigned by the president. Each subcommittee shall have at least ten members. Two members of each subcommittee shall be nonlawyers, one member may be a lawyer who is not a member of the council, and the remaining members of each subcommittee shall be councilors of the North Carolina State Bar. A quorum of a subcommittee shall be five members serving at a particular time. One subcommittee shall oversee the Attorney Client Assistance Program. It shall be the duty of the Attorney Client Assistance subcommittee to develop and oversee policies and programs to help clients and lawyers resolve difficulties or disputes, including fee disputes, using means other than the formal grievance or civil litigation processes; and to perform such other duties and consider such other matters as the council or the president may designate. Each subcommittee shall exercise the powers and discharge the duties of the Grievance Committee with respect to the grievances, fee disputes, and other matters referred to it by the chairperson of the Grievance Committee. Each subcommittee member shall be furnished a brief description of all matters referred to other subcommittees (and such other available information as he or she may request) and be given a reasonable opportunity to provide comments to such other subcommittees. Each subcommittee's decision respecting the grievances, fee disputes, and other matters assigned to it will be deemed final action of the Grievance Committee, unless the full committee at its next meeting, by a majority vote of those present, elects to review a subcommittee decision and upon further consideration decides to reverse or modify that decision. There will be no other right of appeal to the committee as a whole or to another subcommittee. The president shall designate a vice-chairperson to preside over, and oversee the functions of each subcommittee. The vice-chairpersons shall have such other powers as may be delegated to them by the chairperson of the Grievance Committee. The Grievance Committee shall perform such other duties and consider such other matters as the council or the president may designate.

(4) Authorized Practice Committee. It shall be the duty of the Authorized Practice Committee to respond to or investigate inquiries and complaints about conduct that may constitute the unauthorized practice of law in accordance with the provisions of Section .0200 of Subchapter 1D of these rules; to study and advise the council on the appropriate and lawful use and regulation of legal assistants, paralegals and other lay persons in connection with the provision of law-related services; to study and advise the council on the regulation of professional organizations; and to perform such other duties and consider such other matters as the council or the president may designate.

(5) Administrative Committee. It shall be the duty of the Administrative Committee to study and make recommendations on policies concerning the administration of the State Bar, including the administration of the State Bar's facilities, automation, personnel, retirement plan, and district bars; to oversee the membership functions of the State Bar, including the collection of dues, the suspension of members for failure to pay dues and other fees, and the transfer of members to active or inactive status in accordance with the provisions of Sections .0900 and .1000 of Subchapter 1D of these rules; and to perform such other duties and consider such other matters as the council or the president may designate.

(6) Legal Assistance for Military Personnel (LAMP) Committee. It shall be the duty of the LAMP Committee to serve as liaison for lawyers in the military service in this State; to improve legal services to military personnel and dependents stationed in this State; and to perform such other duties and consider such other matters as the council or the president may designate.

(7) Finance and Audit Committee. It shall be the duty of the Finance and Audit Committee to superintend annually the preparation of the State Bar's operational budget and to make recommendations to the Executive Committee concerning that budget and the budgets for the boards listed in subsection (b) below; to make recommendations to the Executive Committee regarding the State Bar's financial policies; to examine the financial records of the State Bar at each regular meeting of the council and report its findings to the Executive Committee; to recommend to the Executive Committee annually the retention of an independent auditor; to direct the work of the independent auditor in accordance with the policies and procedures adopted by the council and the state auditor; and to review the results of the annual audit and make recommendations concerning the audit to the Executive Committee.

(8) Communications Committee. It shall be the duty of the Communications Committee to develop and coordinate official North Carolina State Bar communications to its membership and to third parties, including the use of printed publications, emerging technology, and social media.

(b) Boards. The council of the State Bar shall make appointments to the following boards upon the recommendation of the Executive Committee. The boards are constituents of the North Carolina State Bar and, as standing committees of the State Bar, are subject to the authority of the council.

(1) Interest on Lawyers' Trust Accounts (IOLTA) Board of Trustees. The IOLTA Board shall be constituted in accordance with and shall carry out the provisions of the Plan for Disposition of Funds Received by the North Carolina State Bar from Interest on Trust Accounts set forth in Section .1300 of Subchapter 1D of these rules.

(2) Board of Legal Specialization. The Board of Legal Specialization shall be constituted in accordance with and shall carry out the provisions of the Plan of Legal Specialization set forth in Section .1700 of Subchapter 1D of these rules.

(3) Client Security Fund Board of Trustees. The Client Security Fund Board of Trustees shall be constituted in accordance with and shall carry out the provisions of the Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar set forth in Section .1400 of Subchapter 1D of these rules.

(4) Board of Continuing Legal Education (CLE). The Board of Continuing Legal Education shall be constituted in accordance with and shall carry out the provisions of the Continuing Legal Education Rules and Regulations of the North Carolina State Bar set forth in Sections .1500 and .1600 of Subchapter 1D of these rules.

(5) Lawyer Assistance Program Board. The Lawyer Assistance Program Board shall be constituted in accordance with and shall carry out the provisions of the Rules Governing the Lawyer Assistance Program of the North Carolina State Bar set forth in Section .0600 of Subchapter 1D of these rules.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: June 12, 1996; February 3, 2000; October 6, 2004; November 16, 2006; March 8, 2007; March 11, 2010; October 7, 2010; September 22, 2016; April 5, 2018; September 25, 2019

Section .0800 Election and Appointment of State Bar Councilors

.0801 Purpose

The purpose of these rules is to promulgate fair, open, and uniform procedures to elect and appoint North Carolina State Bar councilors in all judicial district bars. These rules should encourage a broader and more diverse participation and representation of all attorneys in the election and appointment of councilors.

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

Readopted Effective December 8, 1994

.0802 Election - When Held; Notice; Nominations

(a) Every judicial district bar, in any calendar year at the end of which the

term of one or more of its councilors will expire, shall fill said vacancy or vacancies at an election to be held during that year.

(b) The officers of the district bar shall fix the time and place of such election and shall give to each active member (as defined in G.S. 84-16) of the district bar a written notice thereof directed to him or her at his or her address on file with the North Carolina State Bar, which notice shall be placed in the United States Mail, postage prepaid, at least 30 days prior to the date of the election.

(c) The district bar shall submit its written notice of the election to the North Carolina State Bar, at least six weeks before the date of the election.

(d) The North Carolina State Bar will, at its expense, mail these notices.

(e) The notice shall state the date, time and place of the election, give the number of vacancies to be filled, identify how and to whom nominations may be made before the election, and advise that all elections must be by a majority of the votes cast. If the election will be held at a meeting of the bar, the notice will also advise that additional nominations may be made from the floor at the meeting itself. In judicial districts that permit elections by mail or early voting, the notice to members shall advise that nominations may be made in writing directed to the president of the district bar and received prior to a date set out in the notice. Sufficient notice shall be provided to permit nominations received from district bar members to be included on the printed ballots.

History Note: Statutory Authority G.S. 84-18; G.S. 84-23
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: November 5, 1999; August 27, 2013

.0803 Election - Voting Procedures

(a) All nominations made either before or at the meeting shall be voted on by secret ballot.

(b) Cumulative voting shall not be permitted.

(c) Nominees receiving a majority of the votes cast shall be declared elected.

History Note: Statutory Authority G.S. 84-18; G.S. 84-23
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: November 5, 1999

.0804 Procedures Governing Elections by Mail

(a) Judicial district bars may adopt bylaws permitting elections by mail, in accordance with procedures approved by the N.C. State Bar Council and as set out in this section.

(b) Only active members of the judicial district bar may participate in elections conducted by mail.

(c) In districts which permit elections by mail, the notice sent to members referred to in Rule .0802(e) of this subchapter shall advise that the election will be held by mail.

(d) The judicial district bar shall mail a ballot to each active member of the judicial district bar at the member's address of record on file with the North Carolina State Bar. The ballot shall be accompanied by written instructions and shall state when and where the ballot should be returned.

(e) Each ballot shall be sequentially numbered with a red identifying numeral in the upper right hand corner of the ballot. The judicial district bar shall maintain appropriate records respecting how many ballots were mailed to prospective voters in each election, as well as how many ballots are returned.

(f) Only original ballots will be accepted. No photocopied or faxed ballots will be accepted.

History Note: Statutory Authority G.S. 84-18; G.S. 84-23
Adopted by the Supreme Court: November 5, 1999
Amendments Approved by the Supreme Court: August 23, 2012

.0805 Procedures Governing Elections by Electronic Vote

(a) Judicial district bars may adopt bylaws permitting elections by electronic vote in accordance with procedures approved by the N.C. State Bar Council and as set out in this section.

(b) Only active members of the judicial district bar may participate in elections conducted by electronic vote.

(c) In districts which permit elections by electronic vote, the notice sent to members referred to in Rule .0802(e) of this subchapter shall advise that the election will be held by electronic vote and shall identify how and to whom nominations may be made before the election. The notice shall explain when the ballot will be available, how to access the ballot, and the method for voting online. The notice shall also list locations where computers will be available for active members to access the online ballot in the event they do not have personal online access.

(d) Write-in candidates shall be permitted and the instructions shall so state.

(e) Online balloting procedures must ensure that only one vote is cast per active member of the judicial district bar and that all members have access to a ballot.

History Note: Statutory Authority G.S. 84-18
Adopted by the Supreme Court: August 23, 2012

.0806 Procedures Governing Early Voting

(a) Judicial district bars may adopt bylaws permitting early voting for up to 10 business days prior to a councilor election, in accordance with procedures approved by the NC State Bar Council and as set out in this subchapter.

(b) Only active members of the judicial district bar may participate in early voting.

(c) In districts that permit early voting, the notice sent to members referred to in Rule .0802(e) of this subchapter shall advise that early voting will be permitted, and shall identify the locations, dates, and hours for early voting. The notice shall also advise that nominations may be made in writing directed to the president of the district bar and received prior to a date set out in the notice. Sufficient notice shall be provided to permit nominations received from district bar members to be included on the printed ballots.

(d) The notice sent to members referred to in Rule .0802(e) of this subchapter shall be placed in the United States Mail, postage prepaid, at least 30 days prior to the first day of the early voting period.

(e) Write-in candidates shall be permitted during the early voting period and at the election, and the instructions shall so state.

(f) Early voting locations and hours must be reasonably accessible to all active members of the judicial district.

History Note: Statutory Authority G.S. 84-18
Adopted by the Supreme Court: August 27, 2013

.0807 Vacancies

The unexpired term of any councilor whose office has become vacant because of resignation, death, or any cause other than the expiration of a term, shall be filled within 90 days of the occurrence of the vacancy by an election conducted in the same manner as above provided.

History Note: Statutory Authority G.S. 84-18; 84-23
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: November 5, 1999

.0808 Bylaws Providing for Geographical Rotation or Division of Representation

Nothing contained herein shall prohibit the district bar of any judicial district from adopting bylaws providing for the geographical rotation or division of its councilor representation.

History Note: Statutory Authority G.S. 84-18; 84-23
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: November 5, 1999

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 by the Supreme Court: 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 fifteen dollars ($15.00) 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) Members Exempt from Assessment.

(1) A person licensed to practice law in North Carolina for the first time by examination is not liable for judicial district bar membership fees during the year in which the person is admitted;

(2) A person licensed to practice law in North Carolina serving in the United States Armed Forces, whether in a legal or nonlegal capacity, is exempt from judicial district bar membership fees for any year in which the member serves some portion thereof on full-time active duty in military service;

(3) A lawyer who joins a judicial district bar after the beginning of its fiscal year is 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 coterminously, for a period of three (3) months or more, with the fiscal year of the lawyer's new judicial district bar.

(g) Hardship Waivers. A judicial district bar may not grant any waiver from the obligation to pay the judicial district bar's annual membership fee. A judicial district bar may waive the late fee upon a showing of good cause.

(h) Reporting Delinquent Members to State Bar. Three to six months after the delinquency date 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 by the Supreme Court: December 20, 2000
Amendments Approved by the Supreme Court: March 6, 2008; April 10, 2014; March 16, 2017

.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. Any judicial district bar that assesses a mandatory membership fee for the first time after December 31, 2013, must adopt a fiscal year that begins July 1 and ends June 30.

History Note: Statutory Authority G.S. 84-18.1; 84-23
Adopted by the Supreme Court: December 20, 2000
Amendments Approved by the Supreme Court: April 10, 2014

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 by the Supreme Court: 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 by the Supreme Court: 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 by the Supreme Court: 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 elected 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 by the Supreme Court: 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 .0803 of Subchapter 1A (27 N.C.A.C. 1A .0803).

History Note: Statutory Authority G.S. 84-18.1; 84-23
Adopted by the Supreme Court: March 7, 1996
Amendments Approved by the Supreme Court: 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 by the Supreme Court: 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) Notice for meeting to vote on annual membership fee: Notwithstanding the notice periods set forth in paragraphs (a) and (b) above, the written notice for any meeting at which the active members will vote on whether to impose or increase an annual membership fee shall be mailed or delivered to each active member of the district bar at the member's last known mailing address on file with the North Carolina State Bar at least 30 days before the date of the meeting.

(d) 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.

History Note: Statutory Authority G.S. 84-18.1; 84-23
Adopted by the Supreme Court: March 7, 1996
Amendments Approved by the Supreme Court: October 7, 2010

.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 by the Supreme Court: March 7, 1996
Amendments Approved by the Supreme Court: 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 by the Supreme Court: March 7, 1996

.1010 Committees

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

(b) 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.

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

(d) 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.

(e) 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 _____.

(f) Professionalism Committee:

(1) The Professionalism Committee shall consist of the three immediate past presidents of the district bar or such other members of the district bar as shall be appointed by the president.

(2) The purpose of the Professionalism Committee shall be the promotion of professionalism and thereby the bolstering of public confidence in the legal profession. The committee may further enhance professionalism through CLE programs and, when appropriate, through confidential peer intervention in association with the Professionalism Support Initiative (PSI) which is sponsored and supported by the Chief Justice's Commission on Professionalism. The PSI effort is to investigate and informally assist with client-lawyer, lawyer-lawyer, and lawyer-judge relationships to ameliorate disputes, improve communications, and repair relationships. The Professionalism Committee shall have no authority to discipline any lawyer or judge, or to force any lawyer or judge to take any action. The committee shall not investigate or attempt to resolve complaints of professional misconduct cognizable under the Rules of Professional Conduct and shall act in accordance with Rules 1.6(c) and 8.3 of the Rules of Professional Conduct. The committee shall consult and work with the Chief Justice's Commission on Professionalism when appropriate.

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

Adopted by the Supreme Court: March 7, 1996

Amendments Approved by the Supreme Court: March 6, 2002; March 6, 2008; September 25, 2019

.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 by the Supreme Court: 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 by the Supreme Court: March 7, 1996

.1013 Selection of Nominees for District Court Judge

Unless otherwise required by law, the following procedures shall be used to determine the nominees to be recommended to the Governor pursuant to NC Gen. Stat. §7A-142 for vacant district court judgeships in the judicial district.

(a) Meeting for Nominations: The nominees shall be selected by secret, written ballot of those members present at a meeting of the district bar called for this purpose. Fifteen (15) days notice of the meeting shall be given, by mail, to the last known address of each district bar member. Alternatively, if a bylaw permitting elections by mail is adopted by the district bar, the procedures set forth in the bylaw and in Rule .0804 of Subchapter 1A of the Rules of the North Carolina State Bar (27 N.C.A.C. 1A, .0804), shall be followed.

(b) Candidates: Persons who want to be considered for the vacancy shall notify the President in writing five (5) days prior to the meeting at which the election will be conducted or, if the election is by mail, five (5) days prior to the mailing of the ballots.

(c) Voting: Each district bar member eligible to vote pursuant to NC Gen. Stat. § 7A-142 may vote for up to five candidates. Cumulative voting is prohibited. Proxy voting is prohibited.

(d) Submission to Governor: The five candidates receiving the highest number of votes shall be the nominees to fill the vacancy on the district court and their names, and vote totals, shall be transmitted to the Governor. In the event of a tie for fifth place, the names of those candidates involved in the tie shall be transmitted to the Governor together with the names of the two candidates receiving the highest number of votes.

Statutory Authority G.S. 84-18.1; 84-23; 7A-142
Adopted by the Supreme Court: February 27, 2003
Amendments Approved by the Supreme Court: March 6, 2014

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

Section .1400 Rulemaking Procedures

.1401 Publication for Comment

(a) As a condition precedent to adoption, a proposed rule or amendment to a rule must be published for comment as provided in subsection (c).

(b) A proposed rule or amendment to a rule must be presented to the Executive Committee and the council prior to publication for comment, and specifically approved for publication by both.

(c) A proposed rule or amendment to a rule must be published for comment in an official printed or digital publication of the North Carolina State Bar that is mailed or emailed to the membership at least 30 days in advance of its final consideration by the council. The publication of any such proposal must be accompanied by a prominent statement inviting all interested parties to submit comment to the North Carolina State Bar at a specified postal or e-mail address prior to the next meeting of the Executive Committee, the date of which shall be set forth.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court: August 23, 2007
Amendments Approved by the Supreme Court: September 20, 2018

.1402 Review by the Executive Committee

At its next meeting following the publication or republication of any proposed rule or amendment to a rule, the Executive Committee shall review the proposal and any comment that has been received concerning the proposal. The Executive Committee shall then:

(a) recommend the proposal's adoption by the council;

(b) recommend the proposal's adoption by the council with nonsubstantive modification;

(c) recommend to the council that the proposal be republished with substantive modification;

(d) defer consideration of the matter to its next regular business meeting;

(e) table the matter; or

(f) reject the proposal.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court: August 23, 2007

.1403 Action by the Council and Review by the North Carolina Supreme Court

(a) Whenever the Executive Committee recommends adoption of any proposed rule or amendment to a rule in accordance with the procedure set forth in Rule .1402 above, the council at its next regular business meeting shall consider the proposal, the Executive Committee's recommendation, and any comment received from interested parties, and:

(1) decide whether to adopt the proposed rule or amendment, subject to the

approval of the North Carolina Supreme Court as described in G.S. 84-21;

(2) reject the proposed rule or amendment; or

(3) refer the matter back to the Executive Committee for reconsideration.

(b) Any proposed rule or amendment to a rule adopted by the council shall be transmitted by the secretary to the North Carolina Supreme Court for its review on a schedule approved by the Court, but in no event later than 120 days following the council's adoption of the proposed rule or amendment.

(c) A proposed rule or amendment to a rule adopted by the council shall take effect when it is entered upon the minutes of the North Carolina Supreme Court.

(d) The secretary shall promptly transmit the official text of any proposed rule or amendment to a rule adopted by the council and approved by the North Carolina Supreme Court to the Office of Administrative Hearings for publication in the North Carolina Administrative Code.

(e) Any action taken by the council or the North Carolina Supreme Court in regard to any proposed rule or amendment to a rule shall be reported in the next issue of the printed publication referenced in Rule .1401 above.

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

Adopted by the Supreme Court: August 23, 2007

Amendments Approved by the Supreme Court: September 20, 2018

SUBCHAPTER B

Discipline and Disability Rules

Section .0100 Discipline and Disability of Attorneys

Editor's note: The captions in this subchapter are provided as research aids and are not official statements of the North Carolina State Bar Council or the Grievance Committee.

.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) **Role of District Bars** - 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** - 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) **Inherent Authority of State Courts** - 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) **Separate Authority of State Bar and State Courts** - 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) **Separate Powers and Actions** - 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) **Courts Not Authorized to Preempt State Bar Action** - 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) **State Bar Deferral to State Court** - 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) **State Court Deferral to State Bar** - 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) **Copies of State Bar Complaint** - 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) **Status of Relevant Complaints Prior to Action by the Court** -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 panel 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 panel** - a hearing panel 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) **Revised Rules of Professional Conduct** - the Rules of Professional Conduct adopted by the Council of the North Carolina State Bar and approved by the North Carolina Supreme Court effective July 24, 1997.

(41) **Rules of Professional Conduct** - the Rules of Professional Conduct adopted by the Council of the North Carolina State Bar and approved by the North Carolina Supreme Court and which were in effect from October 7, 1985 through July 23, 1997.

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

(43) **Supreme Court** - the Supreme Court of North Carolina.

(44) **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

Amendments Approved by the Supreme Court: December 30, 1998; February 3, 2000, October 8, 2009

.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 panel 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

Amendments Approved by the Supreme Court: September 7, 1995, October 8, 2009

.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) 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;

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

(18) 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;

(19) 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.

(20) 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) **Absence of Chairperson and Delegation of Duties** - 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) **Delegation of Authority** - 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

Amendments Approved by the Supreme Court: February 20, 1995; March 6, 1997; October 2, 1997; March 3, 1999; February 3, 2000; March 10, 2011; August 23, 2012

.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.

(13) in its discretion to refer grievances primarily attributable to the respondent's failure to employ sound trust accounting techniques to the trust account supervisory program in accordance with Rule .0112(k) of this subchapter.

(14) to operate the Attorney Client Assistance Program (ACAP). Functions of ACAP can include without limitation:

(a) assisting clients and attorneys in resolving issues arising in the client/attorney relationship that might be resolved without the need to open grievance files; and

(b) operating the Fee Dispute Resolution Program.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: March 3, 1999; December 20, 2000; August 23, 2012; September 25, 2019

.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 panels, 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 panels, 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 panel.

History Note: Statutory Authority G.S. 84-23; G.S. 84-31

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: March 3, 1999; October 8, 2009

.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 panel. No panel member who hears a disciplinary matter may serve on the panel 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 panel and will be chairperson of any hearing panel 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 panel assigned to the original trial proceeding. Hearing panel 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) **Delegation of Duty** - 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

Amendments Approved by the Supreme Court: September 7, 1995; October 8, 2009

.0109 Hearing Panel: Powers and Duties

Hearing panels 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 panel 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 panel 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 panel;

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

(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, panels, 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
Amendments Approved by the Supreme Court: March 3, 1999; October 8, 2009

.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 panel;

(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
Amendments Approved by the Supreme Court: October 8, 2009

.0111 Grievances: Form and Filing

(a) **Grievance Filing Form** - 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) **Investigation Approval** - 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) **Confidential Reports of Misconduct** - 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) **Declining to Investigate** - The counsel may decline to investigate the following allegations:

(1) that a member provided ineffective assistance of counsel in a criminal case, unless a court has granted a motion for appropriate relief based upon the member's conduct;

(2) that a plea entered in a criminal case was not made voluntarily and knowingly, unless a court granted a motion for appropriate relief based upon the member's conduct;

(3) that a member's advice or strategy in a civil or criminal matter was inadequate or ineffective.

(f) **Time Limits** - Limitation of Grievances.

(1) There is no time limitation for initiation of any grievance based upon a plea of guilty to a felony or upon conviction of a felony.

(2) There is no time limitation for initiation of any grievance based upon allegations of conduct that constitutes a felony, without regard to whether the lawyer is charged, prosecuted, or convicted of a crime for the conduct.

(3) There is no time limitation for initiation of any grievance based upon conduct that violates the Rules of Professional Conduct and has been found by a court to be intentional conduct by the lawyer. As used in this Rule, "court" means a state court of general jurisdiction of any state or of the District of Columbia or a federal court.

(4) All other grievances must be initiated within six years after the last act giving rise to the grievance.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: February 20, 1995; December 30, 1998; October 1, 2003, October 8, 2009

.0112 Investigations: Initial Determination; Notice and Response; Committee Referrals

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

(b) **Grievance Committee Action on Initial or Interim Reports** - As soon as practicable after the receipt of the initial or any interim report of the counsel concerning any grievance, the chair 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) direct the counsel to send a letter of notice to the respondent.

(c) **Letter of Notice, Respondent's Response, and Request for Copy of Grievance** - If the counsel serves a letter of notice upon the respondent, it will be served by certified mail and will direct that a response be provided within 15 days of service of the letter of notice upon the respondent. The response to the letter of notice shall include a full and fair disclosure of all facts and circumstances pertaining to the alleged misconduct. The response must be in writing and signed by the respondent. If the respondent requests it, the counsel will provide the respondent with a copy of the written grievance unless the complainant requests

anonymity pursuant to Rule .0111(d) of this subchapter.

(d) **Request for Copy of Respondent's Response** - The counsel may provide to the complainant a copy of the respondent's response to the letter of notice unless the respondent objects thereto in writing.

(e) **Termination of Further Investigation** - After the Grievance Committee receives the response to a letter of notice, the counsel may conduct further investigation or terminate the investigation, subject to the control of the chair of the Grievance Committee.

(f) **Subpoenas** - For reasonable cause, the chair 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 which the chair deems necessary or material to the inquiry. Each subpoena will be issued by the chair or by the secretary at the direction of the chair. The counsel, deputy counsel, investigator, or any members of the Grievance Committee designated by the chair may examine any such witness under oath or otherwise.

(g) **Grievance Committee Action on Final Reports** – The Grievance Committee will consider the grievance as soon as practicable after it receives the final report of the counsel, except as otherwise provided in these rules.

(h) **Failure of Complainant to Sign and Dismissal Upon Request of Complainant** - The investigation into alleged misconduct of the respondent will not be abated by failure of the complainant to sign a grievance, by settlement or compromise of a dispute between the complainant and the respondent, or by the respondent's payment of restitution. The chair of the Grievance Committee may dismiss a grievance upon request of the complainant and with consent of the counsel where it appears that there is no probable cause to believe that the respondent violated the Rules of Professional Conduct.

(i) **Referral to Law Office Management Training**

(1) 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 failure to employ sound law office management techniques and procedures, the committee may offer the respondent an opportunity to voluntarily participate in a law office management training program approved by the State Bar before the committee considers discipline.

If the respondent accepts the committee's offer to participate in the program, the respondent will then be required to complete a course of training in law office management prescribed by the chair which may include a comprehensive site audit of the respondent's records and procedures as well as attendance at continuing legal education seminars. If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(2) Completion of Law Office Management Training Program – If the respondent successfully completes the law office management training program, the committee may consider the respondent's successful completion of the law office management training program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent fails to successfully complete the law office management training program as agreed, the grievance will be returned to the committee's agenda for consideration of imposition of discipline. The requirement that a respondent complete law office management training pursuant to this rule shall be in addition to the respondent's obligation to satisfy the minimum continuing legal education requirements contained in 27 N.C.A.C. 1D .1517.

(j) **Referral to Lawyer Assistance Program**

(1) 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 offer the respondent an opportunity to voluntarily participate in a rehabilitation program under the supervision of the Lawyer Assistance Program Board before the committee considers discipline.

If the respondent accepts the committee's offer to participate in a rehabilitation program, the respondent must provide the committee with a written acknowledgement of the referral on a form approved by the chair. The acknowledgement of the referral must include the respondent's waiver of any right of confidentiality that might otherwise exist to permit the Lawyer Assistance Program to provide the committee with the information necessary for the committee to determine whether the respondent is in compliance with the rehabilitation program. If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(2) Completion of Rehabilitation Program – If the respondent successfully completes the rehabilitation program, the committee may consider successful completion of the program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent fails to complete the rehabilitation program or fails to cooperate with the Lawyer Assistance Program Board, the Lawyer Assistance Program will report that failure to the counsel and the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(k) **Referral to Trust Accounting Compliance Program**

(1) 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 failure to employ sound trust accounting techniques, the committee may offer the respondent an opportunity to voluntarily participate in the State Bar's Trust Account Compliance Program for up to two years before the committee considers discipline.

If the respondent accepts the committee's offer to participate in the compliance program, the respondent must fully cooperate with the Trust Account Compliance Counsel and must provide to the Office of Counsel quarterly proof of compliance with all provisions of Rule 1.15 of the Rules of Professional Conduct. Such proof shall be in a form satisfactory to the Office of Counsel. If the respondent does not accept the committee's offer, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(2) Completion of Trust Account Compliance Program - If the respondent successfully completes the program, the committee may consider successful completion of the program as a mitigating circumstance and may, but is not required to, dismiss the grievance for good cause shown. If the respondent does not fully cooperate with the Trust Account Compliance Counsel and/or does not successfully complete the program, the grievance will be returned to the committee's agenda for consideration of imposition of discipline.

(3) The committee will not refer to the program any case involving possible misappropriation of entrusted funds, criminal conduct, dishonesty, fraud, misrepresentation, or deceit, or any other case the committee deems inappropriate for referral. The committee will not refer to the program any respondent who has not cooperated fully and timely with the committee's investigation. If the Office of Counsel or the committee discovers evidence that a respondent who is participating in the program may have misappropriated entrusted funds, engaged in criminal conduct, or engaged in conduct involving dishonesty, fraud, misrepresentation, or deceit, the chair will terminate the respondent's participation in the program and the disciplinary process will proceed. Referral to the Trust Accounting Compliance Program is not a defense to allegations that a lawyer misappropriated entrusted funds, engaged in criminal conduct, or engaged in conduct involving dishonesty, fraud, misrepresentation, or deceit, and it does not immunize a lawyer from the disciplinary consequences of such conduct.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: February 20, 1995; March 6, 1997; December 30, 1998; December 20, 2000; March 6, 2002; March 10, 2011; August 25, 2011; August 23, 2012; March 5, 2015

.0113 Proceedings Before the Grievance Committee

(a) **Probable Cause** - 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) **Oaths and Affirmations** - The chairperson of the Grievance Committee will have the power to administer oaths and affirmations.

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

(d) **Subpoenas** - 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) **Closed Meetings** - 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) **Disclosure of Matters Before the Grievance Committee** - 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) **Quorum Requirement** - 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) **Results of Grievance Committee Deliberations** - 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 respondent. 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) **Letters of Caution** - 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 at the commission.

(k) **Admonitions, Reprimands, and Censures**

(1) If probable cause is found but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the committee shall issue an admonition in cases in which the respondent has committed a minor violation of the Rules of Professional Conduct, a reprimand in cases in which the respondent's conduct has violated one or more provisions of the Rules of Professional Conduct and caused harm or potential harm to a client, the administration of justice, the profession, or members of the public, or a censure in cases in which the respondent has violated one or more provisions of the Rules of Professional Conduct and the harm or potential harm caused by the respondent is significant and protection of the public requires more serious discipline. To determine whether more serious discipline is necessary to protect the public or whether the violation is minor and less serious discipline is sufficient to protect the public, the committee shall consider the factors delineated in subparagraphs (2) and (3) below.

(2) **Censure Factors** - Factors that shall be considered in determining whether protection of the public requires a censure include, but are not limited to, the following:

(A) prior discipline for the same or similar conduct;

(B) prior notification by the North Carolina State Bar of the wrongfulness of the conduct;

(C) refusal to acknowledge wrongful nature of conduct;

(D) lack of indication of reformation;

(E) likelihood of repetition of misconduct;

(F) uncooperative attitude toward disciplinary process;

(G) pattern of similar conduct;

(H) violation of the Rules of Professional Conduct in more than one unrelated matter;

(I) lack of efforts to rectify consequences of conduct;

(J) imposition of lesser discipline would fail to acknowledge the seriousness of the misconduct and would send the wrong message to members of the Bar and the public regarding the conduct expected of members of the Bar;

(K) notification contemporaneous with the conduct at issue of the wrongful nature of the conduct and failure to take remedial action.

(3) **Admonition Factors** - Factors that shall be considered in determining whether the violation of the Rules is minor and warrants issuance of an admonition include, but are not limited to, the following:

(A) lack of prior discipline for same or similar conduct;

(B) recognition of wrongful nature of conduct;

(C) indication of reformation;

(D) indication that repetition of misconduct not likely;

(E) isolated incident;

(F) violation of the Rules of Professional Conduct in only one matter;

(G) lack of harm or potential harm to client, administration of justice, profession, or members of the public;

(H) efforts to rectify consequences of conduct;

(I) inexperience in the practice of law;

(J) imposition of admonition appropriately acknowledges the minor nature of the violation(s) of the Revised Rules of Professional Conduct;

(K) notification contemporaneous with the conduct at issue of the wrongful nature of the conduct resulting in efforts to take remedial action;

(L) personal or emotional problems contributing to the conduct at issue;

(M) successful participation in and completion of contract with Lawyer's

Assistance Program where mental health or substance abuse issues contributed to the conduct at issue.

(l) **Procedures for Admonitions, Reprimands, and Censures**

(1) A record of any admonition, reprimand, or censure issued by the Grievance Committee will be maintained in the office of the secretary.

(2) A copy of the admonition, reprimand, or censure 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 admonition, reprimand, or censure to the respondent's last known address on file with the NC State Bar. Service shall be deemed complete upon deposit of the admonition, reprimand, or 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.

(3) Within 15 days after service the respondent may refuse the admonition, reprimand, or censure 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, reprimand, or censure is refused.

(4) If a refusal and request are not served upon the secretary within 15 days after service upon the respondent of the admonition, reprimand, or censure, the admonition, reprimand, or censure 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. A censure that is deemed accepted by the respondent must be filed as provided by Rule .0127(a)(3) of this subchapter.

(5) In cases in which the respondent refuses an admonition, reprimand, or censure, the counsel will prepare and file a complaint against the respondent at the commission.

(m) **Disciplinary Hearing Commission Complaints** - 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

Amendments Approved by the Supreme Court: March 3, 1999; February 3, 2000; October 8, 2009; March 27, 2019

.0114 Proceedings Before the Disciplinary Hearing Commission: General Rules Applicable to All Proceedings

(a) **Applicable Procedure** - Except where specific procedures are provided by these rules, pleadings and proceedings before a hearing panel will conform as nearly as practicable with the requirements of the North Carolina Rules of Civil Procedure and for trial of nonjury civil cases in the superior courts. Any specific procedure set out in these rules controls, and where specific procedures are set out in these rules, the Rules of Civil Procedure will be supplemental only.

(b) **Continuances** - The chairperson of the hearing panel may continue any hearing for good cause shown. After a hearing has commenced, continuances will only be granted pursuant to Rule .0116(b).

(c) **Appearance By or For the Defendant** - The defendant may appear pro se or may be represented by counsel. The defendant may not act pro se if he or she is represented by counsel.

(1) Pro Se Defendant's Address - When a defendant appears in his or her own behalf in a proceeding, the defendant will file with the clerk, 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 the address on record with the State Bar's membership department.

(2) Notice of Appearance - When a defendant is represented by an attorney in a proceeding, the attorney will file with the clerk 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 will be sent to defendant's attorney of record in lieu of transmission to the defendant.

(d) **Filing Time Limits** - Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing by the clerk of the commission within the time limits, if any, for such filing. The date of the receipt by the clerk, and not the date of deposit in the mail, is determinative.

(e) **Form of Papers** - 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 clerk will require a party to refile any paper that does not conform to this size.

(f) **Subpoenas** - The hearing panel 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 as permitted in civil cases under the North Carolina Rules of Civil Procedure. Such process will be issued in the name of the hearing panel by its chairperson, or the chairperson may designate the secretary of the North Carolina State Bar to issue such process. The plaintiff and the defendant have the right to invoke the powers of the panel with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents.

(g) **Admissibility of Evidence** - In any hearing, admissibility of evidence will be governed by the rules of evidence applicable in the superior court of North Carolina at the time of the hearing. The chairperson of the hearing panel will rule on the admissibility of evidence, subject to the right of any member of the panel to question the ruling. If a member of the panel challenges a ruling relating to admissibility of evidence, the question will be decided by a majority vote of the hearing panel.

(h) **Defendant as Witness** – The defendant will, except as otherwise provided by law, be competent and compellable to give evidence for either party.

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

Amendments Approved by the Supreme Court: October 2, 1997; December 30, 1998; March 2, 2006; October 8, 2009; September 22, 2016

.0115 Proceedings Before the Disciplinary Hearing Commission: Pleadings and Prehearing Procedure

(a) **Complaint and Service** - The counsel will file the complaint with the clerk of the commission. The counsel will cause a summons and a copy of the complaint to be served upon the defendant and will inform the clerk of the date of service. The clerk will deliver a copy of the complaint to the chairperson of the commission and will inform the chairperson of the date that service on the defendant was effected. Service of complaints and summonses and other documents or papers will be accomplished as set forth in the North Carolina Rules of Civil Procedure.

(b) **Notice Pleading** - 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.

(c) **Answer** - Within 20 days after the service of the complaint, unless further time is allowed by the chairperson of the commission or of the hearing panel upon good cause shown, the defendant will file an answer to the complaint with the clerk of the commission and will serve a copy on the counsel.

(d) **Designation of Hearing Panel** - Within 20 days after service of the complaint upon the defendant, the chairperson of the commission will designate a hearing panel from among the commission members. The chairperson will notify the counsel and the defendant of the composition of the hearing panel.

(e) **Scheduling Conference** - The chairperson of the hearing panel will hold a scheduling conference with the parties within 20 days after the filing of the answer by the defendant unless another time is set by the chairperson of the commission. The chairperson of the hearing panel will notify the counsel and the defendant of the date, time, and venue (e.g., in person, telephone, video conference) of the scheduling conference. At the scheduling conference, the parties will discuss anticipated issues, amendments, motions, any settlement conference, and discovery. The chairperson of the hearing panel will set dates for the completion of discovery and depositions, for the filing of motions, for the pre-hearing conference, for the filing of the stipulation on the pre-hearing conference, and for the hearing, and may order a settlement conference. The hearing date shall not be less than 60 days from the final date for discovery and depositions unless otherwise

consented to by the parties. The chairperson of the hearing panel may impose sanctions against any party who willfully fails to participate in good faith in the scheduling conference or willfully fails to comply with a scheduling order issued pursuant to this section. The sanctions which may be imposed include but are not limited to those enumerated in Rule 37(b) of the NC Rules of Civil Procedure.

(f) **Failure to File an Answer** - Failure to file an answer admitting or denying the allegations of the complaint or asserting the grounds for failing to do so within the time specified by this rule will be grounds for entry of the defendant's default. If the defendant fails to file an answer to the complaint, the allegations contained in the complaint will be deemed admitted.

(g) **Default**

(1) The clerk will enter the defendant's default when the fact of default is made to appear by motion of the counsel or otherwise.

(2) The counsel may thereupon apply to the hearing panel for default orders as follows:

(A) For an order making findings of fact and conclusions of law. Upon such motion, the hearing panel shall enter an order making findings of fact and conclusions of law as established by the facts deemed admitted by the default. The hearing panel shall then set a date for hearing at which the sole issue shall be the discipline to be imposed.

(B) For an order of discipline. Upon such motion, the hearing panel shall enter an order making findings of fact and conclusions of law as established by the facts deemed admitted by the default. If such facts provide sufficient basis, the hearing panel shall enter an order imposing the discipline deemed to be appropriate. The hearing panel may, in its discretion, set a hearing date and hear such additional evidence as it deems necessary to determine appropriate discipline prior to entering the order of discipline.

(3) For good cause shown, the hearing panel may set aside the entry of default.

(4) After an order imposing discipline has been entered by the hearing panel upon the defendant's default, the hearing panel may set aside the order in accordance with Rule 60(b) of the North Carolina Rules of Civil Procedure.

(h) **Discovery** - Discovery will be available to the parties in accordance with the North Carolina Rules of Civil Procedure. Any discovery undertaken must be completed by the date set in the scheduling order unless the time for discovery is extended by the chairperson of the hearing panel for good cause shown. Upon a showing of good cause, the chairperson of the hearing panel may reschedule the hearing to accommodate completion of reasonable discovery.

(i) **Settlement** - The parties may meet by mutual consent prior to the hearing 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 panel. The hearing panel may reject a proposed settlement agreement but only after conducting a conference with the parties. The chairperson of the hearing panel will notify the counsel and the defendant of the date, time, and venue (e.g., in person, telephone, videoconference) of the conference. If, after the conference the first hearing panel rejects a proposed settlement, another hearing panel must be empanelled to try the case, unless all parties consent to proceed with the original hearing panel. The parties may submit a proposed settlement to a second hearing panel and may, upon the agreement of both parties, request a conference with the panel, but the parties shall not have the right to request a third hearing panel if the settlement order is rejected by the second hearing panel. The second hearing panel shall either accept the settlement proposal or hold a hearing upon the allegations of the complaint.

(j) **Settlement Conference** - Either party may request, or the chair of the hearing panel may order, appointment of a commission member to conduct a settlement conference.

(1) Such request shall be filed with the clerk of the commission and must be made no later than 60 days prior to the date set for hearing.

(2) Upon such request, the chairperson of the commission shall select and assign a commission member not assigned to the hearing panel in the case to conduct a settlement conference and shall notify the parties of the commission member assigned and the date by which the settlement conference must be held. The settlement conference must be no later than 30 days prior to the date set for hearing.

(3) The commission member conducting the settlement conference will set the date, time, and manner.

(4) At the settlement conference, the parties will discuss their positions and desired resolution and the commission member will provide input regarding the case and resolution.

(5) The commission member's evaluation and input shall be advisory only and not binding.

(6) All statements and/or admissions made at the settlement conference shall be for settlement purposes only and shall not be admissible at any hearing in the case. Evidence that is otherwise discoverable, however, shall not be excluded from admission at hearing merely because it is presented in the course of the settlement conference.

(k) **Prehearing Conference and Order**

(1) Unless default has been entered by the clerk, the parties shall hold a prehearing conference. The prehearing conference shall be arranged and held by the dates established in the scheduling order.

(2) Prior to or during the prehearing conference, the parties shall: exchange witness and exhibit lists; discuss stipulations of undisputed facts; discuss the issues for determination by the hearing panel; and exchange contested issues if the parties identify differing contested issues.

(3) Within five days after the date of the prehearing conference, each party shall provide the other with any documents or items identified as exhibits but not previously provided to the other party.

(4) The parties shall memorialize the prehearing conference in a document titled "Stipulation on Prehearing Conference" that shall address the items and utilize the format in the sample provided to the parties by the clerk. By the date set in the scheduling order, the parties shall submit the Stipulation on Prehearing Conference to the clerk to provide to the hearing panel.

(5) Upon five days' notice to the parties, at the discretion of the chairperson of the hearing panel, the chairperson may order the parties to meet with the chairperson or any designated member of the hearing panel for the purpose of promoting the efficiency of the hearing. The participating member of the panel shall have the power to issue such orders as may be appropriate. The venue (e.g., telephone, videoconference, in person) shall be set by the hearing panel member.

(6) The chairperson of the hearing panel may impose sanctions against any party who willfully fails to participate in good faith in a prehearing conference or hearing or who willfully fails to comply with a prehearing order issued pursuant to this section. The sanctions which may be imposed include but are not limited to those enumerated in Rule 37(b) of the NC Rules of Procedure.

(7) Evidence or witnesses not included in the Stipulation on Prehearing Conference may be excluded from admission or consideration at the hearing.

(l) **Prehearing Motions** - The chairperson of the hearing panel, without consulting the other panel members, may hear and dispose of all prehearing 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 panel. The following procedures shall apply to all prehearing motions, including motions which could result in dismissal of all or any of the allegations or could result in final judgment for either party on all or any claims:

(1) Parties shall file motions with the clerk of the commission. Parties may submit motions by regular mail, overnight mail, or in person. Motions transmitted by facsimile or by email will not be accepted for filing except with the advance written permission of the chairperson of the hearing panel. Parties shall not deliver motions or other communications directly to members of the hearing panel unless expressly directed in writing to do so by the chairperson of the hearing panel.

(2) Motions shall be served as provided in the NC Rules of Civil Procedure.

(3) The non-moving party shall have ten days from the filing of the motion to respond. If the motion is served upon the non-moving party by regular mail only, then the non-moving party shall have 13 days from the filing of the motion to respond. Upon good cause shown, the chairperson of the hearing panel may shorten or extend the time period for response.

(4) Any prehearing 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 panel. The chairperson shall set the time, date, and manner of oral argument. The chairperson may order that argument on any prehear-

ing motion may be heard in person or by telephone or electronic means of communication.

(5) Any motion included in or with a defendant's answer will not be acted upon, and no response from the non-moving party will be due, unless and until a party files a notice requesting action by the deadline for filing motions set in the scheduling order. The due date for response by the non-moving party will run from the date of the filing of the notice.

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

Adopted: September 22, 2016

Amendments Approved by the Supreme Court: September 28, 2017

.0116 Proceedings Before the Disciplinary Hearing Commission: Formal Hearing

(a) **Public Hearing**

(1) The defendant will appear in person before the hearing panel 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 panel 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.

(2) Media Coverage -- Absent a showing of good cause, the chairperson of the hearing panel shall permit television, motion picture and still photography cameras, broadcast microphones and recorders (electronic media) to record and broadcast formal hearings. A media outlet shall file a motion with the clerk of the commission seeking permission to utilize electronic media to record or broadcast a hearing no less than 48 hours before the hearing is scheduled to begin. The chairperson will rule on the motion no less than 24 hours before the hearing is scheduled to begin. Any order denying a motion to permit the use of electronic media to record or broadcast a formal hearing shall contain written findings of fact setting forth the facts constituting good cause to support that decision. Except as otherwise provided in this paragraph, the provisions of Rule 15 of the General Rules of Practice for the Superior and District Courts (Electronic Media and Still Photography Coverage of Public Judicial Proceedings) shall apply to electronic media coverage of hearings before the commission.

(b) **Continuance After a Hearing Has Commenced** - 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.

(c) **Burden of Proof**

(1) Unless otherwise provided in these rules, the State Bar shall have the burden of proving by clear, cogent, and convincing evidence that the defendant violated the Rules of Professional Conduct.

(2) In any complaint or other pleading or in any trial, hearing, or other proceeding, the State Bar is not required to prove the nonexistence of any exemption or exception contained in the Rules of Professional Conduct. The burden of proving any exemption or exception shall be upon the person claiming its benefit.

(d) **Orders** - At the conclusion of any disciplinary case, the hearing panel will file an order which will include the panel's findings of fact and conclusions of law. When one or more rule violations has been established by summary judgment, the order of discipline will set out the undisputed material facts and conclusions of law established by virtue of summary judgment, any additional facts and conclusions of law pertaining to discipline, and the disposition. All final orders will be signed by the members of the panel, or by the chairperson of the panel on behalf of the panel, and will be filed with the clerk.

(e) **Preservation of the Record** - The clerk 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 clerk will preserve the record and the pleadings, exhibits, and briefs of the parties.

(f) **Discipline** - If the charges of misconduct are established, the hearing panel will consider any evidence relevant to the discipline to be imposed.

(1) Suspension or disbarment is appropriate where there is evidence that the defendant's actions resulted in significant harm or potential significant harm to the clients, the public, the administration of justice, or the legal profession, and lesser discipline is insufficient to adequately protect the public. The following factors shall be considered in imposing suspension or disbarment:

(A) intent of the defendant to cause the resulting harm or potential harm;

(B) intent of the defendant to commit acts where the harm or potential harm is foreseeable;

(C) circumstances reflecting the defendant's lack of honesty, trustworthiness, or integrity;

(D) elevation of the defendant's own interest above that of the client;

(E) negative impact of defendant's actions on client's or public's perception of the profession;

(F) negative impact of the defendant's actions on the administration of justice;

(G) impairment of the client's ability to achieve the goals of the representation;

(H) effect of defendant's conduct on third parties;

(I) acts of dishonesty, misrepresentation, deceit, or fabrication;

(J) multiple instances of failure to participate in the legal profession's self-regulation process.

(2) Disbarment shall be considered where the defendant is found to engage in:

(A) acts of dishonesty, misrepresentation, deceit, or fabrication;

(B) impulsive acts of dishonesty, misrepresentation, deceit, or fabrication without timely remedial efforts;

(C) misappropriation or conversion of assets of any kind to which the defendant or recipient is not entitled, whether from a client or any other source; or

(D) commission of a felony.

(3) In all cases, any or all of the following factors shall be considered in imposing the appropriate discipline:

(A) prior disciplinary offenses in this state or any other jurisdiction, or the absence thereof;

(B) remoteness of prior offenses;

(C) dishonest or selfish motive, or the absence thereof;

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

(E) indifference to making restitution;

(F) a pattern of misconduct;

(G) multiple offenses;

(H) effect of any personal or emotional problems on the conduct in question;

(I) effect of any physical or mental disability or impairment on the conduct in question;

(J) interim rehabilitation;

(K) full and free disclosure to the hearing panel or cooperative attitude toward the proceedings;

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

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

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

(O) refusal to acknowledge wrongful nature of conduct;

(P) remorse;

(Q) character or reputation;

(R) vulnerability of victim;

(S) degree of experience in the practice of law;

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

(U) imposition of other penalties or sanctions;

(V) any other factors found to be pertinent to the consideration of the discipline to be imposed.

(g) **Service of Final Orders** - The clerk will serve the defendant with the final order of the hearing panel by certified mail, return receipt requested, or by personal service. A defendant who cannot, with reasonable diligence, be served by certified mail or personal service shall be deemed served when the clerk deposits a copy of the 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 addressed to the defendant's last known address on file with the NC State Bar.

History Note: Statutory Authority G.S. 84-23
Adopted: September 22, 2016
Amendments Approved by the Supreme Court: March 16, 2017

.0117 Proceedings Before the Disciplinary Hearing Commission: Posttrial Motions

(a) **New Trials and Amendments of Judgments** (N.C. R. Civ. 59)

(1) Either party may request a new trial or amendment of the hearing panel's final order, based on any of the grounds set out in Rule 59 of the North Carolina Rules of Civil Procedure.

(2) A motion for a new trial or amendment of judgment will be filed with the clerk 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.

(3) 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.

(4) The hearing panel may rule on the motion based on the parties' written submissions or may, in its discretion, order oral argument.

(b) **Relief from Judgment or Order** (N.C. R. Civ. 60)

(1) 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.

(2) A motion for relief from the final judgment or order will be filed with the clerk no later than one year 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.

(3) 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.

(4) The clerk will promptly transmit the motion and any response to the chairperson of the commission, who will appoint a hearing panel. The chairperson will appoint the members of the hearing panel that originally heard the matter wherever practicable.

(5) The hearing panel may rule on the motion based on the parties' written submissions or may, in its discretion, order oral argument.

(c) **Effect of Filing Motion** - The filing of a motion requesting a new trial, amendment of the judgment, or relief from the final judgment or order under this section will not automatically stay or otherwise affect the effective date of an order of the commission.

History Note: Statutory Authority G.S. 84-23
Adopted: September 22, 2016

.0118 Proceedings Before the Disciplinary Hearing Commission: Stayed Suspension

(a) **Procedures: Non-compliance with Conditions** - 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. The following procedures apply during a stayed suspension:

(1) 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 clerk of the commission specifying the violation and seeking an order lifting the stay and activating the suspension. The counsel will serve a copy of the motion upon the defendant.

(2) The clerk will promptly transmit the motion to the chairperson of the commission. The chairperson will appoint a hearing panel to hold a hearing, appointing the members of the hearing panel that originally heard the matter wherever practicable. The chairperson of the commission will notify the counsel and the defendant of the composition of the hearing panel and the time and place for the hearing.

(3) At the hearing, the State Bar will have the burden of proving by the greater weight of the evidence that the defendant violated a condition of the stay.

(4) If the hearing panel finds by the greater weight of the evidence that the defendant violated a condition of the stay, the panel may enter an order lifting the stay and activating the suspension, or any portion thereof. Alternatively, the panel may allow the stay to remain in effect for the original term of the stay, may extend the term of the stay, and/or may include modified or additional conditions for the suspension to remain stayed. If the panel finds that the defendant violated a condition of the stay, the panel may tax the defendant with administrative fees and costs.

(A) In any order lifting a stay and activating a suspension in whole or in part, the panel may include a provision allowing the defendant to apply for a stay of the activated suspension on such terms and conditions as the panel concludes are appropriate.

(B) The panel may impose modified or additional conditions: (a) which the defendant must satisfy to obtain a stay of an activated suspension; (b) with which the defendant must comply during the stay of an activated suspension; and/or (c) which the defendant must satisfy to be reinstated to active status at the end of the activated suspension period.

(C) If the panel activated the entire period of suspension, in order to be reinstated at the end of the activated suspension, the defendant must comply with the requirements of Rule .0129(b) of this subchapter and with any requirements imposed in previous orders entered by the commission.

(D) If the panel activated only a portion of the suspension, in order to be returned to active status at the end of the period of activated suspension the defendant must file a motion with the commission seeking a stay of the remainder of the original term of suspension. If the defendant is granted a stay of the remainder of the original term of suspension, the panel may impose modified and/or additional conditions with which the defendant must comply during the stayed suspension.

(5) If the panel finds that the greater weight of the evidence does not establish that the defendant violated a condition of the stay, it will enter an order continuing the stay.

(6) In any event, the panel will include in its order findings of fact and conclusions of law in support of its decision.

(b) **Completion of Stayed Suspension; Continuation of Stay if Motion Alleging Lack of Compliance is Pending**

(1) Unless there is pending a motion or proceeding in which it is alleged that the defendant failed to comply with the conditions of the stay, the defendant's obligations under an order of discipline end upon expiration of the period of the stay.

(2) When the period of the stay of the suspension would otherwise have terminated, if a motion or proceeding is pending in which it is alleged that the defendant failed to comply with the conditions of the stay, the commission retains jurisdiction to lift the stay and activate all or any part of the suspension. The defendant's obligation to comply with the conditions of the existing stay remains in effect until any such pending motion or proceeding is resolved.

(c) **Applying for Stay of Suspension** - The following procedures apply to a motion to stay a suspension:

(1) The defendant shall file a motion for stay with the clerk and serve a copy of the motion and all attachments upon the counsel. Such motion shall be filed no earlier than 60 days before the first date of eligibility to apply for a stay. The commission will not consider any motion filed earlier than 60 days before the first date of eligibility to apply for a stay. The commission will not consider any motion unless it is delivered to the clerk and served upon the counsel contemporaneously.

(2) The motion must identify each condition for stay and state how the defendant has met each condition. The defendant shall attach supporting documentation establishing compliance with each condition. The defendant has the burden of proving compliance with each condition by clear, cogent, and convincing evidence.

(3) The counsel shall have 30 days after the motion is filed to file a response.

(4) The clerk shall transmit the motion and the counsel's response to the chairperson of the commission. Within 14 days of transmittal of the motion and the response, the chairperson shall issue an order appointing a hearing panel and setting the date, time, and location for the hearing. Wherever practicable, the chairperson shall appoint the members of the hearing panel that entered the order of discipline.

(d) **Hearing on Motion for Stay**

(1) The defendant bears the burden of proving compliance with all conditions for a stay by clear, cogent, and convincing evidence.

(2) Any hearing on a motion for stay will conform as nearly as practicable with the requirements of the North Carolina Rules of Civil Procedure and for trials of nonjury civil causes in the superior courts.

(3) The decision to grant or deny a defendant's motion to stay a suspension is discretionary. The panel should consider whether the defendant has complied with Rule .0128 and Rule .0129 of this subchapter, and any conditions in the order of discipline, as well as whether reinstatement of the defendant will cause harm or potential harm to clients, the profession, the public, or the administration of justice.

(e) **Order on the Motion for Stay** - The hearing panel will determine whether the defendant has established compliance with all conditions for a stay by clear, cogent, and convincing evidence. The panel must enter an order including findings of fact and conclusions of law. The panel may impose modified and/or additional conditions: (a) for the suspension to remain stayed; (b) for eligibility for a stay during the suspension; and/or (c) for reinstatement to active status at the end of the suspension period. The panel may tax costs and administrative fees in connection with the motion.

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

Adopted: September 22, 2016

.0119 Effect of a Finding of Guilt in Any Criminal Case

(a) **Conclusive Evidence of Guilt** - A certified copy of the conviction of an attorney for any crime or a certified copy of a judgment entered against an attorney where a plea of guilty, nolo contendre, 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. For purposes of any disciplinary proceeding against a member, such conviction or judgment shall conclusively establish all elements of the criminal offense and shall conclusively establish all facts set out in the document charging the member with the criminal offense.

(b) **Interim Suspension** - Any member who has been convicted of, pleads guilty to, pleads no contest to, or is found guilty by a jury of a criminal offense showing professional unfitness in any state or federal court may be suspended from the practice of law as set out below.

(1) The counsel shall file with the clerk of the commission and serve upon the member a motion for interim suspension accompanied by proof of the conviction, plea, or verdict.

(2) The member shall have ten days in which to file a response.

(3) The chairperson of the commission may hold a hearing to determine whether the criminal offense is one showing professional unfitness and whether, in the chairperson's discretion, interim suspension is warranted. In determining whether interim suspension is warranted, the chairperson may consider harm or potential harm to a client, the administration of justice, the profession, or members of the public, and impact on the public's perception of the profession. The parties may present additional evidence pertaining to harm or to the circumstances surrounding the offense, but the member may not collaterally attack the conviction, plea or verdict.

(4) The chairperson shall issue an order containing findings of fact and conclusions of law addressing whether there is a qualifying conviction, plea, or verdict, and whether interim suspension is warranted, and either granting or denying the motion.

(5) If the member consents to entry of an order of interim suspension, the parties may submit a consent order of interim suspension to the chairperson of the commission.

(6) The provisions of Rule .0128(c) of this subchapter will apply to the interim suspension.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: November 7, 1996; March 6, 1997; December 30, 1998; February 3, 2000; September 22, 2016

.0120 Reciprocal Discipline & Disability Proceedings

(a) **Notice to Secretary** - 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) **Administration of Reciprocal Discipline** - 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) **Notice and Challenge** - 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) **Effect of Stay** - 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) **Imposition of Discipline** - Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of Rule .0120(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) **Dismissal** - Where the Grievance Committee determines that any of the elements listed in Rule .0120(b)(3) above exist, the committee will dismiss the case or direct that a complaint be filed.

(5) **Effect of Final Adjudication in Another Jurisdiction** - If the elements listed in Rule .0120(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 in the District of North Carolina, Fourth Circuit, or US Supreme Court** - Reciprocal discipline with certain federal courts will be administered as follows:

(1) **Notice and Challenge** - 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 .0120(c)(2) below and will run concurrently with the discipline ordered by the federal court.

(2) **Acceptance of Reciprocal Discipline** - If the member notifies the North Carolina State Bar of his or her acceptance of reciprocal discipline as provided in Rule .0120(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) **Effect of Stay** - 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) **Imposition of Discipline** - Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of Rule .0120(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 .0127(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) **Federal Findings of Fact** - 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 Other Federal Courts** - Discipline imposed by any other federal court will be administered as provided in Rule .0120(b) above.

(d) **Imposition of Discipline** - If the member fails to accept reciprocal discipline as provided in Rule .0120(c) above or if a hearing is held before the Grievance Committee under either Rule .0120(b) above or Rule .0120(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
Amendments Approved by the Supreme Court: March 7, 1996; September 22, 2016

.0121 Surrender of License While Under Investigation

(a) **Surrender of License to the Council** - 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) **Acceptance of Resignation** - The council may accept a member's resignation only if the affidavit required under Rule .0121(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) **Public Record** - The order disbarring the member and the affidavit required under Rule .0121(a) above are matters of public record.

(d) **Consent to Disbarment Before the Commission** - If a defendant against whom a formal complaint has been filed before the commission 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 in .0121(a)(1), (2), (3), and (4) above, the chairperson will accept the surrender and issue an order of disbarment. The order of disbarment becomes effective upon entry of the order with the secretary. 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 to .0118 of this subchapter.

(e) **Wind-Down Period** - 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 of the tender or consent. 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 .0128 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
Amendments Approved by the Supreme Court: March 2, 2006; September 22, 2016

.0122 Disability

(a) **Transfer by Secretary where Member Judicially Declared Incompetent** - Where a member of the North Carolina State Bar has been judicially declared incapacitated, incompetent, or mentally ill by a North Carolina court or by a court of any other jurisdiction, the secretary, upon proper proof of such declaration, will enter an order transferring the member to disability inactive status effective immediately and for an indefinite period until further order of the Disciplinary Hearing Commission. A copy of the order transferring the member to disability inactive status will be served upon the member, the member's guardian, or the director of any institution to which the member is committed.

(b) **Transfer to Disability Inactive Status by Consent** - The chairperson of the Grievance Committee may transfer a member to disability inactive status upon consent of the member and the counsel.

(c) **Initiation of Disability Proceeding**

(1) **Disability Proceeding Initiated by the North Carolina State Bar**

(A) **Evidence a Member has Become Disabled** - When the North Carolina State Bar obtains evidence that a member has become disabled, the Grievance Committee will conduct an inquiry which substantially complies with the procedures set forth in Rule .0113 (a)-(h) 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 Grievance Committee finds probable cause, the counsel will file with the commission a complaint in the name of the North Carolina State Bar, signed by the chairperson of the Grievance Committee, alleging disability. The chairperson of the commission shall appoint a hearing panel to determine whether the member is disabled.

(B) **Disability Proceeding Initiated While Disciplinary Proceeding is Pending** - If, during the pendency of a disciplinary proceeding, the counsel receives evidence constituting probable cause to believe the defendant is disabled within the meaning of Rule .0103(19) of this subchapter, the chairperson of the Grievance Committee may authorize the counsel to file a motion seeking a determination that the defendant is disabled and seeking the defendant's transfer to disability inactive status. The hearing panel appointed to hear the disciplinary proceeding will hear the disability proceeding.

(C) **Pleading in the Alternative** - When the Grievance Committee has found probable cause to believe a member has committed professional misconduct and the Grievance Committee or the chairperson of the Grievance Committee has found probable cause to believe the member is disabled, the State Bar may file a complaint seeking, in the alternative, the imposition of professional discipline for professional misconduct or a determination that

the defendant is disabled.

(2) **Initiated by Hearing Panel During Disciplinary Proceeding** - If, during the pendency of a disciplinary proceeding, a majority of the members of the hearing panel find probable cause to believe that the defendant is disabled, the panel will, on its own motion, enter an order staying the disciplinary proceeding until the question of disability can be determined. The hearing panel will instruct the Office of Counsel of the State Bar to file a complaint alleging disability. The chairperson of the commission will appoint a new hearing panel to hear the disability proceeding. If the new panel does not find the defendant disabled, the disciplinary proceeding will resume before the original hearing panel.

(3) **Disability Proceeding where Defendant Alleges Disability in Disciplinary Proceeding** - 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 defendant will be immediately transferred to disability inactive status pending conclusion of a disability hearing. The disciplinary proceeding will be stayed pending conclusion of the disability hearing. The hearing panel appointed to hear the disciplinary proceeding will hear the disability proceeding.

(d) **Disability Hearings**

(1) **Burden of Proof**

(A) In any disability proceeding initiated by the State Bar or by the commission, the State Bar bears the burden of proving the defendant's disability by clear, cogent, and convincing evidence.

(B) In any disability proceeding initiated by the defendant, the defendant bears the burden of proving the defendant's disability by clear, cogent, and convincing evidence.

(2) **Procedure** - The disability hearing will be conducted in the same manner as a disciplinary proceeding under Rule .0114 to .0118 of this subchapter. The North Carolina Rules of Civil Procedure and the North Carolina Rules of Evidence apply, unless a different or more specific procedure is specified in these rules. The hearing will be open to the public.

(3) **Medical Examination** - The hearing panel may require the member to undergo psychiatric, physical, or other medical examination or testing by qualified medical experts selected or approved by the hearing panel.

(4) **Appointment of Counsel** - The hearing panel may appoint a lawyer to represent the defendant in a disability proceeding if the hearing panel concludes that justice so requires.

(5) **Order**

(A) **When Disability is Proven** - If the hearing panel finds that the defendant is disabled, the panel will enter an order continuing the defendant's disability inactive status or transferring the defendant to disability inactive status. An order transferring the defendant to disability inactive status is effective when it is entered. A copy of the order shall be served upon the defendant or the defendant's guardian or lawyer of record.

(B) **When Disability is Not Proven** - When the hearing panel finds that it has not been proven by clear, cogent, and convincing evidence that the defendant is disabled, the hearing panel shall enter an order so finding. If the defendant had been transferred to disability inactive status pursuant to paragraph (c)(3) of this rule, the order shall also terminate the defendant's disability inactive status.

(e) **Stay/Resumption of Pending Disciplinary Matters**

(1) **Stay or Abatement** - When a member is transferred to disability inactive status, any proceeding then pending before the Grievance Committee or the commission against the member shall be stayed or abated unless and until the member's disability inactive status is terminated.

(2) **Preservation of Evidence** - When a disciplinary proceeding against a member has been stayed because the member has been transferred to disability inactive status, the counsel may continue to investigate allegations of misconduct. The counsel may seek orders from the chairperson of the commission, or the chairperson of a hearing panel if one has been appointed, to preserve evidence of any alleged professional misconduct by the member, including orders which permit the taking of depositions. The chairperson of the commission, or the chairperson of a hearing panel if one has been appointed, may appoint counsel to represent the member when necessary to protect the interests of the member during the preservation of evidence.

(3) **Termination of Disability Inactive Status** - Upon termination of disability inactive status, all disciplinary proceedings pending against the member shall resume. The State Bar may immediately pursue any disciplinary proceedings that were pending when the member was transferred to disability inactive status and any allegations of professional misconduct that came to the State Bar's attention while the member was in disability inactive status. Any disciplinary proceeding pending before the commission that had been stayed shall be set for hearing by the chairperson of the commission.

(f) **Fees and Costs** - The hearing panel may direct the member to pay the costs of the disability proceeding, including the cost of any medical examination and the fees of any lawyer appointed to represent the member.

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

Amendments Approved by the Supreme Court: March 5, 1998; March 6, 2002; October 8, 2009; March 8, 2013; September 22, 2016

.0123 Enforcement of Powers

In addition to the other powers contained herein, in proceedings before any subcommittee or panel 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 panel 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

Amendments Approved by the Supreme Court: October 8, 2009; September 22, 2016

.0124 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

Amendments Approved by the Supreme Court: September 22, 2016

.0125 Notice to Complainant

(a) **Notice of Discipline** - 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) **Referral for Disciplinary Commission Hearing** - 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) **Notice of Dismissal** - 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) **Notice of Letter of Caution or Letter of Warning** - 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) **Referral to Board of Continuing Legal Education** - 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
Amendments Approved by the Supreme Court: March 7, 1996; September 22, 2016

.0126 Appointment of Counsel to Protect Clients' Interests When Attorney Disappears, Dies, or Is Transferred to Disability Inactive Status

(a) **Appointment by Senior Resident Judge** - 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) **Disclosure of Client Information** - 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
Amendments Approved by the Supreme Court: September 22, 2016

.0127 Imposition of Discipline; Findings of Incapacity or Disability; Notice to Courts

(a) **Imposition of Discipline** - 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 panel 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 panel 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 panel 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 panel 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) **Notification of Incapacity or Disability and Transfer to Disability Inactive Status** - Upon the final determination of incapacity or disability, the chairperson of the hearing panel 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 .0127(a)(3) above.

History Note: Statutory Authority G.S. 84-23; G.S. 84-32(a)
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: November 7, 1996, October 8, 2009; September 22, 2016

.0128 Obligations of Disbarred or Suspended Attorneys

(a) **Client Notification** - 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) **Withdrawal** - 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) **Effective Date** - In cases not governed by Rule .0121 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) **Affidavit Showing Compliance with Order** - 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) **Records of Compliance** - 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) **Contempt** - A suspended or disbarred attorney who fails to comply with Rules .0128(a)-(e) above may be subject to an action for contempt instituted by the appropriate authority. Failure to comply with the requirements of Rule .0128(a) above will be grounds for appointment of counsel pursuant to Rule .0126 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: March 6, 1997; September 22, 2016

.0129 Reinstatement

(a) **After Disbarment**

(1) **Reinstatement Procedure and Costs** - 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 panel 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) **Time Limits** - No disbarred attorney may petition for reinstatement until the expiration of at least five years from the effective date of the disbarment.

(3) **Burden of Proof and Elements to be Proved** - 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 .0128 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 misappropriated 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) **Proof of Competency and Learning** - 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 .0129(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) **Passing Bar Exam as Conclusive Evidence** - 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) **Bar Exam Required for Petitions Filed More than Seven Years After Disbarment** - 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) **Petition, Service, and Hearing** - 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 panel 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 panel 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) **Report of Findings** - As soon as possible after the conclusion of the hearing, the hearing panel will file a report containing its findings, conclusions, and recommendations with the secretary.

(8) **Appeal** - A petitioner in whose case the hearing panel recommends that reinstatement be denied may file notice of appeal to the council. Appeal from the report of the hearing panel must be taken within 30 days after service of the panel report upon the petitioner and shall be filed with the secretary. If no appeal is timely filed, the recommendation of the hearing panel to deny reinstatement will be deemed final. All cases in which the hearing panel recommends reinstatement of a disbarred attorney's license shall be heard by the council and no notice of appeal need be filed by the NC 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 panel. The chairperson of the hearing panel, 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 panel, 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 panel, 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 panel which heard the reinstatement petition to settle the record. Such request shall be filed in writing with the hearing panel 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 panel 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) **Copy of Settled Record to Each Member** - 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) **Costs** - The petitioner will bear the costs of transcribing, copying, and transmitting the record to the council.

(E) **Failure to Comply with Rule .0129(a)(10)** - If the petitioner fails to comply with any of the subsections of Rule .0129(a)(10) above, the counsel may petition the secretary to dismiss the petition.

(11) **Review by Council** - The council will review the report of the hearing panel and the record and determine whether, and upon what conditions, the petitioner will be reinstated.

(12) **Reapplication** - 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) **Restoration** - 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) **Suspension of 120 Days or Less** - 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) **Reinstatement Requirements** - 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 .0128 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** - 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 Funds in DHC Order** - 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 Pre-Suspension CLE Requirements** - 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, which shall include the satisfaction of any deficit recorded in the petitioner's State Bar CLE transcript for such period; 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) **Satisfaction of Post-Suspension CLE Requirements** - [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 courses 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 Fees and Assessments** - payment of all membership fees, Client Security Fund assessments, and late fees due and owing to the North Carolina State Bar, including any reinstatement fee due under Rule .0904 or Rule .1524 of subchapter 1D of these rules, 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) **Investigation and Response** - The counsel will conduct any necessary investigation regarding the compliance of the petitioner with the requirements set forth in Rule .0129(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) **Failure of Counsel to File Response** - 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) **Specific Objections in Response** - 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) **Reinstatement Hearing** - 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 panel 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 panel 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) **Reinstatement Order** - The hearing panel 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 panel 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) **Reinstatement** - 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) **Reinstatement Petition** - 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 panel as provided in Rule .0108(a)(2) of this subchapter. A hearing will be conducted pursuant to the procedures set out in Rule .0114 to .0118 of this subchapter.

(3) **Burden of Proof** - 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) **Medical Records** - 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) **Judical Findings** - 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 .0122 of this subchapter to determine whether the member is disabled.

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

(d) **Conditions of Reinstatement** - The hearing panel may impose reasonable conditions on a lawyer's reinstatement from disbarment, suspension or disability inactive status in any case in which the hearing panel 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

Amendments Approved by the Supreme Court: February 20, 1995; March 6, 1997; October 2, 1997; July 22, 1999; August 24, 2000; March 6, 2002; February 27, 2003; October 8, 2009; October 10, 2011; September 22, 2016

.0130 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

Amendments Approved by the Supreme Court: September 22, 2016

.0131 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

Amendments Approved by the Supreme Court: September 22, 2016

.0132 Trust Accounts; Audit

(a) **Investigative Subpoena for Reasonable Cause** - 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, circumstances that constitute reasonable cause, include, but are not limited to:

(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 .0132(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) two or more grievances received by the North Carolina State Bar over a twelve month period alleging facts which, if true, would indicate misconduct for neglect of a client matter or failure to communicate with a client;

(4) any failure to respond to any notices issued by the North Carolina State Bar with regard to a grievance or a fee dispute;

(5) any information received by the North Carolina State Bar which, if true, would constitute a failure to file any federal, state, or local tax return or pay a federal, state, or local tax obligation; or

(6) 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) **Random Investigative Subpoenas** - 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) **Time Limit** - No subpoena issued pursuant to this rule may compel production within five days of service.

(d) **Evidence** - 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) **Attorney-Client Privilege/Confidentiality** - 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

Amendments Approved by the Supreme Court: November 16, 2006; September 22, 2016

.0133 Confidentiality

(a) **Allegations of Misconduct or Alleged Disability** - 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;

(5) the member files an affidavit of surrender of license; or

(6) a member is transferred to disability inactive status pursuant to Rule .0122(g). In such an instance, the order transferring the member shall be public. Any other materials, including the medical evidence supporting the order, shall be kept confidential unless and until the member petitions for reinstatement pursuant to Rule .0122(c), unless provided otherwise in the order.

(b) **Disciplinary Complaints Filed Pursuant to Rule .0113(j)(4), .0113(l)(4), or .0113(m)(4)** - The State Bar may disclose that it filed the complaint before the Disciplinary Hearing Commission pursuant to Rule .0113(j)(4), .0113(l)(4), or .0113(m)(4):

(1) after proceedings before the Disciplinary Hearing Commission have concluded; or

(2) while proceedings are pending before the Disciplinary Hearing Commission, in order to address publicity not initiated by the State Bar.

(c) **Letter of Warning or Admonition** - 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.

(d) **Attorney's Response to a Grievance** - 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.

(e) **Law Enforcement or Regulatory Agency** - This provision will not be construed to prohibit the North Carolina State Bar from providing information or evidence to any law enforcement or regulatory agency.

(f) **Chief Justice's Commission on Professionalism** - This provision will not be construed to prevent the North Carolina State Bar, with the approval of the chairperson of the Grievance Committee, from notifying the Chief Justice's Commission on Professionalism of any allegation of unprofessional conduct by any member.

(g) **Lawyer Assistance Program** - This provision will not be construed to prevent the North Carolina State Bar from notifying the Lawyer Assistance Program of any circumstances that indicate a member may have a substance abuse or mental health issue.

(h) **Other Jurisdictions** - This provision will not be construed to prohibit the North Carolina State Bar, with the approval of the chairperson of the Grievance Committee, from providing information concerning the existence of a letter of caution, letter of warning, or admonition to any agency that regulates the legal profession in any other jurisdiction so long as the inquiring jurisdiction maintains the same level of confidentiality respecting the information as does the North Carolina State Bar.

(i) **National Discipline Data Bank** - 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.

(j) **Client Security Fund Board of Trustees** - 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

Amendments Approved by the Supreme Court: February 20, 1996; November 7, 1996; March 6, 2002; October 9, 2008; September 22, 2016

.0134 Disciplinary Amnesty in Illicit Drug Use Cases

(a) **Information Concerning Illicit Drug Use** - 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 .0134(c), (d) and (e) below. The information will be provided to director of the lawyer assistance program of the North Carolina State Bar.

(b) **Lawyer Assistance Program** - 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) **Failure to Complete Treatment** - If a member under Rule .0134(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) **Crime Relating to Use or Possession of Illicit Drugs** - 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) **Additional Misconduct** - 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 .0134(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

Amendments Approved by the Supreme Court: February 20, 1995; February 3, 2000; September 22, 2016

.0135, Noncompliance Suspension

(a) Noncompliant and Noncompliance Defined. Failure to respond fully and timely to a letter of notice issued pursuant to N.C.A.C. 1B, .0112, failure to respond fully and timely to any request from the State Bar for additional information in any pending grievance investigation, failure to respond fully and timely to any request from the State Bar to produce documents or other tangible or electronic materials in connection with a grievance investigation, and/or failure to respond fully and timely to a subpoena issued by the chair of the Grievance Committee or issued by the secretary of the State Bar shall be referred to herein as "noncompliant" or "noncompliance."

(b) Petition for Noncompliance Suspension. If a respondent against whom a grievance file has been opened and who has been served with a letter of notice or who has been served with a subpoena issued by the chair of the Grievance Committee or issued by the secretary of the State Bar is noncompliant, the State Bar may petition the chair of the Disciplinary Hearing Commission for an order requiring the respondent to show cause why the chair should not enter an order suspending the respondent's law license.

(c) Content of Petition

(1) The petition shall be a verified petition, or shall be supported by an affidavit, demonstrating by clear, cogent, and convincing evidence that the respondent is noncompliant.

(2) The petition shall set forth the efforts made by the State Bar to obtain the respondent's compliance.

(3) Service of Petition

(A) The petition shall be served upon the respondent by mailing a copy of the petition addressed to the last address the respondent provided to the Membership Department of the State Bar pursuant to N.C. Gen. Stat. § 84-34 or addressed to any more recent address that might be known to the State Bar representative who is attempting service.

(B) Service of the petition shall be complete upon mailing.

(d) Order to Show Cause

(1) Upon receiving the State Bar's filed petition, the chair of the DHC shall issue to the respondent an order to show cause.

(2) The order to show cause shall notify the respondent that the respondent's noncompliance or failure to respond to the order to show cause may result in suspension of the respondent's law license.

(3) The order to show cause shall be served upon the respondent by mailing a copy of the order addressed to the last address the respondent provided to the Membership Department of the State Bar pursuant to N.C. Gen. Stat. § 84-34, addressed to any more recent address that might be known to the DHC, or addressed to the address where the State Bar served the petition.

(4) Service of the order to show cause shall be complete upon mailing.

(e) Response to Order to Show Cause

(1) The respondent shall respond to the order to show cause within 14 days of the date of service of the order upon the respondent.

(2) If the respondent responds to the order to show cause within 14 days of the date of service of the order upon the respondent, the chair of the DHC shall schedule a hearing on the order to show cause within ten days of the filing of the respondent's response and shall provide notice to the respondent and to the State Bar of such hearing.

(3) If the respondent does not file a response to the order to show cause within 14 days of the date of service of the order to show cause upon the respondent, the chair of the DHC may enter an order suspending the respondent's law license. Such order of suspension will remain in effect until the chair enters an order finding by clear, cogent, and convincing evidence that the respondent fully cured the noncompliance and reinstating the respondent's law license to active status.

(f) Hearing on Order to Show Cause; Burden of Proof

(1) The State Bar shall have the burden of proving the respondent's noncompliance by clear, cogent, and convincing evidence.

(2) If the chair of the DHC finds that the State Bar has met its burden of proof, the burden of proof shall shift to the respondent to prove one or more of the following by clear, cogent, and convincing evidence:

(A) That the respondent was and is fully in compliance;

(B) That the respondent has fully cured all noncompliance; or

(C) That there is good cause for the respondent's noncompliance.

(g) Entry of Order

If the chair finds that the State Bar has met its burden of proof; finds by clear, cogent, and convincing evidence that the respondent is noncompliant; finds that the respondent has not met the respondent's burden of proof; and fails to find by clear, cogent, and convincing evidence any of the circumstances listed in paragraph 6(b) above, the chair may enter an order suspending the respondent's law license. Such order of suspension shall remain in effect until the chair enters an order finding by clear, cogent, and convincing evidence that the respondent fully cured the noncompliance and reinstating the respondent's law license to active status.

(h) Wind Down

Any attorney suspended for noncompliance shall comply with the wind-down provisions for suspended attorneys as set forth in N.C.A.C. 1B .0128.

(i) Reinstatement from Noncompliance Suspension

(1) Following entry of a noncompliance suspension order, the respondent may seek reinstatement by filing a verified petition with the chair of the DHC demonstrating by clear, cogent, and convincing evidence that the respondent has become, and is at the time of the petition, fully compliant. The respondent shall simultaneously serve a copy of the verified petition on the State Bar.

(2) The State Bar shall have five days from the date of receipt to file an objection to the respondent's petition. If the State Bar does not object, the chair may enter an order finding by clear, cogent, and convincing evidence that the respondent has become, and is at the time of the petition, fully compliant and reinstating the respondent to the active practice of law.

(3) If the State Bar objects to the petition, the chair shall schedule a hearing within ten days of the filing of such objection. It shall be the respondent's burden to prove by clear, cogent, and convincing evidence that the respondent has become, and remains at the time of the hearing, fully compliant.

(4) At the conclusion of the hearing, if the chair finds that the respondent has met her/his burden of proof and finds by clear, cogent, and convincing evidence that the respondent is fully compliant at the time of the hearing, the chair shall enter an order reinstating the respondent to the active practice of law.

(j) Subsequent Petitions for Noncompliance Suspension

The State Bar may file a petition under this rule on the first occasion when a respondent is noncompliant and may file a petition on any subsequent occasions when a respondent is noncompliant.

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

Adopted by the Supreme Court March 17, 2019

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) **Membership Requirements for Establishing a District Grievance Committee** - 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) **Multi-District Grievance Committees** - 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) **Meeting Establishing a District Grievance Committee and Certification** - 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) **Meeting Establishing a Multi-District Grievance Committee and Certification** - 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) **Members of District Committees** - Each district grievance committee shall be composed of not fewer than five nor more than 21 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 five 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) **Chairperson** - 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) **Selection of Attorney and Public Members** - 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) **Term and Replacement of Members** - 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
Amendments Approved by the Supreme Court: October 7, 2010

.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 Dispute Resolution Program** - 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 Resolution 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 Fee Dispute Resolution by Complainant** - If the complainant elects not to participate in the State Bar's Fee Dispute Resolution 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 Resolution Program** - Where a complainant timely elects to participate in fee dispute resolution, the chairperson of the district grievance committee shall refer the portion of the grievance involving a fee dispute to the State Bar Fee Dispute Resolution Program for resolution. If the grievance consists entirely of a fee dispute, and the complainant timely elects to participate in fee dispute resolution, 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
Amendments Approved by the Supreme Court: March 3, 1999; December 20, 2000; August 23, 2007; September 25, 2019

.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) **Notification of State Bar Office of Counsel** - 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) **Letter to Complainant** - 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) **Grievance File Number** - 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) **Letter of Notice: Timing and Form** - 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) **Substance of Grievance** - 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) **Attorney Response** - 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) **Subpoena** - 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) **Summarization of Response for Complainant** - 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) **Findings of Investigative Member** - 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) **Information to be Considered in Recommendation by Committee** - 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) **Probable Cause** - 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) **Written Report to Office of Counsel** - 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) **Timing of Report and Recall of Files by State Bar** - 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) **Notification of Respondent Attorney and Complainant of District Grievance Committee Findings** - 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 Resolution 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 dispute resolution program, please complete and return the form to me within 20 days of the date of this letter. If you decide to participate, 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 dispute resolution 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 dispute resolution, 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
Amendments Approved by the Supreme Court: August 23, 2007

.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 Resolution 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 dispute resolution program, please complete and return the form to me within 20 days of the date of this letter. If you decide to participate, the fee dispute resolution committee will handle those portions of your complaint which involve an apparent fee dispute.

If you do not wish to participate in the fee dispute resolution 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 dispute resolution, 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
Amendments Approved by the Supreme Court: August 23, 2007

.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 .0100 Board of Law Examiners

.0101 Election

(a) The Board of Law Examiners shall consist of 11 members. The members are appointed for three-year terms to serve until expiration of the term, resignation, death, or other cause for termination of members' service.

(b) The council, in making appointments to the Board of Law Examiners, shall make appointments for no more than four consecutive three-year terms, not counting any partial term which may have previously been served.

(c) The council shall appoint board members for three-year terms at its annual meeting in October, with the term of service to begin on the following January 1. Appointment of a board member to complete an unexpired term shall be conducted at the next meeting of the council following the termination of service by the member and the giving of notice of the vacancy.

(d) When vacancies occur for the Board of Law Examiners, notice shall be published in the official publication of the North Carolina State Bar giving the date by which any person desiring to make a suggestion for someone to be considered as a possible member of the Board of Law Examiners must submit the name to the North Carolina State Bar.

(e) In considering an appointment to the Board of Law Examiners, the council may consult with current members of the Board of Law Examiners and consider factors such as geography, practice area, gender, and racial diversity.

(f) No member of the council shall be a member of the Board of Law Examiners.

(g) Any former Board of Law Examiners member being considered for appointment as emeritus member shall have served on the Board of Law Examiners for not less than five years.

History Note: Statutory Authority G.S. 84-24
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: June 9, 2016

.0102 Examination of Applicants for License

All applicants for admission to the Bar shall first obtain a certificate of license from the Board of Law Examiners in accordance with the rules and regulations of that board.

History Note: Statutory Authority G.S. 84-24
Readopted Effective December 8, 1994

.0103 Admission to Practice

Upon receiving license to practice law from the Board of Law Examiners, the applicant shall be admitted to the practice thereof by taking the oath in the manner and form now provided by law.

History Note: Statutory Authority G.S. 84-24
Readopted Effective December 8, 1994

.0104 Approval of Rules and Regulations of Board of Law Examiners

The council shall, as soon as possible, after the presentation to it of rules and regulations for admission to the Bar, approve or disapprove such rules and regulations. The rules and regulations approved shall immediately be certified to the Supreme Court. Such rules and regulations as may not be approved by the council shall be the subject of further study and action, and for the purpose of study, the council and Board of Law Examiners may sit in joint session. No action, however, shall be taken by the joint meeting, but each shall act separately, and no rule or regulation shall be certified to the Supreme Court until approved by the council.

History Note: Statutory Authority G.S. 84-24
Readopted Effective December 8, 1994

.0105 Approval Of Law Schools

Every applicant for admission to the North Carolina State Bar must meet the requirements set out in at least one of the numbered paragraphs below:

(1) The applicant holds an LL.B or J.D. degree from a law school that was approved by the American Bar Association at the time the degree was conferred; or

(2) Prior to August 1995, the applicant received an LL.B., J.D., LL.M., or S.J.D. degree from a law school that was approved by the council of the N.C. State Bar at the time the degree was conferred;

(3) Prior to August 2005, the applicant received an LL.M or S.J.D. degree from a law school that was approved by the American Bar Association at the time the degree was conferred.

(4) The applicant holds an LL.B. or J.D. degree from a law school that was approved for licensure purposes in another state of the United States or the District of Columbia and was licensed in such state or district.

History Note: Statutory Authority G.S. 84-24
Adopted by the Supreme Court: March 3, 1999
Amendments Approved by the Supreme Court: February 27, 2003; March 5, 2015; September 22, 2016

Section .0200 Rules Governing Practical Training of Law Students

.0201 Purpose

The rules in this subchapter are adopted for the following purposes: to support the development of clinical legal education programs at North Carolina's law schools in order that the law schools may provide their students with supervised practical training of varying kinds during the period of their formal legal education; to enable law students to obtain supervised practical training while serving as legal interns for government agencies; and to assist law schools in providing substantial opportunities for student participation in *pro bono* service.

History Note: Statutory Authority G.S. 84-7.1
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: June 7, 2001; March 6, 2008; September 25, 2019

.0202 Definitions

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

(a) Clinical legal education program – Experiential educational program that engages students in "real world" legal matters through supervised practice experience. Under the supervision of a faculty member or site supervisor who is accountable to the law school, students assume the role of a lawyer either as a protégé, lead counsel, or a member of a lawyer team.

(b) Eligible persons - Persons who are unable financially to pay for legal advice or services as determined by a standard established by a judge of the General Court of Justice, a legal services organization, government entity, or a clinical legal education program. "Eligible persons" may include minors who are not financially independent; students enrolled in secondary and higher education schools who are not financially independent; non-profit organizations serving low-income communities; and other organizations financially unable to pay for legal advice or services.

(c) Field placement – Practical training opportunities within a law school's clinical legal education program that place students in legal practice settings external to the law school. Students in a field placement represent clients or perform other lawyering roles under the supervision of practicing lawyers or other qualified legal professionals. Faculty have overall responsibility for assuring the educational value of the learning in the field. Supervising attorneys provide direct feedback and guidance to the students. Site supervisors have administrative responsibility for the legal intern program at the field placement. Such practical training opportunities may be referred to as "externships."

(d) Government agencies - The federal or state government, any local government, or any agency, department, unit, or other entity of federal, state, or local government, specifically including a public defenders office or a district attorney's office.

(e) Law school - An ABA accredited law school or a law school actively seeking accreditation from the ABA and licensed by the Board of Governors of the University of North Carolina. If ABA accreditation is not obtained by a law school so licensed within three years of the commencement of classes, legal interns may not practice, pursuant to these rules, with any legal aid clinic of the law school.

(f) Law school clinic - Courses within a law school's clinical legal education program that place students in a legal practice setting operated by the law school. Students in a law school clinic assume the role of a lawyer representing actual clients or performing other lawyering roles. Supervision of students is provided by faculty employed by the law school (full-time, part-time, adjunct) who are active members of the North Carolina State Bar or another bar as appropriate for the legal matters undertaken.

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

(h) Legal services organization - A nonprofit North Carolina organization organized to operate in accordance with N.C. Gen. Stat. §84-5.1.

(i) *Pro bono* activity – An opportunity while in law school for students to provide legal services to those unable to pay, or otherwise under a disability or disadvantage, consistent with the objectives of Rule 6.1 of the Rules of Professional Conduct.

(j) Rules of Professional Conduct – The Rules of Professional Conduct adopted by the Council of the North Carolina State Bar, approved by the North Carolina Supreme Court, and in effect at the time of application of the rules in this subchapter.

(k) Site supervisor – The attorney at a field placement who assumes administrative responsibility for the legal intern program at the field placement and provides the notices to the State Bar required by Rule .0205(b) of this subchapter. A site supervisor may also be a supervising attorney at a field placement.

(l) Supervising attorney - An active member of the North Carolina State Bar, or an attorney who is licensed in another jurisdiction as appropriate for the legal work to be undertaken, who has practiced law as a full-time occupation for at least two years, and who supervises one or more legal interns pursuant to the requirements of the rules in this subchapter.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: June 7, 2001; March 6, 2002; March 6, 2008; September 25, 2019

.0203 Eligibility

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

(a) be enrolled as a J.D. or LL.M. student in a law school approved by the Council of the North Carolina State Bar;

(b) 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 legal education to perform as a legal intern, which education shall include satisfaction of the prerequisites for participation in the clinic or field placement;

(c) be introduced by an attorney admitted to practice in the tribunal or agency to every judicial official who will preside over a matter in which the student will appear, and, pursuant to Rule .0206(c) of this subchapter, obtain the tribunal's or agency's consent to appear subject to any limitations imposed by the presiding judicial official; such introductions do not have to occur in open court and the consent of the judicial official may be oral or written;

(d) neither ask for nor receive any compensation or remuneration of any kind from any eligible person to whom he or she renders services, but this shall not prevent an attorney, legal services organization, law school, or government agency from paying compensation to the law student or charging or collecting a fee for legal services performed by such law student; and

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

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: June 7, 2001; March 6, 2008; September 25, 2019

.0204 Form and Duration of Certification

Upon receipt of the written materials required by Rule .0203(b) and (e) and Rule .0205(b), 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

Amendments Approved by the Supreme Court: June 7, 2001; September 25, 2019

.0205 Supervision

(a) Supervision Requirements. A supervising attorney shall

(1) for a law school clinic, concurrently supervise an unlimited number of legal interns if the supervising attorney is a full-time, part-time, or adjunct member of a law school's faculty or staff whose primary responsibility is supervising legal interns in a law school clinic and, further provided, the number of legal interns concurrently supervised is not so large as to compromise the effective and beneficial practical training of the legal interns or the competent representation of clients;

(2) for a field placement, concurrently supervise no more than two legal interns; however, a greater number of legal interns may be concurrently supervised by a single supervising attorney if the appropriate faculty supervi-

sor determines, in his or her reasoned discretion, that the effective and beneficial practical training of the legal interns and the competent representation of clients will not be compromised;

(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 competent representation of the client; and

(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.

(b) Filing Requirements.

(1) Prior to commencing supervision, a supervising attorney in a law school clinic shall provide a signed statement to the North Carolina State Bar (i) assuming responsibility for the supervision of identified legal interns, (ii) stating the period during which the supervising attorney expects to supervise the activities of the identified legal interns, and (iii) certifying that the supervising attorney will adequately supervise the legal interns in accordance with these rules.

(2) Prior to the commencement of a field placement for a legal intern(s), the site supervisor shall provide a signed statement to the North Carolina State Bar (i) assuming responsibility for the administration of the field placement in compliance with these rules, (ii) identifying the participating legal intern(s) and stating the period during which the legal intern(s) is expected to participate in the program at the field placement, (iii) identifying the supervising attorney(s) at the field placement, and (iv) certifying that the supervising attorney(s) will adequately supervise the legal intern(s) in accordance with these rules.

(3) A supervising attorney in a law school clinic and a site supervisor for a legal intern program at a field placement shall notify the North Carolina State Bar in writing promptly whenever the supervision of a legal intern concludes prior to the designated period of supervision.

(c) Responsibilities of Law School Clinic in Absence of Legal Intern. During any period when a legal intern is not available to provide representation due to law school seasonal breaks, graduation, or other reason, the supervising attorney shall maintain the status quo of a client matter and shall take action as necessary to protect the interests of the client until the legal intern is available or a new legal intern is assigned to the matter. During law school seasonal breaks, or other periods when a legal intern is not available, if a law school clinic or a supervising attorney is presented with an inquiry from an eligible person or a legal matter that may be appropriate for representation by a legal intern, the representation may be undertaken by a supervising attorney to preserve the matter for subsequent representation by a legal intern. Communications by a supervising attorney with a prospective client to determine whether the prospective client is eligible for clinic representation may include providing immediate legal advice or information even if it is subsequently determined that the matter is not appropriate for clinic representation.

(d) Independent Legal Practice. Nothing in these rules prohibits a supervising attorney in a law school clinic from providing legal services to third parties outside of the scope of the supervising attorney's employment by the law school operating the clinic.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: June 7, 2001; March 6, 2002; March 6, 2008; September 24, 2015; September 25, 2019

.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, including a government agency, on legal matters provided that the legal intern gives a clear prior explanation 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 eligible person, the state in criminal prosecutions, a criminal defendant who is represented by the public defender, or a government agency 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 who is an individual, 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. In all cases in which a legal intern makes an appearance before a tribunal or agency on behalf a government agency, the consent of the government agency shall be presumed if the legal intern is participating in an internship program of the government agency. A statement advising the court of the legal intern's participation in an internship program of the government agency 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

Amendments Approved by the Supreme Court: June 7, 2001; March 6, 2002; March 6, 2008

.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 government agency, 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]"; and

(3) be printed on a business card, provided the name of the supervising attorney also appears on the business card and there appears below the legal intern's name a clear statement 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 on the letterhead of a supervising attorney, legal aid clinic, or government agency.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: June 7, 2001; March 6, 2008; October 7, 2010

.0208 Field Placements

(a) A law student enrolled in a field placement at an organization, entity, agency, or law firm shall be certified as a legal intern if the law student will (i) provide legal advice or services in matters governed by North Carolina law to eligible persons or government agencies outside the organization, entity, agency, or law firm or (ii) appear before any North Carolina tribunal or agency on behalf of an eligible person or a government agency.

(b) Supervision of a legal intern enrolled in a field placement may be shared by two or more attorneys employed by the organization, entity, agency, or law firm, provided one attorney acts as site supervisor, assuming administrative responsibility for the legal intern program at the field placement and providing

the notices to the State Bar required by Rule .0205(b) of this subchapter. All supervising attorneys at a field placement shall comply with the requirements of Rule .0205(a).

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court September 25, 2019

.0209 Relationship of Law School and Clinics; Responsibility Upon Departure of Supervising Attorney or Closure of Clinic

(a) Relationship to Other Clinics. The clinics that are a part of a clinical legal education program at a law school may each operate as an independent entity (the "independent clinic model") or they may operate collectively as one entity with each clinic acting as a department or division of the entity (the "unified clinic model"). In the independent clinic model, clinics function independently of each other, including the maintenance of separate offices and separate conflicts-checking and case management systems. In the unified clinic model, clinics may share offices as well as conflicts-checking and case management systems.

(b) Application of the Rules of Professional Conduct. For the purposes of applying the Rules of Professional Conduct, each law school clinic operated pursuant to the independent clinic model shall be considered one law firm and clinics operated pursuant to the unified clinic model shall collectively be considered one law firm.

(c) Relationship with Law School. The relationship between law school clinics and the law school in which they operate shall be managed in a manner consistent with the requirements of the Rules of Professional Conduct. Procedures shall be established by both the clinics and the law school that are reasonably adequate to protect confidential client information from disclosure including disclosure to the law school administration, non-participating law school faculty and staff, and non-participating students of the law school. The rule of imputed disqualification, as stated in Rule 1.10(a) of the Rules of Professional Conduct, shall not apply to the law school administrators, non-participating law school faculty and staff, and non-participating law school students if reasonable efforts are made to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of clients. See Rule 1.6(c) of the Rules of Professional Conduct.

(d) Responsibility for Maintenance of Client Files. Client files shall be maintained and safeguarded by a law school clinic in accordance with the Rules of Professional Conduct and the ethics opinions interpretative thereof. Closed client files shall be returned to the client or shall be safeguarded and maintained by a law school clinic until disposal is permitted under the Rules of Professional Conduct. See RPC 209.

(e) Engagement Letter. In addition to the consent agreement required by Rule .0206(d) of this section for any representation of an individual client in a matter before a tribunal, a written engagement letter or memorandum of understanding with each client is recommended. The writing should state the general nature of the legal services to be provided and explain the roles and responsibilities of the clinic, the supervising attorney, and the legal intern. See Rule 1.5, cmt. [2] of the Rules of Professional Conduct ("A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.")

(f) Responsibility upon Departure of Supervising Attorney. Upon the departure of a supervising attorney from a law school clinic, the administration of the law school and of the clinic shall promptly identify a replacement supervising attorney for any active case in which no other supervising attorney is participating. In such cases, the departing attorney and the clinic administration shall protect the interests of all affected clients by taking appropriate steps to preserve the status quo of the legal matters of affected clients, consistent with the Rules of Professional Conduct and the ethics opinions interpretative thereof. If the departing attorney will not continue the representation after departure from the clinic, the attorney shall comply with Rule 1.16 of the Rules of Professional Conduct and all court rules for withdrawal from representation. Affected clients shall be notified and advised that (i) they have the right to counsel of choice (which may include the departing attorney if the departing attorney intends to engage in legal practice outside of the law school clinic); (ii) their file will be transferred to the new supervising attorney in the absence of other instructions from the client; and (iii) they may instruct the clinic to mail or deliver the file to the client or to transfer the file to legal counsel outside of the clinic. If instructed by a client, a file shall be promptly returned to the client or transferred to authorized legal counsel outside of the clinic.

(g) Responsibility upon Closure of a Law School Clinic. If a law school clinic is closed for any reason, the supervising attorney, with support from the law school, shall take appropriate steps to preserve the status quo of the legal matters of clients, consistent with the Rules of Professional Conduct and the ethics opinions interpretative thereof. The administration of the law school and of the clinic shall promptly notify all affected clients that (i) they have the right to counsel of choice (which may include the supervising attorney if the supervising attorney will engage in legal practice after closure of the clinic); (ii) the file will be mailed to or delivered to the client and the supervising attorney will withdraw from representation in the absence of other instructions from the client; and (iii) they may instruct the clinic to transfer the file to authorized legal counsel outside of the clinic (which may include the supervising attorney). If the supervising attorney will not continue the representation after closure of the clinic, the attorney shall comply with Rule 1.16 of the Rules of Professional Conduct and all court rules for withdrawal from representation.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court September 25, 2019

.0210 *Pro Bono* Activities

(a) *Pro Bono* Activities for Law Students. *Pro bono* activities for law students may be facilitated by a law school acting under the auspices of a clinical legal education program or another program or department of the law school. As used in this rule, "auspices" means administrative or programmatic support or supervision.

(b) Student Certification Not Required. Regardless of whether the *pro bono* activity is provided under the auspices of a clinical legal education program or another program or department of a law school, a law student participating in a *pro bono* activity made available by a law school is not required to be certified as a legal intern if

(1) the law student will not perform any legal service; or

(2) all of the following conditions are satisfied: (i) the student will perform specifically delegated substantive legal services for third parties (clients) under the direct supervision of an attorney who is an active member of the North Carolina State Bar or licensed in another jurisdiction as appropriate to the legal services to be undertaken (the responsible attorney); (ii) the legal services shall not include representation of clients before a tribunal or agency; (iii) the responsible attorney is personally and professionally responsible for the representation of the clients and for the law student's work product; and (iv) the role of the law student as an assistant to the responsible attorney is clearly explained to each client in advance of the performance of any legal service for the client by the law student.

(c) Law School Faculty and Staff Providing *Pro Bono* Services Under Auspices of a Clinical Legal Education Program. Any member of the law school's faculty or staff who is an active member of the North Carolina State Bar or licensed in another jurisdiction as appropriate to the legal work to be undertaken may serve as the responsible attorney for a *pro bono* activity if the activity is provided to eligible persons under the auspices of the law school's clinical legal education program and the responsible attorney complies with the relevant supervision requirements set forth in Rule .0205(a)(2)-(5) of this subchapter.

(d) Responsibility for Client File. Unless otherwise specified in this rule, if a client file is generated by a *pro bono* activity, it shall be maintained and safeguarded by the responsible attorney in compliance with the Rules of Professional Conduct and the ethics opinions interpretative thereof. If the *pro bono* activity is provided under the auspices of a clinical legal education program and the responsible attorney is a member of the law school's faculty or staff, the client file shall be maintained and safeguarded by the clinical legal education program in compliance with the Rules of Professional Conduct and the Rule .0209(d). If the *pro bono* activity is sponsored by a legal services organization or government agency, the legal services organization or government agency shall maintain and safeguard the client file. If the *pro bono* activity is sponsored by more than one legal services organization or government agency, the co-sponsors shall determine which entity shall maintain and safeguard the client file and shall so inform the client.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court September 25, 2019

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 and as comprehensively revised in 2003) 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 and as comprehensively revised in 2003.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: March 5, 1998; February 5, 2004

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

Amendments Approved by the Supreme Court: 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 pursuant to Rule 1.6(c) of the Revised Rules of Professional

Conduct (2003); provided, however, such confidential information may be disclosed as allowed by Rule 1.6(b) 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

Amendments Approved by the Supreme Court: March 5, 1998; February 5, 2004

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 request 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) Upon initial consideration of the request, by vote of a majority of the members of the committee present at the meeting, the committee shall prepare a written proposed response to the inquiry and shall determine whether to issue the response as a proposed ethics decision or a proposed formal ethics opinion. Prior to the next regularly scheduled meeting of the committee, all proposed formal ethics opinions shall be published and all proposed ethics decisions shall be circulated to the members of the council.

(d) Prior to the next regularly scheduled meeting of the committee, any interested person or group may submit a written request to reconsider a proposed formal ethics opinion or a proposed 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.

(e) Upon reconsideration of a proposed formal ethics opinion or proposed ethics decision, the committee may, by vote of not less than a majority of the duly appointed members of the committee, revise the proposed formal ethics opinion or proposed ethics decision. Prior to the next regularly scheduled meeting of the committee, all revised proposed formal ethics opinions shall be published and all revised proposed ethics decisions shall be circulated to the members of the council.

(f) Upon completion of the process, the committee shall determine, by a vote of not less than a majority of the duly appointed members of the committee, whether to transmit a proposed formal ethics opinion or proposed ethics decision to the council with a recommendation to adopt.

(g) Any interested person or group may request to be heard by the council prior to a vote on the adoption of a 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 a 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.

(j) To vote, a member of the committee must be physically present at a meeting.

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

Readopted Effective December 5, 1994

Amendments Approved by the Supreme Court: March 8, 1998; February 5, 2004

.0105 Procedures for Meetings of the Ethics Committee

(a) Consent Agenda. The agenda for a meeting of the committee shall include a consent agenda consisting of those proposed formal ethics opinions, proposed ethics decisions, and ethics advisories (collectively "proposed opinions") published, circulated, or mailed during the preceding quarter that the chairperson, vice-chair, and staff counsel agree do not warrant discussion by the full committee.

(b) Vote on Consent Agenda. The consent agenda shall be considered at the beginning of the meeting of the committee following the consideration of administrative matters. Any committee member may make a non-debatable motion to remove an item from the consent agenda for separate discussion and vote. The motion must receive an affirmative vote of one-third of all of the duly appointed members of the committee in order for an item to be removed from the consent agenda. The items remaining upon the consent agenda shall be considered together upon a non-debatable motion to approve the remaining items on the consent agenda. The motion must pass by a vote of not less than a majority of the duly appointed members of the committee pursuant to Rule .0104(f) of this subchapter. All items on a consent agenda so approved shall be transmitted to the council with a recommendation to adopt.

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

Adopted by the Supreme Court: March 11, 2010

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

Amendments Approved by the Supreme Court: 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 com-

plained 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 notice - a communication to an accused individual or corporation setting forth the substance of alleged conduct involving unauthorized practice of law.

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

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

(15) Party - after a complaint has been filed, the North Carolina State Bar as plaintiff and the accused individual or corporation as defendant.

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

(17) Preliminary Hearing - hearing by the Authorized Practice Committee to determine whether probable cause exists.

(18) Probable Cause - a finding by the Authorized Practice Committee that there is reasonable cause to believe that a person or corporation has engaged in the unauthorized practice of law justifying legal action against such person or corporation.

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

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

History Note: Statutory Authority G.S. 84-37

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: February 3, 2000; October 6, 2004

.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

Amendments Approved by the Supreme Court: 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

Amendments Approved by the Supreme Court: 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 a complaint for injunction be filed in the name of the State Bar against the respondent;

(3) to dismiss allegations of the unauthorized practice of law upon a finding of no probable cause;

(4) to issue letters of caution, which may include a demand to cease and desist, to respondents in cases where the Committee concludes either that:

a. there is probable cause established to believe respondent has engaged in the unauthorized practice of law in North Carolina, but

(i) respondent has agreed to refrain from engaging in the conduct in the future;

(ii) respondent is unlikely to engage in the conduct again; or

(iii) either referral to a district attorney or complaint for injunction is not warranted under the circumstances; or

b. there is no probable cause established to believe respondent has engaged in the unauthorized practice of law in North Carolina, but

(i) the conduct of the respondent may be improper and may become the basis for injunctive relief if continued or repeated; or

(ii) the Committee otherwise finds it appropriate to caution the respondent.

(5) to direct counsel to stop an investigation and take no action;

(6) to refer a matter to another agency, including the district attorney for criminal prosecution and to other committees of the North Carolina State Bar; and

(7) 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

Amendments Approved by the Supreme Court: February 20, 1995; February 3, 2000; October 6, 2004

.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
Amendments Approved by the Supreme Court: 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 by the Supreme Court: 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
Amendments Approved by the Supreme Court: 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
Amendments Approved by the Supreme Court: 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 by the Supreme Court: 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. In addition, the board may have the dean of a law school in North Carolina, or the dean's designee, appointed by the council as an ex officio member. 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 by the Supreme Court: February 3, 2000
Amendments Approved by the Supreme Court: November 16, 2006

.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 by the Supreme Court: 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. Members of the board serving ex officio shall serve one-year terms and may serve up to three consecutive terms.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Adopted by the Supreme Court: February 3, 2000
Amendments Approved by the Supreme Court: November 16, 2006

.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 by the Supreme Court: 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 by the Supreme Court: 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 by the Supreme Court: 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 by the Supreme Court: 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 by the Supreme Court: 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 by the Supreme Court: 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
Amendments Approved by the Supreme Court: February 3, 2000

.0614 Reserved

.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
Amendments Approved by the Supreme Court: 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

Amendments Approved by the Supreme Court: September 7, 1995; February 3, 2000

.0617 Consensual Inactive Status

Notwithstanding the provisions of Rule .0616 of this subchapter, the court may enter an order transferring the lawyer to inactive status if the lawyer consents. The order may contain such other terms and provisions as the parties agree to and which are necessary for the protection of the public. A lawyer transferred to inactive status pursuant to this rule may not petition for reinstatement pursuant to Rule .0902 of this subchapter. The lawyer may apply to the court at any time for an order reinstating the lawyer to active status.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: February 3, 2000; March 8, 2013

.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

Amendments Approved by the Supreme Court: 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

Amendments Approved by the Supreme Court: 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 by the Supreme Court: March 7, 1996

Amendments Approved by the Supreme Court: 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 by the Supreme Court: 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 by the Supreme Court: 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 by the Supreme Court: February 3, 2000

Section .0700 Procedures for Fee Dispute Resolution

.0701 Purpose and Implementation

The purpose of the Fee Dispute Resolution Program is to help clients and lawyers settle disputes over fees. The Fee Dispute Resolution Program will attempt to assist lawyers and clients in resolving disputes concerning legal fees and expenses. The State Bar will implement the Fee Dispute Resolution Program under the auspices of the Grievance Committee (the committee) as part of the Attorney Client Assistance Program (ACAP). It will be offered to clients and lawyers at no cost.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: February 3, 2000; May 4, 2000; March 8, 2007; March 11, 2010; September 25, 2019

.0702 Jurisdiction

(a) The committee has jurisdiction over a disagreement arising out of a client-lawyer relationship concerning the fees and expenses charged or incurred for legal services provided by a lawyer licensed to practice law in North Carolina.

(b) The committee does not have jurisdiction over the following:

(1) a dispute concerning fees or expenses established by a court, federal or state administrative agency, or federal or state official, or private arbitrator or arbitrator panel;

(2) a dispute over fees or expenses that are or were the subject of litigation or arbitration unless

(i) a court, arbitrator, or arbitration panel directs the matter to the State Bar for resolution,

(ii) both parties to the dispute agree to dismiss the litigation or arbitration without prejudice and pursue resolution through the State Bar's Fee Dispute Resolution program; or

(iii) litigation was commenced pursuant to 27 N.C. Admin. Code 1D § .0707(a);

(3) a dispute between a lawyer and a service provider, such as a court reporter or an expert witness;

(4) a dispute over fees or expenses that are the subject of a pending Client Security Fund claim, or a Client Security Fund claim that has been fully paid.

(5) a dispute between a lawyer and a person or entity with whom the lawyer had no client-lawyer relationship; and

(6) a dispute concerning a fee charged for services provided by the lawyer that do not constitute the practice of law.

(c) The committee will encourage settlement of fee disputes falling within its jurisdiction pursuant to Rule .0708 of this subchapter.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: May 4, 2000; March 11, 2010; August 23, 2012; September 25, 2019

.0703 Coordinator of Fee Dispute Resolution

The secretary-treasurer of the North Carolina State Bar will designate a member of the staff to serve as coordinator of the Fee Dispute Resolution Program. The coordinator will develop forms, maintain records, and provide statistics on the Fee Dispute Resolution Program. The coordinator will also develop an annual report to the council. The coordinator may also serve as a facilitator.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: May 4, 2000; March 8, 2007; March 11, 2010

.0704 Confidentiality

The Fee Dispute Resolution Program is a subcommittee of the Grievance Committee, which maintains all information in the possession of the Fee Dispute Resolution Program. Pursuant to N.C. Gen. Stat. § 84-32.1, documents in the possession of the Fee Dispute Resolution Program are confidential and are not public records.

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

Adopted by the Supreme Court: March 11, 2010

Amendments Approved by the Supreme Court: September 25, 2019

.0705 Selection of Facilitators

The secretary-treasurer of the North Carolina State Bar will designate members of the State Bar staff to serve as facilitators.

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

Adopted by the Supreme Court: May 4, 2000

Amendments Approved by the Supreme Court: March 11, 2010

.0706 Powers and Duties of the Vice-Chairperson

The vice-chairperson of the Grievance Subcommittee overseeing ACAP, or his or her designee, who must be a councilor, will:

(a) approve or disapprove any recommendation that an impasse be declared in any fee dispute; and

(b) refer to the Grievance Committee all cases in which it appears that

(i) a lawyer might have demanded, charged, contracted to receive or received an illegal or clearly excessive fee or a clearly excessive amount for expenses in violation of Rule 1.5 of the Rules of Professional Conduct; or

(ii) a lawyer might have failed to refund an unearned portion of a fee in violation of Rule 1.5 the Rules of Professional Conduct, or

(iii) a lawyer might have violated one or more Rules of Professional Conduct other than or in addition to Rule 1.5.

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

Adopted by the Supreme Court: May 4, 2000

Amendments Approved by the Supreme Court: February 5, 2002; March 8, 2007; March 11, 2010; September 25, 2019

.0707 Processing Requests for Fee Dispute Resolution

(a) A request for resolution of a disputed fee must be submitted in writing to the coordinator of the Fee Dispute Resolution Program addressed to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. A lawyer is required by Rule of Professional Conduct 1.5 to notify in writing a client with whom the lawyer has a dispute over a fee (i) of the existence of the Fee Dispute Resolution Program and (ii) that if the client does not file a petition for fee dispute resolution within 30 days after the client receives such notification, the lawyer will be permitted by Rule of Professional Conduct 1.5 to file a lawsuit to collect the disputed fee. A lawyer may file a lawsuit prior to expiration of the required 30-day notice period or after the petition is filed by the client only if such filing is necessary to preserve a claim. If a lawyer does file a lawsuit pursuant to the preceding sentence, the lawyer must not take steps to pursue the litigation until the fee dispute resolution process is completed. A client may request fee dispute resolution at any time before either party files a lawsuit. The petition for resolution of a disputed fee must contain:

(1) the names and addresses of the parties to the dispute;

(2) a clear and brief statement of the facts giving rise to the dispute;

(3) a statement that, prior to requesting fee dispute resolution, a reasonable attempt was made to resolve the dispute by agreement;

(4) a statement that the subject matter of the dispute has not been adjudicated and is not presently the subject of litigation.

(b) A petition for resolution of a disputed fee must be filed (i) before the expiration of the statute of limitation applicable in the General Court of Justice for collection of the funds in issue or (ii) within three years of the termination of the client-lawyer relationship, whichever is later.

(c) The State Bar will process fee disputes and grievances in the following order:

(1) If a client submits to the State Bar simultaneously a grievance and a request for resolution of disputed fee involving the same attorney-client relationship, the request for resolution of disputed fee will be processed first and the grievance will not be processed until the fee dispute resolution process is concluded.

(2) If a client submits a grievance to the State Bar and the State Bar determines it would be appropriate for the Fee Dispute Resolution Program to attempt to assist the client and the lawyer in settling a dispute over a legal fee, the attempt to resolve the fee dispute will occur first. If a grievance file has been opened, it will be stayed until the Fee Dispute Resolution Program has concluded its attempt to facilitate resolution of the disputed fee.

(3) If a client submits a request for resolution of a disputed fee to the State Bar while a grievance submitted by the same client and relating to the same attorney-client relationship is pending, the grievance will be stayed while the Fee Dispute Resolution Program attempts to facilitate resolution of the disputed fee.

(4) Notwithstanding the provisions of subsections (c)(1),(2), and (3) of this section, the State Bar will process a grievance before it processes a fee dispute or at the same time it processes a fee dispute whenever it determines that doing so is in the public interest.

(d) The coordinator of the Fee Dispute Resolution Program or a facilitator will review the petition to determine its suitability for fee dispute resolution. If it is determined that the dispute is not suitable for fee dispute resolution, the coordinator and/or the facilitator will prepare a letter setting forth the reasons the petition is not suitable for fee dispute resolution and recommending that the petition be discontinued and that the file be closed. The coordinator and/or the facilitator will forward the dismissal letter to the vice-chairperson. If the vice

chairperson agrees with the recommendation, the petition will be discontinued and the file will be closed. The coordinator and/or facilitator will notify the parties in writing that the file was closed. Grounds for concluding that a petition is not suitable for fee dispute resolution or for closing a file include, but are not limited to, the following:

(1) the petition is frivolous or moot; or

(2) the committee lacks jurisdiction over one or more of the parties or over the subject matter of the dispute.

(e) If the vice-chairperson disagrees with the recommendation to close the file, the coordinator will schedule a settlement conference.

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

Adopted by the Supreme Court: May 4, 2000

Amendments Approved by the Supreme Court: March 8, 2007; March 11, 2010; September 25, 2019

.0708 Settlement Conference Procedure

(a) The coordinator will assign the case to a facilitator.

(b) The State Bar will send a letter of notice to the respondent lawyer by certified mail notifying the respondent that the petition was filed and notifying the respondent of the obligation to provide a written response to the letter of notice, signed by the respondent, within 15 days of service of the letter of notice upon the respondent, and enclosing copies of the petition and of any relevant materials provided by the petitioner.

(c) Within 15 days after the letter of notice is served upon the respondent, the respondent must provide a written response to the petition signed by the respondent. The facilitator may grant requests for extensions of time to respond. The response must be a full and fair disclosure of all the facts and circumstances pertaining to the dispute. The response shall include all documents necessary to a full and fair understanding of the dispute. The response shall not include documents that are not necessary to a full and fair understanding of the dispute. The facilitator will provide a copy of the response to the petitioner unless the lawyer respondent objects in writing.

(d) The facilitator will conduct an investigation.

(e) The facilitator will conduct a telephone settlement conference. The facilitator may conduct the settlement conference by conference call or by telephone calls between the facilitator and one party at a time, depending upon which method the facilitator believes has the greater likelihood of success.

(f) The facilitator will explain the following to the parties:

(1) the procedure that will be followed;

(2) the differences between a facilitated settlement conference and other forms of conflict resolution;

(3) that the settlement conference is not a trial;

(4) that the facilitator is not a judge;

(5) that participation in the settlement conference does not deprive the parties of any right they would otherwise have to pursue resolution of the dispute through the court system if they do not reach a settlement;

(6) the circumstances under which the facilitator may communicate privately with any party or with any other person;

(7) whether and under what conditions private communications with the facilitator will be shared with the other party or held in confidence during the conference; and

(8) that any agreement reached will be reached by mutual consent.

(g) It is the duty of the facilitator to be impartial and to advise the parties of any circumstance that might cause either party to conclude that the facilitator has a possible bias, prejudice, or partiality.

(h) It is the duty of the facilitator to timely determine when the dispute cannot be resolved by settlement and to declare that an impasse exists and that the settlement conference should end.

(i) Upon completion of the settlement conference, the facilitator will prepare a disposition letter to be sent to the parties explaining:

(1) that the settlement conference resulted in a settlement and the terms of settlement; or

(2) that the settlement conference resulted in an impasse.

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

Adopted by the Supreme Court: May 4, 2000

Amendments Approved by the Supreme Court: March 11, 2010; September 25, 2019

.0709 Record Keeping

The coordinator of fee dispute resolution will keep a record of each request for fee dispute resolution. The record must contain the following information:

(1) the petitioner's name;

(2) the date the petition was received;

(3) the respondent's name;

(4) the district in which the respondent resides or maintains a place of business;

(5) what action was taken on the petition and, if applicable, how the dispute was resolved; and

(6) the date the file was closed.

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

Adopted by the Supreme Court: May 4, 2000

Amendments Approved by the Supreme Court: March 11, 2010; September 25, 2019

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, retired/nonpracticing status, or emeritus pro bono 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 or the Disciplinary Hearing Commission, as well as all past due fees, fines and penalties owed to the Board of Continuing Legal Education;

(2) the member acknowledges that the member continues to be subject to the Rules of Professional Conduct and to the disciplinary jurisdiction of the State Bar including jurisdiction in any pending matter before the Grievance Committee or the Disciplinary Hearing Commission; and,

(3) in the case of a member seeking emeritus pro bono status, it is determined by the Administrative Committee that the member is in good standing, is not the subject of any matter pending before the Grievance Committee or the Disciplinary Hearing Commission, and will be supervised by an active member employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1.

(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 and, where appropriate, granting emeritus pro bono 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

Amendments Approved by the Supreme Court: March 7, 1996; February 3, 2000; March 6, 2008; March 6, 2014

.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)Definition of "Year"

As used in this rule, a year is a 365 day period of time unless a calendar year is specified.

(c) Requirements for Reinstatement

(1) Completion of Petition.

The member must provide the information requested on a petition form prescribed by the council and must sign the petition under oath.

(2) CLE Requirements Before Inactive.

Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph (c)(5) of this rule, the member must satisfy the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year in which the member was transferred to inactive status, (the "subject year") if such transfer occurred on or after July 1 of the subject year, including any deficit from a prior calendar year that was carried forward and recorded in the member's CLE record for the subject year.

(3) Character and Fitness to Practice.

The member must have the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and must show 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) Additional CLE Requirements.

If more than 1 year has elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must complete 12 hours of approved CLE for each year that the member was inactive up to a maximum of 7 years. The CLE hours must be completed within 2 years prior to filing the petition. For each 12-hour increment, 6 hours may be taken online and 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism. If during the period of inactivity the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision without regard to whether they were taken during the 2 years prior to filing the petition.

(5) Bar Exam Requirement If Inactive 7 or More Years.

[Effective for all members who are transferred to inactive status on or after March 10, 2011.] If 7 years or more have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination. A member subject to this requirement does not have to satisfy the CLE requirements in paragraphs (c)(2) and (c)(4).

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of inactive status shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(4) for each year that the member was inactive up to a maximum of 7 years.

(B) Military Service. Each calendar year in which an inactive member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(4) for each year that the member was inactive up to a maximum of 7 years.

(6) Payment of Fees, Assessments and Costs.

The member must pay all of the following:

(A) a $125.00 reinstatement fee;

(B) the membership fee and the 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 paragraphs (c)(2), (4), and (5);

(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.

(d) 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.

(e) 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.

(f) Recommendation of 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. The chair of the Administrative Committee may appoint a panel composed of at least three members of the committee to consider any petition for reinstatement and, on behalf of the Administrative Committee, to make a recommendation to the council regarding whether the petition should be granted.

(1) Conditions Precedent to Reinstatement. Upon a determination that the petitioner has failed to demonstrate competence to return to the practice of law, the committee may require the petitioner to complete a specified number of hours of continuing legal education, which shall be in addition to the requirements set forth in Rule .0902(b)(2) and (4) above, as a condition precedent to the committee's recommendation that the petition be granted,

(2) Conditions Subsequent to Reinstatement. Upon a determination that the petitioner is fit to return to the practice of law pursuant to the reasonable management of his or her substance abuse, addiction, or debilitating mental condition, the committee may recommend to the council that the reinstatement petition be granted with reasonable conditions to which the petitioner consents. Such conditions may include, but are not limited to, an evaluation by a mental health professional approved by the Lawyer Assistance Program (LAP), compliance with the treatment recommendations of the mental health professional, periodic submission of progress reports by the mental health professional to LAP, and waiver of confidentiality relative to diagnosis and treatment by the mental health professional.

(3) Failure of Conditions Subsequent to Reinstatement. In the event the petitioner fails to satisfy the conditions of the reinstatement order, the committee shall issue a notice directing the petitioner to show cause, in writing, why the petitioner should not be suspended from the practice of law. Notice shall be served and the right to request a hearing shall be as provided in Rule .0902(f) below. The hearing shall be conducted as provided in Section .1000 of this subchapter provided, however, the burden of proof shall be upon the petitioner to show by clear, cogent, and convincing evidence that he or she has satisfied the conditions of the reinstatement order.

(g) Hearing Upon Denial of Petition for Reinstatement

(1) Notice of Council Action and Request for Hearing

If the council denies a petition for reinstatement, the petitioner shall be notified in writing within 14 days after such action. The notice shall be served upon the petitioner 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 petitioner 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.

(h) Reinstatement by Secretary of the State Bar

Notwithstanding paragraph (e) of this rule, an inactive member may petition for reinstatement pursuant to paragraphs (a) and (b) of this rule and may be reinstated by the secretary of the State Bar upon a finding that the inactive member has complied with or fulfilled the conditions for reinstatement set forth in this rule; there are no issues relating to the inactive member's character or fitness; and the inactive member has paid all fees owed to the State Bar including the reinstatement fee. Reinstatement by the secretary is discretionary. If the secretary declines to reinstate a member, the member's petition shall be submitted to the Administrative Committee at its next meeting and the procedure for review of the reinstatement petition shall be as set forth in paragraph (e) of this rule.

(i) Denial of Petition

When a petition for reinstatement is denied by the council in a given calendar year, the member may not petition again until the following calendar year. The reinstatement fee, costs, and any fees paid pursuant to paragraph (c)(7) shall be retained. However, the State Bar membership fee, Client Security Fund assessment, and district bar membership fee assessed for the year in which the application is filed shall be refunded.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: September 7, 1995; March 7, 1996; March 5, 1998; March 3, 1999; February 3, 2000; March 6, 2002; February 27, 2003; March 3, 2005; March 10, 2011; August 25, 2011; March 8, 2012; March 8, 2013; March 6, 2014; October 2, 2014; September 22, 2016; September 20, 2018

.0903 Suspension for Failure to Fulfill Obligations of Membership

(a) Procedure for Enforcement of Obligations of Membership

Whenever a member of the North Carolina State Bar fails to fulfill an obligation of membership in the State Bar, whether established by the administrative rules of the State Bar or by statute, the member shall be subject to administrative suspension from membership pursuant to the procedure set forth in this rule; provided, however, that the procedures for the investigation of and action upon alleged violations of the Rules of Professional Conduct by a member are set forth in subchapter 1B of these rules and that no aspect of any procedure set forth in this rule shall be applicable to the State Bar's investigation of or action upon alleged violations of the Rules of Professional Conduct by a member.

(1) The following are examples of obligations of membership that will be enforced by administrative suspension. This list is illustrative and not exclusive:

(A) Payment of the annual membership fee, including any associated late fee as set forth in G.S. 84-34;

(B) Payment of the annual Client Security Fund assessment;

(C) Payment of the costs of a disciplinary, disability, reinstatement, show cause, or other proceeding of the State Bar as ordered by the chair of the Grievance Committee, the Disciplinary Hearing Commission, the secretary, or the council;

(D) Filing of a pro hac vice registration statement as required in Rule .0101 of subchapter 1H of these rules; and

(E) Filing of an annual report form and attending continuing legal education activities as required by Sections .1500 and .1600 of subchapter 1D of these rules.

(b) Notice

Whenever it appears that a member has failed to comply, in a timely fashion, with an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, the secretary shall prepare a written notice 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.

(c) Service of the Notice

The notice shall be served on the member by mailing a copy thereof by registered or certified mail or designated delivery service (such as Federal Express or UPS), return receipt requested, to the last known address of the member contained in the records of the North Carolina State Bar or such later address as may be known to the person attempting service. Service of the notice may also be accomplished by (i) personal service by a State Bar investigator or by any person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process, or (ii) email sent to the email address of the member contained in the records of the North Carolina State Bar if the member sends an email from that same email address to the State Bar acknowledging such service. A member who cannot, with reasonable diligence, be served by registered or certified mail, designated delivery service, personal service, or email shall be deemed served upon publication of the notice in the State Bar *Journal*.

(d) Entry of Order of Suspension upon Failure to Respond to Notice to Show Cause.

Whenever a member fails to show cause in writing within 30 days of the service of the notice to show cause upon the member, and it appears that the member has failed to comply with an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, the council may enter an order suspending the member from the practice of law. The order shall be effective 30 days after proof of service on the member. The order shall be served on the member by mailing a copy thereof by registered or certified mail or designated delivery service, return receipt requested, to the last-known address of the member contained in the records of the North Carolina State Bar or such later address as may be known to the person attempting service. Service of the order may also be accomplished by (i) personal service by a State Bar investigator or by any person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process, or (ii) email sent to the email address of the member contained in the records of the North Carolina State Bar if the member sends an email from that same email address to the State Bar acknowledging such service. A member who cannot, with due diligence, be served by registered or certified mail, designated delivery service, personal service, or email shall be deemed served by the mailing of a copy of the order to the member's last known address contained in the records of the North Carolina State Bar.

(e) 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 fulfill an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute.

(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 30 days after proof of service on the member. The order shall be served on the member by mailing a copy thereof by registered or certified mail return receipt requested to the last-known address of the member according to the records of the North Carolina State Bar or such later address as may be known to the person effecting the service. Notice may also be by personal service by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process. Unless the member complies with or fulfills the obligation of membership within 30 days after service of the order, the obligations of a disbarred or suspended member to wind down the member's law practice within 30 days set forth in Rule .0128 of Subchapter 1B of these rules shall apply to the member upon the effective date of the order of suspension. If the member fails to fulfill the obligations set forth

in Rule .0128 of Subchapter 1B within 30 days of the effective date of the order, the member shall be subject to professional discipline.

(f) Late Compliance

If a member fulfills the obligation of membership before a suspension order is entered by the council, no order of suspension will be entered.

(g) Administrative Suspension Pursuant to Statute.

The provisions of this rule notwithstanding, if any section of the North Carolina General Statutes requires suspension of an occupational license, the procedure for suspension pursuant to such statute shall be as established by the statute. If no procedure is established by said statute, then the procedures specified in this rule shall be followed.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: September 7, 1995; December 7, 1995; March 7, 1996; March 5, 1998; February 3, 2000; October 1, 2003; March 2, 2006; November 16, 2006; March 6, 2008; October 8, 2009; March 11, 2010; August 23, 2012; March 6, 2014; September 22, 2016; February 26, 2020

.0904 Reinstatement from Suspension

(a) Compliance Within 30 Days of Service of Suspension Order.

A member who receives an order of suspension for failure to comply with an obligation of membership may preclude the order from becoming effective and shall not be required to file a formal reinstatement petition or pay the reinstatement fee if the member shows within 30 days after service of the suspension order that the member has done the following:

(1) fulfilled the obligations of membership set forth in the order;

(2) paid the administrative fees associated with the issuance of the suspension order, including the costs of service;

(3) paid any other delinquency shown on the financial records of the State Bar including outstanding judicial district bar dues;

(4) signed and filed CLE annual report forms as required by Rule .1522 of this subchapter;

(5) completed CLE hours as required by Rules .1518 and .1522 of this subchapter; and

(6) filed any IOLTA certification required by Rule .1319 of this subchapter.

(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 failure to comply with an obligation of membership may petition the council for an order of reinstatement.

(c) Definition of "Year."

As used in this rule, a year is a 365 day period of time unless a calendar year is specified.

(d) Requirements for Reinstatement

(1) Completion of Petition

The member must provide the information requested on a petition form prescribed by the council and must sign the petition under oath.

(2) CLE Requirements Before Suspended

Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph (d)(4) of this rule, the member must satisfy the minimum continuing legal education (CLE) requirements, as set forth in Rule .1518 of this subchapter, for the calendar year in which the member was suspended (the "subject year") if such transfer occurred on or after July 1 of the subject year, including any deficit from a prior year that was carried forward and recorded in the member's CLE record for the subject year. The member shall also sign and file any delinquent CLE annual report form.

(3) Additional CLE Requirements

If more than 1 year has elapsed between the effective date of the suspension order and the date upon which the reinstatement petition is filed, the member must complete 12 hours of approved CLE for each year that the member was suspended up to a maximum of 7 years. The CLE must be completed within 2 years prior to filing the petition. For each 12-hour increment, 6 hours may be taken online and 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism. If during the period of suspension the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision without regard to whether they were taken during the 2 years prior to filing the petition.

(4) Bar Exam Requirement If Suspended 7 or More Years

[Effective for all members who are administratively suspended on or after March 10, 2011.] If 7 years or more have elapsed between the effective date of the suspension order and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination. A member subject to this requirement does not have to satisfy the CLE requirements in paragraphs (d)(2) and (d)(3).

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of suspension shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of 7 years.

(B) Military Service. Each calendar year in which a suspended member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of 7 years.

(5) Character and Fitness to Practice

The member must have the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and must show 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.

(6) Payment of Fees, Assessments and Costs

The member must pay all of the following:

(A) a $125.00 reinstatement fee or $250.00 reinstatement fee if suspended for failure to comply with CLE requirements;

(B) all membership fees, Client Security Fund assessments, and late fees owed at the time of suspension and owed for the year in which the reinstatement petition is filed;

(C) all district bar annual membership fees owed at the time of suspension and owed for the year in which the reinstatement petition is filed;

(D) all attendee fees, fines and penalties owed the Board of Continuing Legal Education at the time of suspension and attendee fees for CLE courses taken to satisfy the requirements of paragraphs (d)(2) and (3) above;

(E) 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

(F) 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.

(7) Pro Hac Vice Registration Statements

The member must file any overdue pro hac vice registration statement for which the member was responsible.

(8) IOLTA Certification

The member must complete any IOLTA certification required by Rule .1319 of this subchapter.

(9) Wind Down of Law Practice During Suspension

The member must demonstrate that the member fulfilled the obligations of a disbarred or suspended member set forth in Rule .0128 of Subchapter 1B during the 30 day period after the effective date of the order of suspension, or that such obligations do not apply to the member due to the nature of the member's legal employment.

(e) Procedure for Review of Reinstatement Petition.

The procedure for review of the reinstatement petition shall be as set forth in Rule .0902(c)-(g) above.

(f) Reinstatement by Secretary of the State Bar.

At any time during the year after the effective date of a suspension order, a sus-

pended member may petition for reinstatement pursuant to paragraphs (b) and (c) of this rule and may be reinstated by the secretary of the State Bar upon a finding that the suspended member has complied with or fulfilled the obligations of membership set forth in the order; there are no issues relating to the suspended member's character or fitness; and the suspended member has paid the costs of the suspension and reinstatement procedure including the costs of service and the reinstatement fee. Reinstatement by the secretary is discretionary. If the secretary declines to reinstate a member, the member's petition shall be submitted to the Administrative Committee at its next meeting and the procedure for review of the reinstatement petition shall be as set forth in Rule .0902(c)-(f).

(g) Reinstatement from Disciplinary Suspension.

Notwithstanding the procedure for reinstatement set forth in the preceding paragraphs of this Rule, if an order of reinstatement from disciplinary suspension is granted to a member pursuant to Rule .0129 of Subchapter 1B of these rules, any outstanding order granting inactive status or suspending the same member for failure to fulfill the obligations of membership under this section shall be dissolved and the member shall be reinstated to active status.

(h) Denial of Petition.

When a petition for reinstatement is denied by the council in a given calendar year, the member may not petition again until the following calendar year. The reinstatement fee, costs, and any fees paid pursuant to paragraph (d)(6) shall be retained. However, the State Bar membership fee, Client Security Fund assessment, and district bar membership fee assessed for the year in which the application is filed shall be refunded.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: September 7, 1995, March 7, 1996, March 5, 1998, February 27, 2003, October 1, 2003; March 2, 2006; November 16, 2006; October 8, 2009; March 11, 2010; March 10, 2011; March 8, 2012; March 8, 2013; August 27, 2013; March 6, 2014; October 2, 2014; September 22, 2016; September 20, 2018

.0905 Pro Bono Practice by Out of State Lawyers

(a) A lawyer licensed to practice in another state but not North Carolina who desires to provide legal services free of charge to indigent persons may file a petition with the secretary addressed to the council setting forth:

(1) the petitioner's name and address;

(2) the state(s) in which the petitioner is or has been licensed and the date(s) when the petitioner was licensed;

(3) the name of a member who is employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1 and has agreed to supervise the petitioner; and

(4) any other matters pertinent to the petition as determined by the council.

(b) Along with the petition, the petitioner shall provide in writing:

(1) a certificate of good standing from each jurisdiction in which the petitioner has been licensed;

(2) a record of any professional discipline ever imposed against the petitioner;

(3) a statement from the petitioner that the petitioner is submitting to the disciplinary jurisdiction of the North Carolina State Bar, and will be governed by the North Carolina Rules of Professional Conduct in regard to any law practice authorized by the council in consequence of the petition; and

(4) a statement from the member identified in the petition agreeing to supervise the petitioner in the provision of pro bono legal services exclusively for indigent persons.

(c) The petition shall be referred to the Administrative Committee for review. After reviewing the petition and other pertinent information, the committee shall make a recommendation to the council regarding whether the petition should be granted.

(d) Upon receipt of a petition and other information satisfying the provisions this rule, the council may, in its discretion, enter an order permitting the petitioner to provide legal services to indigent persons on a pro basis under the supervision of a member employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1. The order shall become effective immediately upon entry by the council. A copy or the order shall be mailed to the petitioner and to the supervising member. No person permitted to practice pursuant to such an order shall pay any membership fee to the North Carolina State Bar or any district bar or any other charge ordinarily imposed upon active members, nor shall any such person be required to attend continuing legal education courses.

(e) A petitioner may be a compensated employee of a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1 and, if granted *pro bono* practice status, may provide legal services to the indigent clients of that corporation subject to the following conditions:

(1) the petitioner has filed an application for admission with the North Carolina Board of Law Examiners (BLE) and has never previously been denied admission to the North Carolina State Bar for any reason; a copy of the petitioner's application shall be provided with the petition for *pro bono* practice;

(2) if the petitioner is granted *pro bono* practice status, that status will terminate when the BLE makes its final ruling on the petitioner's application for admission; and

(3) the petitioner is supervised in the provision of all legal services to indigent persons as set forth in paragraph (d).

(f) A lawyer who is paid in-house counsel for a business organization with offices in North Carolina may petition under this rule to provide legal services to indigent persons on a *pro bono* basis under the supervision of a member employed by a nonprofit corporation qualified to render legal services pursuant to G.S. 84-5.1.

(g) Permission to practice under this rule terminates upon notice from the member identified in the petition pursuant to Rule .0905(a)(3) above, or from the nonprofit corporation employing such member, that the out-of-state lawyer is no longer supervised by any member employed by the corporation. In addition, permission to practice under this rule being entirely discretionary on the part of the council, the order granting such permission may be withdrawn by the council for good cause shown without notice to the out-of-state lawyer or an opportunity to be heard.

History Note: Statutory authority G.S. 84-7.1

Adopted by the Supreme Court: March 6, 2008

Amendments Approved by the Supreme Court: September 24, 2015; September 22, 2016

Section .1000 Rules Governing Reinstatement Hearings Before the Administrative Committee

.1001 Reinstatement Hearings

(a) Notice; Time and Place of Hearing

(1) Time and Place of Hearing

The chairperson of the Administrative Committee shall fix the time and place of the hearing within 30 days after the member's request for hearing is filed with the secretary. The hearing shall be held as soon as practicable after the request for hearing is filed but in no event more than 90 days after such request is filed unless otherwise agreed by the member and the chairperson of the committee.

(2) Notice to Member

The notice of the hearing shall include the date, time and place of the hearing and shall be served upon the member at least 10 days before the hearing date.

(b) Hearing Panel

(1) Appointment

The chairperson of the committee shall appoint a hearing panel consisting of three members of the committee to consider the petition and make a recommendation to the council.

(2) Presiding Panel Member

The chairperson shall appoint one of the three members of the panel to serve as the presiding member. The presiding member shall rule on any question of procedure that may arise in the hearing; preside at the deliberations of the panel; sign the written determination of the panel; and report the panel's determination to the council.

(3) Quorum

A majority of the panel members is necessary to decide the matter.

(4) Panel Recommendation

Following the hearing on a contested reinstatement petition, the panel will make a written recommendation to the council on behalf of the committee

regarding whether the member's license should be reinstated. The recommendation shall include appropriate findings of fact and conclusions of law.

(c) Burden of Proof

(1) Reinstatement from Inactive Status

The burden of proof shall be upon the member to show by clear, cogent and convincing evidence that he or she has satisfied the requirements for reinstatement as set forth in Rule .0902(b) of this subchapter.

(2) Reinstatement from Suspension for Nonpayment of Membership Fees, Late Fee, Client Security Fund Assessment, District Bar Membership Fees, or Assessed Costs

The burden of proof shall be upon the member to show by clear, cogent and convincing evidence that he or she has satisfied the requirements for reinstatement as set forth in Rule .0904(c) of this subchapter.

(3) Reinstatement from Suspension for Failure to Comply with the Rules Governing the Administration of the Continuing Legal Education Program

The burden of proof shall be upon the member to show by clear, cogent and convincing evidence that he or she has

(A) satisfied the requirements for reinstatement as set forth in Rule .0904(d) of this subchapter,

(B) cured any continuing legal education deficiency for which the member was suspended, and

(C) paid the reinstatement fee required by Rule .0904(d)(6) of this subchapter.

(d) Conduct of Hearing

(1) Member's Rights

The member shall have these rights at the hearing

(A) to appear personally and be heard;

(B) to be represented by counsel;

(C) to call and examine witnesses;

(D) to offer exhibits; and

(E) to cross-examine witnesses.

(2) State Bar Appears Through Counsel

The counsel shall appear at the hearing on behalf of the State Bar and shall have the right

(A) to be heard;

(B) to call and examine witnesses;

(C) to offer exhibits; and

(D) to cross-examine witnesses.

(3) Rules of Procedure and Evidence

The hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as practicable and the Rules of Evidence applicable in superior court, unless otherwise provided by this subchapter or the parties agree to other rules.

(4) Report of Hearing; Costs

The hearing shall be reported by a certified court reporter. The member shall pay the costs associated with obtaining the court reporter's services for the hearing. The member shall pay the costs of the transcript and shall arrange for the preparation of the transcript with the court reporter. The member shall be taxed with all other costs of the hearing, but such costs shall not include any compensation to the members of the hearing panel.

(e) Hearing Panel Recommendation

The written recommendation of the hearing panel shall be served upon the member within seven days of the date of the hearing.

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

Adopted by the Supreme Court: March 7, 1996

Amendments Approved by the Supreme Court: March 5, 1998; February 3, 2000

.1002 Review and Order of Council

(a) Review by Council of Recommendation of Hearing Panel

(1) Record to Council

(A) Compilation of Record

The member will compile a record of the proceedings before the hearing panel, including a legible copy of the complete transcript, all exhibits introduced into evidence and all pleadings, motions and orders, unless the member and counsel agree in writing to shorten the record. Any agreements regarding the record shall be included in the record transmitted to the council.

(B) Transmission of Record to Council

The member shall provide a copy of the record to the counsel not later than 90 days after the hearing unless an extension is granted by the president of the State Bar for good cause shown. The member will transmit a copy of the record to each member of the council no later than 30 days before the council meeting at which the petition is to be considered.

(C) Costs

The member shall bear all of the costs of transcribing, copying and transmitting the record to the members of the council.

(D) Dismissal for Failure to Comply

If the member fails to comply fully with any of the provisions of this rule, the counsel may file a motion with the secretary to dismiss the petition.

(2) Oral or Written Argument

In his or her discretion, the president of the State Bar may permit counsel for the State Bar and the member to present oral or written argument, but the council will not consider additional evidence not in the record transmitted from the hearing panel, absent a showing that the ends of justice so require or that undue hardship will result if the additional evidence is not presented.

(b) Order by Council

The council will review the recommendation of the hearing panel and the record and will determine whether and upon what conditions the member will be reinstated.

(c) Costs

The council may tax the costs attributable to the proceeding against the member.

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

Adopted by the Supreme Court: March 7, 1996

Section .1300 Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts (IOLTA)

.1301 Purpose

The IOLTA Board of Trustees (board) shall carry out the provisions of the Plan for Interest on Lawyers' Trust Accounts and administer the IOLTA program (NC IOLTA). Any funds remitted to the North Carolina State Bar from banks by reason of interest earned on general trust accounts established by lawyers pursuant to Rule 1.15-2(b) of the Rules of Professional Conduct or interest earned on trust or escrow accounts maintained by settlement agents pursuant to N.C.G.S. 45A-9 shall be deposited by the North Carolina State Bar through the board in a special account or accounts which shall be segregated from other funds of whatever nature received by the State Bar.

The funds received, and any interest, dividends, or other proceeds earned on or with respect to these funds, net of banking charges described in section .1316(e)(1), shall be used for programs concerned with the improvement of the administration of justice, under the supervision and direction of the NC IOLTA Board. The board will award grants or non-interest bearing loans under the four categories approved by the North Carolina Supreme Court being mindful of its tax exempt status and the IRS rulings that private interests of the legal profession are not to be funded with IOLTA funds.

The programs for which the funds may be awarded are:

(1) providing civil legal services for indigents;

(2) enhancement and improvement of grievance and disciplinary procedures to protect the public more fully from incompetent or unethical attorneys;

(3) development and maintenance of a fund for student loans to enable meritorious persons to obtain a legal education who would not otherwise have adequate funds for this purpose;

(4) such other programs designed to improve the administration of justice as may from time to time be proposed by the board and approved by the Supreme Court of North Carolina.

History Note: Statutory Authority G.S. 84-23; North Carolina Supreme Court Order October 11, 2007

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: April 3, 1996; March 6,

1997; March 6, 2008; March 8, 2012

.1302 Jurisdiction: Authority

The Board of Trustees of the North Carolina State Bar Plan for Interest on Lawyers' Trust Accounts (IOLTA) is created as a standing committee by the North Carolina State Bar Council pursuant to Chapter 84 of the North Carolina General Statutes for the disposition of funds received by the North Carolina State Bar from interest on trust accounts or from other sources intended for the provision of legal services to the indigent and the improvement of the administration of justice.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: March 8, 2007

.1303 Operational Responsibility

The responsibility for operating the program of the board rests with the governing body of 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

.1304 Size of Board

The board shall have nine members, at least six of whom must be attorneys in good standing and authorized to practice law in the state of North Carolina.

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

.1305 Lay Participation

The board may have no more than three members who are not licensed attorneys.

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

.1306 Appointment of Members; When; Removal

The members of the board shall be appointed by the Council of the North Carolina State Bar. The July quarterly meeting is when the appointments are made. 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

.1307 Term of Office

Each member who is appointed to the board shall serve for a term of three years beginning on September 1.

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

.1308 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.

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

.1309 Succession

Each member of the board shall be entitled to serve for two full three-year terms. 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. 84-23
Readopted Effective December 8, 1994

.1310 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 for 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

.1311 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: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

.1312 Source of Funds

Funding for the program carried out by the board shall come from funds remitted from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to Rule 1.15 of the Rules of Professional Conduct and Rule .1316 of this subchapter or interest earned on trust or escrow accounts maintained by settlement agents pursuant to N.C.G.S. 45A-9; voluntary contributions from lawyers; and interest, dividends, or other proceeds earned on the board's funds from investments or from other sources intended for the provision of legal services to the indigent and the improvement of the administration of justice.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: March 8, 2007; February 5, 2009; March 8, 2012

.1313 Fiscal Responsibility

All funds of the board shall be considered funds of the North Carolina State Bar, with the beneficial interest in those funds being vested in the board for grants to qualified applicants in the public interest, less administrative costs. These funds shall be administered and disbursed by the board in accordance with rules or policies developed by the North Carolina State Bar and approved by the North Carolina Supreme Court. The funds shall be used only to pay the administrative costs of the IOLTA program and to fund grants approved by the board under the four categories approved by the North Carolina Supreme Court as outlined above.

(a) Maintenance of Accounts: Audit - The funds of the IOLTA program shall be maintained in a separate account from funds of the North Carolina State Bar such that the funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited on an annual basis. The audit will be conducted after the books are closed at a time determined by the auditors, but not later than March 31 of the year following the year for which the audit is to be conducted.

(b) Investment Criteria - The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the Council of the North Carolina State Bar for handling of dues, rents, and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) Disbursements - Disbursement of funds of the board in the nature of grants to qualified applicants in the public interest, less administrative costs, shall be made by the board in accordance with policies developed by the North Carolina State Bar and approved by the North Carolina Supreme Court. The board shall adopt an annual operational budget and disbursements shall be made in accordance with the budget as adopted. The board shall determine the signatories on the IOLTA accounts.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court:September 28, 2017

.1314 Meetings

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 meet-

ing 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 total membership of the board.

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

Readopted Effective December 8, 1994

.1315 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

.1316 IOLTA Accounts

(a) IOLTA Account Defined. Pursuant to order of the North Carolina Supreme Court, every general trust account, as defined in the Rules of Professional Conduct, must be an interest or dividend-bearing account. (As used herein, "interest" shall refer to both interest and dividends.) Funds deposited in a general, interest-bearing trust account must be available for withdrawal upon request and without delay (subject to any notice period that the bank is required to reserve by law or regulation). Additionally, pursuant to N.C.G.S. 45A-9, a settlement agent who maintains a trust or escrow account for the purposes of receiving and disbursing closing funds and loan funds shall direct that any interest earned on funds held in that account be paid to the NC State Bar to be used for the purposes authorized under the Interest on Lawyers Trust Account Program according to section .1316(d) below. For the purposes of these rules, all such accounts shall be known as "IOLTA Accounts" (also referred to as "Accounts").

(b) Eligible Banks. Lawyers may maintain one or more IOLTA Account(s) only at banks and savings and loan associations chartered under North Carolina or federal law, as required by Rule 1.15 of the Rules of Professional Conduct, that offer and maintain IOLTA Accounts that comply with the requirements set forth in this subchapter (Eligible Banks). Settlement agents shall maintain any IOLTA Account as defined by N.C.G.S. 45A-9 and paragraph (a) above only at an Eligible Bank; however, a settlement agent that is not a lawyer may maintain an IOLTA Account at any bank that is insured by the Federal Deposit Insurance Corporation and has a certificate of authority to transact business from the North Carolina Secretary of State, provided the bank is approved by NC IOLTA. The determination of whether a bank is eligible shall be made by NC IOLTA, which shall maintain (i) a list of participating Eligible Banks available to all members of the State Bar and to all settlement agents, and (ii) a list of banks approved for non-lawyer settlement agent IOLTA Accounts available to non-lawyer settlement agents. A bank that fails to meet the requirements of this subchapter shall be subject only to termination of its eligible or approved status by NC IOLTA. A violation of this rule shall not be the basis for civil liability.

(c) Notice Upon Opening or Closing IOLTA Account. Every lawyer/law firm or settlement agent maintaining IOLTA Accounts shall advise NC IOLTA of the establishment or closing of each IOLTA Account. Such notice shall include (i) the name of the bank where the account is maintained, (ii) the name of the account, (iii) the account number, and (iv) the name and bar number of the lawyer(s) in the firm and/or the name(s) of any non-lawyer settlement agent(s) maintaining the account. The North Carolina State Bar shall furnish to each lawyer/law firm or settlement agent maintaining an IOLTA Accounts a suitable plaque explaining the program, which plaque shall be exhibited in the office of the lawyer/law firm or settlement agent.

(d) Directive to Bank. Every lawyer or law firm and every settlement agent maintaining a North Carolina IOLTA Accounts shall direct any bank in which an IOLTA Account is maintained to:

(1) remit interest, less any deduction for allowable reasonable bank service charges or fees, (as used herein, "service charges" shall include any charge or fee charged by a bank on an IOLTA Account) as defined in paragraph (e), at least quarterly to NC IOLTA;

(2) transmit with each remittance to NC IOLTA a statement showing for each account: (i) the name of the law firm/lawyer or settlement agent maintaining the account, (ii) the lawyer/law firm's or settlement agent's IOLTA Account number, (iii) the earnings period, (iv) the average balance of the account for the earnings period, (v) the type of account, (vi) the rate of interest applied in computing the remittance, (vii) the amount of any service charges for the earnings period, and (viii) the net remittance for the earnings period; and

(3) transmit to the law firm/lawyer or settlement agent maintaining the account a report showing the amount remitted to NC IOLTA, the earnings period, and the rate of interest applied in computing the remittance.

(e) Allowable Reasonable Service Charges. Eligible Banks may elect to waive any or all service charges on IOLTA Accounts. If a bank does not waive service charges on IOLTA Accounts, allowable reasonable service charges may be assessed but only against interest earned on the IOLTA Account or funds deposited by the lawyer/law firm or settlement agent in the IOLTA Account for the purpose of paying such charges. Allowable reasonable service charges may be deducted from interest on an IOLTA Account only at the rates and in accordance with the bank's standard practice for comparable non-IOLTA accounts. Allowable reasonable service charges for IOLTA Accounts are: (i) a reasonable Account maintenance fee, (ii) per check charges, (iii) per deposit charges, (iv) a fee in lieu of a minimum balance, (v) federal deposit insurance fees, and (vi) automated transfer (Sweep) fees. All service charges other than allowable reasonable service charges assessed against an IOLTA Account are the responsibility of and shall be paid by the lawyer or law firm. No service charges in excess of the interest earned on the Account for any month or quarter shall be deducted from interest earned on other IOLTA Accounts or from the principal of the Account.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: March 6, 2008; February 5, 2009; January 28, 2010; March 8, 2012; August 23, 2012

.1317 Comparability Requirements for IOLTA Accounts

(a) Comparability of Interest Rate. Eligible Banks that offer and maintain IOLTA Accounts must pay to an IOLTA Account the highest interest rate generally available from the bank to non-IOLTA Accounts (Comparable Rate) when the IOLTA Account meets or exceeds the same minimum balance or other account eligibility qualifications, if any. In determining the highest interest rate generally available from the bank to non-IOLTA accounts, an Eligible Bank may consider factors, in addition to the IOLTA account balance, customarily considered by the bank when setting interest rates for its customers, provided that such factors do not discriminate between IOLTA accounts and non-IOLTA accounts.

(b) Options for Satisfying Requirement. An Eligible Bank may satisfy the Comparable Rate requirement by electing one of the following options:

(1) use an account product that has a Comparable Rate;

(2) without actually changing the IOLTA Account to the bank's Comparable Rate product, pay the Comparable Rate on the IOLTA Account; or

(3) pay the benchmark rate (Benchmark), which shall be determined by NC IOLTA periodically, but not more frequently than every six months, to reflect the overall Comparable Rate for the NC IOLTA program. The Benchmark shall be a rate equal to the greater of: (i) 0.65% or (ii) 65% of the Federal Funds Target Rate as of the first business day of the IOLTA remitting period, and shall be net of allowable reasonable service charges. When applicable, NC IOLTA will express the Benchmark in relation to the Federal Funds Target Rate.

(c) Options for Account Types. An IOLTA Account may be established as:

(1) subject to paragraph (d), a business checking account with an automated investment feature (Sweep Account), such as an overnight investment in financial institution daily repurchase agreements or money market funds invested solely in or fully collateralized by US government securities, which are US Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof;

(2) a checking account paying preferred interest rates, such as market based or indexed rates;

(3) a public funds interest-bearing checking account, such as accounts used for governmental agencies and other non-profit organizations;

(4) an interest-bearing checking account such as a negotiable order of withdrawal (NOW) account, or business checking account with interest; or

(5) any other suitable interest-bearing deposit account offered by the bank to its non-IOLTA customers.

(d) Financial Requirements for Sweep Accounts. If a bank establishes an

IOLTA Account as described in paragraph (c)(1), the following requirements must be satisfied: an overnight investment in a financial institution daily repurchase agreement shall be fully collateralized by United States government securities, as described in this Rule, and may be established only with an Eligible Bank that is "well capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. A "money market fund" is an investment company registered under the Investment Company Act of 1940, as amended, that is qualified to hold itself out to investors as a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act. A money market fund shall be invested solely in United States government securities or repurchase agreements fully collateralized by United States government securities, as described in this Rule, and, at the time of the investment, shall have total assets of at least two hundred fifty million dollars ($250,000,000.00).

(e) Interest Calculation. Interest shall be calculated in accordance with an Eligible Bank's standard practice for comparable non-IOLTA Accounts.

(f) Higher Rates and Waiver of Service Charges Allowed. Nothing in this rule shall preclude a participating bank from paying a higher interest rate than described above or electing to waive any service charges on IOLTA Accounts.

History Order of the N.C. Supreme Court

Adopted by the Supreme Court: January 28, 2010

.1318 Confidentiality

(a) As used in this rule, "confidential information" means all information regarding IOLTA account(s) other than (1) a lawyer's/law firm's or settlement agent's status as a participant, former participant, or non-participant in NC IOLTA, and (2) information regarding the policies and practices of any bank in respect of IOLTA trust accounts, including rates of interest paid, service charge policies, the number of IOLTA accounts at such bank, the total amount on deposit in all IOLTA accounts at such bank, the total amounts of interest paid to NC IOLTA, and the total amount of service charges imposed by such bank upon such accounts.

(b) Confidential information shall not be disclosed by the staff or trustees of NC IOLTA to any person or entity, except that confidential information may be disclosed (1) to any chairperson of the grievance committee, staff attorney, or investigator of the North Carolina State Bar upon his or her written request specifying the information requested and stating that the request is made in connection with a grievance complaint or investigation regarding one or more trust accounts of a lawyer/law firm or settlement agent; or (2) in response to a lawful order or other process issued by a court of competent jurisdiction, or a subpoena, investigative demand, or similar notice issued by a federal, state, or local law enforcement agency.

History Order of the N.C. Supreme Court

Adopted by the Supreme Court: March 6, 2008

Amendments Approved by the Supreme Court: March 8, 2012

.1319 Certification

Every lawyer admitted to practice in North Carolina shall certify annually on or before June 30 to the North Carolina State Bar that all general trust accounts maintained by the lawyer or his or her law firm are established and maintained as IOLTA accounts as prescribed by Rule 1.15 of the Rules of Professional Conduct and Rule .1316 of this subchapter or that the lawyer is exempt from this provision because he or she does not maintain any general trust account(s) for North Carolina client funds. Any lawyer acting as a settlement agent who maintains a trust or escrow account used for the purpose of receiving and disbursing closing and loan funds shall certify annually on or before June 30 to the North Carolina State Bar that such accounts are established and maintained as IOLTA accounts as prescribed by N.C.G.S. 45A-9 and Rule .1316 of this subchapter.

History Order of the N.C. Supreme Court

Adopted by the Supreme Court: March 6, 2008

Amendments Approved by the Supreme Court: January 28, 2010; March 8, 2012

.1320 Noncompliance

Every lawyer must comply with all of the administrative requirements of this rule, including the certification required in Rule .1319 of this subchapter. A lawyer's failure to comply with the mandatory provisions of this subchapter shall be reported to the Administrative Committee which may initiate proceedings to suspend administratively the lawyer's active membership status and eligibility to practice law pursuant to Rule .0903 of this subchapter.

History Order of the N.C. Supreme Court

Adopted by the Supreme Court: March 6, 2008

Amendments Approved by the Supreme Court: January 28, 2010

.1321 Severability

If any provision of this plan or the application thereof is held invalid, the invalidity does not affect other provisions or application of the plan which can be given effect without the invalid provision or application, and to this end the provisions of the plan are severable.

History Order of the N.C. Supreme Court

Adopted by the Supreme Court: March 6, 2008

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 only 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

Amendments Approved by the Supreme Court: September28, 2017

.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

Amendments Approved by the Supreme Court: 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 Scope, Purpose, and Definitions

(a) Scope

Except as provided herein, these rules shall apply to every active member of the North Carolina State Bar.

(b) 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.

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.

(c) Definitions

(1) "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.

(2) "Administrative Committee" shall mean the Administrative Committee of the North Carolina State Bar.

(3) "Approved program" shall mean a specific, individual educational program approved as a continuing legal education program under these rules by the Board of Continuing Legal Education.

(4) "Board" means the Board of Continuing Legal Education created by these rules.

(5) "Continuing legal education" or "CLE" is any legal, judicial or other educational program accredited by the board. Generally, CLE will include educational programs 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.

(6) "Council" shall mean the North Carolina State Bar Council.

(7) "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.

(8) "Inactive member" shall mean a member of the North Carolina State Bar who is on inactive status.

(9) "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.

(10) 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.

(11) "On demand" program shall mean an accredited educational program

accessed via the internet that is available at any time on a provider's website and does not include live programming.

(12) "Online" program shall mean an accredited educational program accessed through a computer or telecommunications system such as the internet and can include simultaneously broadcast and on demand programming.

(13) "Participatory CLE" shall mean programs or segments of programs 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 programs or segments of programs devoted to a) the substance, underlying rationale, and practical application of the Rules of Professional Conduct; b) the professional obligations of the lawyer to the client, the court, the public, and other lawyers; c) moral philosophy and ethical decision-making in the context of the practice of law; and d) the effects of stress, substance abuse and chemical dependency, or debilitating mental conditions on a lawyer's professional responsibilities and the prevention, detection, treatment, and etiology of stress, substance abuse, chemical dependency, and debilitating mental conditions. This definition shall be interpreted consistent with the provisions of Rule .1501(c)(4) or (6) above.

(15) "Professionalism" programs are programs or segments of programs 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 Rules of Professional Conduct. Such programs address principles of competence and dedication to the service of clients, civility, improvement of the justice system, diversity of the legal profession and clients, advancement of the rule of law, service to the community, and service to the disadvantaged and those unable to pay for legal services.

(16) "Registered sponsor" shall mean an organization that is registered by the board after demonstrating compliance with the accreditation standards for continuing legal education programs as well as the requirements for reporting attendance and remitting sponsor fees for continuing legal education programs.

(17) "Rules" shall mean the provisions of the continuing legal education rules established by the Supreme Court of North Carolina (Section .1500 of this subchapter).

(18) "Sponsor" is any person or entity presenting or offering to present one or more continuing legal education programs, whether or not an accredited sponsor.

(19) "Technology training" shall mean a program, or a segment of a program, devoted to education on information technology (IT) or cybersecurity (see N.C. Gen. Stat. §143B1320(a)(11), or successor statutory provision, for a definition of "information technology"), including education on an information technology product, device, platform, application, or other tool, process, or methodology. To be eligible for CLE accreditation as a technology training program, the program must satisfy the accreditation standards in Rule .1519 and the course content requirements in Rule .1602(e) of this subchapter.

(20) "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

Amendments Approved by the Supreme Court: March 6, 1997; March 3, 1999; June 7, 2001; March 3, 2005; March 8, 2007; October 9, 2008; August25, 2011; April 5, 2018; September 20, 2018; September 25, 2019

.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) Registered sponsors located in North Carolina (for programs offered in or outside North Carolina), registered sponsors not located in North Carolina (for programs offered in North Carolina), and all other sponsors located in or outside of North Carolina (for programs offered in North Carolina) shall, as a condition of conducting an approved program, 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 a registered sponsor, that conducts an approved program 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 program shall comply with paragraph (a)(2) of this rule.

(2) The board shall fix a reasonably comparable fee to be paid by individual attorneys who attend for CLE credit approved continuing legal education programs 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.

(c) No Refunds for Exemptions and Record Adjustments.

(1) Exemption Claimed. If a credit hour of attendance is reported to the board, the fee for that credit hour is earned by the board regardless of an exemption subsequently claimed by the member pursuant to Rule .1517 of this subchapter. No paid fees will be refunded and the member shall pay the fee for any credit hour reported on the annual report form for which no fee has been paid at the time of submission of the member's annual report form.

(2) Adjustment of Reported Credit Hours. When a sponsor is required to pay the sponsor's fee, there will be no refund to the sponsor or to the member upon the member's subsequent adjustment, pursuant to Rule .1522(a) of this subchapter, to credit hours reported on the annual report form. When the member is required to pay the attendee's fee, the member shall pay the fee for any credit hour reported after any adjustment by the member to credit hours reported on the annual report form.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: September 22, 2016; April 5, 2018; September 25, 2019

.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, shall be paid to the Chief Justice's Commission on Professionalism and to the North Carolina Equal Access to Justice Commission for administration of the activities of these commissions. 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

Amendments Approved by the Supreme Court: November 5, 2015

.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, Duties, and Organization of the Board

(a) 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.

(b) The board shall be organized as follows:

(1) Quorum - Five members shall constitute a quorum of the board.

(2) 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.

(3) Other Committees - The chairperson may appoint committees as established by the board for the purpose of considering and deciding matters submitted to them by the board.

(c) 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 and will be heard by the board at its next scheduled meeting. A decision made by the staff 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; March 3, 2005

.1517 Exemptions

(a) Notification of Board. To qualify for an exemption for a particular calendar year, a member shall notify the board of the exemption in the annual report for that calendar year sent to the member pursuant to Rule .1522 of this subchapter. All active members who are exempt are encouraged to attend and participate in legal education programs.

(b) Government Officials and Members of Armed Forces. The governor, the lieutenant governor, and all members of the council of state, members of the United States Senate, members of the United States House of Representatives, members of the North Carolina General Assembly, full-time principal chiefs and vice-chiefs of any Indian tribe officially recognized by the United States or North Carolina state governments, and members of the United States Armed Forces on full-time active duty are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such capacity.

(c) Judiciary and Clerks. Members of the state judiciary who are required by virtue of their judicial offices to take an average of twelve (12) or more hours of continuing judicial or other legal education annually and all members of the federal judiciary are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such judicial capacities. A full-time law clerk for a member of the federal or state judiciary is exempt from the requirements of these rules for any calendar year in which the clerk serves some portion thereof in such capacity, provided, however, that the exemption shall not exceed two consecutive calendar years and, further provided, that the clerkship begins within one year after the clerk graduates from law school or passes the bar examination for admission to the North Carolina State Bar whichever occurs later.

(d) Nonresidents. Any active member residing outside of North Carolina who does not practice in North Carolina for at least six (6) consecutive months and does not represent North Carolina clients on matters governed by North Carolina law shall be exempt from the requirements of these rules.

(e) Law Teachers. An exemption from the requirements of these rules shall be given to any active member who does not practice in North Carolina or represent North Carolina clients on matters governed by North Carolina law and who is:

(1) A full-time teacher at the School of Government (formerly the Institute of Government) of the University of North Carolina;

(2) A full-time teacher at a law school in North Carolina that is accredited by the American Bar Association; or

(3) A full-time teacher of law-related courses at a graduate level professional school accredited by its respective professional accrediting agency.

(f) Special Circumstances Exemptions. 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.

(g) Pro Hac Vice Admission. 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.

(h) Senior Status Exemption. 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 with another active member who assumes responsibility for the advice or representation.

(i) CLE Record During Exemption Period. During a calendar year in which the records of the board indicate that an active member is exempt from the requirements of these rules, the board shall not maintain a record of such member's attendance at accredited continuing legal education programs. Upon the termination of the member's exemption, the member may request carry over credit up to a maximum of twelve (12) credits for any accredited continuing legal education program attended during the calendar year immediately preceding the year of the termination of the exemption. Appropriate documentation of attendance at such programs will be required by the board.

(j) Permanent Disability. Attorneys who have a permanent disability that 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.

(k) Application for Substitute Compliance and Exemptions. 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.

(l) Bar Examiners. 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.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: February 12, 1997; October 1, 2003; March 3, 2005; October 7, 2010; October 2, 2014; June 9, 2016; September 22, 2016; September 25, 2019

.1518 Continuing Legal Education Requirements

(a) Annual Requirement. 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.

Of the 12 hours:

(1) at least 2 hours shall be devoted to the areas of professional responsibility or professionalism or any combination thereof;

(2) at least 1 hour shall be devoted to technology training as defined in Rule .1501(c)(17) of this subchapter and further explained in Rule .1602(e) of this subchapter; and

(3) effective January 1, 2002, at least once every three calendar years, each member shall complete an hour of continuing legal education instruction on substance abuse and debilitating mental conditions as defined in Rule .1602 (a). This hour shall be credited to the annual 12-hour requirement but shall be in addition to the annual professional responsibility/professionalism requirement. To satisfy the requirement, a member must attend an accredited program on substance abuse and debilitating mental conditions that is at least one hour long.

(b) Carryover. 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 paragraph (a)(1) 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.

(c) Professionalism Requirement for New Members. Except as provided in

paragraph (d)(1), each active member admitted to the North Carolina State Bar after January 1, 2011, must complete the North Carolina State Bar Professionalism for New Attorneys Program (PNA Program) in the year the member is first required to meet the continuing legal education requirements as set forth in Rule .1526(b) and (c) of this subchapter. CLE credit for the PNA Program shall be applied to the annual mandatory continuing legal education requirements set forth in paragraph (a) above.

(1) Content and Accreditation. The State Bar PNA Program shall consist of 12 hours of training in subjects designated by the State Bar including, but not limited to, professional responsibility, professionalism, and law office management. The chairs of the Ethics and Grievance Committees, in consultation with the chief counsel to those committees, shall annually establish the content of the program and shall publish the required content on or before January 1 of each year. To be approved as a PNA Program, the program must be provided by a sponsor registered under Rule .1603 of this subchapter and a sponsor must satisfy the annual content requirements, and submit a detailed description of the program to the board for approval at least 45 days prior to the program. A registered sponsor may not advertise a PNA Program until approved by the board. PNA Programs shall be specially designated by the board and no program that is not so designated shall satisfy the PNA Program requirement for new members.

(2) Timetable and Partial Credit. The PNA Program shall be presented in two six-hour blocks (with appropriate breaks) over two days. The six-hour blocks do not have to be attended on consecutive days or taken from the same provider; however, no partial credit shall be awarded for attending less than an entire six-hour block unless a special circumstances exemption is granted by the board. The board may approve an alternative timetable for a PNA program upon demonstration by the provider that the alternative timetable will provide an enhanced learning experience or for other good cause; however, no partial credit shall be awarded for attending less than the entire 12-hour program unless a special circumstances exemption is granted by the board.

(3) Online and Prerecorded Programs. The PNA Program may be distributed over the Internet by live web streaming (webcasting) but no part of the program may be taken online (via the Internet) on demand. The program may also be taken as a prerecorded program provided the requirements of Rule .1604(d) of this subchapter are satisfied and at least one hour of each six-hour block consists of live programming.

(d) Exemptions from Professionalism Requirement for New Members.

(1) Licensed in Another Jurisdiction. A member who is licensed by a United States jurisdiction other than North Carolina for five or more years prior to admission to practice in North Carolina is exempt from the PNA Program requirement and must notify the board of the exemption in the first annual report sent to the member pursuant to Rule .1522 of this subchapter.

(2) Inactive Status. A newly admitted member who is transferred to inactive status in the year of admission to the State Bar is exempt from the PNA Program requirement but, upon the entry of an order transferring the member back to active status, must complete the PNA Program in the year that the member is subject to the requirements set forth in paragraph (a) above unless the member qualifies for the exemption under paragraph (d)(1) of this rule.

(3) Exemptions Under Rule .1517. A newly admitted active member who qualifies for an exemption under Rule .1517 of this subchapter shall be exempt from the PNA Program requirement during the period of the Rule .1517 exemption. The member shall notify the board of the exemption in the first annual report sent to the member pursuant to Rule .1522 of this subchapter. The member must complete the PNA Program in the year the member no longer qualifies for the Rule .1517 exemption or the next calendar year unless the member qualifies for the exemption under paragraph (d)(1) of this rule.

(e) The board shall determine the process by which credit hours are allocated to lawyers' records to satisfy deficits. The allocation shall be applied uniformly to the records of all affected lawyers and may not be appealed by an affected lawyer.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: February 12, 1997; December 30, 1998; March 3, 1999; November 6, 2001; October 1, 2003; March 11, 2010; August 25, 2011; March 6, 2014; March 5, 2015; June 9, 2016; April 5, 2018; September 20, 2018; September 25, 2019

.1519 Accreditation Standards

The board shall approve continuing legal education programs that meet the following standards and provisions.

(a) 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.

(b) 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.

(c) Credit may be given for continuing legal education programs where live instruction is used or mechanically or electronically recorded or reproduced material is used, including videotape, satellite transmitted, and online programs.

(d) Continuing legal education materials are to be prepared, and programs conducted, by an individual or group qualified by practical or academic experience. Credit shall not be given for any continuing legal education program taught or presented by a disbarred lawyer except a program on professional responsibility (including a program on the effects of substance abuse and chemical dependency, or debilitating mental conditions on a lawyer's professional responsibilities) taught by a disbarred lawyer whose disbarment date is at least five years (60 months) prior to the date of the program. The advertising for the program shall disclose the lawyer's disbarment.

(e) Live continuing legal education programs shall be conducted in a setting physically suitable to the educational nature of the program and, when appropriate, equipped with suitable writing surfaces or sufficient space for taking notes.

(f) Thorough, high quality, and carefully prepared written materials should be distributed to all attendees at or before the time the program is presented. These may include written materials printed from a website or computer presentation. A written agenda or outline for a program satisfies this requirement when written materials are not suitable or readily available for a particular subject. The absence of written materials for distribution should, however, be the exception and not the rule.

(g) A sponsor of an approved program 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. Participation in an online program must be verified as provided in Rule .1601(d).

(h) Except as provided in Rules .1501 and.1602(h) 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.

(i) 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 program 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

Amendments Approved by the Supreme Court: March 1, 2001; October 1, 2003; February 5, 2009; March 11, 2010; April 5, 2018; September 25, 2019

.1520 Registration of Sponsors and Program Approval

(a) Registration of Sponsors. An organization desiring to be designated as a registered sponsor of programs may apply to the board for registered sponsor status. The board shall register a sponsor if it is satisfied that the sponsor's programs have met the accreditation standards set forth in Rule .1519 of this subchapter and the application requirements set forth in Rule .1603 of this subchapter.

(1) Duration of Status. Registered sponsor status shall be granted for a period of five years. At the end of the five-year period, the sponsor must apply to renew its registration pursuant to Rule .1603(b) of this subchapter.

(2) Accredited Sponsors. A sponsor that was previously designated by the board as an "accredited sponsor" shall, on the effective date of paragraph (a)(1) of this rule, be re-designated as a "registered sponsor." Each such registered sponsor shall subsequently be required to apply for renewal of registration according to a schedule to be adopted by the board. The schedule shall stagger the submission date for such applications over a three-year period

after the effective date of this paragraph (a)(2).

(b) Program Approval for Registered Sponsors.

(1) Once an organization is approved as a registered sponsor, the continuing legal education programs sponsored by that organization are presumptively approved for credit; however, application must still be made to the board for approval of each program. At least 50 days prior to the presentation of a program, a registered sponsor shall file an application, on a form prescribed by the board, notifying the board of the dates and locations of presentations of the program and the sponsor's calculation of the CLE credit hours for the program.

(2) The board shall evaluate a program presented by a registered sponsor and, upon a determination that the program does not satisfy the requirements of Rule .1519, notify the registered sponsor that the program is not approved for credit. Such notice shall be sent by the board to the registered sponsor within 45 days after the receipt of the application. If notice is not sent to the registered sponsor within the 45-day period, the program shall be presumed to be approved. The registered sponsor may request reconsideration of an unfavorable accreditation 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.

(c) Sponsor Request for Program Approval.

(1) Any organization not designated as a registered sponsor that desires approval of a program shall apply to the board. Applicants denied approval of a program for failure to satisfy the accreditation standards in Rule .1519 of this subchapter 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.

(2) The board may at any time decline to accredit CLE programs offered by a sponsor that is not registered for a specified period of time, as determined by the board, for failure to comply with the requirements of Rule .1512, Rule .1519, and Section .1600 of this subchapter.

(d) Member Request for Program Approval. An active member desiring approval of a program that has not otherwise been approved shall apply to the board. Applicants denied approval of a program for failure to satisfy the accreditation standards in Rule .1519 of this subchapter 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.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: February 27, 2003; March 3, 2005; October 7, 2010; March 6, 2014; April 5, 2018; September 25, 2019

.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 programs 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

Amendments Approved by the Supreme Court: September 25, 2019

.1522 Annual Report and Compliance Period

(a) Annual Written Report. Commencing in 1989, each active member of the North Carolina State Bar shall provide 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. The annual report form shall be corrected, if necessary, signed by the member, and promptly returned to the State Bar via mail or online filing. Upon receipt via mail or online filing of a signed annual report form, appropriate adjustments shall be made to the member's continuing legal education record with the State Bar. No further adjustments shall thereafter be made to the member's continuing legal education record unless, on or before July 31 of the year in which the report form is mailed to members, the member shows good cause for adjusting the member's continuing legal education record for the preceding year.

(b) Compliance Period. The period for complying with the requirements of Rule .1518 of this subchapter is January 1 to December 31. A member may complete the requirements for the year on or by the last day of February of the succeeding year provided, however, that this additional time shall be considered a grace period and no extensions of this grace period shall be granted. All members are encouraged to complete the requirements within the appropriate calendar year.

(c) Report. Prior to January 31 of each year, the prescribed report form concerning compliance with the continuing legal education program for the preceding year shall be available on the State Bar's CLE website and a notice of its posting shall be mailed or emailed to all active members of the North Carolina State Bar.

(d) Late Filing Penalty. Any attorney who, for whatever reasons, files the report showing compliance or declaring an exemption after the due date of the last day of February shall pay a $75.00 late filing penalty. This penalty shall be submitted with the report. A report that is either received by the board or postmarked on or before the due date shall be considered timely filed. An attorney who is issued a notice to show cause pursuant to Rule .1523(b) shall pay a late compliance fee of $125.00 pursuant to Rule .1523(e) of this subchapter. The board may waive the late filing penalty or the late compliance fee upon a showing of hardship or serious extenuating circumstances or other good cause.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: October 1, 2003; March 3, 2005; March 2, 2006; October 9, 2008; September 20, 2018

.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 the 30-day period after service of the notice. Notice shall be served on the member by mailing a copy thereof by registered or certified mail or designated delivery service (such as Federal Express or UPS), return receipt requested, to the last-known address of the member according to the records of the North Carolina State Bar or such later address as may be known to the person attempting service. Service of the notice may also be accomplished by (i) personal service by a State Bar investigator or by any person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process, or (ii) email sent to the email address of the member contained in the records of the North Carolina State Bar if the member sends an email from that same email address to the State Bar acknowledging such service.

(c) Entry of Order of Suspension Upon Failure to Respond to Notice to Show Cause

If a written response attempting to show good cause is not postmarked or received by the board by the last day of the 30-day period after the member was served with the notice to show cause 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(d) 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. If the matter is delegated to a committee of the board and the committee determines that good cause has not been shown, the member may file an appeal

to the board. The appeal must be filed within 30 calendar days of the date of the letter notifying the member of the decision of the committee. 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 30-day period after service of 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 or that the member has not shown compliance with these rules within the 30-day period after service 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 to whom a notice to show cause is issued pursuant to paragraph (b) above shall pay a late compliance fee as set forth in Rule .1522(d) of this subchapter; provided, however, upon a showing of good cause as determined by the board as described in paragraph (d)(2) above, the fee may be waived.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: March 7, 1996; March 6, 1997; February 3, 2000; October 1, 2003; October 9, 2008; August 23, 2012

.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 programs that 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.

(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

Amendments Approved by the Supreme Court: March 7, 1996; March 6, 1997; February 3, 2000; March 3, 2005; September 25, 2019

.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 General Requirements for Program Approval

(a) Approval. CLE programs may be approved upon the written application of a sponsor, including a registered sponsor, or of an active member on an individual program basis. An application for such CLE program approval shall meet the following requirements:

(1) If advance approval is requested by a sponsor, the application and supporting documentation, including one substantially complete set of the written materials to be distributed at the program, shall be submitted at least 50 days prior to the date on which the 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 by the sponsor not later than 50 days after the date the program was presented or prior to the end of the calendar year in which the program

was presented, whichever is earlier. Active members requesting credit must submit the application and supporting documentation within 50 days after the date the program was presented or, if the 50 days have elapsed, as soon as practicable after receiving notice from the board that the program accreditation request was not submitted by the sponsor.

(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 program 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.

(b) Program Quality and Materials. The application and materials provided shall reflect that the program to be offered meets the requirements of Rule .1519 of this subchapter. Sponsors, including registered sponsors, and active members seeking credit for an approved program shall furnish, upon request of the board, a copy of all materials presented and distributed at a CLE program. Written materials consisting merely of an outline without citation or explanatory notations generally will not be sufficient for approval. Any sponsor, including a registered sponsor, that expects to conduct a CLE program for which suitable written materials will not be made available to all attendees may obtain approval for that program only by application to the board at least 50 days in advance of the program showing why written materials are not suitable or readily available for such a program.

(c) Facilities. Sponsors must provide a facility conductive to learning with sufficient space for taking notes.

(d) Online CLE. The sponsor of an online program must have a reliable method for recording and verifying attendance. A participant may periodically log on and off of an online program provided the total time spent participating in the program 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 program.

(e) Records. Sponsors, including registered sponsors, shall within 30 days after the program is concluded

(1) furnish to the board a list of the names of all North Carolina attendees together with their North Carolina State Bar membership numbers; the list shall be in alphabetical order and in a format prescribed by the board;

(2) remit to the board the appropriate sponsor fee; and, if payment is not received by the board within 30 days after the program is concluded, interest at the legal rate shall be incurred; provided, however, the board may waive such interest upon a showing of good cause by a sponsor; and

(3) furnish to the board a complete set of all written materials distributed to attendees at the program.

(f) Announcement. Sponsors that have advanced approval for programs may include in their brochures or other program descriptions the information contained in the following illustration:

This 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.

(g) Notice. Sponsors not having advanced approval shall make no representation concerning the approval of the program for CLE credit by the board. The board will mail a notice of its decision on CLE program approval requests within 45 days of their receipt when the request for approval is submitted before the program and within 45 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.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: October 1, 2003; March 3, 2005; March 6, 2008; October 7, 2010; April 5, 2018; September 25, 2019

.1602 Course Content Requirements

(a) Professional Responsibility Programs on Stress, Substance Abuse, Chemical Dependency, and Debilitating Mental Conditions - Accredited professional responsibility programs on stress, substance abuse, chemical dependency, and debilitating mental conditions shall concentrate on the relationship between stress, substance abuse, chemical dependency, debilitating mental conditions, and a lawyer's professional responsibilities. Such programs may also include (1) education on the prevention, detection, treatment and etiology of stress, 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. No more than three hours of continuing education credit will be granted to any one such program or segment of a program.

(b) Law School Courses - Courses offered by an ABA accredited law school with respect to which academic credit may be earned may be approved programs. 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.

(c) Law Practice Management Programs - A CLE accredited program on law practice management must satisfy the accreditation standards set forth in Rule .1519 of this subchapter with the primary objective of increasing the participant's professional competence and proficiency as a lawyer. The subject matter presented in an accredited program on law practice management shall bear a direct relationship to either substantive legal issues in managing a law practice or a lawyer's professional responsibilities, including avoidance of conflicts of interest, protecting confidential client information, supervising subordinate lawyers and nonlawyers, fee arrangements, managing a trust account, ethical legal advertising, and malpractice avoidance. The following are illustrative, non-exclusive examples of subject matter that may earn CLE credit: employment law relating to lawyers and law practice; business law relating to the formation and operation of a law firm; calendars, dockets and tickler systems; conflict screening and avoidance systems; law office disaster planning; handling of client files; communicating with clients; and trust accounting. If appropriate, a law practice management program may qualify for professional responsibility (ethics) CLE credit. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: marketing; networking/rainmaking; client cultivation; increasing productivity; developing a business plan; improving the profitability of a law practice; selling a law practice; and purchasing office equipment (including computer and accounting systems).

(d) Skills and Training Programs- A program that teaches a skill specific to the practice of law may be accredited for CLE if it satisfies the accreditation standards set forth in Rule .1519 of this subchapter with the primary objective of increasing the participant's professional competence and proficiency as a lawyer. The following are illustrative, non-exclusive examples of subject matter that may earn CLE credit: legal writing; oral argument; courtroom presentation; and legal research. A program that provides general instruction in non-legal skills shall NOT be accredited. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: learning to use software for an application that is not specific to the practice of law (e.g. word processing); learning to use office equipment (except as permitted by paragraph (e) of this rule); public speaking; speed reading; efficiency training; personal money management or investing; career building; marketing; and general office management techniques.

(e) Technology Training Programs – A technology training program must have the primary objective of enhancing a lawyer's proficiency as a lawyer or improving law office management and must satisfy the requirements of paragraphs (c) and (d) of this rule as applicable. Such programs include, but are not limited to, education on the following: a) an IT tool, process, or methodology designed to perform tasks that are specific or uniquely suited to the practice of law; b) using a generic IT tool, process, or methodology to increase the efficiency of performing tasks necessary to the practice of law; c) the investigation, collection, and introduction of social media evidence; d) e-discovery; e) electronic filing of legal documents; f) digital forensics for legal investigation or litigation; g) practice management software; and h) a cybersecurity tool, process, or methodology specifically applied to the needs of the practice of law or law practice man-

agement. A program that provides general instruction on an IT tool, process, or methodology but does not include instruction on the practical application of the IT tool, process, or methodology to the practice of law shall not be accredited. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: generic education on how to use a tablet computer, laptop computer, or smart phone; training programs on Microsoft Office, Excel, Access, Word, Adobe, etc.; and instruction in the use of a particular desktop or mobile operating system. No credit will be given to a program that is sponsored by a manufacturer, distributor, broker, or merchandiser of an IT tool, process, or methodology unless the program is solely about using the IT tool, process, or methodology to perform tasks necessary or uniquely suited to the practice of law and information about purchase arrangements is not included in the accredited segment of the program. A sponsor may not accept compensation from a manufacturer, distributor, broker, or merchandiser of an IT tool, process, or methodology in return for presenting a CLE program about the IT tool, process, or methodology.

(f) Activities That Shall Not Be Accredited - CLE credit will not be given for general and personal educational activities. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit:

(1) courses within the normal college curriculum such as English, history, social studies, and psychology;

(2) courses that 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 designed primarily to sell services or products or to generate greater revenue, such as marketing or advertising (as distinguished from programs dealing with development of law office procedures and management designed to raise the level of service provided to clients).

(g) Service to the Profession Training - A program or segment of a program presented by a bar organization may be granted up to three hours of credit if the bar organization's program trains volunteer attorneys in service to the profession, and if such program or segment meets the requirements of Rule .1519(b)-(g) and Rule .1601(b), (c), and (g) of this subchapter; if appropriate, up to three hours of professional responsibility credit may be granted for such program or program segment.

(h) In-House CLE and Self-Study. No approval will be provided for in-house CLE or self-study by attorneys, except as follows:

(1) programs exempted by the board under Rule .1501(c)(10) of this subchapter; and

(2) live programs on professional responsibility, professionalism, or professional negligence/malpractice presented by a person or organization that is not affiliated with the lawyers attending the program or their law firms and that has demonstrated qualification to present such programs through experience and knowledge.

(i) Bar Review/Refresher Course. Programs designed to review or refresh recent law school graduates or attorneys in preparation for any bar exam shall not be approved for CLE credit.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: March 6, 1997; March 5, 1998; March 3, 1999; March 1, 2001; June 7, 2001; March 3, 2005; March 2, 2006; March 8, 2007; October 9, 2008; March 6, 2014; June 9, 2016; September 20, 2018; September 25, 2019

.1603 Registered Sponsors

(a) Application for Registered Sponsor Status. To be designated as a registered sponsor of programs under Rule .1520(a) of this subchapter, a sponsor must satisfy the following requirements:

(1) File a completed application for registered sponsor status on a form furnished by the board.

(2) During the three years prior to application, present at least five original programs that were approved for CLE credit by the board.

(3) During the three years prior to application, substantially comply with the requirements in Rule .1601(a) and (e) of this subchapter on application for program approval, remitting sponsor fees, and reporting attendance for every program approved for credit.

(b) Renewal of Registration. To retain registered sponsor status, a sponsor must apply for renewal every five years, as required by Rule .1520(a)(1), and must satisfy the requirements of paragraphs (a) of this rule. To facilitate staggered renewal applications, at the time that this rule becomes effective, any sponsor previously designated as an "accredited sponsor" shall be designated a registered sponsor and shall be assigned an initial renewal year which shall be not more than three years later.

(c) Revocation of Registered Sponsor Status. The board may at any time revoke the registration of a registered sponsor for failure to satisfy the requirements of Section .1500 and Section .1600 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

Amendments Approved by the Supreme Court: April 5, 2018; September 25, 2019

.1604 Reserved

.1605 Computation of Credit

(a) Computation Formula - CLE and professional responsibility hours shall be computed by the following formula:

Sum of the total minutes of actual instruction / 60 = 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 program or a continuing paralegal education program held in North Carolina and approved pursuant to Section .0200 of Subchapter G of these rules. Programs 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 programs qualify for one-half of the credits available for the initial program. For example, an initial presentation of 45 minutes would qualify for 4.5 hours of credit.

(d) Teaching Law Courses

(1) Law School Courses. If a member is not a full-time teacher at a law school in North Carolina who is eligible for the exemption in Rule .1517(b) of this subchapter, the member may earn CLE credit for teaching a course or a class in a quarter or semester-long course at an ABA accredited law school. A member may also earn CLE credit by teaching a course or a class at a law school licensed by the Board of Governors of the University of North Carolina, provided the law school is actively seeking accreditation from the ABA. If ABA accreditation is not obtained by a law school so licensed within three years of the commencement of classes, CLE credit will no longer be granted for teaching courses at the school.

(2) Graduate School Courses. Effective January 1, 2012, a member may earn CLE credit by teaching a course on substantive law or a class on substantive law in a quarter or semester-long course at a graduate school of an accredited university.

(3) Courses at Paralegal Schools or Programs. Effective January 1, 2006, a member may earn CLE credit by teaching a paralegal or substantive law course or a class in a quarter or semester-long course at an ABA approved paralegal school or program.

(4) Credit Hours. Credit for teaching described in Rule .1605(d)(1) – (3) above may be earned without regard to whether the course is taught online or in a classroom. Credit will be calculated according to the following formula:

(A) Teaching a Course. 3.5 Hours of CLE credit for every quarter hour of credit assigned to the course by the educational institution, or 5.0 Hours of CLE credit for every semester hour of credit assigned to the course by the educational institution. (For example: a 3-semester hour course will qualify for 15 hours of CLE credit).

(B) Teaching a Class. 1.0 Hour of CLE credit for every 50 – 60 minutes of teaching.

(5) Other Requirements. The member shall also complete the requirements set forth in Rule .1518(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

Amendments Approved by the Supreme Court: March 3, 1999; October 1, 2003; November 16, 2006; August 23, 2012; September 25, 2019

.1606 Fees

(a) Sponsor Fee - The sponsor fee, a charge paid directly by the sponsor, shall be paid by all sponsors of approved programs presented in North Carolina and by registered sponsors located in North Carolina for approved programs wherever presented, except that no sponsor fee is required where approved programs 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 $3.50. This amount shall be allocated as follows: $1.25 to the Board of Continuing Legal Education to administer the CLE program; $1.00 to the Chief Justice's Commission on Professionalism; $1.00 to the North Carolina Equal Access to Justice Commission; and $.25 to the State Bar to administer the funds distributed to the commissions. The fee is computed as shown in the following formula and example which assumes a 6-hour program attended by 100 North Carolina lawyers seeking CLE credit:

Fee: $3.50 x Total Approved CLE Hours (6) x Number of NC Attendees (100) = Total Sponsor Fee($2100)

(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 will be invoiced for any attendees fees owed following the submission of the attorney's annual report form pursuant to Rule .1522(a) of this subchapter. Payment shall be remitted within 30 (thirty) days of the date of the invoice. The amount of the fee, per approved CLE hour for which the attorney claims credit, is $3.50. This amount shall be allocated as follows: $1.25 to the Board of Continuing Legal Education to administer the CLE program; $1.00 to the Chief Justice's Commission on Professionalism; $1.00 to the North Carolina Equal Access to Justice Commission; and $0.25 to the State Bar to administer the funds distributed to the commissions.

It is computed as shown in the following formula and example which assumes that the attorney attended a program approved for 3 hours of CLE credit:

Fee: $3.50 x Total Approved CLE hours (3.0) = Total Attendee Fee ($10.50)

(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 council shall annually review the assessments for the Chief Justice's Commission on Professionalism and the North Carolina Equal Access to Justice Commission and adjust them as necessary to maintain adequate finances for the operation of the commissions.

(d) Uniform Application and Financial Responsibility - The fee shall be applied uniformly without exceptions or other preferential treatment for a sponsor or attendee.

The board shall make reasonable efforts to collect the sponsor fee from the sponsor of a CLE program when appropriate under Rule .1606(a) above.

However, whenever a sponsor fee is not paid by the sponsor of a program, regardless of the reason, the lawyer requesting CLE credit for the program shall be financially responsible for the fee.

History Note: Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: December 30, 1998; October 1, 2003; February 5, 2009; October 8, 2009; November 5, 2015; April 5, 2018; September 25, 2019

.1607 Reserved

.1608 Reserved

.1609 Reserved

.1610 Reserved

.1611 Reserved

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: provided, however, that any member who is designated chairperson at the time that the member's second three-year term expires may serve one additional year on the board in the capacity of chair.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: October 9, 2008; March 5, 2015

.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 the spring of each year. The board by resolution may set the annual meeting date and 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
Amendments Approved by the Supreme Court: September 28, 2017

.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 including, but not limited to, utilizing appropriate and qualified organizations that are ABA accredited, to prepare and administer the written specialty examinations for specialties based predominantly on federal law;

(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 insufficient 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

Amendments Approved by the Supreme Court: November 16, 2006

.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) 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.

(c) The board may appoint advisory members to a specialty committee to assist with the development, administration, and grading of the examination, the drafting of standards for a subspecialty, and any other activity set forth in paragraph (b) of this rule. Advisory members shall be non-voting except as to any specific activity delegated to the advisory members by the board or by the chair of the specialty committee, including the evaluation of applications for certification. No more than five advisory members may be appointed to a specialty committee. Advisory members 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. Advisory members shall hold office for an initial term of three years and shall thereafter serve at the discretion of the board for not more than two additional three-year terms. Appointment by the board to a vacancy shall be for the remaining term, if any, of the advisory member being replaced.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: November 7, 1996; March 10, 2011

.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 in a jurisdiction of the United States for at least five years immediately preceding his or her application and must be licensed in North Carolina for at least three years immediately preceding his or her application. The applicant must be currently in good standing to practice law in this state and the applicant's disciplinary record with the courts, the North Carolina State Bar, and any other government licensing agency must support qualification in the specialty.

(2) The applicant must make a satisfactory showing according to objective and verifiable standards, as determined by the board after advice from the appro-

priate specialty committee, of substantial involvement in the specialty during the five calendar years immediately preceding the calendar year of application. 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 calendar 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. The applicant must provide, as references, the names of at least ten 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 applicant's competence and qualifications to be certified as a specialist. An applicant must receive a minimum of five favorable peer reviews to be considered by the board for compliance with this standard.

(A) Each specialty committee shall evaluate the information provided by an applicant's references to make a recommendation to the board as to the applicant's qualification in the specialty through peer review. The evaluation shall include a determination of the weight to be given to each peer review and shall take into consideration a reference's years of practice, primary practice areas and experience in the specialty, and the context in which a reference knows the applicant.

(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, including advisory members, at the time that the initial written examination for that specialty or any subspecialty of the 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 or of the minimum years of practice requirements set out in paragraph (a)(1) above.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: March 3, 2005; March 10, 2011; March 8, 2012; August 23, 2012; August 27, 2013; February 26, 2020

.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's disciplinary record with the courts, the North Carolina State Bar, and any other government licensing agency supports qualification in the specialty.

(2) The specialist 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 entire period of certification as a specialist. Substantial involvement for continued certification shall be determined in accordance with the principles set forth in Rule .1720(a)(2) of this subchapter and the specific standards for each specialty. In addition, unless prohibited or limited by the standards for a particular specialty, the following judicial service may be substituted for the equivalent years of practice experience if the applicant's judicial service included presiding over cases in the specialty: service as a full-time state or federal trial, appellate, or bankruptcy judge (including service as a federal magistrate judge); service as a judge for the courts of a federally recognized Indian tribe; service as an administrative law judge for the Social Security Administration; and service as a commissioner or deputy commissioner of the Industrial Commission.

(3) 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 12 hours of credit for continuing legal education, or its equivalent, for each year during the entire period of certification as a specialist.

(4) The specialist must comply with the requirements set forth in Rules .1720(a)(1).

(5) The specialist must make a satisfactory showing of qualification in the specialty through peer review. The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in any state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .1720(a)(4) of this subchapter apply to this standard.

(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. Before or after taking a continuing legal education course that is not in the specialty or a related field, a specialist may petition the board to approve the program as satisfying the continuing legal education criteria for recer-

tification. The petition shall show the relevancy of the program to the specialist's proficiency as a specialist, and be referred to the specialty committee for its recommendation prior to a decision by the board.

(c) After the period of initial certification, a specialist may request, in advance and in writing, approval from the board for a waiver of one year of the substantial involvement necessary to satisfy the standards for the specialist's next recertification. The specialist may request a waiver of one year of substantial involvement for every five years that the specialist has met the substantial involvement standard beginning with the period of initial certification. However, none of the years for which a waiver is requested may be consecutive. When a waiver of the substantial involvement requirement is granted, the specialist must satisfy all of the other requirements for recertification.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: March 6, 2002; February 5, 2009; March 8, 2012; August 27, 2013; March 27, 2019

.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 Revocation or Suspension of Certification as a Specialist

(a) Automatic Revocation or Suspension of Specialty Certification Following Professional Discipline. The board shall revoke its certification of a lawyer as a specialist if the lawyer is disbarred or receives a disciplinary suspension, any part of which is or subsequently becomes active, from the Disciplinary Hearing Commission of the North Carolina State Bar, a North Carolina court of law, or, if the lawyer is licensed in another jurisdiction in the United States, from a court of law or the regulatory authority of that jurisdiction. The board shall suspend its certification of a lawyer as a specialist if the lawyer receives a disciplinary suspension, all of which is stayed. If a stayed disciplinary suspension ends without becoming active, the lawyer may be reinstated as a specialist if the lawyer applies for recertification and satisfies all of the requirements for recertification as set forth in the recertification standards for the relevant specialty. During a suspension from specialty certification, application for recertification shall be deferred until the end of the suspension. This provision, and any amendment thereto, shall apply to discipline received on or after the effective date of the provision or the amendment as appropriate.

(b) Discretionary Revocation or Suspension. The board may revoke its certification of a lawyer as a specialist 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 as provided in Rule .1802, 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;

(6) the lawyer certified as a specialist received public discipline from the North Carolina State Bar on or after the effective date of this provision, other than suspension or disbarment from practice and the board finds that the conduct for which the professional discipline was received reflects adversely on the specialization program and the lawyer's qualification as a specialist; or

(7) the lawyer certified as a specialist was sanctioned or received public discipline on or after the effective date of this provision from any state or federal court or, if the lawyer is licensed in another jurisdiction, from the regulatory authority of that jurisdiction in the United States, and the board finds that the conduct for which the sanctions or professional discipline was received reflects adversely on the specialization program and the lawyer's qualification as a specialist.

(c) Report to Board. A lawyer certified as a specialist has a duty to inform the board promptly of any fact or circumstance described in Rules .1723(a) and (b) above.

(d) Reinstatement. 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

Amendments Approved by the Supreme Court: February 5, 2004; April 5, 2018

.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) federal and state criminal law

(b) state criminal law

(c) juvenile delinquency law

(6) immigration law.

(7) workers' compensation law

(8) Social Security disability law

(9) elder law

(10) appellate practice

(11) trademark law

(12) utilities law

(13) privacy and information security law

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: March 2, 2006; February 5, 2009; March 8, 2012; March 6, 2014; April 5, 2018

.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

Amendments Approved by the Supreme Court: February 27, 2003

.1727 Inactive Status

(a) Petition for Inactive Status. The board may transfer a certified specialist to inactive status upon receipt of a petition, on a form approved by the board, demonstrating that the petitioner satisfies the following conditions:

(1) Certified for five years or more;

(2) Special circumstances unique to the specialist constituting undue hardship or other reasonable basis for exempting the specialist from the substantial involvement standard for continued certification; including, but not limited to, marriage to active-duty military personnel requiring frequent relocation, active duty in the military reserves, disability lasting a total of six months or more over a 12-month period of time, and illness of an immediate family member requiring leaves of absence from work in excess of six months or more over a 12-month period of time; and

(3) Discontinuation of all representations of specialist certification in all communications about the lawyer's practice.

(b) Duration of Inactive Status. If the petitioner qualifies, inactive status shall be granted by the board for a period of not more than one year at a time. No more than three years of inactive status, whether consecutive or periodic, shall be granted to any certified specialist.

(c) Designation During Inactive Status. During the period of inactive status, the certified specialist shall be listed in the board's records as inactive. An inactive specialist shall not represent that he or she is certified during any period of inactive status; however, an inactive specialist may advertise or communicate prior dates of certification (e.g., Board Certified Specialist in Family Law 1987-2003).

(d) Annual Requirements. During the period of inactive status, the specialist shall not be required to satisfy the substantial involvement standard for continued certification in the specialty or to pay any fees; however, the specialist shall be required to satisfy the continuing legal education (CLE) standard for continued certification in the specialty. If a five-year period of certification ends during a year of inactive status, application for continued certification pursuant to Rule .1721 of this subchapter shall be deferred until return to active status.

(e) Return to Active Status. To return to active status as a certified specialist, an inactive specialist shall petition the board on a form approved by the board. The inactive specialist shall be reinstated to active status upon demonstration that he or she satisfied the CLE standard for continued certification in the specialty and the recommendation of the specialty committee. Passage of a written examination in the specialty shall not be required unless the inactive specialist failed to satisfy the CLE standard for continued certification during the period of inactivity.

(f) The right to petition for inactive status pursuant to this rule is in addition to the right to request a waiver of substantial involvement allowed by Rule .1721(c) of this subchapter.

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

Adopted by the Supreme Court September 28, 2017

Section .1800 Hearing and Appeal Rules of the Board of Legal Specialization

.1801 Incomplete Applications; Reconsideration of Applications Rejected by Specialty Committee; and Reconsideration Procedure

(a) Incomplete Applications. The executive director of the North Carolina State Bar Board of Legal Specialization (the board) will review every application to determine if the application is complete. An application is incomplete if it does not include complete answers to every question on the application and copies of all documents requested on the application. The applicant will be notified in writing if an application is incomplete. The applicant must submit the information necessary to complete the application within 21 days of the date of the notice. If the applicant fails to provide the required information during the requisite time period, the executive director will return the application to the applicant together with a refund of the application fee less a fifty dollar ($50) administrative fee. The decision of the executive director to reject an application as incomplete is final unless the applicant shows good cause for an extension of time to provide the required information. This provision does not apply to an application with respect to which fewer than five completed peer review forms have been timely filed with the board.

(b) Denial of Application by Specialty Committee. The executive director shall refer all complete applications to the specialty committee for review for compliance with the standards for certification in the specialty area for which certification is sought.

After reviewing the applications, the specialty committee shall recommend to the board the acceptance or rejection of the applications. The specialty committee shall notify the board of its recommendations in writing and the reason for any negative recommendation must be specified.

(1) Notification to Applicant of the Specialty Committee's Action. The executive director shall promptly notify the applicant in writing of the specialty committee's recommendation of rejection of the application and the board's intention to act in accordance with the committee's recommendation. The notification must specify the reason for the recommendation of rejection of the application and shall inform the applicant of the right to petition pursuant to paragraph (c) of this rule for reconsideration of the recommendation of the specialty committee.

(c) Petition for Reconsideration. Within 14 days of the date of the notice from the executive director that an application has been recommended for rejection by a specialty committee, the applicant may petition the board for reconsideration. The petition shall be in writing and shall include the following information: the applicant's election between a reconsideration hearing on the written record or in-person; and the reasons for which the applicant believes the specialty committee's recommendation should not be accepted.

(d) Reconsideration Procedure. Upon receipt of a petition filed pursuant to paragraph (c) of this rule, a three-member panel of the board, to be appointed by the chairperson of the board, shall reconsider an application pursuant to the following procedures:

(1) Notice. The chairperson of the panel shall set the time and place of the hearing to reconsider the applicant's application as soon as practicable after the applicant's request for reconsideration is received. The applicant shall be notified of the date at least 10 days prior to the time set for the hearing.

(2) Reconsideration on the Written Record. If the applicant elects to have the matter decided on the written record, the applicant will not be present at the hearing and no witnesses will appear before the panel except the executive director of the specialization program, or a staff designee, who shall provide administrative support to the panel. At least 10 days prior to the hearing, the applicant shall provide the panel with copies of any documents that the applicant would like to be considered by the panel.

(3) Reconsideration In-Person. If the applicant elects to be present at the hearing, the applicant may be represented by counsel or represent himself or herself at such hearing. The applicant may offer witnesses and documents and may question any witness. At least 10 days prior to the hearing, the applicant shall provide the panel with copies of any documents that the applicant wants considered by the panel and, if the reconsideration is in-person, with the names of prospective witnesses. At least ten days prior to the hearing, the applicant shall be provided with copies of any documents that the executive director will submit to the panel, except confidential peer review forms or information, and with the names of prospective witnesses. Additional documents may be considered at the discretion of the panel.

(4) Burden of Proof. The applicant must make a clear and convincing showing that the application satisfies the standards for certification in the applicable specialty

(5) Conduct of Reconsideration Hearing.

(A) Preservation of Record. The hearing shall be recorded unless the applicant agrees in writing that the hearing shall not be recorded or, if the applicant wants an official transcript, the applicant pays the costs associated with obtaining a court reporter and makes all arrangements for the court reporter's services and for the preparation of the transcript.

(B) Procedural Rules. The reconsideration hearing shall not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted and may be considered by the panel according to its probative value if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

(C) Decision of the Panel. The decision of the panel shall be by a majority of the members of the panel and shall be binding upon the board. Written notification of the decision shall be sent to the applicant. If the board's decision is unfavorable, the notification shall set forth the grounds for the decision and shall notify the applicant of the right to appeal the decision to the North Carolina State Bar Council (the council) pursuant to Rule .1804 of this subchapter.

(e) Failure of Applicant to Petition the Board for Reconsideration Within the Time Allowed by These Procedures. If the applicant does not petition the board for reconsideration of the specialty committee's recommendation of rejection of the application within the time allowed by these rules, the board shall act on the matter at its next board meeting.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: June 1, 1995; November 16, 2006; February 5, 2009; March 11, 2010; September 24, 2015

.1802 Denial, Revocation, or Suspension of Continued Certification as a Specialist

(a) Denial of Continued Certification. The board, upon its initiative or upon recommendation of the appropriate specialty committee, may deny continued certification of a specialist, if the applicant does not meet the requirements as found in Rule .1721(a) of this subchapter.

(b) Revocation and Suspension of Certification as a Specialist. The board shall revoke the certification of a lawyer as provided in Rule .1723(a) of this subchapter and may revoke or suspend the certification of a lawyer as provided in Rule .1723(b) of this subchapter.

(c) Notification of Board Action. The executive director shall notify the lawyer of the board's action to grant or deny continued certification as a specialist upon application for continued certification pursuant to Rule .1721(a) of this subchapter, or to revoke or suspend continued certification pursuant to Rule .1723(a) or (b) of this subchapter. If the board's action is unfavorable, the notification shall set forth the grounds for the action and shall notify the lawyer of the right to a hearing if allowed by these rules.

(d) Request for Hearing. Within 14 days of the date of the notice from the executive director of the board that the lawyer has been denied continued certification pursuant to Rule .1721(a) of this subchapter or that certification has been revoked or suspended pursuant to Rule .1723(b) of this subchapter, the lawyer must request a hearing before the board in writing. There is no right to a hearing upon automatic revocation pursuant to Rule .1723(a) of this subchapter.

(e) Hearing Procedure. Except as set forth in Rule .1802(f) below, the procedures set forth in Rule .1801(d) of this subchapter shall be followed when a lawyer requests a hearing regarding the denial of continued certification pursuant to Rule .1721(a) of this subchapter or the revocation or suspension of certification under Rule .1723(b) of this subchapter.

(f) Burden of Proof: Preponderance of the Evidence. A three-member panel of the board shall apply the preponderance of the evidence rule in determining whether the lawyer's certification should be continued, revoked, or suspended. The burden of proof is upon the lawyer.

(g) Notification of Board's Decision. After the hearing, the board shall timely notify the lawyer of its decision regarding continued certification as a specialist. If the board's decision is unfavorable, the notification shall set forth the grounds for the decision and the lawyer's appeal rights under Rule .1804 of this subchapter.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: February 5, 2004; March 11, 2010

.1803 Reconsideration of Failed Examination

(a) Review of Examination. Within 30 days of the date of the notice from the board's executive director that the applicant has failed the written examination, the applicant may review his or her examination at the office of the board at a time designated by the executive director. The applicant will be given the applicant's scores for each question on the examination. The applicant shall not copy, transcribe, or remove the examination from the board's office (or any other location established by the board for the review of the examination) and shall be subject to such other restrictions as the board deems necessary to protect the content of the examination.

(b) Petition for Grade Review. If, after reviewing the examination, the applicant feels an error or errors were made in the grading, the applicant may file with the executive director a petition for grade review. The petition must be filed within 30 days after the last day of the exam review period and should set out in detail the examination questions and answers which, in the opinion of the applicant, have been incorrectly graded. Supporting information may be filed to substantiate the applicant's claim.

(c) Denial of Petition by Chair. The director of the specialization program shall review the petition and determine whether, if all grading objections of the petitioner are decided in the petitioner's favor, the petitioner's grade on the examination would be changed to a passing grade. If the director determines that the petitioner's grade would not be changed to passing, the director shall notify the chair who may deny the petition on this basis.

(d) Review Procedure. The applicant's examination and petition shall be submitted to a panel consisting of three members of the specialty committee (the grade review panel). All identifying information shall be redacted from the examination and petition prior to submission to the grade review panel. The grade review panel shall review the petition of the applicant and determine whether the grade of the examination should be changed. The grade review panel shall make a written report to the board setting forth its recommendation relative to the grade on the applicant's examination and an explanation of its recommendation.

(e) Decision of the Board. The board shall consider the petition and the report of the grade review panel and shall certify the applicant if it determines by majority vote that the applicant has satisfied all of the standards for certification.

(f) Failure of Examination Prepared and Administered by a Testing Organization on Behalf of the Board. Notwithstanding paragraphs (a) – (d) of this rule, if the board is utilizing a qualified organization to prepare and administer the certification examination for a specialty pursuant to Rule .1716(10) of this subchapter, an applicant for such specialty shall only be entitled to the review and appeal procedures of the organization.

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

Adopted by the Supreme Court: March 11, 2010

Amendments Approved by the Supreme Court: March 6, 2014; September 24, 2015

.1804 Appeal to the Council

(a) Appealable Decisions. An appeal may be taken to the council from a decision of the board which denies an applicant certification (i.e., when an applicant's application has been rejected because it is not in compliance with the standards for certification or when an applicant fails the written specialty examination), denies an applicant continued certification as a specialist, or suspends or revokes a specialist's certification. The rejection of an application because it is incomplete shall not be appealable.

(b) Filing the Appeal. An appeal from a decision of the board as described in paragraph (a) may be taken by filing with the executive director of the North Carolina State Bar (the State Bar) a written notice of appeal not later than 21 days after the date of the notice of the board's decision to the applicant who is denied certification or continued certification or to a lawyer whose certification is suspended or revoked.

(c) Appeal Procedure. The appeal to the council shall be under such rules and regulations as the council may prescribe.

(d) Scope of Review. Review by the council shall be limited to whether the applicant was provided with procedural rights and whether the board, or the reconsideration panel where applicable, applied the correct procedural standards and State Bar rules in rendering its decision. The applicant shall have the burden of making a clear and convincing showing of arbitrary, capricious, or fraudulent denial of procedural rights or misapplication of the procedural standards or State Bar rules.

(e) Notice of the Council's Decision. The applicant shall receive written notice of the council's decision.

(f) Costs. The council may tax the costs attributable to the proceeding against the applicant.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: March 11, 2010; September 22, 2016

.1805 Judicial Review

(a) Appeals - The appellant or the board may appeal from an adverse ruling by the council.

(b) Wake County Superior Court - All appeals from the council shall lie to the Wake County Superior Court. (See N.C. *State Bar v. Du Mont*, 304 N.C. 627, 286 S.E.2d 89 (1982).)

(c) Judicial Review Procedures - Article 4 of G.S. 150-B shall be complied with

by all parties relative to the procedures for judicial review of the council's decision.

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

.1806 Additional Rules Pertaining to Hearing and Appeals

(a) Notices. Every notice required by these rules shall be deemed sufficient if sent to the applicant at the address listed on the applicant's last application to the board or the address in the official membership records of the State Bar.

(b) Expenses Related to Hearings and Appeals. In its discretion, the board may direct that the necessary expenses incurred in any investigation, processing, and hearing of any matter to the board or appeal to the council be paid by the board or appeal to the council be paid by the board. However, all expenses related to travel to any hearing or appeal for the applicant, his or her attorney, and witnesses called by the applicant shall be paid by the applicant.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: March 11, 2010

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.

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

.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 six credits in any one year. Of the 36 hours of CLE, at least 30 hours shall be in real property law and the balance may be in the related areas of environmental law, taxation, business organizations, estate planning and probate law, and elder 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) 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

Amendments Approved by the Supreme Court: October 9, 2008

.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 six credits earned in any one year. Of the 60 hours of CLE, at least 50 hours shall be in real property law and the balance may be in the related areas of environmental law, taxation, business organizations, estate planning and probate law,and elder law.

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .2105(d) of this subchapter apply to this standard.

(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

Amendments Approved by the Supreme Court: October 9, 2008; March 27, 2019

.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 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 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.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amendments Approved by the Supreme Court: November 16, 2006

.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 applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .2205(d) of this subchapter apply to this standard.

(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
Amendments Approved by the Supreme Court: March 17, 2019

.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 (provided, however, that eight of the 45 hours may be in the related areas of elder law, Medicaid planning, and guardianship), and the balance may be in designated related fields. A list of the topics that qualify as related-field CLE shall be maintained by the board on its official website.

(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 test the applicant's knowledge and application of the law of estate planning and probate. A list of the topics covered on the exam shall be maintained by the board on its official website.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: October 9, 2008; June 9, 2016

.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; however, for the purpose of continued certification as a specialist, service outside private practice, during which the specialist had duties primarily in the areas of estate planning, estate administration, and/or trust administration, may be substituted for the equivalent years of experience toward the five-year requirement, as determined by the board in its discretion.

(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 (provided, however, that 15 of the 75 hours may be in the related areas of elder law, Medicaid planning, and guardianship), and the balance may be in the related areas of taxation, business organizations, real property, family law, elder law, Medicaid planning, and guardianship.

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .2305(d) of this subchapter apply to this standard.

(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

Amendments Approved by the Supreme Court: October 9, 2008; April 5, 2018; March 17, 2019

.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 - During the three calendar years prior to the year of application and the portion of the calendar year immediately prior to application, an applicant must have earned no less than 45 hours of accredited continuing legal education (CLE) credits in family law, nine of which may be in related fields. Related fields shall include taxation, trial advocacy, evidence, negotiation (including training in mediation, arbitration, and collaborative law), juvenile law, real property, estate planning and probate law, business organizations, employee benefits, bankruptcy, elder law, and immigration law. Only nine hours of CLE credit will be recognized for attendance at an extended negotiation or mediation training course. Parenting coordinator training will not qualify for family law or related field hours. At least 9 hours of CLE in family law or related fields must be taken during each of the three calendar years preceding application.

(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; Chapter 50C);

(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
Amendments Approved by the Supreme Court: February 5, 2002; February 27, 2003; October 9, 2008

.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; however, for the purpose of continued certification, service as a district court judge in North Carolina hearing a substantial number of family law cases may be substituted, year for year, for the experience required to meet the five-year requirement.

(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 (including training in mediation, arbitration, and collaborative law), juvenile law, real property, estate planning and probate law, business organizations, employee benefits, bankruptcy, elder law, and immigration law. Only nine hours of CLE credit will be recognized for attendance at an extended negotiation or mediation training course. Parenting coordinator training will not qualify for family law or related field hours.

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .2405(d) of this subchapter apply to this standard.

(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

Amendments Approved by the Supreme Court: February 27, 2003; October 9, 2008; September 22, 2016; March 27, 2019

.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 (encompassing both federal and state criminal law), including the subspecialty of state criminal law and juvenile delinquency 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

Amendments Approved by the Supreme Court: March 10, 2011; August 25, 2011

.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 courts. The subspecialty in the field is identified and defined as follows:

(a) State Criminal Law - The practice of criminal law in state trial and appellate courts.

(b) Juvenile Delinquency Law - The practice of law in state juvenile delinquency courts. The standards for the subspecialty are set forth in Rules .2508-.2509.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: March 10, 2011; August 25, 2011

.2503 Recognition as a Specialist in Criminal Law

A lawyer may qualify as a specialist by meeting the standards for criminal law or the subspecialties of state criminal law or juvenile delinquency 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 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 for the subspecialty of juvenile delinquency law, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law – Juvenile Delinquency."

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: March 10, 2011; August 25, 2011

.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 in Criminal Law

Each applicant for certification as a specialist in criminal law or the subspecialty of state criminal 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:

(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) 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 criminal law, but not less than 400 hours in any one year. "Practice" shall mean substantive legal work, specifically including representation in criminal jury trials, 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 criminal law for one year or more, which may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2505(b)(1) above;

(B) Service as a federal, state or tribal court judge for one year or more, which may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2505(b)(1) above;

(3) For the specialty of criminal law and the subspecialty of state criminal law, the board shall require an applicant to show substantial involvement by providing information that demonstrates the applicant's significant criminal trial experience such as:

(A) representation during the applicant's entire legal career in criminal trials concluded by jury verdict;

(B) representation as principal counsel of record in federal felony cases or state felony cases (Class G or higher) ;

(C) court appearances in other substantive criminal proceedings in criminal courts of any jurisdiction; and

(D) representation in appeals of decisions to the North Carolina Court of Appeals, the North Carolina Supreme Court, or any federal appellate court.

(c) Continuing Legal Education

In the specialty of criminal law and the state criminal law 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:

(1) at least 34 hours in skills pertaining to criminal law, such as evidence, substantive criminal law, criminal procedure, criminal trial advocacy and criminal trial tactics;

(2) 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 and the subspecialty of state criminal law 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.

(4) Each applicant must provide for reference and independent inquiry the names and addresses of the following: (i) ten lawyers and judges who practice in the field of criminal law and who are familiar with the applicant's practice, and (ii) opposing counsel and the judge in eight recent cases tried by the applicant to verdict or entry of order.

(5) 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 - The examination shall cover the applicant's knowledge in the following topics in criminal law, and/or in the subspecialty of state criminal law, as the applicant has elected:

(A) the North Carolina and Federal Rules of Evidence;

(B) state and federal criminal procedure and state and federal laws affecting criminal procedure;

(C) constitutional law;

(D) appellate procedure and tactics;

(E) trial procedure and trial tactics;

(F) criminal substantive law;

(3) Required Examination Components.

(A) Criminal Law Specialty.

An applicant for certification in the specialty of criminal law must pass part I of the examination on general topics in criminal law and part II of the examination (federal and state criminal law).

(B) State Criminal Law Subspecialty.

An applicant for certification in the subspecialty of state criminal law must pass part I of the examination on general topics in criminal law and part III of the examination on state criminal law.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: February 5, 2004; October 6, 2004; August 23, 2007; March 10, 2011; March 8, 2013; October 2, 2014; March 16, 2017

.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).

(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 applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. Each applicant also must provide the names and addresses of the following: (i) five lawyers and judges who practice in the field of criminal law and who are familiar with the applicant's practice, and (ii) opposing counsel and the judge in four recent cases tried by the applicant to verdict or entry of order. All other requirements relative to peer review set forth in Rule .2505(d) of this subchapter apply to this standard.

(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

Amendments Approved by the Supreme Court: February 5, 2004; October 6, 2004; March 27, 2019

.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 juvenile delinquency 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

Amendments Approved by the Supreme Court: March 10, 2011; August 25, 2011; March 27, 2019

.2508 Standards for Certification as a Specialist in Juvenile Delinquency Law

Each applicant for certification as a specialist in juvenile delinquency 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:

(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 juvenile delinquency law.

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 400 hours a year to the practice of juvenile delinquency law, but not less than 100 hours in any one year. “Practice” shall mean substantive legal work, specifically including representation of juveniles or the state in juvenile delinquency court, done primarily for the purpose of providing legal advice or representation, or a practice equivalent.

(2) “Practice equivalent” shall mean:

(A) Service for one year or more as a state district court judge responsible for presiding over juvenile delinquency court for 250 hours each year may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2508(b)(1) above;

(B) Service on or participation in the activities of local, state, or national civic, professional or government organizations that promote juvenile justice may be used to meet the requirement set forth in Rule .2508(b)(1) but not to exceed 100 hours for any year during the five years.

(C) Service as a law professor in a juvenile delinquency legal clinic at an accredited law school may be used to meet the requirement set forth in Rule .2508(b)(1).

(D) The practice of state criminal law may be used to meet the requirement set forth in Rule .2508(b)(1) but not to exceed 100 hours for any year during the five years. "Practice of state criminal law" shall mean substantive legal work representing adults or the state in the state's criminal district and superior courts.

(3) An applicant shall also demonstrate substantial involvement during the five years prior to application unless otherwise noted by providing information that demonstrates the applicant's significant juvenile delinquency court experience such as:

(A) Representation of juveniles or the state during the applicant's entire legal career in juvenile delinquency hearings concluded by disposition;

(B) Representation of juveniles or the state in juvenile delinquency felony cases;

(C) Court appearances in other substantive juvenile delinquency proceedings in juvenile court;

(D) Representation of juveniles or the state through transfer to adult court; and

(E) Representation of juveniles or the state in appeals of juvenile delinquency decisions.

(c) Continuing Legal Education - An applicant must have earned no less than 40 hours of accredited continuing legal education (CLE) credits in criminal and juvenile delinquency law during the three years preceding application. Of the 40 hours of CLE, at least 12 hours shall be in juvenile delinquency law, and the balance may be in the following related fields: substantive criminal law, criminal procedure, trial advocacy, and evidence.

(d) Peer Review –

(1) Each applicant for certification as a specialist in juvenile delinquency law 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.

(4) Each applicant must provide for reference and independent inquiry the names and addresses of ten lawyers and judges who practice in the field of juvenile delinquency law or criminal law or preside over juvenile delinquency or criminal law proceedings and who are familiar with the applicant's practice.

(5) 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 - An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of juvenile delinquency law to justify the representation of special competence to the legal profession and the public.

(1) Terms - The examination shall be given annually in written form and 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:

(A) North Carolina Rules of Evidence;

(B) State criminal substantive law;

(C) Constitutional law as it relates to criminal procedure and juvenile delinquency law;

(D) State criminal procedure;

(E) North Carolina Juvenile Code, Subchapters II and III, and related case law; and

(F) North Carolina caselaw as it relates to juvenile delinquency law.

(3) Examination Components - An applicant for certification in the subspecialty of juvenile delinquency law must pass part I of the criminal law examination on general topics in criminal law and part IV of the examination on juvenile delinquency law.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court: August 25, 2011
Amendments Approved by the Supreme Court: March 5, 2015

.2509 Standards for Continued Certification as a Specialist in Juvenile Delinquency Law

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 .2509(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 .2508(b).

(b) Continuing Legal Education - The specialist must have earned no less than 65 hours of accredited continuing legal education credits in criminal law and juvenile delinquency law with not less than six credits earned in any one year. Of the 65 hours, at least 20 hours shall be in juvenile delinquency law, and the balance may be in the following related fields: substantive criminal law, criminal procedure, trial advocacy, and evidence.

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state, practice in the field of juvenile delinquency law or criminal law or preside over juvenile delinquency or criminal law proceedings, and are familiar with the competence and qualification of the applicant as a specialist. An applicant must receive a minimum of three favorable peer reviews to be considered by the board for compliance with this standard. All other requirements relative to peer review set forth in Rule .2508(d) of this subchapter apply to this standard.

(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 .2508 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 .2508 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court: August 25, 2011
Amendments Approved by the Supreme Court: March 27, 2019

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 by the Supreme Court: 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 by the Supreme Court: 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 by the Supreme Court: 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 by the Supreme Court: 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 topics relating to 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 four 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 either annually or every other year as the Board deems appropriate. The examination shall be administered and graded uniformly by the specialty committee.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court: March 6, 1997
Amendments Approved by the Supreme Court: October 2, 2014; February 26, 2020

.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 topics relating to 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 applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All

other requirements relative to peer review set forth in Rule .2605(d) of this subchapter apply to this standard.

(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 by the Supreme Court: March 6, 1997

Amendments Approved by the Supreme Court: October 2, 2014; March 27, 2019

.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 by the Supreme Court: 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 by the Supreme Court: 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 by the Supreme Court: 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 by the Supreme Court: 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 by the Supreme Court: 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 36 hours of accredited continuing legal education (CLE) credits in workers' compensation law and related fields during the three years preceding application, with not less than six credits earned in courses on workers' compensation law in any one year. The remaining 18 hours may be earned in courses on workers' compensation law or any of the following related fields: civil trial practice and procedure; evidence; insurance; mediation; medical injuries, medicine, or anatomy; labor and employment law; Social Security disability law; and the law relating to long-term disability or Medicaid/Medicare claims.

(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 by the Supreme Court: May 4, 2000

Amendments Approved by the Supreme Court: March 10, 2011; March 5, 2015

.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 60 hours of accredited continuing legal education (CLE) credits in workers' compensation law and related fields during the five years preceding application. Of the 60 hours of CLE, at least 30 hours shall be in workers' compensation law, and the balance may be in the following related fields: civil trial practice and procedure; evidence; insurance; mediation; medical injuries, medicine, or anatomy; labor and employment law; Social Security disability law; and the law relating to long-term disability or Medicaid/Medicare claims. The specialist must earn not less than six credits in courses on workers' compensation law each year and the balance of credits may be earned in courses on workers' compensation law or any of the related fields previously listed.

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers, commissioners or deputy commissioners of the North Carolina Industrial Commission, or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .2705(d) of this subchapter apply to this standard.

(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 by the Supreme Court: May 4, 2000

Amendments Approved by the Supreme Court: March 10, 2011; March 5, 2015; September 22, 2016; March 27, 2019

.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 by the Supreme Court: May 4, 2000

Section .2800, Certification Standards for the Social Security Disability Law Specialty

.2801 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates Social Security disability 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 by the Supreme Court: March 2, 2006

.2802 Definition of Specialty

The specialty of Social Security disability law is the practice of law relating to the analysis of claims and controversies arising under Title II and Title XVI of the Social Security Act and the representation of claimants in those matters before the Social Security Administration and/or the federal courts.

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

Adopted by the Supreme Court: March 2, 2006

.2803 Recognition as a Specialist in Social Security Disability Law

If a lawyer qualifies as a specialist in Social Security disability 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 Social Security Disability Law."

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

Adopted by the Supreme Court: March 2, 2006

.2804 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in Social Security disability 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 by the Supreme Court: March 2, 2006

.2805 Standards for Certification as a Specialist in Social Security Disability Law

Each applicant for certification as a specialist in Social Security disability 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 Social Security disability 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 Social Security disability law.

(1) "Substantial involvement" shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 600 hours a year to the practice of Social Security disability law, but not less than 500 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 Social Security disability law for one year or more may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2805(b)(1) above;

(B) Service as a Social Security administrative law judge, Social Security

staff lawyer, or assistant United States attorney involved in cases arising under Title II and Title XVI may be substituted for three of the five years necessary to satisfy the requirement set forth in Rule .2805(b)(1) above;

(3) The board may require an applicant to show substantial involvement in Social Security disability law by providing information regarding the applicant's participation, during his or her legal career, as primary counsel of record in the following:

(A) Proceedings before an administrative law judge;

(B) Cases appealed to the appeals council of the Social Security Administration; and

(C) Cases appealed to federal district court.

(c) Continuing Legal Education - An applicant must earn no less than 36 hours of accredited continuing legal education (CLE) credits in Social Security disability law and related fields during the three years preceding application, with not less than six credits earned in any one year. Of the 36 hours of CLE, at least 18 hours shall be in Social Security disability law, and the balance may be in the following related fields: trial skills and advocacy; practice management; medical injuries, medicine, or anatomy; ERISA; labor and employment law; elder law; workers' compensation law; veterans' disability law; and the law relating to long term disability or Medicaid/Medicare claims.

(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 law in a jurisdiction in the United States and have substantial practice or judicial experience in Social Security disability 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 Social Security disability 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.

(1) Subject Matter - The examination shall cover the applicant's knowledge and application of the law relating to the following:

(A) Title II and Title XVI of the Social Security Act;

(B) Federal practice and procedure in Social Security disability cases;

(C) Medical proof of disability;

(D) Vocational aspects of disability;

(E) Workers' compensation offset;

(F) Eligibility for Medicare and Medicaid;

(G) Eligibility for Social Security retirement and survivors benefits;

(H) Interaction of Social Security benefits with employee benefits (e.g., long term disability and back pay);

(I) Equal Access to Justice Act; and

(J) Fee collection and other ethical issues in Social Security practice.

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

Adopted by the Supreme Court: March 2, 2006

Amendments Approved by the Supreme Court: March 10, 2011

.2806 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 .2806(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 .2805(b) of this subchapter.

(b) Continuing Legal Education - The specialist must earn no less than 60 hours of accredited continuing legal education credits in Social Security disability law and related fields during the five years preceding application. Not less than six of the credits may be earned in any one year. Of the 60 hours of CLE, at least 20 hours shall be in Social Security disability law, and the balance may be in the following related fields: trial skills and advocacy; practice management; medical injuries, medicine, or anatomy; ERISA; labor and employment law; elder law; workers' compensation law; veterans' disability law; and the law relating to long term disability or Medicaid/Medicare claims.

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in a jurisdiction in the United States and are familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .2805(d) of this subchapter apply to this standard.

(d) Time for Application - Application for continued certification shall be made not more than 180 days nor less than 80 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 .2805 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 .2805 of this subchapter.

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

Adopted by the Supreme Court: March 2, 2006

Amendments Approved by the Supreme Court: March 10, 2011; March 27, 2019

.2807 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in Social Security disability 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 by the Supreme Court: March 2, 2006

Section .2900 Certification Standards for the Elder Law Specialty

.2901 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates elder 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 by the Supreme Court: February 5, 2009

.2902 Definition of Specialty

The specialty of elder law is the practice of law involving the counseling and representation of older persons and their representatives relative to the legal aspects of health and long term care planning; public benefits; surrogate decision-making, legal capacity; the conservation, disposition, and administration of the estates of older persons; and the implementation of decisions of older persons and their representatives relative to the foregoing with due consideration to the applicable tax consequences of an action, or the need for more sophisticated tax expertise.

Lawyers certified in elder law must be capable of recognizing issues that

arise during counseling and representation of older persons, or their representatives, with respect to abuse, neglect, or exploitation of the older person, insurance, housing, long term care, employment, and retirement. The elder law specialist must also be familiar with professional and non-legal resources and services publicly and privately available to meet the needs of the older persons, and be capable of recognizing the professional conduct and ethical issues that arise during representation.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court: February 5, 2009

.2903 Recognition as a Specialist in Elder Law

If a lawyer qualifies as a specialist in elder 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 Elder Law."

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court: February 5, 2009

.2904 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in elder 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 by the Supreme Court: February 5, 2009

.2905 Standards for Certification as a Specialist in Elder Law

Each applicant for certification as a specialist in elder 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 elder 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 elder law.

(1) Substantial involvement shall mean during the five years immediately preceding the application, the applicant devoted an average of at least 700 hours a year to the practice of elder 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 service as a law professor concentrating in the teaching of elder law (or such other related fields as approved by the specialty committee and the board) for one year or more. Such service may be substituted for one year of experience to meet the five-year requirement set forth in Rule .2905(b)(1) above.

(c) Substantial Involvement Experience Requirements - In addition to the showing required by Rule .2905(b), an applicant shall show substantial involvement in elder law by providing information regarding the applicant's participation, during the five years immediately preceding the date of the application, in at least sixty (60) elder law matters in the categories set forth in Rule .2905(c)(3) below.

(1) As used in this section, an applicant will be considered to have participated in an elder law matter if the applicant:

(A) provided advice (written or oral, but if oral, supported by substantial documentation in the client's file) tailored to and based on facts and circumstances specific to a particular client;

(B) drafted legal documents such as, but not limited to, wills, trusts, or health care directives, provided that those legal documents were tailored to and based on facts and circumstances specific to the particular client;

(C) prepared legal documents and took other steps necessary for the administration of a previously prepared legal directive such as, but not limited to, a will or trust; or

(D) provided representation to a party in contested litigation or administrative matters concerning an elder law issue.

(2) Of the 60 elder law matters:

(A) forty (40) must be in the experience categories listed in Rule .2905(c)(3)(A) through (E) with at least five matters in each category;

(B) ten (10) must be in experience categories listed in Rule .2905(c)(3)(F) through (N), with no more than five in any one category; and

(C) the remaining ten (10) may be in any category listed in Rule .2905(c)(3), and are not subject to the limitations set forth in Rule .2905(c)(2)(B) or (C).

(3) Experience Categories:

(A) health and personal care planning including giving advice regarding, and preparing, advance medical directives (medical powers of attorney, living wills, and health care declarations) and counseling older persons, attorneys-in-fact, and families about medical and life-sustaining choices, and related personal life choices.

(B) pre-mortem legal planning including giving advice and preparing documents regarding wills, trusts, durable general or financial powers of attorney, real estate, gifting, and the financial and tax implications of any proposed action.

(C) fiduciary representation including seeking the appointment of, giving advice to, representing, or serving as executor, personal representative, attorney-in-fact, trustee, guardian, conservator, representative payee, or other formal or informal fiduciary.

(D) legal capacity counseling including advising how capacity is determined and the level of capacity required for various legal activities, and representing those who are or may be the subject of guardianship/conservatorship proceedings or other protective arrangements.

(E) public benefits advice including planning for and assisting in obtaining Medicaid, supplemental security income, and veterans benefits.

(F) special needs counseling, including the planning, drafting, and administration of special/supplemental needs trusts, housing, employment, education, and related issues.

(G) advice on insurance matters including analyzing and explaining the types of insurance available, such as health, life, long term care, home care, COBRA, medigap, long term disability, dread disease, and burial/funeral policies.

(H) resident rights advocacy including advising patients and residents of hospitals, nursing facilities, continuing care retirement communities, assisted living facilities, adult care facilities, and those cared for in their homes of their rights and appropriate remedies in matters such as admission, transfer and discharge policies, quality of care, and related issues.

(I) housing counseling including reviewing the options available and the financing of those options such as: mortgage alternatives, renovation loan programs, life care contracts, and home equity conversion.

(J) employment and retirement advice including pensions, retiree health benefits, unemployment benefits, and other benefits.

(K) counseling with regard to age and/or disability discrimination in employment and housing.

(L) litigation and administrative advocacy in connection with any of the above matters, including will contests, contested capacity issues, elder abuse (including financial or consumer fraud), fiduciary administration, public benefits, nursing home torts, and discrimination.

(d) Continuing Legal Education - An applicant must earn forty-five (45) hours of accredited continuing legal education (CLE) in elder law during the three full calendar years preceding application and the year of application, with not less than nine (9) credits earned in any of the three calendar years. Elder law CLE is any accredited program on a subject identified in the experience categories described in subparagraph (c)(3) of this rule.

(e) 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 and have substantial practice or judicial experience in elder law or in a related field as set forth in Rule .2905(d). An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons con-

cerning 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.

(f) Examination - An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of elder 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 or by any ABA accredited elder law certification organization with which the board contracts pursuant to Rule .1716(10) of this subchapter.

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

Adopted by the Supreme Court: February 5, 2009

Amendments Approved by the Supreme Court: March 11, 2010; March 10, 2011; March 8, 2012; September 20, 2018

.2906 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 .2906(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 .2905(b) of this subchapter.

(b) Continuing Legal Education - The specialist must earn seventy-five (75) hours of accredited continuing legal education (CLE) credits in elder law during the five calendar years preceding application, with not less than ten (10) credits earned in any calendar year. Elder law CLE is any accredited program on a subject identified in the experience categories described in Rule .2905(c)(3) of this subchapter.

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in this state and familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .2905(e) of this subchapter apply to this standard.

(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 .2905 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 .2905 of this subchapter.

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

Adopted by the Supreme Court: February 5, 2009

Amendments Approved by the Supreme Court: September 20, 2018; March 27, 2019

.2907 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in elder 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 by the Supreme Court: February 5, 2009

Section .3000 Certification Standards for the Appellate Practice Specialty

.3001 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates appellate practice 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 by the Supreme Court: March 10, 2011

.3002 Definition of Specialty

The specialty of appellate practice is the practice of law relating to appeals to the Appellate Division of the North Carolina General Courts of Justice, as well as appeals to appellate-level courts of any state or territory of the United States, the Supreme Court of the United States, the United States Courts of Appeals, the United States Court of Appeals for the Armed Forces and the United States Courts of Criminal Appeals for the armed forces, and any tribal appellate court for a federally recognized Indian tribe (hereafter referred to as a "state or federal appellate court" or collectively as "state and federal appellate courts").

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

Adopted by the Supreme Court: March 10, 2011

.3003 Recognition as a Specialist in Appellate Practice

If a lawyer qualifies as a specialist in appellate practice by meeting the standards for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Appellate Practice." Any lawyer who is entitled to represent that he or she is a "Board Certified Specialist in Criminal Appellate Practice" (having been certified as such under the standards set forth in Section .2500 of this subchapter) at the time of the adoption of these standards shall also be entitled to represent that he or she is a "Board Certified Specialist in Appellate Practice" and shall thereafter meet the standards for continued certification under Rule .3006 of this section in lieu of the standards for continued certification under Rule .2506 of Section .2500 of this subchapter.

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

Adopted by the Supreme Court: March 10, 2011

.3004 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in appellate practice 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 by the Supreme Court: March 10, 2011

.3005 Standards for Certification as a Specialist in Appellate Practice

Each applicant for certification as a specialist in 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 in appellate practice:

(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 appellate practice.

(1) Substantial involvement shall mean that during the five years immediately preceding the application, the applicant devoted an average of at least 400 hours a year, and not less than 100 hours in any one year, to appellate practice. "Practice" shall mean substantive legal work done primarily for the purpose of providing legal advice or representation including activities described in paragraph (2) below, or a practice equivalent as described in paragraph (3) below.

(2) Substantive legal work in appellate practice includes, but is not limited to, the following: preparation of a record on appeal or joint appendix for filing

in any state or federal appellate court; researching, drafting, or editing of a legal brief, motion, petition, or response for filing in any state or federal appellate court; participation in or preparation for oral argument before any state or federal appellate court; appellate mediation, either as the representative of a party or as a mediator, in any state or federal appellate court; consultation on issues of appellate practice including consultation with trial counsel for the purpose of preserving a record for appeal; service on a committee or commission whose principal focus is the study or revision of the rules of appellate procedure of the North Carolina or federal courts; authoring a treatise, text, law review article, or other scholarly work relating to appellate practice; teaching appellate advocacy at an ABA accredited law school; and coaching in appellate moot court programs.

(3) "Practice equivalent" shall include the following activities:

(A) Service as a trial judge for any North Carolina General Court of Justice, United States Bankruptcy Court, or United States District Court, including service as a magistrate judge, for one year or more may be substituted for one year of experience toward the five-year requirement set forth in Rule .3005(b)(1).

(B) Service as a full-time, compensated law clerk for any North Carolina or federal appellate court for one year or more may be substituted for one year of experience toward the five-year requirement set forth in Rule .3005(b)(1).

(C) Service as an appellate judge for any North Carolina or federal appellate court may be substituted for the equivalent years of experience toward the five-year requirement set forth in Rule .3005(b)(1) as long as the applicant's experience, before the applicant took the bench, included substantial involvement in appellate practice (as defined in paragraph (b)(1)) for two years before the applicant's service as an appellate judge.

(4) An applicant must also demonstrate substantial involvement in appellate practice by providing information regarding the applicant's participation during his or her legal career in the following:

(A) Five (5) oral arguments to any state or federal appellate court; and

(B) Principal authorship of ten (10) briefs submitted to any state or federal appellate court.

(c) Continuing Legal Education - An applicant must earn no fewer than 36 hours of accredited continuing legal education (CLE) credits in appellate practice and related fields during the three years preceding application, with no less than six credits to be earned in any one year. Of the 36 hours of CLE, at least 18 hours shall be in appellate practice, and the balance may be in the following related fields: trial advocacy; civil trial practice and procedure; criminal trial practice and procedure; evidence; legal writing; legal research; and mediation. An applicant may ask the specialty committee to recognize an additional field as related to appellate practice for the purpose of meeting the CLE standard. An applicant who uses authorship of a treatise, text, law review article, or other scholarly work relating to appellate practice or the teaching of appellate advocacy at an ABA-accredited law school to satisfy the substantial involvement requirement in paragraph (b) of this rule may not use the same experience to satisfy the CLE requirements of this paragraph (c).

(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 law and must have significant legal or judicial experience in appellate practice. An applicant consents to confidential inquiry by the board or the specialty committee to 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 colleague at the applicant's place of employment 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 to the board and forwarded by the board to the specialty committee.

(e) Examination - An applicant must pass an examination designed to allow the applicant to demonstrate sufficient knowledge, skills, and proficiency in the field of appellate practice to justify the representation of special competence to the legal profession and the public. The examination shall be given annually and shall be administered and graded uniformly by the specialty committee. The exam shall include a written component which may be take-home and may include an oral argument before a moot court.

(1) Subject Matter – The examination shall cover the applicant's knowledge and application of the following:

(A) The North Carolina Rules of Appellate Procedure;

(B) North Carolina General Statutes relating to appeals;

(C) The Federal Rules of Appellate Procedure;

(D) Federal statutes relating to appeals;

(E) The Local Rules and Internal Operating Procedures of the United States Court of Appeals for the Fourth Circuit;

(F) The Rules of the United States Supreme Court;

(G) Brief writing;

(H) Oral argument; and

(I) Principles of appellate jurisdiction.

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

Adopted by the Supreme Court: March 10, 2011

.3006 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 .3006(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 for continuing certification, he or she has had substantial involvement in the specialty as defined in Rule .3005(b) of this subchapter.

(b) Continuing Legal Education - The specialist must earn no less than 60 hours of accredited CLE credits in appellate practice and related fields during the five years preceding application for continuing certification. No less than six of the credits may be earned in any one year. Of the 60 hours of CLE, at least 20 hours shall be in appellate practice, and the balance may be in the related fields set forth in Rule .3005(c).

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law, have significant legal or judicial experience in appellate practice, and are familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .3005(d) of this subchapter apply to this standard.

(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 a lapse, recertification will require compliance with all requirements of Rule .3005 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, the application shall be treated as if it were for initial certification under Rule .3005 of this subchapter.

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

Adopted by the Supreme Court: March 10, 2011

Amendments Approved by the Supreme Court: March 17, 2019

.3007 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in appellate practice are subject to any general requirement, standard, or procedure, adopted by the board, that applies to all applicants for certification or continued certification.

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

Adopted by the Supreme Court: March 10, 2011

.3008 Advisory Members of the Appellate Practice Specialty Committee

The board may appoint former chief justices of the North Carolina Supreme Court to serve as advisory members of the Appellate Practice Specialty Committee. Notwithstanding any other provision in The Plan of Legal Specialization (Section .1700 of this subchapter) or this Section .3000, the board may waive the requirements of Rule .3005(d) and (e) above if an advisory committee member has served at least one year on the North Carolina Supreme Court and may permit the advisory member to file an application to become a board certified specialist in appellate practice upon compliance with all other required standards for certification in the specialty. Advisory members shall hold office for an initial term of three years and shall thereafter serve at the discretion of the board.

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

Adopted by the Supreme Court: March 10, 2011

Section .3100, Certification Standards for the Trademark Law Specialty

.3101 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates trademark law as a specialty 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 by the Supreme Court: March 8, 2013

.3102 Definition of Specialty

The specialty of trademark law is the practice of law devoted to commercial symbols, and typically includes the following: advising clients regarding creating and selecting trademarks; conducting and/or analyzing trademark searches; prosecuting trademark applications; enforcing and protecting trademark rights; and counseling clients on matters involving trademarks. Practitioners regularly practice before the United States Patent and Trademark Office (USPTO), the Trademark Trial and Appeal Board (TTAB), the Trademark Division of the NC Secretary of State's Office, and the North Carolina and/or federal courts.

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

Adopted by the Supreme Court: March 8, 2013

.3103 Recognition as a Specialist in Trademark Law

If a lawyer qualifies as a specialist in trademark 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 Trademark Law."

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

Adopted by the Supreme Court: March 8, 2013

.3104 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in trademark 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 by the Supreme Court: March 8, 2013

.3105 Standards for Certification as a Specialist in Trademark Law

Each applicant for certification as a specialist in trademark law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet following standards for certification in trademark 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 trademark law.

(1) Substantial involvement shall mean that during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of trademark law, but not less than 400 hours in any one year.

(2) Practice shall mean substantive legal work in trademark law 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 trademark law which may be substituted for up to two years of experience to meet the five-year requirement set forth in Rule .3105(b)(1).

(B) Service as a trademark examiner at the USPTO or a functionally equivalent trademark office for any state or foreign government which may be substituted for up to two years of experience to meet the five-year requirement set forth in Rule .3105(b)(1).

(C) Service as an administrative law judge for the TTAB which may be substituted for up to three years of experience to meet the five-year requirement set forth in Rule .3105(b)(1).

(4) The board may, in its discretion, require an applicant to provide additional information as evidence of substantial involvement in trademark law, including information regarding the applicant's participation, during his or her legal career, in the following: portfolio management, prosecution of trademark applications, search and clearance of trademarks, licensing, due diligence, domain name selection and dispute resolution, TTAB litigation, state court trademark litigation, federal court trademark litigation, trademark dispute resolution, and international trademark law.

(c) Continuing Legal Education - To be certified as a specialist in trademark law, an applicant must have earned no less than 36 hours of accredited continuing legal education credits in trademark law during the three years preceding application. The 36 hours must include at least 20 hours in trademark law and the remaining 16 hours in related courses including: business transactions, copyright, franchise law, internet law, sports and entertainment law, trade secrets, and unfair competition.

(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 law and must have significant legal or judicial experience in trademark law. An applicant consents to confidential inquiry by the board or the specialty committee to 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 colleague at the applicant's place of employment 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 to the board and forwarded by the board 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 trademark law to justify the representation of special competence to the legal profession and the public.

(1) Terms - The examination shall be given annually in written form and shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter – The examination shall cover the applicant's knowledge and application of trademark law and rules of practice, and may include the following statutes and related case law:

(A) The Lanham Act (15 USC §1501 et seq.)

(B) Trademark Regulations (37 CFR Part 2)

(C) Trademark Manual of Examining Procedure (TMEP)

(D) Trademark Trial and Appeal Board Manual of Procedure (TBMP)

(E) The Trademark Counterfeiting Act of 1984 (18 USC §2320 et seq.)

(F) North Carolina Trademark Act (N.C. Gen. Stat. Chap. 80).

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

Adopted by the Supreme Court: March 8, 2013

.3106 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 .3106(d). 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 for continuing certification, he or she has had substantial involvement in the specialty as defined in Rule .3105(b) of this subchapter.

(b) Continuing Legal Education - The specialist must earn no less than 60 hours of accredited CLE credits in trademark law and related fields during the five years preceding application for continuing certification. No less than six of the credits may be earned in any one year. Of the 60 hours of CLE, at least 34 hours shall be in trademark law, and the balance of 26 hours may be in the related fields set forth in Rule .3105(c) of this subchapter.

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law, have significant legal or judicial experience in trademark law, and are familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .3105(d) of this subchapter apply to this standard.

(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 a lapse, recertification will require compliance with all requirements of Rule .3105 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, the application shall be treated as if it were for initial certification under Rule .3105 of this subchapter.

History Note: Statutory authority G.S. 84-23
Adopted by the Supreme Court: March 8, 2013
Amendments Approved by the Supreme Court: March 17, 2019

.3107 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in trademark 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 by the Supreme Court: March 8, 2013

Section .3200 Certification Standards for the Utilities Law Specialty

.3201 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates utilities law as a specialty 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 by the Supreme Court: June 9, 2016

.3202 Definition of Specialty

The specialty of utilities law is the practice of law focusing on the North Carolina Public Utilities Act (Chapter 62 of the North Carolina General Statutes) and practice before the North Carolina Utilities Commission (the Commission) and related state and federal regulatory bodies.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court: June 9, 2016

.3203 Recognition as a Specialist in Utilities Law

If a lawyer qualifies as a specialist in utilities 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 Utilities Law."

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court: June 9, 2016

.3204 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in utilities 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 by the Supreme Court: June 9, 2016

.3205 Standards for Certification as a Specialist in Utilities Law

Each applicant for certification as a specialist in utilities 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 utilities 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 utilities law.

(1) Substantial involvement shall mean that during the five years immediately preceding the application, the applicant devoted an average of at least 500 hours a year to the practice of utilities law but not less than 400 hours in any one year.

(2) Practice shall mean substantive legal work in utilities law done primarily for the purpose of providing legal advice or representation, including the activities described in paragraph (3), or a practice equivalent as described in paragraph (4).

(3) Substantive legal work in utilities law includes, but is not limited to, practice before or representation in matters relative to the Commission, Federal Energy Regulatory Commission (FERC), Federal Communications Commission (FCC), Nuclear Regulatory Commission (NRC), Pipeline and Hazardous Materials Safety Administration (PHMSA), North Carolina Department of Environment and Natural Resources (NCDENR), North American Electric Reliability Corporation, utilities commissions of other states, and related state and federal regulatory bodies as well as participation in committee work of organizations or continuing legal education programs that are focused on subject matter involved in practice before the Commission or related state and federal regulatory bodies.

(4) "Practice equivalent" shall mean:

(A) Each year of service as a commissioner on the Commission during the five years prior to application may be substituted for a year of the experience necessary to meet the five-year requirement set forth in Rule .3205(b)(1).

(B) Each year of service on the legal staff of the Commission or of the Public Staff during the five years prior to application may be substituted for a year of the experience necessary to meet the five-year requirement set forth in Rule .3205(b)(1).

(c) Continuing Legal Education – To be certified as a specialist in utilities law, an applicant must have earned no less than 36 hours of accredited continuing legal education credits in utilities law and related fields during the three years preceding application. The 36 hours must include at least 18 hours in utilities law; the remaining 18 hours may be in related-field CLE. Utilities law CLE includes but is not limited to courses on the subjects identified in Rule .3202 and Rule .3205(b)(3) of this subchapter. A list of the topics that qualify as related-field CLE shall be maintained by the board on its official website.

(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 law and must have significant legal or judicial experience in utilities law. An applicant consents to confidential inquiry by the board or the specialty committee to 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 colleague at the applicant's place of employment 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 to the board and forwarded by the board 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 utilities law to justify the representation of special competence to the legal profession and the public.

(1) Terms - The examination shall be given annually in written form and shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter – The examination shall test the applicant's knowledge and application of utilities law.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court: June 9, 2016

.3206 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 .3206(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 for continuing certification, he or she has had substantial involvement in the specialty as defined in Rule .3205(b) of this subchapter.

(b) Continuing Legal Education - The specialist must earn no less than 60 hours of accredited CLE credits in utilities law and related fields during the five years preceding application for continuing certification. Of the 60 hours of CLE, at least 30 hours shall be in utilities law, and the balance of 30 hours may be in the related fields set forth in Rule .3205(c).

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law, have significant legal or judicial experience in utilities law, and are familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .3205(d) of this subchapter apply to this standard.

(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 a lapse, recertification will require compliance with all requirements of Rule .3205 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, the application shall be treated as if it were for initial certification under Rule .3205 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court: June 9, 2016
Amendments Approved by the Supreme Court: March 17, 2019

.3207 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in utilities 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 by the Supreme Court: June 9, 2016

.3300 Certification Standards for the Privacy and Information Security Law Specialty

.3301 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates privacy and information security law as a specialty 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 by the Supreme Court September 28, 2017

.3302 Definition of Specialty

The specialty of privacy and information security law encompasses the laws that regulate the collection, storage, sharing, monetization, security, disposal, and permissible uses of personal or confidential information about individuals, businesses, and organizations, and the security of information regarding individuals and the information systems of businesses and organizations. The specialty also includes legal requirements and risks related to cyber incidents, such as external intrusions into computer systems, and cyber threats, such as governmental information sharing programs.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court September 28, 2017

.3303 Recognition as a Specialist in Privacy and Information Security Law

If a lawyer qualifies as a specialist in privacy and information security 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 Privacy and Information Security Law."

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court September 28, 2017

.3304 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in privacy and information security 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 by the Supreme Court September 28, 2017

.3305 Standards for Certification as a Specialist in Privacy and Information Security Law

Each applicant for certification as a specialist in privacy and information security law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet following standards for certification in privacy and information security 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 privacy and information security law.

(1) Substantial involvement shall mean that during the five years immediately preceding the application, the applicant devoted an average of at least 400 hours a year to the practice of privacy and information security law but not less than 300 hours in any one year.

(2) Practice shall mean substantive legal work in privacy and information security law done primarily for the purpose of providing legal advice or representation, including the activities described in paragraph (3), or a practice equivalent as described in paragraph (4).

(3) Substantive legal work in privacy and information security law includes, but is not limited to, representation on compliance, transactions and litigation relative to the laws that regulate the collection, storage, sharing, monetization, security, disposal, and permissible uses of personal or confidential information about individuals, businesses, and organizations. Practice in this specialty requires the application of information technology principles including current data security concepts and best practices. Legal work in the specialty includes, but is not limited to, knowledge and application of the following: data breach response laws, data security laws, and data disposal laws; unauthorized access to information systems, such as password theft, hacking, and wiretapping, including the Stored Communications Act, the Wiretap Act, and other anti-interception laws; cyber security mandates; website privacy policies and practices, including the Children's Online Privacy Protection Act (COPPA); electronic signatures and records, including the Electronic Signatures in Global and National Commerce Act (E-SIGN Act) and the Uniform Electronic Transactions Act (UETA); e-commerce laws and contractual legal frameworks related to privacy and data security such as Payment Card Industry Data Security Standards (PCI-DSS) and the NACHA rules; direct marketing, including the CAN-SPAM Act, Do-Not-Call, and Do-Not-Fax laws; international privacy compliance, including the European Union data protection requirements; social media policies and regulatory enforcement of privacy-related concerns pertaining to the same; financial privacy, including the Gramm-Leach-Bliley Act, the Financial Privacy Act, the Bank Secrecy Act, and other federal and state financial laws, and the regulations of the federal financial regulators including the SEC, CFPB, and FinCEN; unauthorized transaction and fraudulent funds transfer laws, including the Electronic Funds Transfer Act and Regulation E, as well as the Uniform Commercial Code; credit reporting laws and other "background check" laws, including the Fair Credit Reporting Act; identity theft laws, including the North Carolina Identity Theft Protection Act and the Federal Trade Commission's "Red Flags" regulations; health information privacy, including the Health Information Portability and Accountability Act (HIPAA); educational privacy, including the Family Educational Rights and Privacy Act (FERPA) and state laws governing student privacy and education technology; employment privacy law; and privacy torts.

(4) "Practice equivalent" shall mean:

(A) Full-time employment as a compliance officer for a business or organization for one year or more during the five years prior to application may be substituted for an equivalent number of the years of experience necessary to meet the five-year requirement set forth in Rule .3305(b)(1) if at least 25% of the applicant's work was devoted to privacy and information security implementation.

(B) Service as a law professor concentrating in the teaching of privacy and information security law for one year or more during the five years prior to application may be substituted for an equivalent number of years of experience necessary to meet the five-year requirement set forth in Rule .3305(b)(1);

(c) Continuing Legal Education - To be certified as a specialist in privacy and information security law, an applicant must have earned no less than 36 hours of accredited continuing legal education credits in privacy and information security law and related fields during the three years preceding application. The 36 hours must include at least 18 hours in privacy and information security law; the remaining 18 hours may be in related-field CLE or technical (non-legal) continuing education (CE). At least six credits each year must be earned in privacy and information security law. Privacy and information security law CLE includes but is not limited to courses on the subjects identified in Rule .3302 and Rule .3305(b)(3) of this subchapter. A list of the topics that qualify as related-field CLE and technical CE shall be maintained by the board on its official website.

(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 to serve as references for the applicant. 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 law in North Carolina or another jurisdiction in the United States; however, no more than five references may be licensed in another jurisdiction. References with legal or judicial experience in privacy and information security law are preferred. An applicant consents to confidential inquiry by the board or the specialty committee to 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 colleague at the applicant's place of employment at the time of the application. A lawyer who is in-house counsel for an entity that is the applicant's client may serve as a reference.

(2) Peer review shall be given on standardized forms mailed by the board to each reference. These forms shall be returned to the board and forwarded by the board 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 privacy and information security law to justify the representation of special competence to the legal profession and the public.

(1) Terms - The examination shall be given at least once a year in written form and shall be administered and graded uniformly by the specialty committee or by an organization determined by the board to be qualified to test applicants in privacy and information security law.

(2) Subject Matter - The examination shall test the applicant's knowledge and application of privacy and information security law.

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

Adopted by the Supreme Court September 28, 2017

.3306 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 .3306(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 for continuing certification, he or she has had substantial involvement in the specialty as defined in Rule .3305(b) of this subchapter.

(b) Continuing Legal Education - The specialist must earn no less than 60 hours of accredited CLE credits in privacy and information security law and related fields during the five years preceding application for continuing certification. Of the 60 hours of CLE, at least 30 hours shall be in privacy and information security law, and the balance of 30 hours may be in related field CLE or technical (non-legal) CE. At least six credits each year must be earned in privacy and information security law. A list of the topics that qualify as related-field CLE and technical CE shall be maintained by the board on its official website.

(c) Peer Review - The applicant must provide, as references, the names of at least six lawyers or judges, all of whom are licensed and currently in good standing to practice law in North Carolina or another jurisdiction in the United States; however, no more than three reference may be licensed in another jurisdiction. References must be familiar with the competence and qualification of the applicant as a specialist. For an application to be considered, completed peer reference forms must be received from at least three of the references. All other requirements relative to peer review set forth in Rule .3305(d) of this subchapter apply to this standard.

(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 a lapse, recertification will require compliance with all requirements of Rule .3305 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification was suspended or revoked during a period of certification, the application shall be treated as if it were for initial certification under Rule .3305 of this subchapter.

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

Adopted by the Supreme Court September 28, 2017

Amendments Approved by the Supreme Court: March 17, 2019

.3307 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in privacy and information security 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 by the Supreme Court September 28, 2017

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 [now Chapter 57D], being the "North Carolina Limited Liability Company Act," particularly Section 57C-2-01(c) [now Section 57D-2-02], 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) [now 57D] 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
Amendments Approved by the Supreme Court: 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* www.ncbar.gov/resources/forms.asp) 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* www.ncbar.gov/resources/forms.asp), 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* www.ncbar.gov/resources/forms.asp) 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* www.ncbar.gov/resources/forms.asp) 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* www.ncbar.gov/resources/forms.asp) 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* www.ncbar.gov/resources/forms.asp), 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* www.ncbar.gov/resources/forms.asp) 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* www.ncbar.gov/resources/forms.asp) 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* www.ncbar.gov/resources/forms.asp) 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 certificate of registration for the delinquent professional corporation or professional limited liability company shall be suspended and the secretary of state will be notified 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.

(7) Inactive Status Pending Dissolution - If a professional corporation or professional limited liability company notifies the State Bar in writing or, in response to a notice to show cause issued pursuant to Rule .0103(e)(5) of this subchapter, a delinquent professional corporation or professional limited liability company shows that the organization is no longer practicing law and is winding down the operations and financial activities of the organization, no renewal fee or late fee shall be owed and the organization shall be moved to inactive status for a period of not more than one year. If, at the end of that period, a copy of the articles of dissolution has not been filed with the State Bar, the secretary of the State Bar shall send a notice to show cause letter and shall pursue suspension of the certificate of registration as set forth in Rule. .0103(e)(5) of this subchapter.

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

Readopted Effective December 8, 1994

Amendments Approved by the Supreme Court: March 6, 1997; October 1, 2003; March 16, 2017

.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) 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

Amendments Approved by the Supreme Court: 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

Section .0200 Registration of Interstate and International Law Firms

.0201 Registration Requirement

No law firm or professional organization that (1) maintains offices in North Carolina and one or more other jurisdictions, or (2) files for a certificate of authority to transact business in North Carolina from the North Carolina Secretary of State, 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

Amendments Approved by the Supreme Court: March 5, 1998; March 6, 2014

.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
Amendments Approved by the Supreme Court: 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

.0206 Non-renewal of Registration

If a law firm or professional organization registered under these rules no longer meets the criteria for registration, it shall notify the State Bar in writing. If such written notice is not received by the State Bar on or before December 31 of the year in which registration is no longer required, the registration fee for the next calendar year, as set forth in Rule .0203 of this subchapter, shall be owed.

History note: Statutory authority G.S. 84-23
Adopted by the Supreme Court: October 1, 2003

Section .0300 Rules Concerning Prepaid Legal Services Plans

.0301 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 these rules shall not be construed to indicate approval or disapproval of the plan.

History Note: Statutory Authority G.S. 84-23 and 84-23.1
Adopted by the Supreme Court: February 5, 2002
Amendments Approved by the Supreme Court: August 23, 2007

.0302 Registration Requirement

A prepaid legal services plan ("plan") must be registered with the North Carolina State Bar before its implementation or operation in North Carolina. 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. No prepaid legal services plan may operate in North Carolina unless at least one licensed North Carolina attorney has agreed to provide the legal services offered under the plan at all times during the operation of the plan. No prepaid legal services plan may operate in any manner that constitutes the unauthorized practice of law. No plan may operate until its registration has been accepted by the North Carolina State Bar in accordance with these rules.

History Note: Statutory Authority G.S. 84-23 and 84-23.1
Adopted by the Supreme Court: February 5, 2002
Amendments Approved by the Supreme Court: August 23, 2007

.0303 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 specified legal services that are paid for in advance of any immediate need for the specified legal services ("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 North Carolina legal services offered by a plan must be provided by a North Carolina licensed lawyer who is not an employee, director, or owner of the plan. A prepaid legal services 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 and 84-23.1
Adopted by the Supreme Court: February 5, 2002
Amendments Approved by the Supreme Court: August 23, 2007

.0304 Registration Procedures

To register with the North Carolina State Bar, a prepaid legal services plan must comply with all of the following procedures for initial registration:

(a) A prepaid legal services plan seeking to operate in North Carolina must file an initial registration statement form with the secretary of the North Carolina State Bar, using a form promulgated by the State Bar, requesting registration.

(b) The owner or sponsor of the prepaid legal services plan must fully disclose in its initial registration statement form filed with the secretary at least the following information: the name of the plan, the name of the owner or sponsor of the plan, a principal address for the plan in North Carolina, a designated plan representative to whom communications with the State Bar will be directed, all persons or entities with ownership interest in the plan and the extent of their interests, all terms and conditions of the plan, all services provided under the plan and a schedule of benefits and fees or charges for the plan, a copy of all plan documents, a copy of all plan marketing and advertising materials, a copy of all plan contracts with its customers, a copy of all plan contracts with plan attorneys, and a list of all North Carolina attorneys who have agreed to participate in the plan. Additionally, the owner or sponsor will provide a detailed statement explaining how the plan meets the definition of a prepaid legal services plan in North Carolina. The owner or sponsor of the prepaid legal services plan will certify or acknowledge the veracity of the information contained in the registration statement, an understanding of the rules applicable to prepaid legal services plans, and an understanding of the law on unauthorized practice.

(c) The Authorized Practice Committee ("committee"), as a duly authorized standing committee of the North Carolina State Bar Council, shall oversee the registration of prepaid legal services plans in accordance with these rules. The committee shall also establish any deadlines by when registrations may be submitted for review and any additional, necessary rules and procedures regarding the initial and annual registrations, and the revocation of registrations, of prepaid legal services plans.

History Note: Statutory Authority G.S. 84-23 and 84-23.1
Adopted by the Supreme Court: February 5, 2002
Amendments Approved by the Supreme Court: August 23, 2007; October 7, 2010

.0305 Registration

Counsel will review the plan's initial registration statement to determine whether the registration statement is complete and the plan, as described in the registration statement, meets the definition of a prepaid legal services plan and otherwise satisfies the requirements for registration provided by Rule .0304. If, in the opinion of counsel, the plan clearly meets the definition and the registration statement otherwise satisfies the requirements for registration, the secretary will issue a certificate of registration to the plan's sponsor. If, in the opinion of counsel, the plan does not meet the definition or otherwise fails to satisfy the requirements for registration, counsel will inform the plan's sponsor that the registration is not accepted and explain any deficiencies. Upon notice that the plan's registration has not been accepted, the plan sponsor may resubmit an amended plan registration form or request a hearing before the committee pursuant to Rule .0313 below. Counsel will provide a report to the committee each quarter identifying the plans submitted and the registration decisions made by counsel.

History Note: Statutory Authority G.S. 84-23 and 84-23.1
Adopted by the Supreme Court: February 5, 2002
Amendments Approved by the Supreme Court: August 23, 2007; October 7, 2010

.0306 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. Plan amendments must be submitted in the same manner as the initial registration and may not be implemented until the amended plan is registered in accordance with Rule .0305.

History Note: Statutory Authority G.S. 84-23 and 84-23.1
Adopted by the Supreme Court: February 5, 2002
Amendments Approved by the Supreme Court: August 23, 2007

.0307 Annual Registration

After its initial registration, a prepaid legal services plan may continue to operate so long as it is operated as registered and it renews its registration annually on or before January 31 by filing a registration renewal form with the secretary and paying the annual registration fee.

History Note: Statutory Authority G.S. 84-23 and 84-23.1
Adopted by the Supreme Court: February 5, 2002
Amendments Approved by the Supreme Court: August 23, 2007

.0308 Registration Fee

The initial and annual registration fees for each prepaid legal services plan shall be $100. The fee is nonrefundable.

History Note: Statutory Authority G.S. 84-23 and 84-23.1
Adopted by the Supreme Court: February 5, 2002
Amendments Approved by the Supreme Court: August 23, 2007; March 8, 2012

.0309 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 and 84-23.1
Adopted by the Supreme Court: February 5, 2002
Amendments Approved by the Supreme Court: August 23, 2007

.0310 Advertising of State Bar Approval Prohibited

Any plan that advertises or otherwise represents that it is registered with the North Carolina State Bar shall include a clear and conspicuous statement within the advertisement or communication that registration with the North Carolina State Bar does not constitute approval of the plan by the State Bar.

History Note: Statutory Authority G.S. 84-23 and 84-23.1
Adopted by the Supreme Court: February 5, 2002
Amendments Approved by the Supreme Court: August 23, 2007

.0311 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 of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23 and 84-23.1
Adopted by the Supreme Court: February 5, 2002
Amendments Approved by the Supreme Court: August 23, 2007

.0312 Revocation of Registration

Whenever it appears that a plan no longer meets the definition of a prepaid legal services plan; is marketed or operates in a manner that is not consistent with the representations made in the initial or amended registration statement and accompanying documents upon which the State Bar relied in registering the plan; is marketed or operates in a manner that would constitute the unauthorized practice of law; is marketed or operates in a manner that violates state or federal laws or regulations, including the rules and regulations of the North Carolina State Bar; or has failed to pay the annual registration fee, the committee may instruct the secretary to serve upon the plan's sponsor a notice to show cause why the plan's registration should not be revoked. The notice shall specify the plan's apparent deficiency and allow the plan's sponsor to file a written response within 30 days of service by sending the same to the secretary. If the sponsor fails to file a timely written response, the secretary shall issue an order revoking the plan's registration and shall serve the order upon the plan's sponsor. If a timely written response is filed, the secretary shall schedule a hearing, in accordance with Rule .0313 below, before the Authorized Practice Committee at its next regularly scheduled meeting and shall so notify the plan sponsor. All notices to show cause and orders required to be served herein may be served by certified mail to the last address provided for the plan sponsor on its most current registration statement or in accordance with 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. The State Bar will not renew the annual registration of any plan that has received a notice to show cause under this section, but the plan may continue to operate under the prior registration until resolution of the show cause notice by the council.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Readopted Effective December 8, 1994.
Amendments Approved by the Supreme Court: August 23, 2007

.0313 Hearing before the Authorized Practice Committee

At any hearing concerning the registration of a prepaid legal services plan, the committee chair will preside to ensure that the hearing is conducted in accordance with these rules. The committee chair shall cause a record of the proceedings to be made. Strict compliance with the Rules of Evidence is not required, but may be used to guide the committee in the conduct of an orderly hearing. The plan sponsor may appear and be heard, be represented by counsel, offer witnesses and documents in support of its position and cross-examine any adverse witnesses. The counsel may appear on behalf of the State Bar and be heard, and may offer witnesses and documents. The burden of proof shall be upon the sponsor to establish the plan meets the definition of a prepaid legal services plan, that all registration fees have been paid, and that the plan has operated in a manner consistent with all material representations made in its then current registration statement, the law, and these rules. If the sponsor carries its burden of proof, the plan's registration shall be accepted or continued. If the sponsor fails to carry its burden of proof, the committee shall recommend to the council that the plan's registration be denied or revoked.

History Note: Statutory Authority G.S. 84-23 and 84-23.1
Adopted by the Supreme Court: February 5, 2002
Amendments Approved by the Supreme Court: August 23, 2007

.0314 Action by the Council

Upon the recommendation of the committee, the council may enter an order denying or revoking the registration of the plan. The order shall be effective when entered by the council. A copy of the order shall be served upon the plan's sponsor as prescribed in Rule .0312 above.

History Note: Statutory Authority G.S. 84-23 and 84-23.1
Adopted by the Supreme Court: February 5, 2002
Amendments Approved by the Supreme Court: August 23, 2007

SUBCHAPTER G

Certification of Paralegals

Section .0100 The Plan for Certification of Paralegals

.0101 Purpose

The purpose of this plan for certification of paralegals (plan) is to assist in the delivery of legal services to the public by identifying individuals who are qualified by education and training and have demonstrated knowledge, skill, and proficiency to perform substantive legal work under the direction and supervision of a licensed lawyer, and including any individual who may be otherwise authorized by applicable state or federal law to provide legal services directly to the public; and to improve the competency of those individuals by establishing mandatory continuing legal education and other requirements of certification.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court: October 6, 2004

.0102 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 Paralegal Certification (board), which board shall have jurisdiction over the certification of paralegals in North Carolina.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court: October 6, 2004

.0103 Operational Responsibility

The responsibility for operating the paralegal certification 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
Adopted by the Supreme Court: October 6, 2004

.0104 Size and Composition of Board

The board shall have nine members, five of whom must be lawyers in good standing and authorized to practice law in the state of North Carolina. One of the members who is a lawyer shall be a program director at a qualified paralegal studies program. Four members of the board shall be paralegals certified under the plan, provided, however, that the paralegals appointed to the inaugural board shall be exempt from this requirement during their initial and successive terms but each such member shall be eligible, during the shorter of such initial term or the alternative qualification period, for certification by the board upon the board's determination that the member meets the requirements for certification in Rule .0119(b).

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court: October 6, 2004
Amendments Approved by the Supreme Court: March 2, 2006

.0105 Appointment of Members; When; Removal

(a) Appointment. The council shall appoint the members of the board, provided, however, after the appointment of the initial members of the board, each paralegal member appointed for an initial term shall be selected by the council from two nominees determined by a vote by mail or online of all active certified paralegals in an election conducted by the board.

(b) Procedure for Nomination of Candidates for Paralegal Members.

(1) Composition of Nominating Committee. At least 60 days prior to a meeting of the council at which one or more paralegal members of the board are subject to appointment for a full three year term, the board shall appoint a nominating committee comprised of certified paralegals as follows:

(i) A representative selected by the North Carolina Paralegal Association;

(ii) A representative selected by the North Carolina Bar Association Paralegal Division;

(iii) A representative selected by the North Carolina Advocates for Justice Legal Assistants Division;

(iv) Three representatives from three local or regional paralegal organizations to be selected by the board; and

(v) An independent paralegal (not employed by a law firm, government entity, or legal department) to be selected by the board.

(2) Selection of Candidates. The nominating committee shall meet within 30 days of its appointment to select five (5) certified paralegals as candidates for each paralegal member vacancy on the board for inclusion on the ballot to be mailed to all active certified paralegals.

(3) Vote of Certified Paralegals. At least 30 days prior to the meeting of the council at which a paralegal member appointment to the board will be made, a ballot shall be mailed or a notice of online voting shall be emailed or mailed to all active certified paralegals at each certified paralegal's physical or email address of record on file with the North Carolina State Bar. The ballot or notice shall be accompanied by written instructions, and shall state how many paralegal member positions on the board are subject to appointment, the names of the candidates selected by the nominating committee

for each such position, and when and where the ballot should be returned. If balloting will be online, the notice shall explain how to access the ballot on the State Bar's paralegal website and the method for voting online. Write-in candidates shall be permitted and the instructions shall so state. Each ballot sent by mail shall be sequentially numbered with a red identifying numeral in the upper right hand corner of the ballot. Online balloting shall be by secure log-in to the State Bar's paralegal website using the certified paralegal's identification number and personal password. Any certified paralegal who does not have an email address on file with the State Bar shall be mailed a ballot. The board shall maintain appropriate records respecting how many ballots or notices are sent to prospective voters in each election as well as how many ballots are returned. Only original ballots will be accepted by mail. Ballots received after the deadline stated on the ballot or the email notice will not be counted. The names of the two candidates receiving the most votes for each open paralegal member position shall be the nominees submitted to the council.

(c) Time of Appointment. 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 at the quarterly meeting of the council occurring on the anniversary of the appointment of the initial board.

(d) Vacancies. Vacancies occurring by reason of death, resignation, or removal shall be filled by appointment of the council, subject to the requirements of Rule .0105(a)1, 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.

(e) Removal. 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

Adopted by the Supreme Court: October 6, 2004

Amendments Approved by the Supreme Court: March 8, 2007; March 11, 2010; August 25, 2011; March 6, 2014

.0106 Term of Office

Subject to Rule .0107 of this subchapter, each member of 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 council appoints the member.

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

Adopted by the Supreme Court: October 6, 2004

.0107 Staggered Terms

The members of the board shall be appointed to staggered terms such that three members are appointed in each year. Of the initial board, three members (one lawyer and two paralegals) shall be appointed to terms of one year; three members (two lawyers and one paralegal) shall be appointed to terms of two years; and three members (two lawyers and one paralegal) shall be appointed to terms of three years. Thereafter, three members (lawyers or paralegals as necessary to fill expired terms) shall be appointed in each year for full three year terms.

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

Adopted by the Supreme Court: October 6, 2004

.0108 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. Each certified paralegal member shall be eligible for reappointment by the council at the end of his or her term without appointment of a nominating committee or vote of all active paralegals as would be otherwise required by Rule .0105 of this subchapter. 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

Adopted by the Supreme Court: October 6, 2004

Amendments Approved by the Supreme Court: March 6, 2014

.0109 Appointment of Chairperson

The council shall appoint the chairperson of the board from among the lawyer members of the board. The term of the 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

Adopted by the Supreme Court: October 6, 2004

.0110 Appointment of Vice-Chairperson

The council shall appoint the vice-chairperson of the board from among the members of the board. The term of the 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

Adopted by the Supreme Court: October 6, 2004

.0111 Source of Funds

Funding for the program carried out by the board shall come from such application fees, examination 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

Adopted by the Supreme Court: October 6, 2004

.0112 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 there from 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

Adopted by the Supreme Court: October 6, 2004

.0113 Meetings

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. Notice of meeting shall be given at least one day prior to the meeting by mail, electronic mail, telegram, facsimile transmission, or telephone. A quorum of the board for conducting its official business shall be five or more of the members serving at the time of the meeting.

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

Adopted by the Supreme Court: October 6, 2004

.0114 Annual Report

The board shall prepare a report of its activities for the preceding year and shall present the same at the annual meeting of the council.

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

Adopted by the Supreme Court: October 6, 2004

.0115 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 certification of paralegals and shall have the power and duty

(1) to administer the plan of certification for paralegals;

(2) to appoint, supervise, act on the recommendations of, and consult with committees as appointed by the board or the chairperson;

(3) to certify paralegals or deny, suspend or revoke the certification of paralegals;

(4) to establish and publish procedures, rules, regulations, and bylaws to implement this plan;

(5) to propose and request the council to make amendments to this plan

whenever appropriate;

(6) to cooperate with other boards or agencies in enforcing standards of professional conduct;

(7) to evaluate and approve continuing legal education courses for the purpose of meeting the continuing legal education requirements established by the board for the certification of paralegals;

(8) to cooperate with other organizations, boards and agencies engaged in the recognition, education or regulation of paralegals; and

(9) to set fees, with the approval of the council, and to, in appropriate circumstances, waive such fees.

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

Adopted by the Supreme Court: October 6, 2004

Amendments Approved by the Supreme Court: March 2, 2006

.0116 Retained Jurisdiction of the Council

The council retains jurisdiction with respect to the following matters:

(1) amending this plan;

(2) hearing appeals taken from actions of the board;

(3) establishing or approving fees to be charged in connection with the plan;

(4) regulating the conduct of lawyers in the supervision of paralegals; and

(5) determining whether to pursue injunctive relief as authorized by G. S. 84-37 against persons acting in violation of this plan.

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

Adopted by the Supreme Court: October 6, 2004

.0117 Privileges Conferred and Limitations Imposed

The board in the implementation of this plan shall not alter the following privileges and responsibilities of lawyers and their non-lawyer assistants.

(1) No rule shall be adopted which shall in any way limit the right of a lawyer to delegate tasks to a non-lawyer assistant or to employ any person to assist him or her in the practice of law.

(2) No person shall be required to be certified as a paralegal to be employed by a lawyer to assist the lawyer in the practice of law.

(3) All requirements for and all benefits to be derived from certification as a paralegal are individual and may not be fulfilled by nor attributed to the law firm or other organization or entity employing the paralegal.

(4) Any person certified as a paralegal under this plan shall be entitled to represent that he or she is a "North Carolina Certified Paralegal (NCCP)", a "North Carolina State Bar Certified Paralegal (NCSB/CP)" or a "Paralegal Certified by the North Carolina State Bar Board of Paralegal Certification."

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

Adopted by the Supreme Court: October 6, 2004

.0118 Certification Committee

(a) The board shall establish a separate certification committee. The certification committee shall be composed of seven members appointed by the board. At least two members of the committee shall be lawyers, licensed and currently in good standing to practice law in this state, and two members of the committee shall be certified paralegals. The remaining members of the committee shall be either lawyers, licensed and currently in good standing to practice law in this state, or certified paralegals. The paralegals appointed to the inaugural committee shall be exempt from the certification requirement during their initial term but each such member shall be eligible, during the shorter of such initial term or the alternative qualification period, for certification by the board upon the board's determination that the committee member meets the requirements for certification in Rule .0119(b).

(b) The chair of the Board of Paralegal Certification shall appoint one member of the committee to serve for a one-year term as chair of the committee and one member of the committee to serve for a one-year term as vice chair of the committee. The chair and vice chair may be reappointed to multiple terms in these positions.

(c) 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 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 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 the committee to a third three-year term if the board determines that the reappointment is in the best interest of the program. Meetings of the certification committee shall be held at regular intervals at such times, places and upon such notices as the committee may from time to time prescribe or upon direction of the board.

(d) The committee shall advise and assist the board in carrying out the board's objectives and in the implementation and regulation of this plan by advising the board as to standards for certification of individuals as paralegals. The committee shall be charged with actively administering the plan as follows:

(1) upon request of the board, make recommendations to the board for certification, continued certification, denial, suspension, or revocation of certification of paralegals and for procedures with respect thereto;

(2) draft and regularly revise the certification examination; and

(3) perform such other duties and make such other recommendations as may be delegated to or requested by the board.

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

Adopted by the Supreme Court: October 6, 2004

Amendments Approved by the Supreme Court: March 2, 2006; March 6, 2014; September 20, 2018

.0119 Standards for Certification of Paralegals

(a) To qualify for certification as a paralegal, an applicant must pay any required fee, and comply with the following standards:

(1) Education or Work Experience. The applicant must have earned one of the following requirements:

(A) an associate's, bachelor's, or master's degree from a qualified paralegal studies program;

(B) a certificate from a qualified paralegal studies program and an associate's or bachelor's degree in any discipline from any institution of post-secondary education that is accredited by an accrediting body recognized by the United States Department of Education (an accredited US institution) or an equivalent degree from a foreign educational institution if the degree is determined to be equivalent to a degree from an accredited US institution by an organization that is a member of the National Association of Credential Evaluation Services (NACES) or the Association of International Credentials Evaluators (AICE);

(C) a juris doctorate degree from a law school accredited by the American Bar Association; or

(D) a high school diploma or equivalent plus five years of experience (comprising 10,000 work hours) as a legal assistant/paralegal or paralegal educator and, within the twelve months prior to the application, completed one hour of CLE on the topic of professional responsibility. Demonstration of work experience may be established by sworn affidavit(s) from the lawyer(s) or other supervisory personnel who has knowledge of the applicant's work as a legal assistant/paralegal during the entirety of the claimed work experience.

(2) National Certification. If an applicant has obtained and thereafter maintains in active status at all times prior to application (i) the designation Certified Legal Assistant (CLA)/Certified Paralegal (CP) from the National Association of Legal Assistants; (ii) the designation PACE-Registered Paralegal (RP)/Certified Registered Paralegal (CRP) from the National Federation of Paralegal Associations; or (iii) another national paralegal credential approved by the board, the applicant is not required to satisfy the educational or work experience standard in paragraph (a)(1).

(3) Examination. The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability. The board shall assure that the contents and grading of the examinations are designed to produce a uniform minimum level of competence among the certified paralegals.

(b) Notwithstanding an applicant's satisfaction of the standards set forth in Rule .0119(a), no individual may be certified as a paralegal if:

(1) the individual's certification or license as a paralegal in any state is under suspension or revocation;

(2) the individual's license to practice law in any state is under suspension or revocation;

(3) the individual

(A) was convicted of a criminal act that reflects adversely on the individual's honesty, trustworthiness, or fitness as a paralegal;

(B) engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(C) engaged in the unauthorized practice of law; or

(D) has had a nonlegal state or federal occupational or professional license suspended or revoked for misconduct.

However, the board may certify an applicant whose application discloses conduct described in Rule .0119(c)(3) if, after consideration of mitigating factors, including remorse, reformation of character, and the passage of time, the board determines that the individual is honest, trustworthy, and fit to be a certified paralegal; or

(4) the individual is not a legal resident of the United States.

(c) All matters concerning the qualification of an applicant for certification, including, but not limited to, applications, examinations and examination 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.

(d) Qualified Paralegal Studies Program. A qualified paralegal studies program is a program of paralegal or legal assistant studies that is an institutional member of the Southern Association of Colleges and Schools or other regional or national accrediting agency recognized by the United States Department of Education, and is either

(1) approved by the American Bar Association;

(2) an institutional member of the American Association for Paralegal Education; or

(3) offers at least the equivalent of 18 semester credits of coursework in paralegal studies as prescribed by the American Bar Association Guidelines for the Approval of Paralegal Education including the equivalent of one semester credit in legal ethics.

(e) Designation as a Qualified Paralegal Studies Program. The board shall determine whether a paralegal studies program is a qualified paralegal studies program upon submission by the program of an application to the board provided, however, a paralegal studies program is not required to submit an application for qualification as long as the program satisfies the requirements of Rule .0119(d)(1) or (2).

(1) A program designated by the board as a qualified paralegal studies program shall renew its application for designation every five years.

(2) An applicant for certification who lists on a certification application a paralegal studies program that does not satisfy the requirements of Rule .0119(d)(1) or (2) or that has not been designated by the board as a qualified paralegal studies program shall be responsible for obtaining a completed application for designation from the program or shall submit the information required on the application for determination that the program is a qualified paralegal studies program.

(3) Designation of a paralegal studies program as a qualified paralegal studies program under this section does not constitute an approval or an endorsement of the program by the board or the North Carolina State Bar.

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

Adopted by the Supreme Court October 6, 2004

Amendments Approved by the Supreme Court: March 2, 2006; March 8, 2007; February 5, 2009; March 11, 2010; March 6, 2014; March 5, 2015; June 9, 2016; April 5, 2018; February 26, 2020

.0120 Standards for Continued Certification of Paralegals

(a) The period of certification as a paralegal shall be one (1) year. During such period the board may require evidence from the paralegal of his or her continued qualification for certification as a paralegal, and the paralegal must consent to inquiry by the board regarding the paralegal's continued competence and qualification to be certified. Application for and approval of continued certification shall be required annually prior to the end of each certification period. To qualify for continued certification as a paralegal, an applicant must demonstrate participation in not less than 6 hours of credit in board approved continuing legal education, or its equivalent, during the year within which the application for continued certification is made.

(b) Upon written request of the paralegal, the board may for good cause shown waive strict compliance by such paralegal with the criteria relating to continuing legal education, as those requirements are set forth in Rule .0120(a).

(c) A late fee of $25.00 will be charged to any certified paralegal who fails to file the renewal application within forty-five (45) days of the due date; provided, however, a renewal application will not be accepted more than ninety (90) days after the due date. Failure to renew shall result in lapse of certification.

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

Adopted by the Supreme Court: October 6, 2004

Amendments Approved by the Supreme Court: October 8, 2009

.0121 Lapse, Suspension or Revocation of Certification

(a) The board may suspend or revoke its certification of a paralegal, after hearing before the board on appropriate notice, upon a finding that

(1) the certification was made contrary to the rules and regulations of the board;

(2) the individual certified as a paralegal made a false representation, omission or misstatement of material fact to the board;

(3) the individual certified as a paralegal failed to abide by all rules and regulations promulgated by the board;

(4) the individual certified as a paralegal failed to pay the fees required;

(5) the individual certified as a paralegal no longer meets the standards established by the board for the certification of paralegals;

(6) the individual is not eligible for certification on account of one or more of the grounds set forth in Rule .0119(c); or

(7) the individual violated the confidentiality agreement relative to the questions on the certification examination.

(b) An individual certified as a paralegal has a duty to inform the board promptly of any fact or circumstance described in Rule .0121(a).

(c) If an individual's certification lapses, or if the board revokes a certification, the individual cannot again be certified as a paralegal unless he or she so qualifies upon application made as if for initial certification and upon such other conditions as the board may prescribe. If the board suspends certification of an individual as a paralegal, such certification cannot be reinstated except upon the individual's application and compliance with such conditions and requirements as the board may prescribe.

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

Adopted by the Supreme Court: October 6, 2004

Amendments Approved by the Supreme Court: March 6, 2008

.0122 Right to Review and Appeal to Council

(a) Lapsed Certification. An individual whose certification has lapsed pursuant to Rule .0120(c) of this subchapter for failure to complete all of the requirements for renewal within the prescribed time limit shall have the right to request reinstatement for good cause shown. A request for reinstatement shall be in writing, must state the personal circumstances prohibiting or substantially impeding satisfaction of the requirements for renewal within the prescribed time limit, and must be made within 90 days of the date notice of lapse is mailed to the individual. The request for reinstatement shall be reviewed on the written record and ruled upon by the board. There shall be no other right to review by the board or appeal to the council under this rule.

(b) An individual who is denied certification or continued certification as a paralegal or whose certification is suspended or revoked shall have the right to a review before the board pursuant to the procedures set forth below and, thereafter, the right to appeal the board's ruling thereon to the council under such rules and regulations as the council may prescribe.

(1) Notification of the Decision of the Board. Following the meeting at which the board denies certification for failure to meet the standards for certification, including failing the examination, denies continued certification, or suspends or revokes certification, the executive director shall promptly notify the individual in writing of the decision of the board. The notification shall specify the reason for the decision of the board and shall inform the individual of his or her right to request a review before the board.

(2) Request for Review by the Board. Except as provided in paragraph (c) of this rule, within 30 days of the mailing of the notice from the executive director described in paragraph (b) of this rule, the individual may request

review by the board. The request shall be in writing and state the reasons for which the individual believes the prior decision of the board should be reconsidered and withdrawn. The request shall state whether the board's review shall be on the written record or at a hearing.

(3) Review by the Board. A three-member panel of the board shall be appointed by the chair of the board to reconsider the board's decision and take action by a majority of the panel. At least one member of the panel shall be a lawyer member of the board and at least one member of the panel shall be a paralegal member of the board. The decision of the panel shall constitute the final decision of the board.

(A) Review on the Record. If requested, the panel shall review the entire written record including the individual's application, all supporting documentation, and any written materials submitted by the individual within 30 days of mailing the request for review. The panel shall make its decision within sixty (60) days of receipt of the written request for review from the individual.

(B) Review Hearing. If requested, the panel shall hold a hearing at a time and location that is convenient for the panel members and the individual provided the hearing occurs within sixty (60) days of receipt of the written request for review from the individual. The hearing shall be informal. The Rules of Evidence and the Rules of Civil Procedure shall not apply. The individual may be represented by a lawyer at the hearing, may offer witnesses and exhibits, and may question witnesses for the board. The panel may ask witnesses to appear and may consider exhibits on its own request. Witnesses shall not be sworn. The hearing shall not be reported unless the applicant pays the costs of the transcript and arranges for the preparation of the transcript with the court reporter.

(C) Decision of the Panel. The individual shall be notified in writing of the decision of the panel and, if unfavorable, the right to appeal the decision to the council under such rules and regulations as the council may prescribe. To exercise this right, the individual must file an appeal to the council in writing within 30 days of the mailing of the notice of the decision of the panel.

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

Adopted by the Supreme Court: October 6, 2004

Amendments Approved by the Supreme Court: March 8, 2007; February 5, 2009; March 8, 2013; August 27, 2013; September 20, 2018

.0123 Inactive Status Upon Demonstration of Hardship

(a) Inactive Status

The board shall transfer a certified paralegal to inactive status upon receipt of a petition, on a form approved by the board, demonstrating hardship as defined in paragraph (b) of this rule and upon payment of any fees owed to the board at the time of the petition unless waived by the board.

(1) The period of inactive status shall be one year from the designated renewal date.

(2) On or before the expiration of inactive status, a paralegal on inactive status must file a petition for (continued) inactive status or seek reinstatement to active status by filing a renewal application pursuant to Rule .0120 of this subchapter. Failure to petition for continued inactive status or renewal shall result in lapse of certification.

(3) A paralegal may be inactive for not more than a total of five consecutive years.

(4) During a period of inactive status, a paralegal is not required to pay the renewal fee or to complete continuing legal education.

(5) During a period of inactive status, a paralegal shall not be entitled to represent that he or she is a North Carolina certified paralegal or to use any of the designations set forth in Rule .0117(4) of this subchapter.

(b) Hardship

The following conditions shall qualify as hardship justifying a transfer to inactive status:

(1) Financial inability to pay the annual renewal fee and to pay for continuing legal education courses due to unemployment or underemployment of the paralegal for a period of three months or more;

(2) Disability or serious illness for a period of three months or more;

(3) Active military service; and

(4) Transfer of the paralegal's active duty military spouse to a location outside of North Carolina.

(c) Reinstatement before Expiration of Inactive Status

To be reinstated as a certified paralegal, the paralegal must petition the board for reinstatement by filing a renewal application prior to the expiration of the inactive status period and must pay the annual renewal fee. If the paralegal was inactive for a period of two consecutive calendar years or more during the year prior to the filing of the petition, the paralegal must complete 12 hours of credit in board-approved continuing paralegal education, or its equivalent. Of the 12 hours, at least 2 hours shall be devoted to the areas of professional responsibility or professionalism, or any combination thereof.

(d) Certification after Expiration of Inactive Status Period

If the inactive status period expires before the paralegal petitions for reinstatement, certification shall lapse, and the paralegal cannot again be certified unless the paralegal qualifies upon application made as if for initial certification.

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

Adopted by the Supreme Court: August 24, 2012

.0124 Retired Certified Paralegal Status

(a) Petition for Status Change - The board shall transfer a certified paralegal to Retired Certified Paralegal status upon receipt of a petition, on a form approved by the board, demonstrating that the petitioner has satisfied the following conditions:

(1) Certified for five years or more;

(2) At least 55 years of age or older;

(3) Discontinued all work as a paralegal;

(4) Paid all fees owed to the board at the time of filing the petition; and

(5) The prohibitions on certification specified in Rule .0119(c) of this subchapter are not applicable to or formally alleged against the petitioner.

(b) Designation During Retired Status - During a period of retired status, the certified paralegal may represent that he or she is a "North Carolina State Bar Retired Certified Paralegal" or an appropriate variation thereof.

(c) No Annual Requirements - During a period of retired status, the paralegal shall not be required to file an annual renewal application pursuant to Rule .0120 of this subchapter, to pay an annual renewal fee, or to satisfy the annual continuing education requirements set forth in Rule .0120.

(d) Termination of Status - Retired certified paralegal status may continue for a period of time not to exceed a total of five years (or 60 months). At the end of five years (or 60 months) of retired status, certification will lapse and, to become a certified paralegal, the paralegal must satisfy all requirements for initial certification set forth in Rule .0119(a). A certified paralegal's status may be changed from active to retired multiple times provided the five-year (60 months) period of retired status is not exceeded.

(e) Return to Active Status - A retired certified paralegal may return to active status at any time during the five-year period set forth in paragraph (d). To reactivate the "certified paralegal" credential, the certified paralegal shall file a petition with the board, on a form approved by the board, and shall pay a reactivation fee of $50. Upon transfer to active status by the board, the certified paralegal may hold herself or himself out as a "North Carolina State Bar Certified Paralegal" or an appropriate variation thereof. Thereafter, the certified paralegal shall complete continuing education and file annual renewal applications as required by Rule .0120 of this subchapter.

(f) Return to Work as Paralegal - A retired certified paralegal must file a petition for return to active status within 30 days of returning to work as a paralegal. Failure to do so will result in revocation of certification.

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

Adopted by the Supreme Court September 28, 2017

Section .0200, Rules Governing Continuing Paralegal Education

.0201 Continuing Paralegal Education (CPE)

(a) Each active certified paralegal subject to these rules shall complete 6 hours of approved continuing education during each year of certification.

(b) Of the 6 hours, at least 1 hour shall be devoted to the areas of professional responsibility or professionalism or any combination thereof.

(1) A professional responsibility course or segment of a course shall be

devoted to (1) the substance, the underlying rationale, and the practical application of the Rules of Professional Conduct; (2) the professional obligations of the lawyer to the client, the court, the public, and other lawyers, and the paralegal's role in assisting the lawyer to fulfill those obligations; (3) the effects of substance abuse and chemical dependency, or debilitating mental condition on a lawyer's or a paralegal's professional responsibilities; or (4) the effects of stress on a paralegal's professional responsibilities.

(2) A professionalism course or segment of a course shall be devoted to the identification and examination of, and the encouragement of adherence to, non-mandatory aspirational standards of professional conduct that transcend the requirements of the 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.

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

Adopted by the Supreme Court: August 18, 2005

Amendments Approved by the Supreme Court: March 6, 2014

.0202 Accreditation Standards

The Board of Paralegal Certification shall approve continuing education activities in compliance with the following standards and provisions.

(a) An approved activity shall have significant intellectual or practical content and the primary objective of increasing the participant's professional competence and proficiency as a paralegal.

(b) An approved activity shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility, professionalism, or ethical obligations of paralegals.

(c) A certified paralegal may receive credit for continuing education activities in which live instruction or recorded material is used. Recorded material includes videotaped or satellite transmitted programs, and programs on CD-ROM, DVD, or other similar electronic or digital replay formats. A minimum of three certified paralegals must register to attend the presentation of a replayed 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.

(d) A certified paralegal may receive credit for participation in a course online. An on-line course is an educational seminar available on a provider's website reached via the internet. To be accredited, a computer-based CPE course must be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and/or other participants.

(e) Continuing 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, when appropriate, equipped with suitable writing surfaces or sufficient space for taking notes.

(f) 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 presentation, computer website, or CD-ROM. A written agenda or outline for a presentation satisfies this requirement when written materials are not suitable or readily available for a particular subject. The absence of written materials for distribution should, however, be the exception and not the rule.

(g) Any continuing legal education activity approved for lawyers by the North Carolina State Bar's Board of Continuing Legal Education meets these standards.

(h) In-house continuing legal education and self-study shall not qualify for continuing paralegal education (CPE) credit.

(i) A certified paralegal may receive credit for completion of a course offered by an ABA accredited law school with respect to which academic credit may be earned. No more than 6 CPE hours in any year may be earned by attending such courses. Credit shall be awarded as follows: 3.5 hours of CPE credit for every quarter hour of credit assigned to the course by the educational institution, or 5.0 hours of CPE credit for every semester hour of credit assigned to the course by the educational institution.

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

Adopted by the Supreme Court: August 18, 2005

Amendments Approved by the Supreme Court: March 2, 2006; March 11, 2010; March 8, 2013

.0203 General Course Approval

(a) Approval - Continuing education activities, not otherwise approved or accredited by the North Carolina State Bar Board of Continuing Legal Education, may be approved upon the written application of a sponsor, or of a certified paralegal on an individual program basis. An application for continuing paralegal education (CPE) approval shall meet the following requirements:

(1) If advance approval is requested by a sponsor, the application and supporting documentation (i.e., the agenda with timeline, speaker information and a description of the written materials) 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 a certified paralegal, the application need not include a complete set of supporting documentation.

(2) If more than five certified paralegals request approval of a particular program, either in advance of the date on which the course or program is scheduled or subsequent to that date, the program will not be accredited unless the sponsor applies for approval of the program and pays the accreditation fee set forth in Rule .0204.

(3) 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.

(4) The application shall be submitted on a form furnished by the Board of Paralegal Certification.

(5) The application shall contain all information requested on the form.

(6) 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.

(7) The application shall include a detailed calculation of the total continuing paralegal education (CPE) hours and the hours of professional responsibility for the program.

(8) If the sponsor has not received notice of accreditation within 15 days prior to the scheduled date of the program, the sponsor should contact the Board of Paralegal Certification via telephone or e-mail.

(8) Announcement - Sponsors who have advance approval for courses from the Board of Paralegal Certification 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 North Carolina State Bar Board of Paralegal Certification for continuing paralegal 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 of Paralegal Certification.

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

Adopted by the Supreme Court: August 18, 2005

Amendments Approved by the Supreme Court: August 27, 2013

.0204 Fees

Accredited Program Fee - Sponsors seeking accreditation for a particular program (whether or not the sponsor itself is accredited by the North Carolina State Bar Board of Continuing Legal Education), that has not already been approved or accredited by the North Carolina State Bar Board of Continuing Legal Education, shall pay a non-refundable fee of $75. However, no fee shall be charged for any program that is offered without charge to attendees. All programs must be approved in accordance with Rule .0203(a). An accredited program may be advertised by the sponsor in accordance with Rule .0203(b).

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

Adopted by the Supreme Court: August 18, 2005

Amendments Approved by the Supreme Court: June 9, 2016

.0205 Computation of Hours of Instruction

(a) Hours of continuing paralegal education (CPE) will be computed by adding the number of minutes of actual instruction, dividing by 60 and

rounding the results to the nearest one-tenth of an hour.

(b) Only actual instruction will be included in computing the total hours. The following will be excluded:

(1) introductory remarks;

(2) breaks;

(3) business meetings.

(c) Teaching - Continuing paralegal education (CPE) credit may be earned for teaching an approved continuing education activity. Three CPE credits will be awarded for each thirty (30) minutes of presentation. Repeat live presentations will qualify for one-half of the credit available for the initial presentation. No credit will be awarded for video replays.

(d) Teaching at a Qualified Paralegal Studies Program - Continuing paralegal education (CPE) credit may be earned for teaching a course at a qualified paralegal studies program, which program shall be qualified pursuant to Rule .0119(a) of this subchapter. Two CPE credits will be awarded for each semester credit (or its equivalent) awarded to the course.

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

Adopted by the Supreme Court: August 18, 2005

SUBCHAPTER H

Registration of Attorneys Appearing Pro Hac Vice

Section .0100 Registration Procedure

.0101 Registration

(a) Whenever an out-of-state attorney (the admittee) is admitted to practice *pro hac vice* pursuant to G.S. 84-4.1, it shall be the responsibility of the member of the North Carolina State Bar who is associated in the matter (the responsible attorney) to file with the secretary a complete registration statement verified by the admittee. This registration statement must be submitted within 30 days of the court's order admitting the admittee upon a form approved by the Council of the North Carolina State Bar.

(b) Failure of the responsible attorney to file the registration statement in a timely fashion shall be grounds for administrative suspension from the practice of law in North Carolina pursuant to the procedures set forth in Rule .0903 of subchapter D of these rules.

(c) Whenever it appears that a registration statement required by paragraph (a) above has not been filed in a timely fashion, notice of such apparent failure shall be sent by the secretary to the court in which the admittee was admitted *pro hac vice* for such action as the court deems appropriate.

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

Adopted by the Supreme Court: March 2, 2006

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

Chapter 2
Rules of Professional Conduct

Table of Contents

Editor's Note

The complete text of the Rules Professional Conduct and all of the comments thereto, as approved by the North Carolina Supreme Court, follow. Correlation tables appear in Additional Resources at the end of the *Handbook*. These tables cross-reference the 1997 and 2003 versions of the Rules with the comparable provisions of the superseded 1985 Rules of Professional Conduct (in effect from January 1, 1986, to July 23, 1997) and 1973 Code of Professional Conduct (in effect from April 30, 1974, to December 31, 1985).

A "History Note" after each Rule sets forth the statutory authority for the Rule. The date of original approval of the Rule by the North Carolina Supreme Court is identified as the "Adopted" date. Note that the Rules of Professional Conduct were comprehensively reorganized and renumbered in 1997; therefore, most of the Rules show July 24, 1997, as the date of adoption by the Supreme Court. The dates upon which amendments to a Rule were approved by the Supreme Court are listed after "Amendments Approved by the Supreme Court."

The History Note for each Rule is followed by annotations of ethics opinions of the State Bar that 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 current Rules of Professional Conduct. Ethics opinions rendered invalid by subsequent opinion or by the current Rules are generally not annotated. (A CPR opinion may be obtained by calling the ethics department at the State Bar.) An ethics opinion promulgated under the 1997 Rules and thereafter is designated as a "Formal Ethics Opinion."

The primary source material for the comprehensive revisions to the Rules undertaken in both 1997 and 2003 was the ABA Model Rules of Professional Conduct. The comment to Rule 1.19 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 to other state bars and regulatory agencies for assistance and materials.

0.1 PREAMBLE: A LAWYER'S PROFESSIONAL RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, 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 evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. *See, e.g.*, Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. *See* Rule 8.4.

[4] 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 Rules of Professional Conduct or other law.

[5] 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 the legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, 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. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who, because of economic or social barriers, cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] 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.

[8] The legal profession is a group of people united in a learned calling for the public good. At their best, lawyers assure the availability of legal services to all, regardless of ability to pay, and as leaders of their communities, states, and nation, lawyers use their education and experience to improve society. It is the basic responsibility of each lawyer 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.

[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, the profession and government instituted additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs were developed, and programs will be developed by the profession and the government. Every lawyer should support all proper efforts to meet this need for legal services.

[10] Many of a lawyer's professional responsibilities are prescribed in the 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.

[11] 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 the 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.

[12] 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 ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of profes-

sional 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. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[13] Although a matter is hotly contested by the parties, a lawyer should treat opposing counsel with courtesy and respect. The legal dispute of the client must never become the lawyer's personal dispute with opposing counsel. A lawyer, moreover, should provide zealous but honorable representation without resorting to unfair or offensive tactics. The legal system provides a civilized mechanism for resolving disputes, but only if the lawyers themselves behave with dignity. A lawyer's word to another lawyer should be the lawyer's bond. As professional colleagues, lawyers should encourage and counsel new lawyers by providing advice and mentoring; foster civility among members of the bar by acceding to reasonable requests that do not prejudice the interests of the client; and counsel and assist peers who fail to fulfill their professional duties because of substance abuse, depression, or other personal difficulties.

[14] 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.

[15] 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.

[16] 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 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.

[17] 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 Rules of Professional Conduct, when properly applied, serve to define that relationship.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; November 16, 2006

ETHICS OPINION NOTES

2008 FEO 2. Opinion holds that a lawyer is not prohibited from advising a school board sitting in an adjudicative capacity in a disciplinary or employment proceeding while another lawyer from the same firm represents the administration; however, such dual representation is harmful to the public's perception of the fairness of the proceeding and should be avoided.

2008 FEO 3. Opinion rules a lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

0.2 SCOPE

[1] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms "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 discretion to exercise professional judgment. 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. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[3] 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.

[4] 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 attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[5] 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. These rules do not abrogate any such authority.

[6] 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.

[7] Violation of a Rule should not give rise itself to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. 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 extra-disciplinary consequences of violating such a Rule.

[8] 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 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 by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; February 5, 2004

ETHICS OPINION NOTES

2006 FEO 14. When a lawyer charges a fee for a consultation, and the lawyer accepts payment, there is a client-lawyer relationship for the purposes of the Rules of Professional Conduct.

2010 FEO 1. A lawyer may not appear in court for a party who has not authorized the representation and with whom the lawyer has not established a client-lawyer relationship unless allowed by statute, court order, or subsequent case law.

2017 FEO 5. An agreement between law firms engaged in merger negotiations not to solicit or hire lawyers from the other firm for a relatively short period of time after expiration of the term of the agreement is permissible because it is a de minimis restriction on lawyer mobility that does not impair client choice and is reasonable under the circumstances.

RULE 1.0: TERMINOLOGY

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

(b) "Confidential information" denotes information described in Rule 1.6.

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

(d) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation, government entity, or other organization.

(e) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of North Carolina and has a purpose to deceive.

(f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate to the circumstances.

(g) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(h) "Principal" denotes a member of a partnership for the practice of law, a shareholder in a law firm organized as a professional corporation, a member of an association authorized to practice law, or a lawyer having management authority over the legal department of a company, organization, or government entity.

(i) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(j) "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.

(k) "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.

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

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

(n) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. The term encompasses any proceeding conducted in the course of a trial or litigation, or conducted pursuant to the tribunal's rules of civil or criminal procedure or other relevant rules of the tribunal, such as a deposition, arbitration, or mediation. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, may render a binding legal judgment directly affecting a party's interests in a particular matter.

(o) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, and any data embedded therein (commonly referred to as metadata), including handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (d) 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 in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for 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. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, 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.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of North Carolina and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. *See, e.g.*, Rules 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation rea-

sonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. *See* Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (o) and (c). Other Rules require that a client's consent be obtained in a writing signed by the client. *See, e.g.*, Rules 1.8(a) and (g). For a definition of "signed," see paragraph (o).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 2, 2014; March 5, 2015; September 22, 2016

ETHICS OPINION NOTES

2008 FEO 2. A lawyer is not prohibited from advising a school board sitting in an adjudicative capacity in a disciplinary or employment proceeding while another lawyer from the same firm represents the administration; however, such dual representation is harmful to the public's perception of the fairness of the proceeding and should be avoided. (Discusses "screened.")

2009 FEO 11. In order to obtain informed consent to a conflict, a lawyer must provide enough information for his client to make an informed decision, such as why the interests are adverse, how the representation may be affected, what risks are involved, and what other options are available.

2010 FEO 12. If a screen is implemented prior to any participation by a new associate in a matter the associate worked on at another firm, and prior to the communication of any confidential information, the purpose for the screening procedure will have been effectuated.

2011 FEO 14. A lawyer must obtain client consent, confirmed in writing, before outsourcing its transcription and typing needs to a company located in a foreign jurisdiction. (Discusses "Confirmed in Writing.")

2012 FEO 4. A lawyer who represented an organization while employed with another firm must be screened from participation in any matter, or any matter substantially related thereto, in which she previously represented the organization, and from any matter against the organization if she acquired confidential information of the organization that is relevant to the matter and which has not become generally known. (Discusses "screened.")

2013 FEO 4. Opinion examines the ethical duties of a lawyer representing both the buyer and the seller on the purchase of a foreclosure property and the lawyer's duties when the representation is limited to the seller. (Term examined: "informed consent.")

2013 FEO 8. Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer. (Term examined: "firm.")

RULE 1.1: COMPETENCE

A lawyer shall not handle a legal matter that 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.

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 competence 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 transac-

tions ordinarily require more extensive treatment than matters of lesser complexity or consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. *See* Rule 1.2(c).

Retaining or Contracting with Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. *See also* Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee division), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience, and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. *See* Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

Distinguishing Professional Negligence

[9] 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.

[10] 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 by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 2, 2014

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 FEO 12. 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.

2002 FEO 5. Whether electronic mail should be retained as a part of a client's file is a legal decision to be made by the lawyer.

2007 FEO 12. A lawyer may outsource limited legal support services to foreign assistants provided the lawyer properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client's advanced informed consent.

2008 FEO 14. It is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract, or pleading excerpts from a legal brief, contract, or pleading written by another lawyer and placed into the public domain.

2009 FEO 17. Whether a lawyer rendering a title opinion to a title insurer should tack to an owner's policy of title insurance or a mortgagee's policy is a question of standard of care and outside the purview of the Ethics Committee.

2011 FEO 10. A lawyer may advertise on a website that offers daily discounts to consumers where the website company's compensation is a percentage of the amount paid to the lawyer if certain disclosures are made and certain conditions are satisfied.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2013 FEO 8. Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

2014 FEO 5. A lawyer must advise a civil litigation client about the legal ramifications of the client's postings on social media as necessary to represent the client competently. The lawyer may advise the client to remove postings on social media if the removal is done in compliance with the rules and law on preservation and spoliation of evidence.

2015 FEO 4. Opinion analyzes a lawyer's professional responsibilities when she discovers that she made an error that may adversely impact the client's case.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(1) A lawyer shall abide by a client's decision whether to settle 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 that do not prejudice the rights of a 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.

(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 scope of the representation if the limitation is reasonable under the circumstances.

(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.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation. 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] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. *See* Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. *See* Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, 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

[5] 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.

Agreements Limiting Scope of Representation

[6] The scope of services to be 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. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. *See* Rule 1.1.

[8] Although paragraph (c) does not require that the client's informed consent to a limited representation be in writing, a specification of the scope of representation will normally be a necessary part of any written communication of the rate or basis of the lawyer's fee. See Rule 1.0(f) for the definition of "informed consent."

[9] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. *See, e.g.*, Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[10] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. 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.

[11] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. *See* Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. *See* Rule 4.1.

[12] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[13] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance 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.

[14] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. *See* Rule 1.4(a)(5).

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court: July 24, 1997
Amendments Approved by the Supreme Court: March 1, 2003

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.

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 114. Attorneys may give legal advice and drafting assistance to persons wishing to proceed *pro se* without appearing as counsel of record.

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 FEO 2. 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 FEO 12. 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.

2002 FEO 1. 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.

2003 FEO 2. A lawyer must report a violation of the Rules of Professional Conduct as required by Rule 8.3(a) even if the lawyer's unethical conduct stems from mental impairment (including substance abuse).

2003 FEO 7. A lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

2003 FEO 16. A lawyer who is appointed to represent a parent in a proceeding to determine whether the parent's child is abused, neglected or dependent, must seek to withdraw if the client disappears without communicating her objectives for the representation, and, if the motion is denied, must refrain from advocating for a particular outcome.

2005 FEO 10. Opinion addresses ethical concerns raised by an internet-based or virtual law practice and the provision of unbundled legal services.

2008 FEO 3. A lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2008 FEO 7. A closing lawyer shall not record and disburse when a seller has delivered the deed to the lawyer but the buyer instructs the lawyer to take no further action to close the transaction.

2010 FEO 1. A lawyer may not appear in court for a party who has not authorized the representation and with whom the lawyer has not established a client-lawyer relationship unless allowed by statute, court order, or subsequent case law.

2011 FEO 3. A criminal defense lawyer may advise an undocumented alien that deportation may result in avoidance of a criminal conviction and may file a notice of appeal to superior court although there is a possibility that client will be deported.

2012 FEO 5. A lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee's lawyer using the employer's business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages unless a court determines that the messages are not privileged.

2012 FEO 9. A lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2013 FEO 2. If after providing an incarcerated criminal client with a summary/explanation of the discovery materials in the client's file, the client requests access to any of the discovery materials, the lawyer must afford the client the opportunity to meaningfully review relevant discovery materials unless certain conditions exist.

2014 FEO 5. A lawyer must advise a civil litigation client about the legal ramifications of the client's postings on social media as necessary to represent the client competently. The lawyer may advise the client to remove postings on social media if the removal is done in compliance with the rules and law on preservation and spoliation of evidence.

2016 FEO 2. When advancing claims on behalf of a criminal defendant who filed a *pro se* Motion for Appropriate Relief, subsequently appointed defense counsel must correct erroneous claims and statements of law or facts set out in the previous *pro se* filing.

2019 FEO 2: A lawyer may not agree to terms in an ERISA plan agreement that usurp client's authority as to the representation.

2019 FEO 7. Opinion rules that a lawyer may agree to an "attorney eyes only" disclosure restriction if the lawyer determines that doing so is in the client's best interest and is in accordance with applicable law

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 take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] 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. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] 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 substan-

tial 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 and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. *See* Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. *See* Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. *Cf.* 27 N.C.A.C. 1B, .0122 (providing for court appointment of a lawyer to inventory files and take other protective action to protect the interests of the clients of a lawyer who has disappeared or is deceased or disabled).

Distinguishing Professional Negligence

[6] 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.

[7] Conduct warranting the imposition of professional discipline under the rule is characterized by the element of intent 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

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Amendments Approved by the Supreme Court: March 1, 2003; September 28, 2017

ETHICS OPINION NOTES

RPC 48. Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

99 FEO 5. 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.

2013 FEO 8. Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

2014 FEO 5. A lawyer must advise a civil litigation client about the legal ramifications of the client's postings on social media as necessary to represent the client competently. The lawyer may advise the client to remove postings on social media if the removal is done in compliance with the rules and law on preservation and spoliation of evidence.

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(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] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. *See* Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should address with the client how the lawyer and the client will communicate, and should respond to or acknowledge client communications in a reasonable and timely manner.

Explaining Matters

[5] 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. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, 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 are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not 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. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(f).

[6] 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 diminished capacity. *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.

Withholding Information

[7] 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 or the interests or convenience of another person. 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 by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 2, 2014

ETHICS OPINION NOTES

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 FEO 12. 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.

2006 FEO 1. A lawyer who represents the employer and its workers' compensation carrier must share the case evaluation, litigation plan, and other information with both clients unless the clients give informed consent to withhold such information.

2007 FEO 12. A lawyer may outsource limited legal support services to a foreign lawyer or a nonlawyer (collectively "foreign assistants") provided the lawyer properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client's advanced informed consent.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2013 FEO 2. If after providing a criminal client with a summary/explanation of the discovery materials in the client's file, the client requests access to the entire file, the lawyer must afford the client the opportunity to meaningfully review all of the relevant discovery materials unless the lawyer believes it is in the best interest of the client's legal defense not to do so.

2013 FEO 8. Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

2015 FEO 4. Opinion analyzes a lawyer's professional responsibilities when she discovers that she made an error that may adversely impact the client's case.

2019 FEO 7. Opinion rules that a lawyer may agree to an "attorney eyes only" disclosure restriction if the lawyer determines that doing so is in the client's best interest and is in accordance with applicable law.

RULE 1.5: FEES

(a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. The 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.

(b) When the lawyer has not regularly represented the client, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(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 a 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 each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

(f) Any lawyer having a dispute with a client regarding a fee for legal services must:

(1) at least 30 days prior to initiating legal proceedings to collect a disputed fee, notify his or her client in writing of the existence of the North Carolina State Bar's program of fee dispute resolution; the notice shall state that if the

client does not file a petition for resolution of the disputed fee with the State Bar within 30 days of the lawyer's notification, the lawyer may initiate 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. Good faith participation requires the lawyer to respond timely to all requests for information from the fee dispute resolution facilitator.

Comment

Appropriate Fees and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are not clearly excessive under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must not be clearly excessive. A lawyer may seek reimbursement for expenses for in-house services, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, an understanding will have ordinarily evolved concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, a written understanding as to fees and expenses should be promptly established. Generally, furnishing the client with a simple memorandum or copy of the lawyer's customary fee arrangements will suffice, provided that the writing states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is clearly excessive, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] 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 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] 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.

[6] 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.

Prohibited Contingent Fees

[7] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[8] 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 either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. A lawyer may divide a fee with an out-of-state lawyer who refers a matter to the lawyer if the conditions of paragraph (e) are satisfied. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. *See* Rule 1.1.

[9] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[10] Participation in the fee dispute resolution program of the North Carolina State Bar is mandatory when a client requests resolution of a disputed fee. A lawyer's obligation to respond timely to all requests for information from the fee dispute resolution facilitator continues even if the lawyer and the client reach a resolution of the dispute while the fee dispute petition is pending. 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. If the address of the client is unknown, the lawyer must 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.

[11] 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.

[12] A lawyer may petition a tribunal for a legal fee if allowed by applicable law or, subject to the requirements for fee dispute resolution set forth in Rule 1.5(f), may bring an action against a client to collect a fee. The tribunal's determination of the merit of the petition or the claim is reached by an application of law to fact and not by the application of this Rule. Therefore, a tribunal's reduction or denial of a petition or claim for a fee is not evidence that the fee request violates this Rule and is not admissible in a disciplinary proceeding brought under this Rule.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; September 25, 2019

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 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. (*But see* 2000 FEO 5)

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 FEO 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 FEO 3. 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 FEO 9. 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 FEO 14. 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 FEO 1. A lawyer may not accept a referral fee or solicitor's fee for referring a client to an investment advisor.

2000 FEO 5. 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. 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.

2002 FEO 4. A lawyer may collect a contingent fee and/or a court-awarded attorney fee if consistent with the fee agreement with the client but may not collect a clearly excessive total fee under any circumstance.

2005 FEO 11. Opinion examines the requirements for an interim account used to pay the costs for real estate closings and also rules that the actual costs may be marked up by the lawyer provided there is full disclosure and the overcharges are not clearly excessive.

2005 FEO 12. Opinion explores a lawyer's obligation to return legal fees when a third party is the payor.

2005 FEO 13. A minimum fee that will be billed against at an hourly rate and is collected at the beginning of representation belongs to the client and must be deposited into the trust account until earned and, upon termination of representation, the unearned portion of the fee must be returned to the client.

2006 FEO 2. A lawyer may only refer a client to a financing company if certain conditions are met.

2006 FEO 12. Opinion explores the circumstances under which a lawyer may obtain litigation funding from a financing company.

2006 FEO 14. When a lawyer charges a fee for a consultation, and the lawyer accepts payment, there is a client-lawyer relationship for the purposes of the Rules of Professional Conduct.

2006 FEO 15. A lawyer may charge a reasonable dormancy fee against unclaimed funds if the client agrees in advance and the fee meets other statutory requirements.

2007 FEO 8. A lawyer may not charge a client for filing and presenting a motion to withdraw unless withdrawal advances the client's objectives for the representation or the charge is approved by the court when ruling on a petition for legal fees from a court-appointed lawyer.

2007 FEO 13. To insure honest billing predicated on hourly charges, the lawyer must establish a reasonable hourly rate for his services and for the services of his staff; disclose the basis for the amounts to be charged; avoid wasteful, unnecessary, or redundant procedures; and make certain that the total cost to the client is not clearly excessive.

2008 FEO 8. A provision in a law firm employment agreement for dividing legal fees received after a lawyer's departure from a firm must be reasonable and may not penalize or deter the withdrawing lawyer from taking clients with her.

2008 FEO 10. Opinion surveys prior ethics opinions on legal fees, sets forth the ethical requirements for the different types of fees paid in advance, authorizes

minimum fees earned upon payment, and provides model fee provisions.

2010 FEO 4. A lawyer may accept barter dollars as payment for legal services but all advance payments of litigation expenses by a barter exchange client must be paid in cash or by check or credit card.

2010 FEO 6. If a lawyer associates another law firm in connection with a legal matter, the lawyer may receive a fee in proportion to the services he performs in the matter or he may receive a fee based on his assumption of joint responsibility for the representation.

2010 FEO 10. A law firm may charge a client for the expenses associated with a remote consultation, but may not charge a flat fee for the remote consultation irrespective of the actual cost to the firm.

2011 FEO 10. A lawyer may advertise on a website that offers daily discounts to consumers where the website company's compensation is a percentage of the amount paid to the lawyer if certain disclosures are made and certain conditions are satisfied.

2012 FEO 3. A lawyer may charge interest on a delinquent client account, without an advance agreement with the client, to the extent and in the manner permitted by law.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2012 FEO 12. An agreement for a departing lawyer to pay his former firm a percentage of any legal fee subsequently recovered from the continued representation of a contingent fee client by the departing lawyer does not violate Rule 5.6 if the agreement was negotiated by the departing lawyer and the firm after the departing lawyer announced his departure from the firm and the specific percentage is a reasonable resolution of the dispute over the division of future fees.

2013 FEO 3. Opinion examines a lawyer's responsibilities when charging and collecting from a client for the expenses of representation.

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

2015 FEO 4. Opinion analyzes a lawyer's professional responsibilities when she discovers that she made an error that may adversely impact the client's case.

2018 FEO 4. A lawyer may offer clients on-site access to a financial brokerage company as a payment option for legal fees so long as the lawyer is satisfied that the financial arrangements offered by the company are legal, the lawyer receives no consideration from the company, and the lawyer does not recommend one payment option over another.

2018 FEO 6: Opinion rules that, with certain conditions, a lawyer may include in a client's fee agreement a provision allowing the lawyer's purchase of litigation cost protection insurance and requiring reimbursement of the insurance premium from the client's funds in the event of a settlement or favorable trial verdict.

2019 FEO 5. Opinion rules that a lawyer may receive virtual currency as a flat fee for legal services, provided the fee is not clearly excessive and the terms of Rule 1.8(a) are satisfied, but may not accept virtual currency as entrusted funds to be billed against or to be held for the benefit of the lawyer, the client, or any third party.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

(1) to comply with the Rules of Professional Conduct, the law or court order;

(2) to prevent the commission of a crime by the client;

(3) to prevent reasonably certain death or bodily harm;

(4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;

(5) to secure legal advice about the lawyer's compliance with these Rules;

(6) 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;

(7) to comply with the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court; or

(8) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(d) The duty of confidentiality described in this Rule encompasses 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.

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client acquired during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information acquired during a lawyer's prior representation of a former client, and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients, and Rule 8.6 for a lawyer's duty to disclose information to rectify a wrongful conviction.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information acquired during the representation. See Rule 1.0(f) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply 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, for example, applies not only to matters communicated in confidence by the client but also to all information acquired during 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* Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information acquired during the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a

client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. 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

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information acquired during the representation of their clients, the confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime. Paragraph (b)(2) recognizes that a lawyer should be allowed to make a disclosure to avoid sacrificing the interests of the potential victim in favor of preserving the client's confidences when the client's purpose is wrongful. Similarly, paragraph (b)(3) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] A lawyer may have been innocently involved in past conduct by a client that was criminal or fraudulent. 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 acquired during the representation. Paragraph (b)(4) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification.

[8] Although paragraph (b)(2) does not require the lawyer to reveal the client's anticipated misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. *See* Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances. 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).

[9] Paragraph (b)(4) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information acquired during the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(4) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[10] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[11] 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. Such a charge can arise in a civil, criminal, disciplinary or other 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. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(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 also applies, of course, where a proceeding has been commenced.

[12] A lawyer entitled to a fee is permitted by paragraph (b)(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.

[13] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information acquired during the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(1) permits the lawyer to make such disclosures as are necessary to comply with the law.

[14] Paragraph (b)(1) also permits compliance with a court order requiring a lawyer to disclose information relating to a client's representation. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client's representation, however, the lawyer must, absent informed consent of the client to do otherwise, assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal. *See* Rule 1.4. Unless review is sought, however, paragraph (b)(1) permits the lawyer to comply with the court's order.

[15] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that 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.

[16] Paragraph (b) permits but does not require the disclosure of information acquired during a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider 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. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). *See* Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. *See* Rule 3.3(c).

Detection of Conflicts of Interest

[17] Paragraph (b)(8) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. *See* Rule 1.17, Comment [8]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to

the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[18] Any information disclosed pursuant to paragraph (b)(8) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(8) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(8). Paragraph (b)(8) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation. *See* Comment [5].

Acting Competently to Preserve Confidentiality

[19] Paragraph (c) requires a lawyer to act competently to safeguard information acquired during the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *See* Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information acquired during the professional relationship with a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information to comply with other law—such as state and federal laws that govern data privacy, or that impose notification requirements upon the loss of, or unauthorized access to, electronic information—is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[20] When transmitting a communication that includes information acquired during the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the client's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[21] The duty of confidentiality continues after the client-lawyer relationship has terminated. *See* Rule 1.9(c)(2). *See* Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Lawyer's Assistance Program

[22] 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 client-lawyer relationship.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 2, 2014; March 16, 2017

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 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. (*But see* Rule 3.3)

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 settle-

ment 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.)

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 FEO 5. 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 FEO 10. 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 FEO 16. 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 FEO 18. 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 FEO 20. 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 11. 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. 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. 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.

2002 FEO 7. Opinion clarifies RPC 206 by ruling that a lawyer may reveal the relevant confidential information of a deceased client in a will contest proceeding if the attorney/client privilege does not apply to the lawyer's testimony.

2003 FEO 9. A lawyer may participate in a settlement agreement that contains a provision limiting or prohibiting disclosure of information obtained during the representation even though the provision will effectively limit the lawyer's ability to represent future claimants.

2003 FEO 15. An attorney may provide an accounting of disbursements of sums recovered for a personal injury claimant as required by N.C.G.S. § 44-50.1.

2004 FEO 6. A lawyer may disclose confidential client information to collect a fee, including information necessary to support a claim that the corporate veil should be pierced, provided the claim is advanced in good faith.

2005 FEO 4. Absent consent to disclose from the parent, a lawyer may not reveal confidences received from a parent seeking representation of a minor.

2005 FEO 9. A lawyer for a publicly traded company does not violate the Rules of Professional Conduct if the lawyer "reports out" confidential information as permitted by SEC regulations.

2006 FEO 1. A lawyer who represents the employer and its workers' compensation carrier must share the case evaluation, litigation plan, and other information with both clients unless the clients give informed consent to withhold such information.

2006 FEO 10. A lawyer must use reasonable care under the circumstances to protect from disclosure a client's confidential health information and is encouraged, but not required, to use similar care with regard to health information of third parties.

2007 FEO 2. A lawyer may not take possession of a client's contraband if possession is itself a crime and, unless there is an exception allowing disclosure of confidential information, the lawyer may not disclose confidential information relative to the contraband.

2007 FEO 12. A lawyer may outsource limited legal support services to a foreign lawyer or a nonlawyer (collectively "foreign assistants") provided the lawyer properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client's advanced informed consent.

2008 FEO 1. A lawyer representing an undocumented worker in a workers' compensation action has a duty to correct court documents containing false statements of material fact and is prohibited from introducing evidence in support of the proposition that an alias is the client's legal name.

2008 FEO 3. A lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2008 FEO 5. Client files may be stored on a website accessible by clients via the internet provided the confidentiality of all client information on the website is protected.

2008 FEO 13. Unless affected clients expressly consent to the disclosure of their confidential information, a lawyer may allow a title insurer to audit the lawyer's real estate trust account and reconciliation reports only if certain written assurances to protect client confidences are obtained from the title insurer, the audited account is only used for real estate closings and the audit is limited to certain records and to real estate transactions insured by the title insurer.

2009 FEO 1. A lawyer must use reasonable care to prevent the disclosure of confidential client information hidden in metadata when transmitting an electronic communication and a lawyer who receives an electronic communication from another party or another party's lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document.

2009 FEO 3. A lawyer has a professional obligation not to encourage or allow a nonlawyer employee to disclose confidences of a previous employer's clients for purposes of solicitation.

2009 FEO 8. A lawyer for a party to a partition proceeding may subsequently serve as a commissioner for the sale but not as a commissioner for the partitioning of the property.

2009 FEO 14. A lawyer participating in a real estate transaction may not place his client's title insurance with a title insurance agency in which the lawyer's spouse has any ownership interest.

2011 FEO 6. A law firm may contract with a vendor of software as a service provided the lawyer uses reasonable care to safeguard confidential client information.

2011 FEO 14. A lawyer must obtain client consent, confirmed in writing, before outsourcing its transcription and typing needs to a company located in a foreign jurisdiction.

2011 FEO 16. A criminal defense lawyer accused of ineffective assistance of counsel by a former client may share confidential client information with prosecutors to help establish a defense to the claim so long as the lawyer reasonably believes a response is necessary and the response is narrowly tailored to respond to the allegations.

2012 FEO 5. A lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee's lawyer using the employer's business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages unless a court determines that the messages are not privileged.

2012 FEO 9. A lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2013 FEO 5. A lawyer/trustee must explain his role in a foreclosure proceeding to any unrepresented party that is an unsophisticated consumer of legal services; if he fails to do so and that party discloses material confidential information, the lawyer may not represent the other party in a subsequent, related adversarial proceeding unless there is informed consent.

2013 FEO 12. Pursuant to an applicable exception to the duty of confidentiality, when a client terminates representation in a worker's compensation case, the subsequently hired lawyer may disclose the settlement terms to the former lawyer to resolve a pre-litigation claim for fee division.

2014 FEO 1. Opinion encourages lawyers to become mentors to law students and new lawyers ("protégés") who are not employees of the mentor's firm and examines the application of the duty of confidentiality to client communications to which a protégé maybe privy.

2015 FEO 5. In post-conviction or appellate proceedings, a discharged lawyer may discuss a former client's case and turn over the former client's file to successor counsel if the former client consents or the disclosure is impliedly authorized.

2016 FEO 4. A lawyer may not disclose financial information obtained during the representation of a former client to assist the sheriff with the execution on a judgment for unpaid legal fees.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(f) and (c).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a 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 persons and issues involved. *See also* Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). *See* Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. *See* Rule 1.9. *See also* Comments [5] and [29] to this Rule.

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The withdrawing lawyer must seek court approval where necessary and take steps to minimize harm to the clients. *See* Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. *See* Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client may be materially limited as a result of the lawyer's other

responsibilities or interests. For example, a lawyer asked to represent a seller of commercial real estate, a real estate developer and a commercial lender is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself preclude the representation or require disclosure and consent. The critical questions are the likelihood that a difference in interests 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.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, 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. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, 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 financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. *See* Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. *See* Rule 1.19.

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. *See* Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. *See* Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(n)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. *See* Rule 1.0(f) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. *See* Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be 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. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. *See* Rule 1.0(c). *See also* Rule 1.0(o) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. *See* Rule 1.0(c). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client

and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A 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 in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation 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 disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. *See* Comment [8].

[27] For example, conflict questions may 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 be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. *See* Comment [15]. 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 in interest among them. Thus, a lawyer may seek 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 or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. 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.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed

consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. *See* Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] 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 or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

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 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. (*But see* 2002 FEO 2)

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. 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. 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 FEO 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.

2002 FEO 1. A lawyer may participate in a non-profit organization that promotes a cooperative method for resolving family law disputes although the client is required to make full disclosure and the lawyer is required to withdraw before court proceedings commence.

2002 FEO 3. A lawyer for an estate may seek removal of the personal representative if the personal representative's breach of fiduciary duties constitutes grounds for removal under the law.

2002 FEO 6. The lawyer for the plaintiff may not prepare the answer to a complaint for an unrepresented adverse party to file pro se.

2003 FEO 1. A lawyer must withdraw from joint representation of a general contractor and a surety if a position advanced on behalf of the general contractor is frivolous, for the purpose of delay or interferes with a legal duty owed by the surety to the claimant.

2003 FEO 7. A lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

2003 FEO 12. An insurance defense lawyer may give the insured and the insurance carrier an evaluation of a pending case, including settlement prospects, but may not give an opinion to the carrier on whether to decline to settle within policy limits and go to trial if the opinion is contrary to the wishes of the insured.

2005 FEO 1. A lawyer may not appear before a judge who is a family member without consent from all parties and, although consent is not required, the other members of the firm must disclose the relationship before appearing before the judge.

2005 FEO 7. An attorney may recommend that a prospective client use a computer in the attorney's office and the services of an Internet-based company to complete a required bankruptcy certification form.

2006 FEO 1. A lawyer who represents the employer and its workers' compensation carrier must share the case evaluation, litigation plan, and other information with both clients unless the clients give informed consent to withhold such information.

2006 FEO 2. A lawyer may only refer a client to a financing company if certain conditions are met.

2006 FEO 5. The county tax attorney may not bid at a tax foreclosure sale of real property.

2007 FEO 7. A lawyer may continue to represent a husband and wife in a Chapter 13 bankruptcy after they divorce provided the conditions on common representation set forth in Rule 1.7 are satisfied.

2007 FEO 10. A lawyer employed by a school board may serve as an administrative hearing officer with the informed consent of the board.

2007 FEO 11. A lawyer is not required to withdraw from representing one client if the other client revokes consent without good reason and an evaluation of the factors set out in comment [21] to Rule 1.7 and the Restatement (Third) of the Law Governing Lawyers indicates continued representation is favored.

2008 FEO 2. A lawyer is not prohibited from advising a school board sitting in an adjudicative capacity in a disciplinary or employment proceeding while another lawyer from the same firm represents the administration; however, such dual representation is harmful to the public's perception of the fairness of the proceeding and should be avoided.

2008 FEO 12. A lawyer may not initiate foreclosure on a deed of trust on a client's property while still representing the client.

2009 FEO 9. Opinion describes reasonable procedures for a computer-based conflicts checking system.

2009 FEO 11. A lawyer may undertake the representation of a debtor in a Chapter 13 bankruptcy, although the lender is a current client, if the lawyer reasonably believes that he will be able to provide competent and diligent representation to the debtor in the bankruptcy action while protecting the lender's interests in those matters where the lawyer represents the lender and both clients give informed consent.

2009 FEO 12. A lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party provided the lawyer explains who he represents and does not give the unrepresented party legal advice; however, the lawyer may not prepare a waiver of exemptions for the adverse party.

2010 FEO 3. A lawyer who currently represents a police officer in an internal affairs investigation may not concurrently represent a person charged with a criminal offense if the police officer is one of the prosecuting witnesses and will be subject to cross-examination.

2010 FEO 12. A hiring law firm may ask an incoming law school graduate to provide sufficient information as to his prior legal experience so that the hiring law firm can identify potential conflicts of interest.

2010 FEO 13. A lawyer's self-interest in promoting his own financial services company must not distort his independent professional judgment in the provision of legal services to the client including referral of the client to the lawyer's own ancillary business.

2012 FEO 2. A lawyer-mediator may not draft a business contract for pro se parties to mediation.

2012 FEO 9. A lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

2014 FEO 6. A lawyer who provides free brief consultations to members of a nonprofit organization must still screen for conflicts prior to conducting a consultation.

2014 FEO 10. A lawyer who handles adoptions as part of her or his law practice and also owns a financial interest in a for-profit adoption agency may, with informed consent, represent an adopting couple utilizing the services of the adoption agency but may not represent the biological parents.

2015 FEO 4. Opinion analyzes a lawyer's professional responsibilities when she discovers that she made an error that may adversely impact the client's case.

2016 FEO 3. A lawyer working for a private law firm may not negotiate for employment with another firm if the firm represents a party adverse to the lawyer's client unless both clients give informed consent.

2018 FEO 4. A lawyer may offer clients on-site access to a financial brokerage company as a payment option for legal fees so long as the lawyer is satisfied that the financial arrangements offered by the company are legal, the lawyer receives no consideration from the company, and the lawyer does not recommend one payment option over another.

2019 FEO 1: A lawyer may not jointly represent clients and prepare a separation agreement.

2019 FEO 3: Opinion rules that an ongoing sexual relationship between opposing counsel creates a conflict of interest in violation of Rule 1.7(a).

II. REAL PROPERTY CONFLICTS.

CPR 100. (*See also* RPC 210 and 97 FEO 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 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 FEO 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 FEO 10. 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 FEO 11. 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 FEO 1. A lawyer may not accept a referral fee or solicitor's fee for referring a client to an investment advisor.

99 FEO 8. 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.

2004 FEO 3. A lawyer may represent both the lender and the trustee on a deed of trust in a dispute with the borrower if the conditions for common representation can be satisfied.

2004 FEO 10. The lawyer for the buyer of residential real estate may prepare the deed without creating a client-lawyer relationship with the seller provided the lawyer makes specific disclosures to the seller and clarifies her role for the seller.

2006 FEO 3. A lawyer who represented the trustee or served as the trustee in a foreclosure proceeding at which the lender acquired the subject property may, under some circumstances, represent all parties on the closing of the sale of the property by the lender provided the lawyer concludes that his judgment will not be impaired by loyalty to the lender and there is full disclosure and informed consent.

2007 FEO 9. A closing lawyer must comply with the conditions placed upon the delivery of a deed by the seller, including recording the deed and disbursing proceeds, despite receiving contrary instructions from the buyer.

2008 FEO 7. A closing lawyer shall not record and disburse when a seller has delivered the deed to the lawyer but the buyer instructs the lawyer to take no further action to close the transaction.

2008 FEO 11. A lawyer may serve as the trustee in a foreclosure proceeding while simultaneously representing the beneficiary of the deed of trust on unrelated matters and that the other lawyers in the firm may also continue to represent the beneficiary on unrelated matters.

2011 FEO 4. A lawyer may not agree to procure title insurance exclusively from a particular title insurance agency on every transaction referred to the lawyer by a person associated with the agency.

2011 FEO 5. A lawyer may not represent the beneficiary of the deed of trust in a contested foreclosure if the lawyer's spouse and paralegal own an interest in the closely-held corporate trustee.

2012 FEO 2. A lawyer-mediator may not draft a business contract for pro se parties to mediation.

2013 FEO 4. Opinion examines the ethical duties of a lawyer representing both the buyer and the seller on the purchase of a foreclosure property and the lawyer's duties when the representation is limited to the seller.

2013 FEO 5. A lawyer/trustee must explain his role in a foreclosure proceeding to any unrepresented party that is an unsophisticated consumer of legal services; if he fails to do so and that party discloses material confidential information, the lawyer may not represent the other party in a subsequent, related adversarial proceeding unless there is informed consent.

2013 FEO 14. Common representation in a commercial real estate loan closing is, in most instances, a "nonconsentable" conflict meaning that a lawyer may not ask the borrower and the lender to consent to common representation.

2014 FEO 2. A lawyer may not represent both the trustee and the secured creditor in a contested foreclosure proceeding.

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest directly adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the

client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer 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:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(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.

(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 gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include 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:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) 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 authorized by law 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.

(j) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i), that applies to any one of them shall apply to all of them.

Comment

Note: *See* Rule 1.19 for the prohibition on client-lawyer sexual relationships.

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. *See* Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not 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 utilities' 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] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. *See* Rule 1.0(f) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. *See* Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1, 8.1 and 8.3.

Gifts to Lawyers

[6] 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 a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client con-

cerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] 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 paragraphs (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. *See also* Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. *See also* Rule 1.0(f) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule permits a lawyer to acquire a lien to secure the lawyer's fee or expenses provided the requirements of Rule 1.7 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 resolution program. *See* Rule 1.5(f).

[17] The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Imputation of Prohibitions

[18] Under paragraph (j), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

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. (*But see* Rule 1.8(e))

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 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 84. An attorney may not condition settlement of a civil dispute on an agreement not to report lawyer misconduct.

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 FEO 14. 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 FEO 17. 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 FEO 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 FEO 9. Although a lawyer may recommend the purchase a financial product to a legal client, the lawyer may not receive a commission for its sale.

2003 FEO 7. A lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

2005 FEO 12. Opinion explores a lawyer's obligation to return legal fees when a third party is the payor.

2006 FEO 11. Outside of the commercial or business context, a lawyer may not, at the request of a third party, prepare documents, such as a will or trust instrument, that purport to speak solely for principal without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

2006 FEO 12. Opinion explores the circumstances under which a lawyer may obtain litigation funding from a financing company.

2008 FEO 12. A lawyer may not initiate foreclosure on a deed of trust on a client's property while still representing the client.

2010 FEO 13. A lawyer may receive a fee or commission in exchange for providing financial services and products to a legal client so long as the lawyer complies with the ethical rules pertaining to the provision of law-related services, business transactions with clients, and conflicts of interest.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2014 FEO 10. A lawyer who handles adoptions as part of her or his law practice and also owns a financial interest in a for-profit adoption agency may, with informed consent, represent an adopting couple utilizing the services of the adoption agency but may not represent the biological parents.

2015 FEO 3. A lawyer may not offer a computer tablet to a prospective client in a direct mail solicitation letter.

2018 FEO 6: Opinion rules that, with certain conditions, a lawyer may include in a client's fee agreement a provision allowing the lawyer's purchase of litigation cost protection insurance and requiring reimbursement of the insurance premium from the client's funds in the event of a settlement or favorable trial verdict.

2019 FEO 5. Opinion rules that a lawyer may receive virtual currency as a flat fee for legal services, provided the fee is not clearly excessive and the terms of Rule 1.8(a) are satisfied, but may not accept virtual currency as entrusted funds to be billed against or to be held for the benefit of the lawyer, the client, or any third party.

RULE 1.9: DUTIES TO FORMER CLIENTS

(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 gives informed consent, confirmed in writing.

(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 gives informed consent, confirmed in writing.

(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 information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, 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. Nor could a lawyer who has represented multiple clients in a matter represent one or more of the clients in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent or the continued representation of the client(s) is not materially adverse to the interests of the former clients. *See* Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends 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 in that transaction clearly is prohibited. 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.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the information learned by the lawyer to establish a substantial risk that the lawyer has information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] 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.

[5] 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(c). 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.

[6] Application of paragraph (b) depends on a situation's particular facts, 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. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] 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(c).

[8] Paragraph (c) provides that 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 of Governing Lawyers, 111 cmt. d.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). *See* Rule 1.0(f). With regard to the effectiveness of an advance waiver, see Comment [22] 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 by the Supreme Court: July 24, 1997
Amendments Approved by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

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 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 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 condi-

tions 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. 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.

2003 FEO 9. A lawyer may participate in a settlement agreement that contains a provision limiting or prohibiting disclosure of information obtained during the representation even though the provision will effectively limit the lawyer's ability to represent future claimants.

2003 FEO 14. Opinion rules that if a current representation requires cross-examination of a former client using confidential information gained in the prior representation, then a lawyer has a disqualifying conflict of interest.

2009 FEO 8. A lawyer for a party to a partition proceeding may subsequently serve as a commissioner for the sale but not as one of the commissioners for the partitioning of the property.

2010 FEO 3. If a Lawyer who formerly represented a police officer determines that he does not need to use any confidential information that is not generally known to effectively cross-examine the officer in a prospective client's criminal matter, the lawyer must still disclose the former lawyer-client relationship so that the prospective client can make an informed decision about the lawyer's representation.

2011 FEO 2. Factors to be taken into consideration when determining whether a former client's delay in objecting to a conflict constitutes a waiver.

2012 FEO 4. A lawyer who represented an organization while employed with another firm must be screened from participation in any matter, or any matter substantially related thereto, in which she previously represented the organization, and from any matter against the organization if she acquired confidential information of the organization that is relevant to the matter and which has not become generally known.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2015 FEO 8. A lawyer who previously represented a husband and wife in several matters may not represent one spouse in a subsequent domestic action against the other spouse without the consent of the other spouse unless, after thoughtful and thorough analysis of a number of factors relevant to the prior representations, the lawyer determines that there is no substantial relationship between the prior representations and the domestic matter.

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: 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 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer, including a prohibition under Rule 6.6, and the prohibition does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(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) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter; and

(2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. *See* Rule 1.0(d). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. *See* Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] 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).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. *See* Rules 1.0(l) and 5.3.

[5] 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).

[6] Where the conditions of paragraph (c) are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware,

however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.

[7] Requirements for screening procedures are stated in Rule 1.0(l). Paragraph (c)(2) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, nor does it specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] Rule 1.10(d) removes imputation with the informed consent of the affected client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(f).

[10] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11 (b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[11] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (j) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

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. (*But see* Rule 1.10(c))

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 FEO 3. 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.

2005 FEO 1. A lawyer may not appear before a judge who is a family member without consent from all parties and, although consent is not required, the other members of the firm must disclose the relationship before appearing before the judge.

2008 FEO 11. A lawyer may serve as the trustee in a foreclosure proceeding while simultaneously representing the beneficiary of the deed of trust on unrelated matters and that the other lawyers in the firm may also continue to represent the beneficiary on unrelated matters.

2010 FEO 12. Conflicts of interest created by work performed by a law clerk are not imputed to other members of a law firm.

2012 FEO 4. A lawyer who represented an organization while employed with another firm must be screened from participation in any matter, or any matter substantially related thereto, in which she previously represented the organization, and from any matter against the organization if she acquired confidential information of the organization that is relevant to the matter and which has not become generally known.

RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a 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 gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), 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 timely screened from any participation in the matter; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) 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. As used in this Rule, the term "confidential government information" means information that 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. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(A) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(B) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is partici-

pating 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).

(e) 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.

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflicts of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. *See* Rule 1.0(f) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10, however, is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) impose additional obligations on a lawyer who has served or is currently serving as an officer or employee of the government. They apply in situations where a lawyer is not adverse to a former client and are designed to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, 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 in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. *See* Rule 1.13 Comment [9].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. *See* Rule 1.0(l) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement nor do they specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely significantly to injure the client, a reasonable delay may be justified.

[8] Paragraph (c) 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.

[9] Paragraphs (a) and (d) 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.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 6, 2004

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.

RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

(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 or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

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

(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 timely screened from any participation in the matter; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

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

Comment

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember 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 respon-

sibility 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.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. *See* Rule 1.0(f) and (c). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. *See* Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(l). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement nor does it specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the client, a reasonable delay may be justified.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

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. (*But see* Rule 1.12(c))

2007 FEO 10. A lawyer employed by a school board may serve as an administrative hearing officer with the informed consent of the board.

2010FEO 8. A lawyer who consults with both parties to a dispute relative to the lawyer's prospective service as a mediator may not subsequently represent one of the parties to the dispute.

2012 FEO 2. A lawyer-mediator may not draft a business contract for pro se parties to mediation.

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 refuses 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, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, 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 reveal such information outside the organization to the extent permitted by Rule 1.6 and may resign in accordance with Rule 1.16.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee, or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under these Rules, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) 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. 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 Rule means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] 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.

[3] 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. Paragraph (b) makes clear, however, that when the lawyer knows that the organization may be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is a violation of the law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(g), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, 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. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the mat-

ter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule 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 reasonably believes that disclosure of information protected by Rule 1.6 is necessary to prevent the commission of a crime by an organizational client, for example, disclosure is permitted by Rule 1.6(b)(2). If the lawyer's services are being or have been used by an organizational client to further a crime or fraud by the organization, Rule 1.6(b)(4) permits the lawyer to disclose confidential information to prevent, mitigate, or rectify the consequences of such conduct. In such circumstances, Rule 1.2(d) may be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee, or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) and (c), or who withdraws in circumstances that require or permit the lawyer to take action under these Rules, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. *See* Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or 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 relevant branch of government 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 under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful 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. This Rule does not limit that authority. *See* Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or 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.

[11] 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

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder, director, employee, member, or other constituent.

Derivative Actions

[13] 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.

[14] 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 by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; March 2, 2006

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 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 18. An attorney may not simultaneously represent shareholders in a derivative action and the corporation's landlord on a claim for back rent.

RPC 97. Counsel for a condominium association may represent the association against a unit owner.

97 FEO 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.

2005 FEO 9. A lawyer for a publicly traded company does not violate the Rules of Professional Conduct if the lawyer "reports out" confidential information as permitted by SEC regulations.

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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 diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. 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. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] 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. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. 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).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

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 FEO 16. 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 FEO 18. 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.

2003 FEO 7. A lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

2006 FEO 11. Outside of the commercial or business context, a lawyer may not, at the request of a third party, prepare documents, such as a will or trust instrument, that purport to speak solely for principal without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

Rule 1.15: SAFEKEEPING PROPERTY

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, Trust Account Management in Multiple-Lawyer Firm. The 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 four subparts as well as the annotations appear after the text for Rule 1.15-4.

Rule 1.15-1: DEFINITIONS

For purposes of this Rule 1.15, the following definitions apply:

(a) "Bank" denotes a bank or 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) "Demand deposit" denotes any account from which deposited funds can be withdrawn at any time without notice to the depository institution.

(e) "Electronic transfer" denotes a paperless transfer of funds.

(f) "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.

(g) "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.

(h) "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.

(i) "Funds" denotes any form of money, including cash, payment instruments such as checks, money orders, or sales drafts, and receipts from electronic fund transfers.

(j) "General trust account" denotes any trust account other than a dedicated trust account.

(k) "Item" denotes any means or method by which funds are credited to or debited from an account; for example: a check, substitute check, remotely created check, draft, withdrawal order, automated clearinghouse (ACH) or electronic transfer, electronic or wire funds transfer, electronic image of an item and/or information in electronic form describing an item, or instructions given in person or by telephone, mail, or computer.

(l) "Legal services" denotes services (other than professional fiduciary services) rendered by a lawyer in a client-lawyer relationship.

(m) "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.

(n) "Trust account" denotes an account, designated as such, maintained by a lawyer for the deposit of trust funds.

(o) "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 by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: May 4, 2000; March 1, 2003; March 6, 2008; October 8, 2009; August 23, 2012; June 9, 2016; April 5, 2018

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. Trust funds placed in a general account are those which, in the lawyer's good faith judgment, are nominal or short-term. General trust accounts are to be administered in accordance with the Rules of Professional Conduct and the provisions of 27 NCAC Chapter 1, Subchapter D, Sections .1300.

(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 or a bank with branch offices in North Carolina except that, with the written consent of the client, a dedicated trust account may be maintained at a bank that does not have offices in North Carolina or at 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) Funds in Accounts. A trust or fiduciary account may only hold entrusted property. Third party funds that are not received by or placed under the control of the lawyer in connection with the performance of legal services or professional fiduciary services may not be deposited or maintained in a trust or fiduciary account. Additionally, no funds belonging to a the lawyer shall be deposited or maintained 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 shall 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) Items Payable to Lawyer. Any item 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 on the item by client name, file number, or other identifying information the client from whose balance the item is drawn. Any item that does not include this information may not be used to withdraw funds from a trust account or a fiduciary account for payment of the lawyer's fees or expenses.

(i) No Bearer Items. No item shall be drawn on a trust account or fiduciary account made payable to cash or bearer and no cash shall be withdrawn from a trust account or fiduciary account by any means.

(j) Debit Cards Prohibited. Use of a debit card to withdraw funds from a general or dedicated trust account or a fiduciary account is prohibited.

(k) No Benefit to Lawyer or Third Party. 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.

(l) Bank Directive. Every lawyer maintaining a trust account or fiduciary account with demand deposit at a bank or other financial institution shall file with the bank or other financial institution a written directive requiring the bank or other financial institution 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 or other financial institution that does not agree to make such reports.

(m) 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.

(n) 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.

(o) 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.

(p) Duty to Report Misappropriation. A lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the Trust Account Compliance Counsel (TACC) in the North Carolina State Bar Office of Counsel. Discovery of intentional theft or fraud must be reported to the TACC immediately. When an accounting or bank error results in an unintentional and inadvertent use of one client's trust funds to pay the obligations of another client, the event must be reported unless the misapplication is discovered and rectified on or before the next quarterly reconciliation required by Rule 1.15-3(d)(1). This rule requires disclosure of information otherwise protected by Rule 1.6 if necessary to report the misappropriation or misapplication..

(q) Interest on Deposited Funds. Under no circumstances shall the lawyer be entitled to any interest earned on funds deposited in a trust account or fiduciary account. Except as authorized by Rule .1316 of subchapter 1D of the Rules and Regulations of the North Carolina State Bar, 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.

(r) 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-53 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.

(s) Check Signing and Electronic Transfer Authority.

(1) Every trust account check must be signed by a lawyer, or by an employee who is not responsible for performing monthly or quarterly reconciliations and who is supervised by a lawyer.

(2) Every electronic transfer from a trust account must be initiated by a lawyer, or by an employee who is not responsible for performing monthly or quarterly reconciliations and who is supervised by a lawyer.

(3) Prior to exercising signature or electronic transfer authority, a lawyer or supervised employee shall take a one-hour trust account management continuing legal education (CLE) course approved by the State Bar for this purpose. The CLE course must be taken at least once for every law firm at which the lawyer or the supervised employee is given signature or transfer authority.

(4) Trust account checks may not be signed using signature stamps, preprinted signature lines on checks, or electronic signatures other than "digital signatures" as defined in 21 CFR 11.3(b)(5).

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; March 6, 2008; February 5, 2009; August 23, 2012; June 9, 2016; April 5, 2018

Rule 1.15-3: RECORDS AND ACCOUNTINGS

(a) Check Format. All general trust accounts, dedicated trust accounts, and fiduciary accounts must use business-size checks that contain an Auxiliary On-Us field in the MICR line of the check.

(b) 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 records listing the source and date of receipt of any funds deposited in the account including, but not limited to, bank receipts, deposit slips and wire and electronic transfer confirmations, and, in the case of a general trust account, all records also listing the name of the client or other person to whom the funds belong;

(2) all canceled checks or other items drawn on the account, or 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 name, file number, or other identifying information of the client from whose balance each item is drawn, provided, that:

(A) digital images must be legible reproductions of the front and back of the original items with no more than six images per page and no images smaller than 1-3/16 x 3 inches; and

(B) the bank must maintain, for at least six years, the capacity to reproduce electronically additional or enlarged images of the original items or records related thereto upon request within a reasonable time;

(3) all instructions or authorizations to transfer, disburse, or withdraw funds from the trust account (including electronic transfers or debits), or a written or electronic record of any such transfer, disbursement, or withdrawal showing the amount, date, and recipient of the transfer or disbursement, and, in the case of a general trust account, also showing the name of the client or other person to whom the funds belong;

(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 item 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.

(c) 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 records listing the source and date of receipt of all funds deposited in the account including, but not limited to, depository receipts, deposit slips, and wire and electronic transfer confirmations;

(2) a copy of all checks or other items drawn on the account, or 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(b)(2);

(3) all instructions or authorizations to transfer, disburse, or withdraw funds

from the account (including electronic transfers or debits) or a written or electronic record of any such transfer, disbursement, or withdrawal showing the amount, date, and recipient of the transfer or disbursement;

(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 item drawn on the account for insufficient funds; and

(5) any other records required by law to be maintained for the account.

(d) Reconciliations of General Trust Accounts.

(1) Quarterly Reconciliations. For each general trust account, a reconciliation report shall be prepared at least quarterly. Each reconciliation report shall show all of the following balances and verify that they are identical:

(A) The balance that appears in the general ledger as of the reporting date;

(B) The total of all subsidiary ledger balances in the general trust account, determined by listing and totaling the positive balances in the individual client ledgers and the administrative ledger maintained for servicing the account, as of the reporting date; and

(C) The adjusted bank balance, determined by adding outstanding deposits and other credits to the ending balance in the monthly bank statement and subtracting outstanding checks and other deductions from the balance in the monthly statement.

(2) Monthly Reconciliations. Each month, the balance of the trust account as shown on the lawyer's records shall be reconciled with the current bank statement balance for the trust account.

(3) The lawyer shall review, sign, date, and retain a copy of the reconciliations of the general trust account for a period of six years in accordance with Rule 1.15-3(g).

(e) 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.

(f) 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.

(g) 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 at least the six (6) year period immediately preceding the lawyer's most recent fiscal year end.

(h) 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 in North Carolina upon request by the State Bar.

(i) Reviews.

(1) Each month, for each general trust account, dedicated trust account, and fiduciary account, the lawyer shall review the bank statement and cancelled checks for the month covered by the bank statement.

(2) Each quarter, for each general trust account and dedicated trust account, the lawyer shall review the statement of costs and receipts, client ledger, and cancelled checks of a random sample of representative transactions completed during the quarter to verify that the disbursements were properly made. The transactions reviewed must involve multiple disbursements unless no such transactions are processed through the account, in which case a single disbursement is considered a transaction for the purpose of this paragraph. A sample of three representative transactions shall satisfy this requirement, but a larger sample may be advisable.

(3) Each quarter, for each fiduciary account, the lawyer shall engage in a review as described in Rule 1.15-3(i)(2); however, if the lawyer manages more than ten fiduciary accounts, the lawyer may perform reviews on a random sample of at least ten fiduciary accounts in lieu of performing reviews on all such accounts.

(4) The lawyer shall take the necessary steps to investigate, identify, and resolve within ten days any discrepancies discovered during the monthly and quarterly reviews.

(5) A report of each monthly and quarterly review, including a description of the review, the transactions sampled, and any remedial action taken, shall be prepared. The lawyer shall sign, date, and retain a copy of the report and associated documentation for a period of six years in accordance with Rule 1.15-3(g).

(j) Retention of Records in Electronic Format. Records required by Rule 1.15-3 may be created, updated, and maintained electronically, provided

(1) the records otherwise comply with Rule 1.15-3, to wit: electronically created reconciliations and reviews that are not printed must be reviewed by the lawyer and electronically signed using a "digital signature" as defined in 21 CFR 11.3(b)(5);

(2) printed and electronic copies of the records in industry-standard formats can be made on demand; and

(3) the records are regularly backed up by an appropriate storage device.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 6, 2004; March 6, 2008; June 9, 2016; April 5, 2018

RULE 1.15-4: TRUST ACCOUNT MANAGEMENT IN A MULTI-MEMBER FIRM

(a) Trust Account Oversight Officer (TAOO). Lawyers in a law firm of two or more lawyers may designate a partner in the firm to serve as the trust account oversight officer (TAOO) for any general trust account into which more than one firm lawyer deposits trust funds. The TAOO and the partners of the firm, or those with comparable managerial authority (managing lawyers), shall agree in writing that the TAOO will oversee the administration of any such trust account in conformity with the requirements of Rule 1.15, including, specifically, the requirements of this Rule 1.15-4. More than one partner may be designated as a TAOO for a law firm.

(b) Limitations on Delegation. Designation of a TAOO does not relieve any lawyer in the law firm of responsibility for the following:

(1) oversight of the administration of any dedicated trust account or fiduciary account that is associated with a legal matter for which the lawyer is primary legal counsel or with the lawyer's performance of professional fiduciary services; and

(2) review of the disbursement sheets or statements of costs and receipts, client ledgers, and trust account balances for those legal matters for which the lawyer is primary legal counsel.

(c) Training of the TAOO.

(1) Within the six months prior to beginning service as a TAOO, a lawyer shall,

(A) read all subparts and comments to Rule 1.15, all formal ethics opinions of the North Carolina State Bar interpreting Rule 1.15, and the North Carolina State Bar Trust Account Handbook;

(B) complete one hour of accredited continuing legal education (CLE) on trust account management approved by the State Bar for the purpose of training a lawyer to serve as a TAOO;

(C) complete two hours of training (live, online, or self-guided) presented by a qualified educational provider on one or more of the following topics: (i) financial fraud, (ii) safeguarding funds from embezzlement, (iii) risk assessment and management for bank accounts, (iv) information security and online banking, or (v) accounting basics; and

(D) become familiar with the law firm's accounting system for trust accounts.

(2) During each year of service as a TAOO, the designated lawyer shall attend one hour of accredited continuing legal education (CLE) on trust account management approved by the State Bar for the purpose of training a TAOO or one hour of training, presented by a qualified educational provider, on one or more of the subjects listed in paragraph (c)(1)(C).

(d) Designation and Annual Certification. The written agreement designating a lawyer as the TAOO described in paragraph (a) shall contain the following:

(1) A statement by the TAOO that the TAOO agrees to oversee the operation of the firm's general trust accounts in compliance with the require-

ments of all subparts of Rule 1.15, specifically including the mandatory oversight measures in paragraph (e) of this rule;

(2) Identification of the trust accounts that the TAOO will oversee;

(3) An acknowledgement that the TAOO has completed the training described in paragraph (c)(1) and a description of that training;

(4) A statement certifying that the TAOO understands the law firm's accounting system for trust accounts; and

(5) An acknowledgement that the lawyers in the firm remain professionally responsible for the operation of the firm's trust accounts in compliance with Rule 1.15.

Each year on the anniversary of the execution of the agreement, the TAOO and the managing lawyers shall execute a statement confirming the continuing designation of the lawyer as the TAOO, certifying compliance with the requirements of this rule, describing the training undertaken by the TAOO as required by paragraph (c)(2), and reciting the statements required by subparagraphs (d)(1), (2), (4), and (5). During the lawyer's tenure as TAOO and for six years thereafter, the agreement and all subsequent annual statements shall be maintained with the trust account records (see Rule 1.15-3(g)).

(e) Mandatory Oversight Measures. In addition to any other record keeping or accounting requirement set forth in Rule 1.15-2 and Rule 1.15-3, the firm shall adopt a written policy detailing the firm's trust account management procedures which shall annually be reviewed, updated, and signed by the TAOO and the managing lawyers. Each version of the policy shall be retained for the minimum record keeping period set forth in Rule 1.15-3(g).

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

Adopted by the Supreme Court: June 9, 2016

Comments to Rule 1.15 and All Subparts

[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. Client funds must be promptly deposited into the trust account. Client funds must be deposited in a general trust account if there is no duty to invest on behalf of the client. Generally speaking, if a reasonably prudent person would conclude that the funds in question, either because they are nominal in amount or are to be held for a short time, could probably not earn sufficient interest to justify the cost of investing, the funds should be deposited in the general trust account. In determining whether there is a duty to invest, a lawyer shall exercise his or her professional judgment in good faith and shall consider the following:

a) The amount of the funds to be deposited;

b) The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

c) The rates of interest or yield at financial institutions where the funds are to be deposited;

d) The cost of establishing and administering dedicated accounts for the client's benefit, including the service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the client's benefit;

e) The capability of financial institutions, lawyers, or law firms to calculate and pay income to individual clients;

f) Any other circumstances that affect the ability of the client's funds to earn a net return for the client.

When regularly reviewing the trust accounts, the lawyer shall determine whether changed circumstances require further action with respect to the funds of any client. The determination of whether a client's funds are nominal or short-term shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with an ethical impropriety or breach of professional conduct based on the good faith exercise of such judgment

[4] A law firm with offices in another state may send a North Carolina client's funds to a firm office in another state for centralized processing provided, however, the funds are promptly deposited into a trust account with a bank that has branch offices in North Carolina, and further provided, the funds are transported and held in a safe place until deposited into the trust account. If this procedure is followed, client consent to the transfer of the funds to an out-of-state office of the firm is not required. However, all such client funds are subject to the requirements of these rules. 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.

[5] 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

[6] 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."

[7] 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.

[8] 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).

[9] 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

[10] 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

[11] 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

[12] 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.

[13] Client or third-party funds on occasion pass through, or are originated by, intermediaries before deposit to a trust or fiduciary account. Such intermediaries include banks, credit card processors, litigation funding entities, and online marketing platforms. A lawyer may use an intermediary to collect a fee. However, the lawyer may not participate in or facilitate the collection of a fee by an intermediary that is unreliable or untrustworthy. Therefore, the lawyer has an obligation to make a reasonable investigation into the reliability, stability, and viability of an intermediary to determine whether reasonable measures are being taken to segregate and safeguard client funds against loss or theft and, should such funds be lost, that the intermediary has the resources to compensate the client. Absent other indicia of fraud (such as the use of non-industry standard methods for collection of credit card information), a lawyer's diligence obligation is satisfied if the intermediary collects client funds using a credit or debit card. Unearned fees, if collected by an intermediary, must be transferred to the lawyer's designated trust or fiduciary account within a reasonable period of time so as to minimize the risk of loss while the funds are in the possession of another, and to enable the collection of interest on the funds for the IOLTA program or the client as appropriate. See 27 N.C.A.C. 1B, Sect. .1300.

Abandoned Property

[14] 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.

Disputed Funds

[15] A lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as the State Bar's program for fee dispute resolution. *See* Rule 1.5(f). The undisputed portion of the funds shall be promptly distributed.

[16] Third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claim is resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Responsibility for Records and Accountings

[17] 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. The required record retention period of six years set forth in this rule does not preclude the State Bar from seeking records for a period prior to the retention period and, if obtained, from pursuing a disciplinary action based thereon if such action is not prohibited by law or other rules of the State Bar.

[18] The rules permit the retention of records in electronic form. A storage device is appropriate for backing up electronic records if it reasonably assures that the records will be recoverable despite the failure or destruction of the original storage device on which the records are stored. For a discussion of storage methods not solely under the control of the lawyer, see 2011 FEO 6.

[19] Many businesses are now converting paper checks to automated clearinghouse (ACH) debits to decrease costs and increase operating efficiencies. When a check is converted, the check is taken either at the point-of-sale or through the mail for payment, the account information is captured from the check, and an electronic transaction is created for payment through the ACH system. The original physical check is typically destroyed by the converting entity (although an image of the check may be stored for a certain period of time). If a check drawn on a trust account is converted to ACH, the lawyer will not receive either the physical check or a check image. The transaction will appear on the lawyer's trust account statement as an ACH debit with limited information about the payment (e.g., dollar amount, date processed, originator of the ACH debit).

[20] To prevent conversion of a check to ACH without authorization, a lawyer is required to use checks with an "Auxiliary On-Us field." A check will not be eligible for conversion to ACH if it contains an Auxiliary On-Us field, which is an additional field that appears in the left-most position of the MICR (magnetic ink character recognition) line on a business size check. The lawyer should confirm with the lawyer's financial institution that the Auxiliary On-Us field is included on the lawyer's trust account checks. Including an Auxiliary On-Us field on the check will require using checks that are longer than six inches. As with the other information in the MICR line of a check, the routing, account and payment numbers, the financial institution issuing the check determines the content of the Auxiliary On-Us field.

[21] Authorized ACH debits that are electronic transfers of funds (in which no checks are involved) are allowed provided the lawyer maintains a record of the transaction as required by Rule 1.15-3(b)(3) and (c)(3). The record, whether consisting of the instructions or authorization to debit the account, a record or receipt from the register of deeds or a financial institution, or the lawyer's independent record of the transaction, must show the amount, date, and recipient of the transfer or disbursement, and, in the case of a general trust account, also show the name of the client or other person to whom the funds belong.

[22] 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. In addition, the lawyer must take steps to discover any unauthorized transactions involving trust funds as soon as possible. Therefore, it is essential that the lawyer regularly reconcile a general trust account. This means that, at least once a month, the lawyer must reconcile the current bank statement balance with the balance shown for the entire account in the lawyer's records, such as a check register or its equivalent, as of the date of the bank statement. At least once a quarter, the lawyer must reconcile the individual client balances shown on the lawyer's ledger with the current bank statement balance. Monthly reconciliation will help to uncover unauthorized ACH transactions promptly. The current bank balance is the balance obtained when subtracting 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

[23] A properly maintained trust account should not have any items 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.

Fraud Prevention Measures

[24] The mandatory monthly and quarterly reviews and oversight measures in Rule 1.15-3(i) facilitate early detection of internal theft and early detection and correction of errors. They are minimum fraud prevention measures necessary for the protection of funds on deposit in a firm trust or fiduci-

ary account from theft by any person with access to the account. Internal theft from trust accounts by insiders at a law firm can only be timely detected if the records of the firm's trust accounts are routinely reviewed. For this reason, Rule 1.15-3(i)(1) requires monthly reviews of the bank statements and cancelled checks for all general, dedicated, and fiduciary accounts. In addition, Rule 1.15-3(i)(2) requires quarterly reviews of a random sample of three transactions for each trust account, dedicated trust account, and fiduciary account including examination of the statement of costs and receipts, client ledger, and cancelled checks for the transactions. Review of these documents will enable the lawyer to verify that the disbursements were made properly. Although not required by the rule, a larger sample than three transactions is advisable to increase the likelihood that internal theft will be detected.

[25] Another internal control to prevent fraud is found in Rule 1.15-2(s) which addresses the signature authority for trust account checks. The provision prohibits an employee who is responsible for performing the monthly or quarterly reconciliations for a trust account from being a signatory on a check for that account. Dividing the check signing and reconciliation responsibilities makes it more difficult for one employee to hide fraudulent transactions. Similarly, signature stamps, preprinted signature lines on checks, and electronic signatures are prohibited to prevent their use for fraudulent purposes.

[26] In addition to the recommendations in the North Carolina State Bar Trust Account Handbook (see the chapter on *Safeguarding Funds from Embezzlement*), the following fraud prevention measures are recommended:

(1) Enrolling the trust account in an automated fraud detection program;

(2) Implementation of security measures to prevent fraudulent wire transfers of funds;

(3) Actively maintaining end-user security at the law firm through safety practices such as strong password policies and procedures, the use of encryption and security software, and periodic consultation with an information technology security professional to advise firm employees; and

(4) Insuring that all staff members who assist with the management of the trust account receive training on and abide by the security measures adopted by the firm.

Lawyers should frequently evaluate whether additional fraud control measures are necessary and appropriate.

Duty to Report Misappropriation or Misapplication

[27] A lawyer is required by Rule 1.15-2(p) to report to the Trust Account Compliance Counsel of the North Carolina State Bar Office of Counsel if the lawyer knows or reasonably believes that entrusted property, including trust funds, has been misappropriated or misapplied. The rule requires the reporting of an unintentional misapplication of trust funds, such as the inadvertent use of one client's funds on deposit in a general trust account to pay the obligations of another client, unless the lawyer discovers and rectifies the error on or before the next scheduled quarterly reconciliation. A lawyer is required to report the conduct of lawyers and non-lawyers as well as the lawyer's own conduct. A report is required regardless of whether information leading to the discovery of the misappropriation or misapplication would otherwise be protected by Rule 1.6. If disclosure of confidential client information is necessary to comply with this rule, the lawyer's disclosure should be limited to the information that is necessary to enable the State Bar to investigate. *See* Rule 1.6, cmt. [15].

Designation of a Trust Account Oversight Officer

[28] In a firm with two or more lawyers, personal oversight of all of the activities in the general trust accounts by all of the lawyers in the firm is often impractical. Nevertheless, any lawyer in the firm who deposits into a general trust account funds entrusted to the lawyer by or on behalf of a client is professionally responsible for the administration of the trust account in compliance with Rule 1.15 regardless of whether the lawyer directly participates in the administration of the trust account. Moreover, Rule 5.1 requires all lawyers with managerial or supervisory authority over the other lawyers in a firm to make reasonable efforts to ensure that the other lawyers conform to the Rules of Professional Conduct. Rule 1.15-4 provides a procedure for delegation of the oversight of the routine administration of a general trust account to a firm partner, shareholder, or member (see Rule 1.0(h)) in a manner that is professionally responsible. By identifying, training, and documenting the appointment of a trust account oversight officer (TAOO) for the law firm, the lawyers in a multiple-lawyer firm may responsibly delegate the routine administration of the firm's general trust accounts to a qualified lawyer. Delegation consistent with the requirements of Rule 1.15-4 is evidence of a lawyer's good faith effort to comply with Rule 5.1.

[29] Nevertheless, designation of a TAOO does not insulate from professional discipline a lawyer who personally engaged in dishonest or fraudulent conduct. Moreover, a lawyer having actual or constructive knowledge of dishonest or fraudulent conduct or the mismanagement of a trust account in violation of the Rules of Professional Conduct by any firm lawyer or employee remains subject to professional discipline if the lawyer fails to promptly take reasonable remedial action to avoid the consequences of such conduct including reporting the conduct as required by Rule 1.15-2(p) or Rule 8.3. *See also* Rule 5.1 and Rule 5.3.

Limitations on Delegation to TAOO

[30] Despite the designation of a TAOO pursuant to Rule 1.15-4, each lawyer in the firm remains professionally responsible for the trust account activity associated with the legal matters for which the lawyer provides representation. Therefore, for each legal matter for which the lawyer is primary counsel, the lawyer must review and approve any disbursement sheet or settlement statement, trust account entry in the client ledger, and trust account balance associated with the matter. Similarly, a lawyer who establishes a dedicated trust account or fiduciary account in connection with the representation of a client is professionally responsible for the administration of the dedicated trust account or fiduciary account in compliance with Rule 1.15.

Training for Service as a TAOO

[31] A qualified provider of the educational training programs for a TAOO described in Rule 1.15-4(c)(1)(C) need not be an accredited sponsor of continuing legal education programs (see 27 N.C.A.C. 1D, Rule .1520), but must be knowledgeable and reputable in the specific field and must offer educational materials as part of its usual course of business. Training may be completed via live presentations, online courses, or self-guided study. Self-guided study may consist of reading articles, presentation materials, or websites that have been created for the purpose of education in the areas of financial fraud, safeguarding funds from embezzlement, risk management for bank accounts, information security and on-line banking, or basic accounting.

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

Amendments Approved by the Supreme Court: March 1, 2003; March 6, 2008; June 9, 2016; March 27, 2019

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 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 physi-

cian'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 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. (*See also* Rule 1.15-2(e))

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 FEO 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.

97 FEO 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 FEO 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 FEO 14. 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 FEO 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. A lawyer may sign a statement acknowledging a finance company's interest in a client's recovery subject to certain conditions.

2001 FEO 3. 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 FEO 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 FEO 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.

2005 FEO 11. Opinion examines the requirements for an interim account used to pay the costs for real estate closings and also rules that the actual costs may be marked up by the lawyer provided there is full disclosure and the overcharges are not clearly excessive.

2005 FEO 13. A minimum fee that will be billed against at an hourly rate and is collected at the beginning of representation belongs to the client and must be deposited into the trust account until earned and, upon termination of representation, the unearned portion of the fee must be returned to the client.

2006 FEO 8. A lawyer may disburse against deposited items in reliance upon a bank's funding schedule under certain circumstances.

2006 FEO 15. A lawyer may charge a reasonable dormancy fee against unclaimed funds if the client agrees in advance and the fee meets other statutory requirements.

2006 FEO 16. Under certain circumstances a lawyer may consider a dispute with a client over legal fees resolved and transfer funds from the trust account to his operating account to pay those fees.

2008 FEO 10. Opinion surveys prior ethics opinions on legal fees, sets forth the ethical requirements for the different types of fees paid in advance, authorizes minimum fees earned upon payment, and provides model fee provisions.

2008 FEO 13. Unless affected clients expressly consent to the disclosure of their confidential information, a lawyer may allow a title insurer to audit the lawyer's real estate trust account and reconciliation reports only if certain written assurances to protect client confidences are obtained from the title insurer, the audited account is only used for real estate closings and the audit is limited to certain records and to real estate transactions insured by the title insurer.

2009 FEO 4. A law firm may establish a credit card account that avoids commingling by depositing unearned fees into the law firm's trust account and earned fees into the law firm's operating account provided the problem of chargebacks is addressed.

2010 FEO 4. All advance payments of litigation expenses by a barter exchange client must be paid in cash or by check or credit card.

2011 FEO 6. A law firm may contract with a vendor of software as a service provided the lawyer uses reasonable care to safeguard confidential client information.

2011 FEO 7. A law firm may use on-line banking to manage its trust accounts provided the firm's managing lawyers are regularly educated on the security risks and actively maintain end-user security.

2011 FEO 10. A lawyer may advertise on a website that offers daily discounts to consumers where the website company's compensation is a percentage of the amount paid to the lawyer if certain disclosures are made and certain conditions are satisfied.

2011 FEO 13. Client funds or the funds of a third party that are placed in the lawyer's control for the purpose of being safeguarded, managed or disbursed in connection with a transaction, but which were not designated or identified as funds for the payment of legal fees, may not be retained in the trust account, pursuant to Rule 1.15-2(g), as disputed funds to which the lawyer may be entitled.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2012 FEO 13. The partners and managerial lawyers remaining in a firm are responsible for the safekeeping and proper disposition of both the active

and closed files of a suspended, disbarred, missing, or deceased member of the firm.

2013 FEO 3. Opinion examines a lawyer's responsibilities when charging and collecting from a client for the expenses of representation.

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

2013 FEO 13. A lawyer may disburse immediately against funds that are credited to the lawyer's trust account by automated clearinghouse (ACH) transfer and electronic funds transfer (EFT) despite the risk that an originator may initiate a reversal.

2015 FEO 6. When funds are stolen from a lawyer's trust account by a third party who is not employed or supervised by the lawyer, and the lawyer was managing the trust account in compliance with the Rules of Professional Conduct, the lawyer is not professionally responsible for replacing the funds stolen from the account.

2017 FEO 2: A lawyer representing an estate must maintain the checking account for the estate in accordance with Rule 1.15 consistent with the extent to which the lawyer has control over the account.

2017 FEO 4: A lawyer is prohibited from disbursing settlement funds pursuant to the client's directive if the funds are subject to a perfected lien.

2019 FEO 5. Opinion rules that a lawyer may receive virtual currency as a flat fee for legal services, provided the fee is not clearly excessive and the terms of Rule 1.8(a) are satisfied, but may not accept virtual currency as entrusted funds to be billed against or to be held for the benefit of the lawyer, the client, or any third party.

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) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client; or

(2) the client knowingly and freely assents to the termination of the representation; or

(3) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; or

(4) the client insists upon taking action that the lawyer considers repugnant, imprudent, or contrary to the advice and judgment of the lawyer, or with which the lawyer has a fundamental disagreement; or

(5) the client has used the lawyer's services to perpetrate a crime or fraud; or

(6) 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; or

(7) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(8) 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

(9) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(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 or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

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. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. *See* Rules 1.2(c) and 6.5. *See also* Rule 1.3, Comment [4].

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. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request 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. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a 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 self-representation by the client.

[6] If the client has severely diminished capacity, 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 may take reasonably necessary protective action as provided in 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 may also withdraw where the client insists on taking action that the lawyer considers repugnant or imprudent or with which the lawyer has a fundamental disagreement.

[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] The lawyer may never retain papers to secure a fee. Generally, anything in the file that 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.

[11] 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 by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

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 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. 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 FEO 9. 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.

2002 FEO 5. Opinion rules that whether electronic mail should be retained as a part of a client's file is a legal decision to be made by the lawyer.

2005 FEO 13. A minimum fee that will be billed against at an hourly rate and is collected at the beginning of representation belongs to the client and must be deposited into the trust account until earned and, upon termination of representation, the unearned portion of the fee must be returned to the client.

2006 FEO 18. When representation is terminated by a client, a lawyer who advances the cost of a deposition and transcript may not condition release of the transcript to the client upon reimbursement of the cost.

2007 FEO 8. A lawyer may not charge a client for filing and presenting a motion to withdraw unless withdrawal advances the client's objectives for the representation or the charge is approved by the court when ruling on a petition for legal fees from a court-appointed lawyer.

2009 FEO 8. After the entry of the order of sale in a partition proceeding, and before seeking the permission of the clerk to withdraw from the representation to serve as the commissioner for the sale, the lawyer must obtain the client's informed consent, confirmed in writing, to withdraw from the representation to serve as commissioner.

2010 FEO 1. A lawyer may appear in a lawsuit on behalf of an insured whose whereabouts are unknown if the insured has authorized the representation. However, if the insured cannot thereafter be located, the lawyer may have to file a motion to withdraw.

2013 FEO 8. Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

2013 FEO 15. Records relative to a client's matter that would be helpful to subsequent legal counsel must be provided to the client upon the termination of the representation and may be provided in an electronic format if readily accessible to the client without undue expense.

2015 FEO 5. In post-conviction or appellate proceedings, a discharged lawyer may discuss a former client's case and turn over the former client's file to successor counsel if the former client consents or the disclosure is impliedly authorized.

RULE 1.17: SALE OF LAW PRACTICE

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, from an office that is within a one-hundred (100) mile radius of the purchased law practice, except the seller may continue to practice law with the purchaser and may provide legal representation at no charge to indigent persons or to members of the seller's family;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) Written notice is sent to each of the seller's clients regarding:

(1) the proposed sale, including the identity of the purchaser;

(2) 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

(3) 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 the purchaser identifies a conflict of interest that pro-

hibits the purchaser from representing the client, the seller's notice to the client shall advise the client to retain substitute counsel.

(e) If a client cannot be given notice, 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 to obtain an order authorizing the transfer of a file. 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.

(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 other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing principals 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 purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily 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 an independent contract lawyer or an employee for the practice. Permitting the seller to continue to work for the practice will assist in the smooth transition of cases and will provide mentoring to new lawyers. The requirement that the seller cease private practice also does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business. Similarly, the Rule allows the seller to provide *pro bono* representation to indigent persons on his own initiative and to provide legal representation to family members without charge. *See also* 98 Formal Ethics Opinion 6 (1998)(requirements in rule relative to sale of law practice to lawyer who is stranger to the firm do not apply to the sale of law practice to lawyer who is a current employee of firm).

[4] The Rule permits a sale attendant upon discontinuing the private practice of law from an office that is within a one-hundred (100) mile radius of the purchased practice. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another part of North Carolina or to another state.

Sale of Entire Practice or Entire Area of Practice

[5] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than the entire practice area 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 purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

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. *See* Rule 1.6(b)(8). Providing the purchaser access to detailed information relating to the representation, such as the client's 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 given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 30 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.

Other Applicable Ethical Standards

[11] 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 the client's informed consent for those conflicts that can be agreed to (*see* Rule 1.7 regarding conflicts and Rule 1.0(f) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer 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).

[13] After purchase, the law practice may retain the same name subject to the requirements of Rule 7.5. The seller's retirement or discontinuation of affiliation with the law practice must be indicated on letterhead and other communications as necessary to avoid misleading the public as to the seller's relationship to the law practice. If the seller becomes an independent contract lawyer or employee of the practice, the letterhead and other communications must indicate that the seller is no longer the owner of the firm; an "of counsel" designation would be sufficient to do so.

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 non-lawyer 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 this 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 by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; November 16, 2006; October 2, 2014; September 22, 2016

ETHICS OPINION NOTES

98 FEO 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: DUTIES TO PROSPECTIVE CLIENT

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(1) the disqualified lawyer is timely screened from any participation in the matter; and

(2) written notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In such a situation, to avoid the creation of a duty to the person under this Rule, a lawyer has an affirmative obligation to warn the person that a communication with the lawyer will not create a client-lawyer relationship and information conveyed to the lawyer will not be confidential or privileged. *See also* Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person is communicating information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(f) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. *See* Rule 1.0(l) (requirements for screening procedures). Paragraph (d)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement nor does it specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the client, a reasonable delay may be justified.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, *see* Rule 1.15. For the special considerations when a prospective client has diminished capacity, see Rule 1.14.

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

Adopted by the Supreme Court: March 1, 2003

Amendments Approved by the Supreme Court: October 2, 2014

ETHICS OPINION NOTES

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 244. 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.

RPC 246. 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.

2003 FEO 8. Opinion interprets various provisions of Rule 1.18.

2006 FEO 14. Opinion rules that when a lawyer charges a fee for a consultation, and the lawyer accepts payment, there is a client-lawyer relationship for the purposes of the Rules of Professional Conduct.

2011 FEO 8. Guidelines for the use of live chat support services on law firm websites.

2011 FEO 10. A lawyer may advertise on a website that offers daily discounts to consumers where the website company's compensation is a percentage of the amount paid to the lawyer if certain disclosures are made and certain conditions are satisfied.

Rule 1.19: 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 competently to 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 that 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 by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

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, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. 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 by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

2011 FEO 4. A lawyer may not agree to procure title insurance exclusively from a particular title insurance agency on every transaction referred to the lawyer by a person associated with the agency.

Rule 2.2: RESERVED

Adopted by the Supreme Court: July 24, 1997; Revoked March 1, 2003

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 but 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] 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 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

[3] 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 in 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

[4] 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 that 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

[5] 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 by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

RULE 2.4: LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission and the North Carolina Canons of Ethics for Arbitrators.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the

first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (*see* Rule 1.0(n)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

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

Adopted by the Supreme Court: March 1, 2003

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 in law and fact 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 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 never is 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. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. 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 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.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim that otherwise would be prohibited by this Rule.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

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.

2003 FEO 13. An attorney may file a time-barred claim on behalf of a client, even when the defendant is unavailable and can only be served by publication.

2006 FEO 9. If the lawyer concludes that pursuit of a lawsuit filed against a defendant is frivolous, but the GAL for the minor client insists on continuing the litigation, the lawyer must either move to withdraw from the representation or seek to have the GAL removed.

2008 FEO 3. A lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2008 FEO 4. A lawyer may issue a subpoena in compliance with Rule 45 of the Rules of Civil Procedure which authorizes a subpoena for the production of documents to the lawyer's office without the need to schedule a hearing, deposition or trial.

2008 FEO 17. A lawyer appointed to represent a parent at the trial of a juvenile case may file a notice of appeal to preserve the client's right to appeal although the lawyer does not believe that the appeal has merit.

2009 FEO 5. A lawyer may serve the opposing party with discovery requests that require the party to reveal her citizenship status, but the lawyer may not report the status to ICE unless required to do so by federal or state law.

2009 FEO 15. A prosecutor must dismiss a DWI charge when the prosecutor fails to appeal a court order suppressing evidence from the traffic stop thereby eliminating the evidence necessary to prove the charge.

2011 FEO 3. A criminal defense lawyer may advise an undocumented alien that deportation may result in avoidance of a criminal conviction and may file a notice of appeal to superior court although there is a possibility that client will be deported.

2013 FEO 1. Subject to conditions, a prosecutor may enter into an agreement to consent to vacating a conviction upon the convicted person's release of civil claims against the prosecutor, law enforcement authorities, or other public officials or entities.

2016 FEO 2. When advancing claims on behalf of a criminal defendant who filed a *pro se* Motion for Appropriate Relief, subsequently appointed defense counsel must correct erroneous claims and statements of law or facts set out in the previous *pro se* filing.

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. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done 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 by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

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 or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) 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

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and

the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. *See* Rule 1.0(n) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adjudicative proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of material fact or law or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] 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* Rule 8.4(b), Comment.

Legal Argument

[4] 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)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that 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.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. *See* Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. *See* Rule 1.0(g). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. 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. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. *See also* Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The lawyer's action must also be seasonable: depending upon the circumstances, reasonable remedial measures do not have to be undertaken immediately, however, the lawyer must act before a third party relies to his or her detriment upon the false testimony or evidence. The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate's only option may be to make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. *See* Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

[13] The general rule that an advocate must reveal the existence of perjury

with respect to a material fact—even that of a client—applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation 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

[14] A practical time limit on the obligation to rectify false evidence or false statements of material fact or law has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when no matters in the proceeding are still pending before the tribunal or the proceeding has concluded pursuant to the rules of the tribunal such as when a final judgment in the proceeding is affirmed on appeal, a bankruptcy case is closed, or the time for review has passed.

Ex Parte Proceedings

[15] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any 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.

Withdrawal

[16] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

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. (*See also* Rule 3.3(a)(3))

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. (*See also* Rule 3.3(a)(3))

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. (*See also* Rule 3.3(a)(3))

98 FEO 1. 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 FEO 5. 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 FEO 20. 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. 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 FEO 1. 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.

2003 FEO 5. Opinion rules that neither a defense lawyer nor a prosecutor may participate in the misrepresentation of a criminal defendant's prior record level in a sentencing proceeding even if the judge is advised of the misrepresentation and does not object.

2008 FEO 1. A lawyer representing an undocumented worker in a workers' compensation action has a duty to correct court documents containing false statements of material fact and is prohibited from introducing evidence in support of the proposition that an alias is the client's legal name.

2008 FEO 3. A lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2010 FEO 1. A lawyer may appear in a lawsuit on behalf of an insured whose whereabouts are unknown if the insured has authorized the representation. However, if the insured cannot thereafter be located, the lawyer may not mislead the court about the insured's absence.

2011 FEO 3. A criminal defense lawyer may advise an undocumented alien that deportation may result in avoidance of a criminal conviction and may file a notice of appeal to superior court although there is a possibility that client will be deported.

2011 FEO 12. A lawyer must notify the court when a clerk of court mistakenly dismisses a client's charges.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2016 FEO 2. When advancing claims on behalf of a criminal defendant who filed a *pro se* Motion for Appropriate Relief, subsequently appointed defense counsel must correct erroneous claims and statements of law or facts set out in the previous *pro se* filing.

2018 FEO 2: A lawyer has a duty to disclose to a tribunal adverse legal authority that is controlling as to that tribunal if the legal authority is known to the lawyer and is not disclosed by opposing counsel.

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 or any other person to disobey an obligation under the rules of a tribunal, except a lawyer acting in good faith may take appropriate steps to test the validity of such an obligation;

(d) in pretrial procedure,

(1) make a frivolous discovery request

(2) fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party, or

(3) fail to disclose evidence or information that the lawyer knew, or reasonably should have known, was subject to disclosure under applicable law, rules of procedure or evidence, or court opinions;

(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 marshaled 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 the 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. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[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] Paragraph (d) makes it clear that a lawyer must be reasonably diligent in making inquiry of the client, or third party, about information or documents responsive to discovery requests or disclosure requirements arising from statutory law, rules of procedure, or caselaw. "Reasonably" is defined in Rule 0.1, *Terminology*, as meaning "conduct of a reasonably prudent and competent lawyer." Rule 0.1(i). When responding to a discovery request or disclosure requirement, a lawyer must act in good faith. The lawyer should impress upon the client the importance of making a thorough search of the client's records and responding honestly. If the lawyer has reason to believe that a client has not been forthcoming, the lawyer may not rely solely upon the client's assertion that the response is truthful or complete.

[6] 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.

[7] 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 by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 1, 2003; November 16, 2006

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.

2008 FEO 15. Provided the agreement does not constitute the criminal offense of compounding a crime and is not otherwise illegal, and does not contemplate the fabrication, concealment, or destruction of evidence, a lawyer may participate in a settlement agreement of a civil claim that includes a non-reporting provision prohibiting the plaintiff from reporting the defendant's conduct to law enforcement authorities.

2009 FEO 7. A criminal defense lawyer or a prosecutor may not interview a child who is the alleged victim in a criminal case alleging physical or sexual abuse if the child is younger than the age of maturity as determined by the General Assembly for the purpose of an in-custody interrogation (currently age fourteen) unless the lawyer has the consent of a non-accused parent or guardian or a court order allows the lawyer to seek an interview with the child without such consent; a lawyer may interview a child who is this age or older without such consent or authorization provided the lawyer complies with Rule 4.3, reasonably determines that the child is sufficiently mature to understand the lawyer's role and purpose, and avoids any conduct designed to coerce or intimidate the child.

2014 FEO 5. A lawyer must advise a civil litigation client about the legal ramifications of the client's postings on social media as necessary to represent the client competently. The lawyer may advise the client to remove postings on social media if the removal is done in compliance with the rules and law on preservation and spoliation of evidence.

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) A lawyer representing a party in a matter pending before a tribunal shall not:

(1) seek to influence a judge, juror, member of the jury venire, or other official by means prohibited by law;

(2) communicate ex parte with a juror or member of the jury venire except as permitted by law;

(3) unless authorized to do so by law or court order, communicate ex parte with the judge or other official regarding a matter pending before the judge or official;

(4) engage in conduct intended to disrupt a tribunal, including:

(A) 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;

(B) engaging in undignified or discourteous conduct that is degrading to a tribunal; or

(C) intentionally or habitually violating any established rule of procedure or evidence; or

(5) communicate with a juror or prospective juror after discharge of the jury if:

(A) the communication is prohibited by law or court order;

(B) the juror has made known to the lawyer a desire not to communicate; or

(C) the communication involves misrepresentation, coercion, duress or harassment.

(b) All restrictions imposed by this rule also apply to communications with, or investigations of, family members of a juror or of a member of the jury venire.

(c) A lawyer shall reveal promptly to the court improper conduct by a juror or a member of the jury venire, and improper conduct by another person toward a juror, a member of the jury venire, or the family members of a juror or a member of the jury venire.

(d) For purposes of this rule:

(1) *Ex parte* communication means a communication on behalf of a party to a matter pending before a tribunal that occurs in the absence of an opposing party, without notice to that party, and outside the record.

(2) A matter is "pending" before a particular tribunal when that tribunal has been selected to determine the matter or when it is reasonably foreseeable that the tribunal will be so selected.

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, jurors and members of the jury venire 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 members of the jury venire 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 juror or a member of the jury venire about the case.

[3] After the jury has been discharged, a lawyer may communicate with a juror unless the communication is prohibited by law or court order. The lawyer must refrain from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases, and must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] Vexatious or harassing investigations of jurors or members of the jury venire 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 jurors or members of the jury venire should act with circumspection and restraint.

[5] Communications with, or investigations of, members of the families of jurors or the families of members of the jury venire 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, jurors or members of the jury venire.

[6] 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 juror, a prospective juror, or a member of the family of either should make a prompt report to the court regarding such conduct.

[7] The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, shall not give or lend anything of value to a judge, a hearing officer, or an official or employee of a tribunal under circumstances which might give the appearance that the gift or loan is made to influence official action.

[8] 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.

[9] 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.

[10] As professionals, lawyers are expected to avoid disruptive, undignified, discourteous, and abusive behavior. Therefore, the prohibition against conduct intended to disrupt a tribunal applies to conduct that does not serve a legitimate goal of advocacy or a requirement of a procedural rule and includes angry outbursts, insults, slurs, personal attacks, and unfounded personal accusations as well as to threats, bullying, and other attempts to intimidate or humiliate judges, opposing counsel, litigants, witnesses, or court personnel. Zealous advocacy does not rely upon such tactics and is never a justification for such conduct. This conduct is prohibited both in open court and in ancillary proceedings conducted pursuant to the authority of the tribunal (e.g., depositions). *See* comment [11], Rule 1.0(n). Similarly, insults, slurs, threats, personal attacks, and groundless personal accusations made in documents filed with the tribunal are also prohibited by this Rule. "Conduct of this type breeds disrespect for the courts and for the legal profession. Dignity, decorum, and respect are essential ingredients in the proper conduct of a courtroom, and therefore in the proper administration of justice." *Atty. Grievance Comm'n v. Alison*, 565 A.2d 660, 666 (Md. 1989). *See also* Rule 4.4(a) (prohibiting conduct that serves no substantial purpose other than to embarrass, delay, or burden a third person) and Rule 8.4(d) (prohibiting conduct prejudicial to the administration of justice).

[11] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition or mediation. *See* Rule 1.0(n).

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; March 5, 2015; April 5, 2018; March 27, 2019

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 FEO 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 FEO 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 FEO 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 FEO 12. Opinion sets forth the disclosures a lawyer must make to the judge prior to engaging in an ex parte communication.

98 FEO 13. Opinion restricts informal written communications with a judge or judicial official relative to a pending matter.

98 FEO 20. 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.

2001 FEO 15. A lawyer may not communicate ex parte with a judge in reliance upon the communication being "permitted by law" unless there is a statute or case law specifically and clearly authorizing such communications or proper notice is given to the adverse party or counsel. (Note: Judicial Standards Commission does not consider communications made *ex parte* pursuant to G.S. 15A-534.1 to be improper.)

2003 FEO 17. An attorney may only provide a judge with additional authority post-hearing if the communication is permitted by the rules of the tribunal and a copy of the writing is furnished simultaneously to opposing counsel.

2014 FEO 8. A lawyer may accept an invitation from a judge to be a "connection" on a professional networking website, and may endorse a judge. However, a lawyer may not accept a legal skill or expertise endorsement or a recommendation from a judge.

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 the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of a matter is in progress;

(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, in addition to subparagraphs (1) through (6):

(A) the identity, residence, occupation and family status of the accused;

(B) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(C) the fact, time and place of arrest; and

(D) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is reasonably necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e) 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.

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] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. 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. A lawyer who is subject to the rule must take reasonable measures to insure the compliance of nonlawyer assistants and may not employ agents to make statements the lawyer is prohibited from making. Rule 5.3 and Rule 8.4(a); see, e.g., Rule 3.8(f) (prosecutor's duty to exercise reasonable care to prevent persons assisting prosecutor or associated with prosecutor from making improper extrajudicial statements).

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a). Although paragraph (b)(2) allows extrajudicial statements about information in a public record, a lawyer may not use this safe harbor to justify, by means of filing pleadings or other public records, statements prohibited by paragraph (a). *See also* Rule 3.1.

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record 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 or 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;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others. Moreover, when there is sufficient prior notice, a lawyer is encouraged to seek judicial intervention to prevent improper extrajudicial statements that may be prejudicial to the client and thereby avoid the necessity of a public response.

[8] *See* Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 9, 2008

ETHICS OPINION NOTES

CPR 4. The rule restricting pretrial publicity does not apply when the case is on appeal.

98 FEO 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 unless:

(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 tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. 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] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(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 tribunal and the opposing party. Whether the tribunal is likely to be misled or 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 conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 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, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. 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. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. *See* Rule 1.7. *See* Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(f) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

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.

2010 FEO 5. In a case involving international child support enforcement issues, the child support enforcement lawyer, who works in the North Carolina Attorney General's Office, may call another lawyer from the attorney general's staff to testify as an expert.

2011 FEO 1. Guidelines for the application of the prohibition in Rule 3.7 on a lawyer serving as both advocate and witness when the lawyer is the litigant.

2012 FEO 9. A lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

2012 FEO 15. Whether a lawyer is a "necessary witness" and thereby disqualified from acting as a client's advocate at a trial is an issue left up to the discretion of the tribunal.

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) after reasonably diligent inquiry, make timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions including 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) 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;

(f) 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 and 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 or this Rule.

(g) When a prosecutor knows of new, credible evidence or information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall:

(1) if the conviction was obtained in the prosecutor's jurisdiction, promptly disclose that evidence or information to (i) the defendant or defendant's counsel of record if any, and (ii) the North Carolina Office of Indigent Defense Services or, in the case of a federal conviction, the federal public defender for the jurisdiction; or

(2) if the conviction was obtained in another jurisdiction, promptly disclose that evidence or information to the prosecutor's office in the jurisdiction of the conviction or to (i) the defendant or defendant's counsel of record if any, and (ii) the North Carolina Office of Indigent Defense Services or, in the case of a federal conviction, the federal public defender for the jurisdiction of conviction.

(h) A prosecutor who concludes in good faith that evidence or information is not subject to disclosure under paragraph (g) does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.

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 or to uphold a conviction. 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. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. See the ABA Standards of Criminal Justice Relating to the Prosecution Function. A systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[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, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[4] Every prosecutor should be aware of the discovery requirements established by statutory law and case law. *See, e.g.*, N.C. Gen. Stat. §15A-903 et. seq, *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. U.S.,* 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419 (1995). 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 harm to an individual or to the public interest.

[5] Paragraph (e) 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 (f) 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 that a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[7] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[8] When a prosecutor knows of new, credible evidence or information creating a reasonable likelihood that a defendant did not commit an offense for which the defendant was convicted in the prosecutor's district, paragraph (g)(1) requires prompt disclosure to the defendant. However, if disclosure will harm the defendant's interests or the integrity of the evidence or information, disclosure should be made to the defendant's lawyer if any. Disclosure must be made to North Carolina Indigent Defense Services (NCIDS) or, if appropriate, the federal public defender, under all circumstances regardless of whether disclosure is also made to the defendant or the defendant's lawyer. If there is a good faith basis for not disclosing the evidence or information to the defendant, disclosure to NCIDS or the federal public defender and to any counsel of record satisfies this rule. If the conviction was obtained in another jurisdiction, paragraph (g)(2) allows the prosecutor promptly to disclose the evidence or information to the prosecutor's office in the jurisdiction of conviction in lieu of any other disclosure. The prosecutor in the jurisdiction of the conviction then has an independent duty of disclosure under paragraph (g)(1). In lieu of disclosure to the prosecutor's office in the jurisdiction of conviction, paragraph (g)(2) requires disclosure to the defendant or to the defendant's lawyer, if any, and to NCIDS or, if appropriate, the federal public defender.

[9] The word "new" as used in paragraph (g) means evidence or information unknown to a trial prosecutor at the time of the conviction or, if known to a trial prosecutor at the time of the conviction, never previously disclosed to the defendant or defendant's legal counsel. When analyzing new evidence or information, the prosecutor must evaluate the substance of the information received, and not solely the credibility of the source, to determine whether the evidence or information creates a reasonable likelihood that the defendant did not commit the offense.

[10] Nevertheless, a prosecutor who receives evidence or information relative to a conviction may disclose that evidence or information as directed in paragraph (g)(1) and (2) without examination to determine whether it is new, credible, or creates a reasonable likelihood that a convicted defendant did not commit an offense. A prosecutor who receives evidence or information subject to disclosure under paragraph (g) does not have a duty to undertake further investigation to determine whether the defendant is in fact innocent.

[11] A prosecutor's independent judgment, made in good faith, that the new evidence or information is not of such nature as to trigger the obligations of paragraph (g), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; November 16, 2006; March 16, 2017

ETHICS OPINION NOTES

RPC 129. 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.

RPC 152. 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.

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.

2011 FEO 16. A criminal defense lawyer accused of ineffective assistance of counsel by a former client may share confidential client information with prosecutors to help establish a defense to the claim so long as the lawyer reasonably believes a response is necessary and the response is narrowly tailored to respond to the allegations.

2013 FEO 1. Subject to conditions, a prosecutor may enter into an agreement to consent to vacating a conviction upon the convicted person's release of civil claims against the prosecutor, law enforcement authorities, or other public officials or entities.

2013 FEO 6 . A state prosecutor does not violate the Rules of Professional Conduct by asking the court to enter an order for arrest when a defendant detained by ICE fails to appear in court on the defendant's scheduled court date.

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 partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

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 ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortuous misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. Rule 1.6(b)(1) permits a lawyer to disclose information when required by law. Similarly, Rule 1.6(b)(4) permits a lawyer to disclose information when necessary to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

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.

2008 FEO 3. A lawyer may assist a pro se litigant by drafting pleadings

and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2008 FEO 14. It is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract or pleading excerpts from a legal brief, contract or pleading written by another lawyer.

2018 FEO 5. Opinion rules that a lawyer may not use deception when seeking access to a person's restricted social network presence and may not instruct a third party to use deception.

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 to do so by law or a court order. 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 contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] 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.

[3] 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 independent justification or legal authorization for communicating with a represented person is permitted to do so.

[4] A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). However, parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client or, in the case of a government lawyer, investigatory personnel, concerning a communication that the client, or such investigatory personnel, is legally entitled to make. The Rule is not 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 the dispute.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. When a government agency or body is represented 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).

[6] Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[7] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[8] This Rule 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. The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[9] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. It also prohibits communications with any constituent of the organization, regardless of position or level of authority, who is participating or participated substantially in the legal representation of the organization in a particular matter. Consent of the organization's lawyer is not required for communication with a former constituent unless the former constituent participated substantially in the legal representation of the organization in the matter. 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. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4, Comment [2].

[10] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(g). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[11] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

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. (*But see* 97 FEO 2)

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 119. 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.

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 FEO 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 FEO 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. 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.(*See also* comment [9] to Rule 4.2)

2002 FEO 8. A lawyer who is appointed the guardian ad litem for a minor plaintiff in a tort action and is represented in this capacity by legal counsel, must be treated by opposing counsel as a represented party and, therefore, direct contact with the guardian ad litem, without consent of counsel, is prohibited.

2003 FEO 2. Lawyer may not communicate directly with the opposing party although the opposing lawyer appears to be impaired by reason of substance abuse or mental impairment.

2003 FEO 4. A lawyer may not proffer evidence gained during a private investigator's verbal communication with an opposing party known to be represented by legal counsel unless the lawyer discloses the source of the evidence to the opposing lawyer and to the court prior to the proffer.

2004 FEO 4. A lawyer may ask questions of a deponent that were recommended by another lawyer, although the deponent is the defendant in the other lawyer's case, provided notice of the deposition is given to the deponent's lawyer.

2005 FEO 5. Opinion explores the extent to which a lawyer may communicate with employees or officials of a represented government entity.

2006 FEO 19. The prohibition against communications with represented persons does not apply to a lawyer acting solely as a guardian ad litem.

2009 FEO 7. A criminal defense lawyer or a prosecutor may not interview a child who is the alleged victim in a criminal case alleging physical or sexual abuse if the child is younger than the age of maturity as determined by the General Assembly for the purpose of an in-custody interrogation (currently age fourteen) unless the lawyer has the consent of a non-accused parent or guardian or a court order allows the lawyer to seek an interview with the child without such consent; a lawyer may interview a child who is this age or older without such consent or authorization provided the lawyer complies with Rule 4.3, reasonably determines that the child is sufficiently mature to understand the lawyer's role and purpose, and avoids any conduct designed to coerce or intimidate the child.

2010 FEO 5. A lawyer defending a non-custodial parent in a child support action brought by the lawyer for the county's child support enforcement program does not represent the parent and the lawyer's direct communications with the custodian do not violate Rule 4.2.

2011 FEO 15. Pursuant to the North Carolina Public Records Act, a lawyer may communicate with a government official for the purpose of identifying a custodian of public records and with the custodian of public records to make a request to examine public records related to the representation although the custodian is an adverse party, or an employee of an adverse party, whose lawyer does not consent to the communication.

2012 FEO 7. Consent from the lawyer for a represented person must be obtained before copying that person on electronic communications; however, the consent required by Rule 4.2 may be implied by the facts and circumstances surrounding the communication.

2012 FEO 9. A lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

2014 FEO 9. A private lawyer may supervise an investigation involving misrepresentation if done in pursuit of a public interest and certain conditions are satisfied.

2018 FEO 5. Opinion rules that a lawyer representing a client in a matter may view the public portion of a represented person's social network presence but may not request or direct another to request access to the restricted portion. A lawyer may request or accept information from a third party with access to the restricted portion.

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 legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that 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. To avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

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.

2002 FEO 6. The lawyer for the plaintiff may not prepare the answer to a complaint for an unrepresented adverse party to file pro se.

2003 FEO 7. A lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

2009 FEO 7. A criminal defense lawyer or a prosecutor may not interview a child who is the alleged victim in a criminal case alleging physical or sexual abuse if the child is younger than the age of maturity as determined by the General Assembly for the purpose of an in-custody interrogation (currently age fourteen) unless the lawyer has the consent of a non-accused parent or guardian or a court order allows the lawyer to seek an interview with the child without such consent; a lawyer may interview a child who is this age or older without such consent or authorization provided the lawyer complies with Rule 4.3, reasonably determines that the child is sufficiently mature to understand the lawyer's role and purpose, and avoids any conduct designed to coerce or intimidate the child.

2009 FEO 12. A lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party provided the lawyer explains who he represents and does not give the unrepresented party legal advice; however, the lawyer may not prepare a waiver of exemptions for the adverse party.

2014 FEO 10. Communication between unrepresented birth parent and lawyer, who handles adoptions as part of law practice and owns a financial interest in a for-profit adoption agency, must be limited to providing or collecting information to be used to complete the forms required by the adoption agency.

2015 FEO 1. A lawyer may not prepare pleadings and other filings for an unrepresented opposing party in a civil proceeding currently pending before a tribunal if doing so is tantamount to giving legal advice to that person.

2015 FEO 2. When the original debt is $100,000 or more, a lawyer for a lender may prepare and provide to an unrepresented borrower, owner, or guarantor a waiver of the right to notice of foreclosure and the right to a foreclosure hearing pursuant to N.C.G.S. § 45-21.16(f) if the lawyer explains the lawyer's role and does not give legal advice to any unrepresented person. However, a lawyer may not prepare such a waiver if the waiver is a part of a loan modification package for a mortgage secured by the borrower's primary residence.

2018 FEO 5. Opinion rules that a lawyer representing a client in a matter may view the public portion of an unrepresented person's social network presence; request access to the restricted portion using his true identity; and request or accept information from a third party with access to the restricted portion.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) 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.

(b) A lawyer who receives a writing relating to the representation of the lawyer's client and knows or reasonably should know that the writing was inadvertently sent shall promptly notify the sender.

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 and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Threats, bullying, harassment, insults, slurs, personal attacks, unfounded personal accusations generally serve no substantial purpose other than to embarrass, delay, or burden others and violate this rule. Conduct that serves no substantial purpose other than to intimidate, humiliate, or embarrass lawyers, litigants, witnesses, or other persons with whom a lawyer interacts while representing a client also violates this rule. *See also* Rule 3.5(a) (prohibiting conduct intended to disrupt a tribunal) and Rule 8.4(d) (prohibiting conduct prejudicial to the administration of justice).

[3] Paragraph (b) recognizes that lawyers sometimes receive writings that were mistakenly sent or produced by opposing parties or their lawyers. *See* Rule 1.0(o) for the definition of "writing," which includes electronic communications and metadata. A writing is inadvertently sent when it is accidentally transmitted, such as when an electronic communication or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a writing was sent inadvertently, then this rule requires the lawyer promptly to notify the sender in order to permit that person to take protective measures. This duty is imputed to all lawyers in a firm. Whether the lawyer who receives the writing is required to take additional steps, such as returning the writing, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of

a writing has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer. A lawyer who receives an electronic communication from the opposing party or the opposing party's lawyer must refrain from searching for or using confidential information found in the metadata embedded in the communication. *See* 2009 FEO 1.

[4] Some lawyers may choose to return a writing or delete electronically stored information unread, for example, when the lawyer learns before receiving the writing that it was inadvertently sent. Whether the lawyer is required to do so is a matter of law. When return of the writing is not required by law, the decision voluntarily to return such a writing or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. *See* Rules 1.2 and 1.4.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; August 18, 2005; October 2, 2014; March 5, 2015

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.

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.

2007 FEO 1. A lawyer owes no ethical duty to the heirs of an estate that he represents in a wrongful death action except as set forth in Rule 4.4.

2009 FEO 1. A lawyer must use reasonable care to prevent the disclosure of confidential client information hidden in metadata when transmitting an electronic communication and a lawyer who receives an electronic communication from another party or another party's lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document.

2009 FEO 5. A lawyer may serve the opposing party with discovery requests that require the party to reveal her citizenship status, but the lawyer may not report the status to ICE unless required to do so by federal or state law.

2010 FEO 2. A lawyer may not serve an out of state health care provider with an unenforceable North Carolina subpoena and may not use documents produced pursuant to such a subpoena.

2011 FEO 16. A criminal defense lawyer accused of ineffective assistance of counsel by a former client may share confidential client information with prosecutors to help establish a defense to the claim so long as the lawyer reasonably believes a response is necessary and the response is narrowly tailored to respond to the allegations.

2012 FEO 5. A lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee's lawyer using the employer's business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages unless a court determines that the messages are not privileged.

2014 FEO 4. A lawyer may send a subpoena for medical records to an entity covered by HIPAA without providing the assurances necessary for the entity to comply with the subpoena as set out in 45 C.F.R. § 164.512(e)(ii).

2014 FEO 7. A lawyer may provide a foreign entity or individual with a North Carolina subpoena accompanied by a statement/letter explaining that the subpoena is not enforceable in the foreign jurisdiction, the recipient is not required to comply with the subpoena, and the subpoena is being provided solely for the recipient's records.

2015 FEO 1. A lawyer may not prepare pleadings and other filings for an unrepresented opposing party in a civil proceeding currently pending before a tribunal if doing so is tantamount to giving legal advice to that person.

RULE 5.1: RESPONSIBILITIES OF PRINCIPALS, MANAGERS, AND SUPERVISORY LAWYERS

(a) A principal in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority, shall make reasonable efforts to ensure that the firm or the organization has in effect measures giving reasonable assurance that all lawyers in the firm or the organization 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 lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a principal or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

Comment

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm or legal department of an organization. *See* Rule 1.0(d). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm or organization.

[2] Paragraph (a) requires lawyers with managerial authority within a firm or organization to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm or organization will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's or organization's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm or organization, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated principal or special committee. *See* Rule 5.2. Firms and organizations, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm or organization can influence the conduct of all its members and the principals and managing lawyers may not assume that all lawyers associated with the firm or organization will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. *See also* Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a principal or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has 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. Principals and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a principal or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a principal or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoid-

able 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 has a duty to correct the resulting misapprehension.

[6] 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, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a principal, 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.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. *See* Rule 5.2(a).

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; September 22, 2016

ETHICS OPINION NOTES

2012 FEO 13. The partners and managerial lawyers remaining in a firm are responsible for the safekeeping and proper disposition of both the active and closed files of a suspended, disbarred, missing, or deceased member of the firm.

2013 FEO 8. Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

2015 FEO 9. A lawyer who does not own equity in a law firm may be held out to the public by the designation "partner," "income partner," or "non-equity partner," provided the lawyer was officially promoted based upon legitimate criteria and the lawyer complies with the professional responsibilities arising from the designation.

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 knowledge 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 by the Supreme Court: July 24, 1997

ETHICS OPINION NOTES

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a principal, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or organization shall make reasonable efforts to ensure that the firm or organization 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 the 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 or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a principal or has comparable managerial authority in the law firm or organization in which the person is employed, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

Comment

[1] Paragraph (a) requires lawyers with managerial authority within a law firm or organization to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. *See* Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm or organization to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. *See* Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations and, depending upon the risk of unauthorized disclosure of confidential client information, should consider whether client consent is required. *See* Rule 1.1, cmt. [7]. The extent of this obligation will depend upon the circumstances, including the education, experience, and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and eth-

ical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. *See also* Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. *See* Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

[5] 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(o).

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 2, 2014; September 24, 2015; September 22, 2016

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 FEO 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.

2000 FEO 10. 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.

2002 FEO 9. A nonlawyer assistant supervised by a lawyer may identify to the client who is a party to such a transaction the documents to be executed with respect to the transaction, direct the client as to the correct place on each document to sign, and handle the disbursement of proceeds for a residential real estate transaction, even though the supervising lawyer is not physically present.

2004 FEO 13. A lawyer may form a professional corporation for the practice of law and the professional corporation may enter into a law partnership with another such professional corporation.

2005 FEO 2. A law firm that employs a nonlawyer to represent Social Security claimants must so disclose in any advertising for this service and to prospective clients.

2005 FEO 6. The compensation of a nonlawyer law firm employee who represents Social Security disability claimants before the Social Security Administration may be based upon the income generated by such representation.

2006 FEO 13. If warranted by exigent circumstances, a lawyer may allow a paralegal to sign his name to court documents so long as it does not violate any law and the lawyer provides the appropriate level of supervision.

2007 FEO 12. A lawyer may outsource limited legal support services foreign assistants provided the lawyer properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client's advanced informed consent.

2009 FEO 10. A lawyer must provide appropriate supervision to a nonlawyer appearing pursuant to N.C. Gen. Stat. §96-17(b) on behalf of a claimant or an employer in an unemployment hearing.

2011 FEO 14. A lawyer must obtain client consent, confirmed in writing, before outsourcing its transcription and typing needs to a company located in a foreign jurisdiction.

2012 FEO 11. A law firm may send a nonlawyer field representative to meet with a prospective client and obtain a representation contract if a lawyer at the firm has reviewed sufficient information from the prospective client to determine that an offer of representation is appropriate.

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

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, principal, 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, disabled, or disappeared lawyer 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 portion of the total compensation that fairly represents the services rendered by the deceased lawyer or the disbarred lawyer;

(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; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter; and

(6) a lawyer or law firm may pay a portion of a legal fee to a credit card processor, group advertising provider, or online marketing platform if the amount paid is for payment processing or for administrative or marketing services, and there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship.

(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 salary, 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] A determination under paragraph (a)(6) of this rule as to whether an advertising provider or online marketing platform (jointly "platform") will interfere with the independent professional judgment of a lawyer requires consideration of a number of factors. These factors include, but are not limited to, the following: (a) the percentage of the fee or the amount the platform charges the lawyer; (b) the percentage of the fee or the amount that the lawyer receives from clients obtained through the platform; (c) representations made to prospective clients and to clients by the platform; (d) whether the platform communicates directly with clients and to what degree; and (e) the nature of the relationship between the lawyer and the platform. A relationship wherein the platform, rather than the lawyer, is in charge of communications with a client indicates interference with the lawyer's professional judgment. The lawyer should have unfettered discretion as to whether to accept clients from the platform, the nature and extent of the legal services the lawyer provides to clients obtained through the platform, and whether to participate or continue participating in the platform. The lawyer may not permit the platform to direct or control the lawyer's legal services and may not assist the platform to engage in the practice of law, in violation of Rule 5.5(a).

[3] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. *See also* Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

[4] 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

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Amendments Approved by the Supreme Court: March 1, 2003; September 22, 2016; March 27, 2019

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 FEO 17. 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 FEO 2. 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.

2003 FEO 6. A law firm may contract with a professional employer organization (PEO) to perform human resources, payroll, and other non-operational employment functions, including the employment of the lawyers of the firm, provided the PEO does not control or influence the lawyers' exercise of independent professional judgment.

2003 FEO 7. A lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

2003 FEO 10. A Social Security lawyer may agree to compensate a nonlawyer/ claimant's representative for the prior representation of a claimant.

2004 FEO 13. A lawyer may form a professional corporation for the practice of law and the professional corporation may enter into a law partnership with another such professional corporation.

2005 FEO 6. The compensation of a nonlawyer law firm employee who represents Social Security disability claimants before the Social Security Administration may be based upon the income generated by such representation.

2006 FEO 4. A lawyer may not participate in a prepaid legal services plan unless all the conditions for participation are met and participation does not otherwise result in a violation of the Rules of Professional Conduct.

2006 FEO 11. Outside of the commercial or business context, a lawyer may not, at the request of a third party, prepare documents, such as a will or trust instrument, that purport to speak solely for principal without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

2010 FEO 4. Paying a percentage fee to a barter exchange manager is a surcharge on the transaction and is not fee sharing with a nonlawyer.

2011 FEO 4. A lawyer may not agree to procure title insurance exclusively from a particular title insurance agency on every transaction referred to the lawyer by a person associated with the agency.

2011 FEO 10. A lawyer may advertise on a website that offers daily discounts to consumers where the website company's compensation is a percentage of the amount paid to the lawyer if certain disclosures are made and certain conditions are satisfied.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2013 FEO 7 . A law firm may not share a fee from a tax appeal with a nonlawyer tax representative unless such nonlawyer representatives are legally permitted by the tax authorities to represent claimants and to be awarded fees for such representation.

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL 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 who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction if the lawyer's conduct is in accordance with these Rules and:

(1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized;

(2) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice and the lawyer's services are not services for which pro hac vice admission is required;

(3) the lawyer acts with respect to a matter that is in or is reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the lawyer's services arise out of or are reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission is required; or

(4) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation and the lawyer is admitted pro hac vice or the lawyer's services are not services for which pro hac vice admission is required.

(d) A lawyer admitted to practice in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, does not engage in the unauthorized practice of law in this jurisdiction and may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law if the lawyer's conduct is in accordance with these Rules and:

(1) the lawyer provides legal services to the lawyer's employer or its organizational affiliates; the services are not services for which pro hac vice admission is required; and, when the services are performed by a foreign lawyer and require advice on the law of this or another US jurisdiction or of the United States, such advice is based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) the lawyer is providing services limited to federal law, international law, the law of a foreign jurisdiction or the law of the jurisdiction in which the lawyer is admitted to practice, or the lawyer is providing services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) A lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction and may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law if the lawyer's conduct is in accordance with these Rules, the lawyer is the subject of a pending application for admission to the North Carolina State Bar by comity, having never previously been denied admission to the North Carolina State Bar for any reason, and the lawyer satisfies the following conditions:

(1) is licensed to practice law in a state with which North Carolina has comity in regard to admission to practice law;

(2) is a member in good standing in every jurisdiction in which the lawyer is licensed to practice law;

(3) has satisfied the educational and experiential requirements prerequisite to comity admission to the North Carolina State Bar;

(4) is domiciled in North Carolina;

(5) has established a professional relationship with a North Carolina law firm and is actively supervised by at least one licensed North Carolina attorney affiliated with that law firm; and

(6) gives written notice to the secretary of the North Carolina State Bar that the lawyer intends to begin the practice of law pursuant to this provision, provides the secretary with a copy of the lawyer's application for admission to the State Bar, and agrees that the lawyer is subject to these rules and the disciplinary jurisdiction of the North Carolina State Bar. A lawyer acting pursuant to this provision may not provide services for which pro hac vice admission is required, and shall be ineligible to practice law in this jurisdiction immediately upon being advised that the lawyer's application for comity admission has been denied.

(f) A lawyer shall not assist another person in the unauthorized practice of law.

(g) 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.

(h) 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.

(i) For the purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. The practice of law in violation of lawyer-licensing standards of another jurisdiction constitutes a violation of these Rules. This Rule does not restrict the ability of lawyers authorized by federal statute or other federal law to represent the interests of the United States or other persons in any jurisdiction.

[2] There are occasions in which lawyers admitted to practice in another United States jurisdiction, but not in North Carolina, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in North Carolina under circumstances that do not create an unreasonable risk to the interests of their clients, the courts, or the public. Paragraphs (c), (d), and (e) identify seven situations in which the lawyer may engage in such conduct without fear of violating this Rule. All such conduct is subject to the duty of competent representation. *See* Rule 1.1. Rule 5.5 does not address the question of whether other conduct constitutes the unauthorized practice of law. The fact that conduct is not included or described in this Rule is not intended to imply that such conduct is the unauthorized practice of law. With the exception of paragraphs (d) and (e), this Rule does not authorize a US or foreign lawyer to establish an office or other systematic and continuous presence in North Carolina without being admitted to practice here. Presence may be systematic and continuous even if the lawyer is not physically present in this jurisdiction. A lawyer not admitted to practice in North Carolina must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in North Carolina. *See also* Rules 7.1(a) and 7.5(b). However, a lawyer admitted to practice in another jurisdiction who is principal, shareholder, or employee of an interstate or international law firm that is registered with the North Carolina State Bar pursuant to 27 N.C.A.C. 1E, Section .0200, may practice, subject to the limitations of this Rule, in the North Carolina offices of such law firm.

[3] Paragraphs (c), (d), and (e) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory, or commonwealth of the United States and, where noted, any foreign jurisdiction. The word "admitted" in paragraphs (c), (d)(2), and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice because, for example, the lawyer is on inactive status.

[4] Paragraphs (c), (d), and (e) do not authorize communications advertising legal services in North Carolina by lawyers who are admitted to practice in other jurisdictions. Nothing in these paragraphs authorizes a lawyer not licensed in this jurisdiction to solicit clients in North Carolina. Whether and how lawyers may communicate the availability of their services in this jurisdiction are governed by Rules 7.1-7.5.

[5] Lawyers not admitted to practice generally in North Carolina may be authorized by law or order of a tribunal or an administrative agency to appear before a the tribunal or agency. Such authority may be granted pursuant to formal rules or law governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(1), a lawyer does not violate this Rule when the lawyer appears before such a tribunal or agency. Nor does a lawyer violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing, such as factual investigations and discovery conducted in connection with a litigation or administrative proceeding, in which an out-

of-state lawyer has been admitted or in which the lawyer reasonably expects to be admitted.

[6] Paragraph (c)(2) recognizes that the complexity of many matters requires that a lawyer whose representation of a client consists primarily of conduct in a jurisdiction in which the lawyer is admitted to practice, also be permitted to act on the client's behalf in other jurisdictions in matters arising out of or otherwise reasonably related to the lawyer's representation of the client. This conduct may involve negotiations with private parties, as well as negotiations with government officers or employees, and participation in alternative dispute-resolution procedures. This provision also applies when a lawyer is conducting witness interviews or other activities in this jurisdiction in preparation for a litigation or other proceeding that will occur in another jurisdiction where the lawyer is either admitted generally or expects to be admitted pro hac vice.

[7] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in North Carolina if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, and if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[8] Paragraph (c)(4) recognizes that association with a lawyer licensed to practice in North Carolina is likely to protect the interests of both clients and the public. The lawyer admitted to practice in North Carolina, however, may not serve merely as a conduit for an out-of-state lawyer but must actively participate in and share actual responsibility for the representation of the client. If the admitted lawyer's involvement is merely pro forma, then both lawyers are subject to discipline under this Rule.

[9] Paragraphs (d) and (e) identify three circumstances in which a lawyer who is admitted to practice in another jurisdiction, or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may establish an office or other systematic and continuous presence in North Carolina for the practice of law. Except as provided in these paragraphs, a lawyer who is admitted to practice law in another jurisdiction and who desires to establish an office or other systematic or continuous presence in North Carolina must be admitted to practice law generally in North Carolina.

[10] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers, and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[11] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation, or judicial precedent.

[12] Paragraph (e) permits a lawyer who is awaiting admission by comity to practice on a provisional and limited basis if certain requirements are met. As used in this paragraph, the term "professional relationship" refers to an employment or partnership arrangement.

[13] The definition of the practice of law is established by N.C.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 (d) 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.

[14] Lawyers may also provide 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*. However, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[15] Paragraphs (g) and (h) clarify the limitations on employment of a disbarred or suspended lawyer. In the absence of statutory prohibitions or specific conditions placed on a disbarred or suspended lawyer 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 lawyer 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 a lawyer or in any way in which he or she seems to assume responsibility for a client's legal matters. The disbarred or suspended lawyer should have no communications or dealings with, or on behalf of, clients represented by such disbarred or suspended lawyer 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 lawyer or law firm should perform no services for clients represented by the disbarred or suspended lawyer during such period. Care should be taken to ensure that clients fully understand that the disbarred or suspended lawyer is not acting as a lawyer, 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 concerning the disbarred or suspended lawyer's status with the law firm. Additionally, a disbarred or suspended lawyer 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 lawyer would not be acting unethically and would not be assisting a nonlawyer in the unauthorized practice of law.

[16] A lawyer or law firm should not employ a disbarred or suspended lawyer who was associated with such lawyer 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 lawyer. 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.

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Amendments Approved by the Supreme Court: March 1, 2003; November 16, 2006; October 2, 2014; September 24, 2015; September 22, 2016

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 FEO 7. 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 FEO 8. 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 FEO 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.

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 FEO 10. 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.

2002 FEO 9. A nonlawyer assistant supervised by a lawyer may identify to the client who is a party to such a transaction the documents to be executed with respect to the transaction, direct the client as to the correct place on each document to sign, and handle the disbursement of proceeds for a residential real estate transaction, even though the supervising lawyer is not physically present.

2006 FEO 13. If warranted by exigent circumstances, a lawyer may allow a paralegal to sign his name to court documents so long as it does not violate any law and the lawyer provides the appropriate level of supervision.

2007 FEO 3. Opinion explains the duties of a lawyer who represents a local government and of a lawyer who is elected to the governing body of the local government relative to a nonlawyer appearing in a representative capacity for a party at a zoning variance and other quasi-judicial hearings before the government body.

2007 FEO 12. A lawyer may outsource limited legal support services to foreign assistants provided the lawyer properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client's advanced informed consent.

2008 FEO 6. A lawyer may hire a nonlawyer independent contractor to organize and speak at educational seminars so long as the nonlawyer does not give legal advice.

2009 FEO 2. A closing lawyer who reasonably believes that a title company engaged in the unauthorized practice of law when preparing a deed must report the lawyer who assisted the title company but may close the transaction if the client consents and doing so is in the client's interest.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2012 FEO 11. A law firm may send a nonlawyer field representative to meet with a prospective client and obtain a representation contract if a lawyer at the firm has reviewed sufficient information from the prospective client to determine that an offer of representation is appropriate.

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

Authorized Practice Advisory Opinion 2002-1. The North Carolina State Bar has been requested to interpret the North Carolina unauthorized practice of law statutes (N.C. Gen. Stat. §§84-2.1 to 84-5) as they apply to residential real estate transactions. The State Bar issues the following authorized practice of law advisory opinion pursuant to N.C. Gen. Stat. §84-37(f) after careful consideration and investigation. This opinion supersedes any prior opinions and decisions of any standing committee of the State Bar interpreting the unauthorized practice of law statutes to the extent those opinions and decisions are inconsistent with the conclusions expressed herein.

Authorized Practice Advisory Opinion 2006-1. Opinion rules that land use professionals who are not lawyers may testify as to factual matters and as experts at quasi-judicial proceedings before planning boards, boards of adjustment, and other government bodies, but the introduction of evidence and advocacy on behalf of parties at such proceedings is the practice of law that may be performed only by a licensed lawyer.

RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Comment

[1] An agreement restricting the right of lawyers 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. The Rule also does not prohibit restrictions on a lawyer's right to practice that are included in a plea agreement or other settlement of a criminal matter or the resolution of a disciplinary proceeding where the accused is a lawyer.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; September 24, 2015

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 FEO 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.

2003 FEO 9. A lawyer may participate in a settlement agreement that contains a provision limiting or prohibiting disclosure of information obtained during the representation even though the provision will effectively limit the lawyer's ability to represent future claimants.

2007 FEO 6. A partnership, shareholders, or other similar agreement may include a repurchase or buy-out provision that takes into account the loss in firm value generated by the lawyer's departure provided the provision is fair and is not based solely upon loss in value due to the loss of client billings.

2008 FEO 8. A provision in a law firm employment agreement for dividing legal fees received after a lawyer's departure from a firm must be reasonable and may not penalize or deter the withdrawing lawyer from taking clients with her.

2012 FEO 12. An agreement for a departing lawyer to pay his former firm a percentage of any legal fee subsequently recovered from the continued representation of a contingent fee client by the departing lawyer does not violate Rule 5.6 if the agreement was negotiated by the departing lawyer and the firm after the departing lawyer announced his departure from the firm and the specific percent-

age is a reasonable resolution of the dispute over the division of future fees.

2017 FEO 5. An agreement between law firms engaged in merger negotiations not to solicit or hire lawyers from the other firm for a relatively short period of time after expiration of the term of the agreement is permissible because it is a de minimis restriction on lawyer mobility that does not impair client choice and is reasonable under the circumstances.

RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

[1] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[2] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[3] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. *See*, e.g., Rule 8.4.

[4] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in Rule 5.7(a)(1).

[5] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[6] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[7] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[8] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[9] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and scrupulously to adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. *See also* Rule 8.4 (Misconduct).

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

Adopted by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

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.

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 FEO 9. 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.

2010 FEO 13. A lawyer may receive a fee or commission in exchange for providing financial services and products to a legal client so long as the lawyer complies with the ethical rules pertaining to the provision of law-related services, business transactions with clients, and conflicts of interest.

2014 FEO 10. A lawyer who handles adoptions as part of her or his law practice and also owns a financial interest in a for-profit adoption agency may, with informed consent, represent an adopting couple utilizing the services of the adoption agency but may not represent the biological parents.

RULE 6.1: VOLUNTARY PRO BONO PUBLICO SERVICE

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means;

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; or

(3) individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate

(b) provide any additional services through:

(1) the delivery of legal services described in paragraph (a) at a substantially reduced fee; or

(2) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Comment

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The North Carolina State Bar urges all lawyers to provide a minimum of 50 hours of pro bono services annually. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] The critical need for legal services among persons of limited means is recognized in paragraphs (a)(1) and (2) of the Rule. Legal services to persons of limited means consists of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but, nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraph (a). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations described in paragraphs (a)(2) and (3).

[5] Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1), (2), and (3), and (b) (1). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b)(2). Such lawyers and judges are not expected to undertake the reporting outlined in paragraph twelve of this Comment.

[6] Paragraph (a)(3) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(1) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(2) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees; serving on boards of pro bono or legal services programs; taking part in Law Day activities; acting as a continuing legal education instructor, a mediator or an arbitrator; and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[10] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[11] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

[12] Lawyers are encouraged to report pro bono legal services to Legal Aid of North Carolina, the North Carolina Equal Access to Justice Commission, or other similar agency as appropriate in order that such service might be recognized and serve as an inspiration to others.

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

Adopted by the Supreme Court: January 28, 2010

ETHICS OPINION NOTES

2014 FEO 3. Opinion encourages government lawyers to engage in pro bono representation unless prohibited by law from doing so.

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 services 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 by the Supreme Court: July 24, 1997

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 concentrating 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 by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

RULE 6.5: LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Comment

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. *See, e.g.*, Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. *See* Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

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

Adopted by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

2008 FEO 3. A lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2014 FEO 6. A lawyer who provides free brief consultations to members of a nonprofit organization must still screen for conflicts prior to conducting a consultation.

RULE 6.6: 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 by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

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 53. A lawyer may sue a municipality although his partner serves as a member of its governing body.

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 hospital's board of trustees may not sue the hospital on behalf of a client.

2002 FEO 2. A lawyer may represent a party suing a public body or nonprofit organization, although the lawyer's partner or associate serves on the board, subject to certain conditions.

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

(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 must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] *See also* Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 2, 2014

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 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 FEO 6. The omission of the lawyer's address from a targeted direct mail letter is a material misrepresentation.

99 FEO 7. 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.

2000 FEO 1. 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. A lawyer may respond to an inquiry posted on a web page message board provided there are certain disclosures.

2000 FEO 6. 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.

2003 FEO3. A lawyer may advertise that he is a member of an organization with a self-laudatory title, provided it is a legitimate, disinterested organization with objective and verifiable standards for admission.

2004 FEO 7. It is misleading to advertise the number of years of experience of the lawyers with a firm without indicating that it is the combined legal experience of all of the lawyers with the firm.

2004 FEO 8. Unless the lawyer invariably makes the repayment of costs advanced contingent upon the outcome of each matter, an advertisement for legal services that states that there is no fee unless there is a recovery must also state that costs advanced must be repaid at the conclusion of the matter.

2004 FEO 9. A trade name for a law firm that implies an affiliation with a financial planning company is misleading and prohibited.

2005 FEO 2. A law firm that employs a nonlawyer to represent Social Security claimants must so disclose in any advertising for this service and to prospective clients.

2005 FEO 14. The URL for a law firm website does not have to include words that identify the site as belonging to a law firm provided the URL is not otherwise misleading.

2006 FEO 6. A lawyer may put extraneous statements on the envelope of a solicitation letter provided the statements do not mislead the recipient and the font used for the statements is smaller than the font used for the advertising disclaimer required by Rule 7.3(c).

2007 FEO 5. A lawyer may use the title "doctor" but only in a post-secondary school academic setting.

2007 FEO 14. A lawyer may advertise the lawyer's inclusion in the list of lawyers in North Carolina Super Lawyers and other similar publications and may advertise in such publications subject to certain conditions.

2009 FEO 6. A website may include a "case summary" section if there is sufficient information about each case included on the webpage to comply with Rule 7.1(a).

2009 FEO 16. A law firm website may include a case summary section showcasing successful verdicts and settlements if the section contains accurate information accompanied by an appropriate disclaimer. Any reference on the website to membership in an organization with a self-laudatory name must comply with the requirements of 2003 FEO 3.

2010 FEO 4. A lawyer may be included in a barter exchange trading network list or directory of members and other advertisements to members of the barter exchange so long as the list, directory, or advertisement does not include information that is false or misleading.

2010 FEO 6. A lawyer may place an advertisement for employment in practice areas in which the lawyer does not have experience if the lawyer intends to obtain competence through study or by associating a lawyer who is competent in those areas of law. If, at the time the advertisement is placed, it is likely the lawyer will associate more experienced lawyers to handle the resulting cases, that fact must be disclosed to the public in the advertisement.

2010 FEO 9. A dramatization disclaimer is not required when using a stock photograph in an advertisement so long as, in the context of the advertisement, the stock photograph is not materially misleading.

2010 FEO 10. A law firm may charge a client for the expenses associated with an out-of-office consultation so long as advertisements referencing the service indicate that the client will be charged for the service and the client consents to the charge prior to the visit.

2010 FEO 11. A lawyer may list membership in an organization with a self-laudatory name on his letterhead if a disclaimer of similar results and information about the criteria for membership also appears on the letterhead.

2010 FEO 14. It is a violation of the Rules of Professional Conduct for a lawyer to select another lawyer's name as a keyword for use in an Internet search engine company's search-based advertising program.

2011 FEO 9. A lawyer may not allow a person who is not employed by or affiliated with the lawyer's firm to use firm letterhead.

2011 FEO 10. A lawyer may advertise on a website that offers daily discounts to consumers where the website company's compensation is a percentage of the amount paid to the lawyer if certain disclosures are made and certain conditions are satisfied.

2012 FEO 1. Testimonials that discuss characteristics of a lawyer's client service may be used in lawyer advertising without the use of a disclaimer. Testimonials that refer generally to results may be used so long as the testimonial is accompanied by an appropriate disclaimer. The reference to specific dollar amounts in client testimonials is prohibited.

2012 FEO 6. A law firm may use a leased time-shared office address or a post office address to satisfy the address disclosure requirement for advertising communications in Rule 7.2(c) so long as certain requirements are met.

2012 FEO 8. A lawyer may ask a former client for a recommendation to be posted on the lawyer's profile on a professional networking website and may accept a recommendation if certain conditions are met.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2014 FEO 8. A lawyer may accept an invitation from a judge to be a "connection" on a professional networking website, and may endorse a judge. However, a lawyer may not accept a legal skill or expertise endorsement or a recommendation from a judge.

2015 FEO 3. A lawyer may not offer a computer tablet to a prospective client in a direct mail solicitation letter.

2015 FEO 9. A lawyer who does not own equity in a law firm may be held out to the public by the designation "partner," "income partner," or "non-equity partner," provided the lawyer was officially promoted based upon legitimate criteria and the lawyer complies with the professional responsibilities arising from the designation.

2017 FEO 1: A lawyer may advertise through a text message service that allows the user to initiate live telephone communication.

2017 FEO 3: A billboard advertisement need not contain the lawyer's name, firm name, or the firm's office address if the URL address on the advertisement lands on the lawyer's website where such information can be easily found. The opinion applies to all forms of legal advertisement.

2018 FEO 1: Opinion explains when a lawyer may participate in an online rating system and a lawyer's professional responsibility for the content posted on a profile on a website directory.

2018 FEO 3: The name of a lawyer who is under an active suspension must be removed from the firm name.

2018 FEO 8. Opinion rules that a lawyer may advertise membership in an organization that bestows a laudatory designation on the lawyer subject to certain conditions, including that the lawyer does not pay for the designation or inclusion; the lawyer ascertains that the organization made adequate inquiry into the lawyer's qualifications; and any advertisement of the designation includes an explanation of the standards for the designation and a disclaimer when the designation may create unjustified expectations.

2019 FEO 6. Opinion rules that a lawyer may not offer incentives in exchange for activity on his social media account if the social media platform broadcasts or displays users' interactions with the account to other users of the platform.

RULE 7.2: ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may adver-

tise services through written, recorded or electronic communication, including public media.

(b) 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 costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service that complies with Rule 7.2(d), or a prepaid or group legal services plan that complies with Rule 7.3(d); and

(3) pay for a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule, other than that of a lawyer referral service as described in paragraph (d), shall include the name and office address of at least one lawyer or law firm responsible for its content.

(d) 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 prospective 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:

(A) 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

(B) 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 learning about and 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. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers may entail the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, 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] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.1(b) for the disclaimer required in any advertisement that contains a dramatization and see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

[5] "Electronic communication(s)," as used in Section 7 of the Rules of Professional Conduct, refers to the transfer of writing, signals, data, sounds, images, signs or intelligence via an electronic device or over any electronic medium. Examples of electric communications include, but are not limited to, websites, email, text messages, social media messaging and image sharing. A lawyer who sends electronic communications to advertise or market the lawyer's professional services must comply with these Rules and with any state or federal restrictions on such communications. *See, e.g.*, N.C. Gen. Stat. §75-104; Telephone Consumer Protection Act, 47 U.S.C. §227; and 47 CFR 64.

Paying Others to Recommend a Lawyer

[6] Except as permitted under paragraphs (b)(1)-(b)(3), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rule 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's service). To comply with Rule 7.1, a lawyer must not pay a lead generator if the lead generator states, implies, or creates an impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. *See also* Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[7] A lawyer may pay the usual charges of a prepaid or group legal services plan or a not-for-profit lawyer referral service. A legal services plan is defined in Rule 7.3(d). Such a plan assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service.

[8] A lawyer who accepts assignments or referrals from a prepaid or group legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. *See* Rule 5.3. Any lawyer who participates in a legal services plan or lawyer 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. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. 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 (d)(7)(B) 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. In addition, the lawyer may not allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 2, 2014; September 28, 2017

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(d)(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 (d)(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(d)(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.

2004 FEO 1. A lawyer may participate in an on-line service that is similar to both a lawyer referral service and a legal directory provided there is no fee sharing with the service and all communications about the lawyer and the service are truthful.

2004 FEO 2. An attorney may not offer promotional merchandise in a targeted direct mail solicitation letter as an inducement to call the attorney's office.

2005 FEO 10. Opinion addresses ethical concerns raised by an internet-based or virtual law practice and the provision of unbundled legal services.

2006 FEO 7. A lawyer may be a member of a for-profit networking organization provided the lawyer does not distribute business cards and is not required to make referrals to other members.

2007 FEO 4. Opinion provides guidance on miscellaneous issues relative to client seminars and solicitation, gifts to clients and others following referrals, distribution of business cards, and client endorsements.

2010 FEO 4. A barter exchange that provides a complete, impartial list of all participating lawyers, does not purport to recommend or select a lawyer for an exchange member seeking legal services, and does not restrict the number of participating lawyers is not a lawyer referral service.

2011 FEO 4. A lawyer may not agree to procure title insurance exclusively from a particular title insurance agency on every transaction referred to the lawyer by a person associated with the agency.

2011 FEO 10. A lawyer may advertise on a website that offers daily discounts to consumers where the website company's compensation is a percentage of the amount paid to the lawyer if certain disclosures are made and certain conditions are satisfied.

2012 FEO 6. A law firm may use a leased time-shared office address or a post office address to satisfy the address disclosure requirement for advertising communications in Rule 7.2(c) so long as certain requirements are met.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2012 FEO 14. The advertising content displayed on certain gift or promotional items does not have to include an office address.

2013 FEO 10. With certain disclosures, a lawyer may participate in an online group legal advertising service that gives a participating lawyer exclusive rights to contacts arising from a particular territory.

2017 FEO 1: A lawyer may advertise through a text message service that allows the user to initiate live telephone communication.

2017 FEO 3: A billboard advertisement need not contain the lawyer's name, firm name, or the firm's office address if the URL address on the advertisement lands on the lawyer's website where such information can be easily found. The opinion applies to all forms of legal advertisement.

2018 FEO 1: Opinion explains when a lawyer may participate in an online rating system and a lawyer's professional responsibility for the content posted on a profile on a website directory.

2018 FEO 7: Opinion rules that, subject to certain conditions, a lawyer may participate in an online service for soliciting client reviews that collects and posts positive reviews to increase the lawyer's ranking on internet search engines.

2019 FEO 6. Opinion rules that a lawyer may not offer incentives in exchange for activity on his social media account if the social media platform broadcasts or displays users' interactions with the account to other users of the platform.

RULE 7.3: SOLICITATION OF CLIENTS

(a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a potential client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a potential client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation 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) Targeted Communications. Unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), every written, recorded, or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the statement, in capital letters, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES" (the advertising notice), which shall be conspicuous and subject to the following requirements:

(1) Written Communications. Written communications shall be mailed in an envelope. The advertising notice shall be printed on the front of the envelope, in a font that is as large as any other printing on the front or the back of the envelope. If more than one color or type of font is used on the front or the back of the envelope, the font used for the advertising notice shall match in color, type, and size the largest and widest of the fonts. The front of the envelope shall contain no printing other than the name of the lawyer or law firm and return address, the name and address of the recipient, and the advertising notice. The advertising notice shall also be printed at the beginning of the body of the enclosed written communication in a font as large as or larger than any other printing contained in the enclosed

written communication. If more than one color or type of font is used on the enclosed written communication, then the font of the advertising notice shall match in color, type, and size the largest and widest of the fonts. Nothing on the envelope or the enclosed written communication shall be more conspicuous than the advertising notice.

(2) Electronic Communications. The advertising notice shall appear in the "in reference" or subject box of the address or header section of the communication. No other statement shall appear in this block. The advertising notice shall also appear, at the beginning and ending of the electronic communication, in a font as large as or larger than any other printing in the body of the communication or in any masthead on the communication. If more than one color or type of font is used in the electronic communication, then the font of the advertising notice shall match in color, type, and size the largest and widest of the fonts. Nothing in the electronic communication shall be more conspicuous than the advertising notice.

(3) Recorded Communications. The advertising notice shall be clearly articulated at the beginning and ending of the recorded communication.

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service 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 any immediate need for the specified legal 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 North Carolina 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 prepaid legal services 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] A solicitation is a communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] There is a potential for abuse when a solicitation involves direct in-person, live telephone, or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to 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.

[3] This potential for abuse inherent in direct in-person, live telephone, or real-time electronic solicitation justifies its prohibition, particularly because lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm a person's judgment.

[4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone or real-time electronic 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 can be 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, live telephone, or real-time electronic contact can be disputed and may not be 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.

[5] There is far less likelihood that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[6] But 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 someone 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 as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).

[7] 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 people who are seeking legal services for themselves. 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 potential 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.

[8] Paragraph (c) of this rule requires that all targeted mail solicitations of potential clients must be mailed in an envelope on which the statement, "This

is an advertisement for legal services," appears in capital letters in a font at least as large as any other printing on the front or the back of the envelope. The statement must appear on the front of the envelope with no other distracting extraneous written statements other than the name and address of the recipient and the name and return address of the lawyer or firm. Postcards may not be used for targeted mail solicitations. No embarrassing personal information about the recipient may appear on the back of the envelope. The advertising notice must also appear in the "in reference" or subject box of an electronic communication (email) and at the beginning of any paper or electronic communication in a font that is at least as large as the font used for any other printing in the paper or electronic communication. On any paper or electronic communication required by this rule to contain the advertising notice, the notice must be conspicuous and should not be obscured by other objects or printing or by manipulating fonts. For example, inclusion of a large photograph or graphic image on the communication may diminish the prominence of the advertising notice. Similarly, a font that is narrow or faint may render the advertising notice inconspicuous if the fonts used elsewhere in the communication are chubby or flamboyant. The font size requirement does not apply to a brochure enclosed with the written communication if the written communication contains the required notice. As explained in 2007 Formal Ethics Opinion 15, the font size requirement does not apply to an insignia or border used in connection with a law firm's name if the insignia or border is used consistently by the firm in official communications on behalf of the firm. Nevertheless, any such insignia or border cannot be so large that it detracts from the conspicuousness of the advertising notice. 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.

[9] *See* Rule 7.2, cmt. [5] for the definition of "electronic communication(s)" as used in paragraph (c)(2) of this rule. A lawyer may not send electronic or recorded communications if prohibited by law. *See, e.g.*, N.C. Gen. Stat. §75-104; Telephone Consumer Protection Act 47 U.S.C. §227; and 47 CFR 64. "Real-time electronic contact" as used in paragraph (a) of this rule is distinct from the types of electronic communication identified in Rule 7.2, cmt. [5]. Real-time electronic contact includes, for example, video telephony (e.g., FaceTime) during which a potential client cannot ignore or delay responding to a communication from a lawyer.

[10] Paragraph (d) of this Rule permits a lawyer 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 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 Rule 7.3(d) as well as Rules 7.1, 7.2 and 7.3(b). *See* 8.4(a).

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 6, 2004; November 16, 2006; August 23, 2007; August 25, 2011; October 2, 2014; September 24, 2015; September 28, 2017

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 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 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 services 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 FEO 6. The omission of the lawyer's address from a targeted direct mail letter is a material misrepresentation.

2000 FEO 3. A lawyer may respond to an inquiry posted on a web page message board provided there are certain disclosures.

2004 FEO 2. An attorney may not offer promotional merchandise in a targeted direct mail solicitation letter as an inducement to call the attorney's office.

2004 FEO 5. A solicitation letter to prospective members of a class action must contain the words "This is an advertisement for legal services" pursuant to Rule 7.3(c).

2006 FEO 4. A lawyer may not participate in a prepaid legal services plan unless all the conditions for participation are met and participation does not otherwise result in a violation of the Rules of Professional Conduct.

2006 FEO 6. A lawyer may put extraneous statements on the envelope of a solicitation letter provided the statements do not mislead the recipient and the font used for the statements is smaller than the font used for the advertising disclaimer required by Rule 7.3(c).

2006 FEO 7. A lawyer may be a member of a for-profit networking organization provided the lawyer does not distribute business cards and is not required to make referrals to other members.

2007 FEO 4. Opinion provides guidance on miscellaneous issues relative to client seminars and solicitation, gifts to clients and others following referrals, distribution of business cards, and client endorsements.

2007 FEO 15. Opinion provides clarification of the technical requirements for targeted direct mail letters set forth in Rule 7.3(c) of the Rules of Professional Conduct.

2008 FEO 6. A lawyer may hire a nonlawyer independent contractor to organize and speak at educational seminars so long as the nonlawyer does not give legal advice.

2009 FEO 3. A lawyer has a professional obligation not to encourage or allow a nonlawyer employee to disclose confidences of a previous employer's

clients for purposes of solicitation.

2011 FEO 8. Guidelines for the use of live chat support services on law firm websites.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2015 FEO 3. A lawyer may not offer a computer tablet to a prospective client in a direct mail solicitation letter.

2015 FEO 7. The business relationships with health care professionals created by a lawyer previously employed as a health care consultant constitute prior professional relationships within the meaning of Rule 7.3(a) thus permitting the lawyer to directly solicit legal employment by in-person, live telephone, or real-time electronic contact with the health care professionals.

2017 FEO 1: A lawyer may advertise through a text message service that allows the user to initiate live telephone communication.

RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer shall not state or imply that the lawyer is certified as a specialist in a field of practice unless:

(1) the certification was granted by the North Carolina State Bar;

(2) the certification was granted by an organization that is accredited by the North Carolina State Bar; or

(3) the certification was granted by an organization that is accredited by the American Bar Association under procedures and criteria endorsed by the North Carolina State Bar; and

(4) the name of the certifying organization is clearly identified in the communication.

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 signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations are expected to apply standards of experience, knowledge and proficiency 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 a representation of specialty may be made only if the certifying organization is the North Carolina State Bar, an organization accredited by the North Carolina State Bar, or an organization accredited 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 by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

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 be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not 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 for a determination of whether the name is misleading.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation 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.

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." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. 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. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is not a public legal aid agency may be required to avoid a misleading implication. A firm name that includes the surname of a deceased or retired principal is, strictly speaking, a trade name. However, the use of such names, as well as designations such as "Law Offices of John Doe," "Smith and Associates," and "Jones Law Firm" are useful means of identification and are permissible without registration with the State Bar. However, it is misleading to use the surname 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 principal may be used in the name of a law firm only if the principal has ceased the practice of law.

[2] 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. 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] 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. *See*, *however*, Rule 5.5.

[4] With regard to paragraph (e), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; September 22, 2016

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 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."

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.

2004 FEO 9. A trade name for a law firm that implies an affiliation with a financial planning company is misleading and prohibited.

2005 FEO 8. Opinion rules that the URL for a law firm website is a trade name that must register with the North Carolina State Bar and meet the requirements of Rule 7.5(a).

2005 FEO 14. Opinion rules that the URL for a law firm website does not have to include words that identify the site as belonging to a law firm provided the URL is not otherwise misleading.

2006 FEO 20. A law firm may not continue to use a former member's surname in the law firm name if the member continues the practice of law with another firm.

2010 FEO 11. A lawyer may list membership in an organization with a self-laudatory name on his letterhead if a disclaimer of similar results and information about the criteria for membership also appears on the letterhead.

2015 FEO 9. A lawyer who does not own equity in a law firm may be held out to the public by the designation "partner," "income partner," or "non-equity partner," provided the lawyer was officially promoted based upon legitimate criteria and the lawyer complies with the professional responsibilities arising from the designation.

RULE 7.6: RESERVED

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. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and 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 N.C.G.S. §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, including Rule 1.6 and, in some cases, Rule 3.3.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

RULE 8.2: JUDICIAL AND LEGAL OFFICIALS

(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] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against such unjust criticism.

[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 by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows 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 who knows 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 is disciplined in any state or federal court for a violation of the Rules of Professional Conduct in effect in such state or federal court shall inform the secretary of the North Carolina State Bar of such action in writing no later than 30 days after entry of the order of discipline.

(e) A lawyer who is serving as a mediator and who is subject to the North Carolina Supreme Court Standards of Professional Conduct for Mediators (the Standards) is not required to disclose information learned during a mediation if the Standards do not allow disclosure. If disclosure is allowed by the Standards, the lawyer is required to report professional misconduct consistent with the duty to report set forth in paragraph (a).

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. A lawyer is not generally required by this rule to report the lawyer's own professional misconduct; however, to advance the goals of self-regulation, lawyers are encouraged to report their own misconduct to the North Carolina State Bar or to a court if the misconduct would otherwise be reportable under this rule. Nevertheless, Rule 1.15-2(p) *requires* a lawyer to report the misappropriation or misapplication of entrusted property, including trust funds, to the North Carolina State Bar regardless of whether the lawyer is reporting the lawyer's own conduct or that of another person.

[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 North Carolina State Bar unless some other agency or court 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 an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, 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 (c) 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.

[7] The North Carolina Supreme Court has adopted Standards of Professional Conduct for Mediators (the Standards) to regulate the conduct of certified mediators and mediators in court-ordered mediations. Mediators governed by the Standards are required to keep confidential the statements and conduct of the parties and other participants in the mediation, with limited exceptions, to encourage the candor that is critical to the successful resolution of legal disputes. Paragraph (e) recognizes the concurrent regulatory function of the Standards and protects the confidentiality of the mediation process. Nevertheless, if the Standards allow disclosure, a lawyer serving as a mediator who learns of or observes conduct by a lawyer that is a violation of the Rules of Professional Conduct is required to report consistent with the duty set forth in paragraph (a) of this Rule. In the event a lawyer serving as a mediator is confronted with professional misconduct by a lawyer participating in a mediation that may not be disclosed pursuant to the Standards, the lawyer/mediator should consider withdrawing from the mediation or taking such other action as may be required by the Standards. See, e.g., N.C. Dispute Resolution Commission Advisory Opinion 10-16 (February 26, 2010).

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 7, 2010; June 9, 2016

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 FEO 5. Disclosures made during a LAP support group meeting are

confidential and not reportable to the State Bar under Rule 8.3.

2003 FEO 2. A lawyer must report a violation of the Rules of Professional Conduct as required by Rule 8.3(a) even if the lawyer's unethical conduct stems from mental impairment (including substance abuse).

2009 FEO 2. A closing lawyer who reasonably believes that a title company engaged in the unauthorized practice of law when preparing a deed must report the lawyer who assisted the title company but may close the transaction if the client consents and doing so is in the client's interest.

2011 FEO 4. A lawyer may not agree to procure title insurance exclusively from a particular title insurance agency on every transaction referred to the lawyer by a person associated with the agency.

2013 FEO 8. Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

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 that reflects adversely on the lawyer's fitness as a lawyer;

(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] Lawyers are subject to discipline when they 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, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client or, in the case of a government lawyer, investigatory personnel, of action the client, or such investigatory personnel, is lawfully entitled to take.

[2] 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 offenses 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 a serious disciplinary violation regardless of whether the victim is the lawyer's employer, partner, law firm, client, or a third party.

[3] 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.

[4] 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. Conduct warranting the imposition of professional discipline under paragraph (d) is characterized by the element of intent or some other aggravating circumstance. 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.

[5] Threats, bullying, harassment, and other conduct serving no substantial purpose other than to intimidate, humiliate, or embarrass anyone associated with the judicial process including judges, opposing counsel, litigants, witnesses, or court personnel violate the prohibition on conduct prejudicial to the administration of justice. When directed to opposing counsel, such conduct tends to impede opposing counsel's ability to represent his or her client effectively. Comments "by one lawyer tending to disparage the personality or performance of another...tend to reduce public trust and confidence in our courts and, in more extreme cases, directly interfere with the truth-finding function by distracting judges and juries from the serious business at hand." *State v. Rivera*, 350 N.C. 285, 291, 514 S.E.2d 720, 723 (1999). *See* Rule 3.5, cmt. [10] and Rule 4.4, cmt. [2].

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[7] 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 lawyers. 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 by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; March 5, 2015

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 FEO 2. 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 FEO 19. Opinion provides guidelines for a lawyer representing a client with a civil claim that also constitutes a crime.

99 FEO 2. 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. A lawyer acting as a notary must follow the law when acknowledging a signature on a document.

2001 FEO 12. 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.

2003 FEO 5. Neither a defense lawyer nor a prosecutor may participate in the misrepresentation of a criminal defendant's prior record level in a sentencing proceeding even if the judge is advised of the misrepresentation and does not object.

2003 FEO 11. A departed lawyer must deal honestly with the members of her former firm when dividing a legal fee.

2005 FEO 3. A lawyer may not threaten to report an opposing party or a witness to immigration officials to gain an advantage in civil settlement negotiations.

2007 FEO 2. A lawyer may not take possession of a client's contraband if possession is itself a crime and, unless there is an exception allowing disclosure of confidential information, the lawyer may not disclose confidential information relative to the contraband.

2008 FEO 3. A lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2008 FEO 4. A lawyer may issue a subpoena in compliance with Rule 45 of the Rules of Civil Procedure which authorizes a subpoena for the production of documents to the lawyer's office without the need to schedule a hearing, deposition or trial.

2008 FEO 14. It is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract or pleading excerpts from a legal brief, contract or pleading written by another lawyer.

2008 FEO 15. Provided the agreement does not constitute the criminal offense of compounding a crime and is not otherwise illegal, and does not contemplate the fabrication, concealment, or destruction of evidence, a lawyer may participate in a settlement agreement of a civil claim that includes a non-reporting provision prohibiting the plaintiff from reporting the defendant's conduct to law enforcement authorities.

2010 FEO 2. A lawyer may not serve an out of state health care provider with an unenforceable North Carolina subpoena and may not use documents produced pursuant to such a subpoena.

2010 FEO 14. It is a violation of the Rules of Professional Conduct for a lawyer to select another lawyer's name as a keyword for use in an Internet search engine company's search-based advertising program.

2011 FEO 9. A lawyer may not allow a person who is not employed by or affiliated with the lawyer's firm to use firm letterhead.

2011 FEO 12. A lawyer must notify the court when a clerk of court mistakenly dismisses a client's charges.

2012 FEO 5. A lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee's lawyer using the employer's business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages unless a court determines that the messages are not privileged.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2014 FEO 7. A lawyer may provide a foreign entity or individual with a North Carolina subpoena accompanied by a statement/letter explaining that the subpoena is not enforceable in the foreign jurisdiction, the recipient is not required to comply with the subpoena, and the subpoena is being provided solely for the recipient's records.

2014 FEO 8. A lawyer may accept an invitation from a judge to be a "connection" on a professional networking website, and may endorse a judge. However, a lawyer may not accept a legal skill or expertise endorsement or a recommendation from a judge.

2014 FEO 9. A private lawyer may supervise an investigation involving misrepresentation if done in pursuit of a public interest and certain conditions are satisfied.

2018 FEO 5. Opinion rules that a lawyer may not use deception when seeking access to a person's restricted social network presence and may not instruct a third party to use deception.

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 not admitted in North Carolina is also subject to the disciplinary authority of North Carolina if the lawyer renders or offers to render any legal services in North Carolina. A lawyer may be subject to the disciplinary authority of both North Carolina and another jurisdiction 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 matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer is not subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

[1] It is longstanding law that conduct of a lawyer admitted to practice in North Carolina is subject to the disciplinary authority of North Carolina.

Extension of the disciplinary authority of North Carolina to other lawyers who render or offer to render legal services in North Carolina is for the protection of the citizens of North Carolina.

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 more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct might involve significant contacts with more than one jurisdiction.

[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 a lawyer shall be subject to only one set of rules of professional conduct, (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, and (iii) providing a safe harbor for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer is not subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

[6] If North Carolina and another admitting jurisdiction were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 2, 2014

RULE 8.6: INFORMATION ABOUT A POSSIBLE WRONGFUL CONVICTION

(a) Subject to paragraph (b), when a lawyer knows of credible evidence or information, including evidence or information otherwise protected by Rule 1.6, that creates a reasonable likelihood that a defendant did not commit the offense for which the defendant was convicted, the lawyer shall promptly disclose that evidence or information to the prosecutorial authority for the jurisdiction in which the defendant was convicted and to North Carolina Office of Indigent Defense Services or, if appropriate, the federal public defender for the district of conviction.

(b) Notwithstanding paragraph (a), a lawyer shall not disclose evidence or information if:

(1) the evidence or information is protected from disclosure by law, court order, or 27 N.C. Admin. Code Ch. 1B §.0129;

(2) disclosure would criminally implicate a current or former client or otherwise substantially prejudice a current or former client's interests; or

(3) disclosure would violate the attorney-client privilege applicable to communications between the lawyer and a current or former client.

(c) A lawyer who in good faith concludes that information is not subject to disclosure under this rule does not violate the rule even if that conclusion is subsequently determined to be erroneous.

(d) This rule does not require disclosure if the lawyer knows an appropriate governmental authority, the convicted defendant, or the defendant's lawyer already possesses the information.

Comment

[1] The integrity of the adjudicative process faces perhaps no greater threat than when an innocent person is wrongly convicted and incarcerated. The special duties of a prosecutor with respect to disclosure of potentially exonerating post-conviction information are set forth in Rule 3.8(g) and (h). However, as noted in the comment to Rule 3.3, Candor Toward the Tribunal, the special obligation to protect the integrity of the adjudicative process applies to all lawyers. Under Rule 3.3(b), this obligation may require a lawyer to disclose fraudulent testimony to a tribunal even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. Similarly, the need to rectify a wrongful conviction and prevent or end the incarceration of an innocent person justifies extending the duty to disclose potentially exculpatory information to all members of the North Carolina State Bar, regardless of practice area and limited only by paragraph (b). It also justifies the disclosure of information otherwise protected by Rule 1.6. For prosecutors, compliance with Rule 3.8(g) and (h) constitutes compliance with this rule.

[2] This rule may require a lawyer to disclose credible evidence or information, whether protected by Rule 1.6 or not, if the evidence or information creates a reasonable likelihood that a convicted defendant did not commit the offense for which the defendant was convicted. To determine whether disclosure is required, a lawyer must not only consider the credibility of the evidence or information and its source but must also evaluate the substance of the evidence or information to determine whether it creates a reasonable likelihood that the defendant did not commit the offense.

[3] The duty to disclose is qualified in paragraph (b) by legal obligations and client loyalty. A lawyer may not disclose evidence or information if prohibited by law, court order, or the administrative rule that makes the proceedings of the State Bar's Grievance Committee confidential (27 N.C. Admin. Code Ch. 1B §.0129). The latter prohibition insures a lawyer's response to a grievance does not inadvertently impose a duty to disclose on the lawyers in the State Bar Office of Counsel or on the State Bar Grievance Committee. In addition, paragraph (b) specifies that a lawyer may not disclose evidence or information if doing so would criminally implicate the lawyer's client or the evidence or information was received in a privileged communication between the client and the lawyer. Disclosure is also prohibited when it would result in substantial prejudice the client's interests. Substantial prejudice to a client's interests includes bodily harm, loss of liberty, or loss of a significant legal right or interest such as the right to effective assistance of counsel or the right against self-incrimination.

[4] When disclosure of information protected by Rule 1.6 is permitted, the lawyer should counsel the client confidentially, advising the client of the lawyer's duty to disclose and, if possible, seeking the client's cooperation.

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

Adopted by the Supreme Court: March 16, 2017

Index to Rules

Ethics Opinions

Editor's Note

The official ethics opinions of the North Carolina State Bar follow this note. There are 252 "RPC" opinions which were promulgated under the superseded 1985 Rules of Professional Conduct (effective from January 1, 1986, until July 24, 1997). The ethics opinions adopted under the Rules of Professional Conduct as comprehensively revised in 1997 (effective July 25, 1997) and in 2003 (effective February 27, 2003) follow the RPCs and are designated as "Formal Ethics Opinions" or "FEOs." Each RPC bears the identifying number assigned to it at the time of its initial publication in the *Journal*, the State Bar's quarterly publication. The FEOs, on the other hand, are identified by the year of initial publication in the *Journal* and are numbered serially. The RPCs cite rules from the 1985 Rules for authority. Note that the numbers for the 1985 Rules may be substantially different from comparable rules in the 1997/2003 Revised Rules which are cited in the FEOs. Reference should be made to the correlation tables in the Additional Resources section at the back of the *Handbook* for the comparable numbers.

There may be a gap in the sequential numbering of FEOs. This occurs when the State Bar Council has declined to adopt or has yet to act upon a proposed formal ethics opinion.

After the designation for each RPC and FEO opinion, you will find the specific day 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 headnote 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 and some of the FEOs were adopted under the Revised Rules of Professional Conduct prior to their comprehensive amendment in 2003, 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 current Rules of Professional Conduct. A researcher should check the text of the current 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 *Journal* or the State Bar website, www.ncbar.gov, 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 payment 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* CPR's 305, 297, 220, 201, 166, 137, and 94. These CPR's 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 sim-

ply 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, CPR's 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, CPR's 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 services 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. CPR's 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 non-lawyer 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 obligations 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. CPR's 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 CPR's 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 appropriately 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 perform-

ance 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 nor 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

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). *See also* RPC 249.

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 coemployee 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. CPR's 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 CPR's 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," suggesting, 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 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 commence-

ment 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 inter-

ests 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 post-

conviction 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, qual-

ified 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

Editor's note: *See* Rule 5.4(a)(4) for the exception.

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

Editor's Note: Portions of this opinion may be overruled by RPC 158.

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 is overruled by 2002 Formal Ethics Opinion 2.

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
Editor's note: This opinion is overruled by Rule 7.1(b).

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, CPR's 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. CPR's 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). For further guidance see Rule 1.7, [cmt.] 22, and ABA Formal Opinion 05-436.

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 written 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 com-

pulsory 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: The statutes referenced below are now found in Chapter B of the General Statutes.

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 to 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 pro-

ceedings 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

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). *See* RPC 248 for subsequent opinions on these issues.

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 unrep-

resented 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 profes-

sional 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 counsel?

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 mem-

ber 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 indignities 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 PJC's (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

Editor's Note: See 2002 FEO 7 for additional guidance.

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.

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 advertise-

ment 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). This opinion is overruled by N.C. Gen. Stat. §97-25.6 (2012) (Reasonable access to medical information).

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). 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: See 99 Formal Ethics Opinion 2 for additional guidance. Rule 45 of the N.C. Rules of Civil Procedure was revised following adoption of this opinion. Rule 45 should be consulted as to the legal requirements for issuing a subpoena.

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 custodian 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.

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

Editor's Note: To the extent that this opinion is contrary to Rule 4.4, Respect for Rights of Third Persons, paragraph (b) and comments [2] and [3], as revised in 2003 and thereafter, the rule and comment are controlling.

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.

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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.

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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.

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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

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.

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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.

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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 follow-

ing 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.

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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 con-

fidentiality 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).

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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.

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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 nonlawyer 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.

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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 nonlawyer 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 nonlawyer 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 nonlawyer 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 nonlawyer who assists her regardless of whether the nonlawyer 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 nonlawyer 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.

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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. Unfortunately, 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.

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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.

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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.

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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.

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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, any property belonging to the estate of a debtor . . . 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 administrative 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).

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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 nonlawyer independent contractor to search a title to take reasonable steps to ascertain that the nonlawyer is competent and, at all times that the nonlawyer is assisting the lawyer, to provide the nonlawyer with appropriate supervision and instruction regardless of the distance between the lawyer and nonlawyer. *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).]

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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.

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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.

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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).

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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

Editor's note: This opinion is overruled by 2002 Formal Ethics Opinion 9.

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 nonlawyer 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 nonlawyer. *See* Rule 1.1, Rule 5.3, Rule 5.5(b), and RPC 183. A nonlawyer 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 nonlawyer cannot give advice or opinion upon the legal rights of the client. Therefore, a nonlawyer 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."

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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 multi-disciplinary partnership or professional association in which legal fees might be shared with a nonlawyer or legal services might be provided by an employee of a corporation other than a professional corporation or a nonlawyer 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 nonlawyer. 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 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 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 nonlawyer 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 nonlawyer 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 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…," 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 nonlawyer 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 agreements.

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 Ethics 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

Editor's note: This opinion is overruled by 2002 Formal Ethics Opinion 9.

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 closing 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(c), 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

Editor's note: See Rule 1.8 (e)(1) for amendments in 2003 that supersede this opinion.

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

Editor's note: This opinion is overruled by 2002 Formal Ethics Opinion 9.

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 insur-

ance 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 attorney/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 sit-

uation. 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.

2001 Formal Ethics Opinion 15

April 19, 2002

Ex Parte Communication With A Judge When Permitted by Law

Opinion rules that a lawyer may not communicate ex parte *with a judge in reliance upon the communication being "permitted by law" unless there is a statute or case law specifically and clearly authorizing such communications or proper notice is given to the adverse party or counsel.*

Inquiry:

Rule 3.5(a)(3) prohibits *ex parte* communications with a judge or other official except under the following circumstances:

(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.

G.S. 15A-539 of the North Carolina General Statutes states as follows: "A prosecutor may at any time apply to an appropriate district court judge or superior court judge for modification or revocation of an order of release under [Article 26]." The statute does not say that the application to the judge may be made *ex parte*.

On more than one occasion, Attorney A has gotten a client's bond modified in a court proceeding only to have the prosecutor communicate with the judge *ex parte* and obtain a reinstatement of the original bond. The prosecutor, in reliance upon the statement "at any time" in G.S. 15A-539, presumes that he or she is permitted by law to engage in these *ex parte* communications without notice to Attorney A or the client.

Does the *ex parte* communication with the judge violate Rule 3.5(a)(3)?

Opinion:

Yes. Lawyers must act in good faith when determining whether an *ex parte* communication is "permitted by law" particularly because such communications limit the adverse party's right to be heard and to be represented by counsel. Therefore, a lawyer may not engage in an *ex parte* communication with a judge or other official in reliance upon the communication being "permitted by law" unless there is a statute or case law specifically and clearly authorizing

such communication. Such authorization may not be inferred by the absence in the statute or case law of a specific statement requiring notice to the adverse party or counsel prior to the *ex parte* communication. *See* RPC 237.

2002 Formal Ethics Opinion 1

April 19, 2002

Participation in Collaborative Resolution Process Requiring Lawyer to Agree to Limit Future Court Representation

Opinion rules that a lawyer may participate in a non-profit organization that promotes a cooperative method for resolving family law disputes although the client is required to make full disclosure and the lawyer is required to withdraw before court proceedings commence.

Inquiry #1:

Several lawyers from different law firms would like to start a non-profit organization (the "CFL Organization") to promote the use of a process called "collaborative family law" to facilitate the resolution of domestic disputes through non-adversarial negotiation. The goal of the collaborative family law process is to avoid the negative economic, social, and emotional consequences of protracted litigation by using cooperative negotiation and problem solving. In the "four-way meetings" to negotiate a settlement, each spouse is represented by a lawyer of his or her choice provided the lawyer is trained in and dedicated to the process of collaborative family law. A spouse who wants the CFL Organization to facilitate a collaborative family law process may be represented by a lawyer who is not a member of the organization provided the lawyer is committed to the process. However, it is anticipated that in the majority of cases, both the husband and the wife will be represented by lawyers who are members of the CFL Organization. Each spouse agrees to pay his or her own legal fees. A lawyer participating in the process, including a member of CFL Organization, receives all compensation for legal representation from his or her client.

May a lawyer who is a member of the CFL Organization represent a spouse in a collaborative family law process if another member of the organization represents the other spouse?

Opinion #1:

Yes, provided both lawyers determine that their professional judgment on behalf of their respective clients will not be impaired by their relationship to the other lawyer through the CFL Organization, and both clients consent to the representation after consultation. *See* Rule 1.7(b).

Inquiry #2:

To further the goal of avoiding litigation, the lawyers must agree to limit their representation of their respective clients to representation in the collaborative family law process and to withdraw from representation prior to court proceedings. May a lawyer ask a client to agree, in advance, to this limitation on the lawyer's legal services?

Opinion #2:

Yes. Rule 1.2(c) permits a lawyer to limit the objectives of a representation if the client consents after consultation.

Inquiry #3:

The CFL Organization wants to publish a brochure describing the process of collaborative family law and its differences from litigation and other methods of resolving disputes. May the brochure include the names of the lawyers who are members of the CFL Organization and provide a description of their training and their commitment to the process?

Opinion #3:

Yes. As a communication about lawyers and their legal services, the brochure must comply with the Rules of Professional Conduct including the duty to be truthful and not misleading. *See* Rule 7.1.

Inquiry #4:

May a lawyer representing a spouse contact the other spouse, if not represented by counsel, to propose the use of the collaborative family law process and, if interested, to recommend contacting another member of the CFL Organization, or another lawyer trained in collaborative family law? May the lawyer send the opposing party a copy of the CFL Organization brochure and other information about the process?

Opinion #4:

Yes, provided there is full disclosure of the lawyer's relationship to the CFL Organization and the lawyer complies with the limitations on communications with unrepresented persons set forth in Rule 4.3. This communication is not a prohibited solicitation if the lawyer will receive no financial benefit from the CFL Organization as a result of the other spouse's employment of another CFL lawyer. *See* Rule 7.3(a). Nevertheless, the lawyer may not give advice to the unrepresented spouse other than the advice to secure counsel. *See* Rule 4.3(a). Such advice must be general: the lawyer may not refer the unrepresented spouse to a specific lawyer but may provide a list of lawyers who ascribe to the collaborative family law process. Moreover, the lawyer may describe the collaborative family law process in communications with the unrepresented spouse but the lawyer may not give the unrepresented spouse advice about the benefits or risks of the process for the unrepresented spouse.

Inquiry #5:

The collaborative family law process requires both spouses to agree to disclose voluntarily all assets, income, debts, and other information necessary for both parties to make informed choices. Is it a violation of the lawyer's duty of competent representation to encourage a client to participate in the process and to disclose such information voluntarily?

Opinion #5:

In order that the client may make an informed decision about participating in the process, the lawyer must use his or her professional judgment to analyze the benefits and risks for the client in participating in the collaborative family law process, taking the disclosure requirements into consideration, and advise the client accordingly. *See* Rule 1.1 and Rule 1.4(b).

Inquiry #6:

In a court proceeding, adultery may determine a client's right to alimony. May a lawyer represent a client in the collaborative family law process if the disclosure requirements for the process permit withholding of information about adultery despite the general policy of full disclosure? May a lawyer represent a client in the process if the disclosure requirements require the disclosure of information about adultery even if it may be detrimental to the disclosing party?

Opinion #6:

A lawyer may represent a client in the collaborative family law process if it is in the best interest of the client, the client has made informed decisions about the representation, the disclosure requirements do not involve dishonesty or fraud, and all parties understand and agree to the specific disclosure requirements. Before representing a client in the collaborative family law process, the lawyer must examine the totality of the situation and advise the client of the benefits and risks of participation in the collaborative family law process including the benefits and risks of making and receiving certain disclosures (or not receiving those disclosures). *See* Rule 1.4(b).

2002 Formal Ethics Opinion 2

July 19, 2002
Revised January 24, 2003

Implications of Service on a Public Body or Non-Profit Board

Opinion rules that a lawyer may represent a party suing a public body or non-profit organization, although the lawyer's partner or associate serves on the board, subject to certain conditions.

Inquiry #1:

Attorney A is a lawyer with Law Firm C. He was retained by the defendant in a condemnation lawsuit filed by D County pursuant to Chapter to 40A of the North Carolina General Statutes. Subsequent to Attorney A's entering an appearance in the condemnation proceeding, Attorney B, who is also a lawyer with Law Firm C, was elected to the Board of County Commissioners of D County ("the Board").

The Board is the governing body of D County. Neither the Board nor its members are parties to the condemnation proceeding. However, the proceeding was filed at the direction of the Board and the Board has the authority to compromise or dismiss the action. Attorney B disclosed to the Board that Attorney A represents the defendant in the condemnation suit. He also advised the Board that he would refrain from consideration or comment, as a member

of the Board, on the condemnation action. He promised to absent himself from meetings in which the matter is discussed and will not vote on any issue relating to the condemnation proceeding. After full disclosure from Attorney B, and upon the advice of its attorney, the Board unanimously resolved that it does not object to Attorney A's representation of the defendant in the condemnation proceeding, provided Attorney B continues to comply with the conditions previously noted. Attorney A's client, after the full disclosure, also has no objections.

May Attorney A continue as counsel for the defendant in the condemnation action while Attorney B serves as a member of the Board of Commissioners of D County?

Opinion #1:

Yes, subject to certain conditions. Lawyers should be encouraged to serve on public bodies, whether by election or appointment, because, by education and experience, lawyers are uniquely qualified for such service. Any barriers to public service by lawyers should be removed if procedures can be established that preserve the ethical values of the profession.

To avoid the appearance of impropriety or undue influence, a lawyer who is elected or appointed to a public body must be screened in his law firm from participation in an action brought by another lawyer in the firm against the public body or any subsidiary of that public body. *See* Rule 6.6 and RPC 53. This means that the law firm must adopt reasonably adequate procedures, under the circumstances, to isolate the lawyer from participation in the discussion of the matter with the other members of the firm and from exposure to any confidential information relative to the matter. Sharing of the legal fee generated by the representation, while not specifically prohibited, is discouraged. Although receipt of the fee by the board member/lawyer may not materially affect his judgment or neutrality, screening from participation in the profit earned from the representation increases the isolation of the lawyer and thereby enhances the public's perception that the lawyer is not exercising undue influence on the other members of the board. Therefore, if practical, a law firm should adopt reasonable procedures for withholding the lawyer's share in the profit (after overhead) from the legal fee earned from the representation.

The lawyer serving on the public body must also make full disclosure to the body on which he serves and be screened from participation in the public body's deliberations on the matter. The lawyer must do the following:

(1) Disclose in writing or in open meeting to the governing body his relationship to the matter involved;

(2) Refrain from any expression of opinion, public or private, or any formal or informal consideration of the matter, including any communication with other members of the staff of the governing body;

(3) Absent himself from any discussion of the matter by the governing body; and

(4) Withdraw from voting on all issues relating to the matter.

CPR 290 and RPC 53. These safeguards will help avoid any inappropriate influence on the other members of the governing body and will protect the lawyer's neutrality. *See* Rule 6.6(b). Nevertheless, if the lawyer is named, in an official or individual capacity, as a party in the action, it is unlikely that the lawyer will be able to maintain his neutrality on the public body or within the law firm. Therefore, it is a disqualifying conflict of interest for the board member's law partner or associate to undertake the representation of any party in litigation or other adversary action if the board member is a necessary party to the action in either his individual or official capacity. *See* RPC 53.

In RPC 160, the Ethics Committee ruled that a lawyer whose associate is an appointed member of a public hospital's board of trustees may not sue the hospital on behalf of a client. The opinion holds that permitting the lawyer to go forward with the suit against the hospital creates a conflict of interest. However, the opinion fails to distinguish between a suit against the hospital itself and a suit against the members of the board of trustees in their official or individual capacities. In dicta, it is implied that the holding in RPC 160 also pertains to a lawyer whose partner or associate is an elected member of a public governing body but the exact application of RPC 160 to this situation is unclear. For the reasons noted above, RPC 160 is overruled.

Inquiry #2:

May lawyers at Law Firm C accept new representation adverse to County D provided it does not involve litigation?

Opinion #2:

Yes, subject to the limitations set forth above, and further subject to the limitation that the representation may not be undertaken if it is known at the outset or reasonably should be known, that, in the event there is subsequent litigation arising from the matter, Attorney B will be named, in either his individual or official capacity, as an opposing party in the lawsuit. *See* RPC 53. If this cannot be ascertained at the beginning of the representation, the lawyers may undertake the representation but must withdraw if it subsequently becomes apparent that Attorney B should be named as an opposing party in a lawsuit arising from the matter.

Inquiry #3:

May lawyers at Law Firm C accept new representations in litigation matters adverse to D County?

Opinion #3:

Yes, subject to the limitations set forth in Opinion No. 1 above.

Inquiry #4:

May lawyers at Law Firm C accept new representations in which the Board itself, or members of the Board in their official capacity, are adverse parties?

Opinion #4:

See Opinion #1 above.

Inquiry #5:

Attorney X, another member of Law Firm C, serves on the board of a non-profit organization. Attorney Y, also of the firm, is representing a client with a claim against the organization. May Attorney X continue to serve as a member of the board if Attorney Y files an action against the organization on behalf of the client?

Opinion #5:

Lawyers should be encouraged to serve on the boards of non-profit organizations for the same reasons that they should be encouraged to serve on government bodies. Therefore, subject to the screening and disclosure conditions set forth in Opinion No. 1 above, a lawyer may continue to serve on the board of a non-profit organization although another member of the firm brings an action against the organization. RPC 160, as noted above, is overruled.

Inquiry #6:

Assume that the preceding inquiries concern representation of a client in a transaction rather than representation in an adversarial proceeding or litigation. If another lawyer in the firm serves on a board of the public body or non-profit organization that is a party to the transaction, may the representation continue if the lawyer serving on the board of the public body or non-profit organization follows the procedures set forth in Opinion #1?

Opinion #6:

Yes.

2002 Formal Ethics Opinion 3

July 19, 2002

Representation of a Fiduciary With Personal Conflict

Opinion rules that a lawyer for an estate may seek removal of the personal representative if the personal representative's breach of fiduciary duties constitutes grounds for removal under the law.

Inquiry #1:

Several years prior to his death, Decedent was involved in an automobile accident. Decedent's personal injury claim was resolved by a structured settlement agreement calling for monthly payments, with periodic lump sum payments, extending 10 years after his death. The structured settlement documents named Daughter, the child of his first marriage, as beneficiary should he pass away prior to completion of the payouts. However, Decedent subsequently entered into two separate contracts with Company to assign a portion of the monthly and lump sum payments to Company for valuable consideration. As part of the agreement with Company, Decedent gave notice to the annuity carrier of a change in beneficiary from Daughter to his estate.

When Decedent passed away, the annuity carrier refused to honor the

change of beneficiary documentation and began sending the monthly annuity payments to Daughter. The estate has two heirs, Daughter and Widow. Widow qualified as administratrix and hired Attorney to represent the estate. Several creditors' claims were filed against the estate. In an attempt to collect all the assets of the estate, including the annuity payments, Attorney filed a declaratory judgment action against Daughter, Company, and the annuity carrier. At the same time, Company filed suit against the estate, the annuity carrier, and Daughter. The annuity carrier thereafter stopped making any payments pending the resolution of the case.

Both the declaratory judgment action and Company's lawsuit were assigned to mediation. A mediated agreement was first reached between Widow, Daughter, and the annuity carrier. The annuity carrier would only agree to make payments to Daughter but did not care how Daughter divided the payments. Daughter and Widow agreed to a percentage split of whatever would be received from the annuity irrespective of the ultimate resolution of Company's claim.

The agreement between Daughter and Widow requires money to be deposited in a trust account and then divided by the trustee between the two heirs of the estate pursuant to their agreement. No money will be paid into the estate to cover creditors' claims. The estate has several creditors, potential creditors including Company, and funeral bills.

Assuming the assets in the estate are sufficient to satisfy the creditors' claims, what is Attorney's duty under these circumstances?

Opinion #1:

Attorney represents the estate and the personal representative in her official capacity. RPC137. As attorney for the estate, Attorney has a duty to see that the estate is properly administered and that funds due to the estate are first used to satisfy the claims of creditors of the estate. (But for the settlement between the sole two heirs, Attorney would also have a duty to see that the remaining funds of the estate are distributed to the lawful beneficiaries.) Attorney must inform Widow of the conflict between her personal interest in receiving a share of the annuity payments and her duties as administratrix. Notwithstanding this conflict, Attorney may conclude that the assets currently in the estate are sufficient to cover the creditors' claims, and therefore no interests are prejudiced if the annuity proceeds are not paid directly into the estate. Attorney need not withdraw from the representation under these circumstances.

Inquiry #2:

If the assets of the estate are insufficient to satisfy all debts of the estate, what are Attorney's duties?

Opinion #2:

Attorney may not continue the representation of the estate under these circumstances because the interests of Widow as an individual are in conflict with the interests of the estate. *See* RPC 22 and Rule 1.7. If Widow decides that she wants to pursue her personal interest in the annuity proceeds without regard for her fiduciary duties to the estate, Attorney must recommend that she resign as administratrix for the estate in order that a neutral party may be appointed.

Attorney does not represent Widow in her individual capacity and owes no duty to protect her individual interests. RPC 22. If Widow will not step down, and insists upon pursuing her personal interests to the detriment of the estate, Attorney may conclude that Widow is in breach of her fiduciary duty to the estate. Attorney must determine whether Widow's actions constitute grounds for removal under applicable law. If so Attorney must inform Widow that he may petition to remove her as administratrix. If she still declines to resign, Attorney may notify the clerk of court and seek to have her removed. *See* Rule 1.6(d)(4); *but cf.* 99 FEO 4 (distinguishable because of representation of co-executors). In any case, Attorney should seek to withdraw from the representation rather than assist or ignore Widow's pursuit of her personal interests to the detriment of the estate. If Widow is removed, Attorney may represent the estate at the request of the new personal representative. *See* RPC 22.

2002 Formal Ethics Opinion 4

April 18, 2003

Collecting Contingent Fee and Court-Awarded Attorney Fee

Opinion rules that a lawyer may collect a contingent fee and/or a court-awarded attorney fee if consistent with the fee agreement with the client but may not collect a clearly excessive total fee under any circumstance.

Inquiry #1:

Attorney has a contingent fee contract for representation of Plaintiff on injuries arising out of an automobile accident. The contract provides for the payment to Attorney of one-third of any amount recovered for Plaintiff. There is no provision in the contract on what will be done with any court-awarded legal fee. The case is tried and the jury awards the Plaintiff $3,000 in damages. Attorney petitions the court for an attorney fee pursuant to N.C. Gen. Stat. §6-21.1. The statute gives the trial judge the discretion to award an attorney fee when a judgment in a personal injury or property damage suit is $10,000 or less. After examining the time Attorney spent representing Plaintiff, the court awards a $6,000 attorney fee to be taxed as a part of the court costs.

May Attorney collect both the contingent fee and the attorney fee awarded by the court?

Opinion #1:

A lawyer may collect both the contingent fee and the court-awarded fee, or some portion thereof, provided the total amount received by the lawyer is consistent with the fee agreement with the client and is not clearly excessive. *See* Opinion #2 and #3. However, unless results obtained for the client are extremely favorable and the work required by the representation was substantial, ordinarily collecting the entire contingent fee and the entire court-awarded fee would be clearly excessive in violation of Rule 1.5(a). *See* Rule 1.5(b)(4) (whether a fee is clearly excessive depends, in part, on the amount involved and the results obtained); *see also* Ethics Decision 97-3.

Inquiry #2:

If Attorney keeps the fee awarded by the court, he will receive more from the representation than the Plaintiff will receive from the damage award. Is this unethical?

Opinion #2:

The purpose of N.C. Gen. Stat. §6-21.1 is to allow the judge to award a "reasonable attorney fee" in cases where it might not be feasible for the injured party to bring suit if the injured party must pay a lawyer out of the damage award. *See, e.g. Martin v. Hartford Accident & Indemnity Company*, 68 N.C. App. 534, 316 S.E. 2d 126, *cert. denied*, 311 N.C. 760, 321 S.E. 2d 140 (1984). The courts have set out the factors that trial judges must consider in deciding whether to award an attorney fee under N.C. Gen. Stat. §6-21.1. *See, e.g. Washington v. Horton*, 132, N.C. App. 347, 515 S.E. 2d 331 (1994).

The "reasonableness" of the fee award is determined by the court pursuant to the statute and the appellate opinions interpreting the statute. The Ethics Committee has no authority to interpret the law. As a matter of professional responsibility, however, if the fee received by the lawyer is not "clearly excessive" or illegal in violation of Rule 1.5(a), and it complies with or is consistent with the fee agreement with the client, it is irrelevant whether the fee awarded by the judge exceeds the amount of the verdict.

Inquiry #3:

May Attorney add the court-awarded attorney fee ($6,000) to the judgment ($3,000) and take a one-third contingent fee from the total? Is this prohibited fee sharing with a nonlawyer? Does it matter that this will give Plaintiff twice as much ($6,000) as the amount awarded by the jury?

Opinion #3:

The lawyer may share some or the entire attorney fee award with the client since this will clearly benefit the client and may, in some instances, avoid a violation of Rule 1.5. Unless otherwise prohibited by law, whether the client receives more than the jury award as a result of this arrangement is a matter of private agreement between the client and the lawyer.

Rule 5.4(a) prohibits a lawyer from sharing legal fees with a nonlawyer. As noted in comment [1] to the rule, the prohibition is meant to protect the exercise of a lawyer's independent professional judgment on behalf of a client from interference by a nonlawyer with a pecuniary interest in the outcome of the representation. Sharing an attorney fee award with the client will not interfere with the lawyer's professional judgment on behalf of the same client and, therefore, is not prohibited.

Inquiry #4:

What provisions should be included in Attorney's fee agreement with Plaintiff to address this situation?

Opinion #4:

To help the client make informed decisions about the representation and to avoid a fee dispute, the fee agreement should explain the potential availability of a court awarded attorney fee under N.C. Gen. Stat. §6-21.1. *See* Rule 1.4(b) and Rule 1.5. If the agreement provides that the lawyer will be paid an amount that is contingent upon the amount of damages awarded to the client in a judgment, the agreement should also set forth the basis for determining the total fee to be paid to the lawyer if the court awards a legal fee in addition to the damage award. For example, if the lawyer intends to take either the contingent fee amount or the court awarded fee, whichever is greater, the fee agreement should so specify.

2002 Formal Ethics Opinion 5

October 18, 2002

Retention of E-mail in a Client's File

Opinion rules that whether electronic mail should be retained as a part of a client's file is a legal decision to be made by the lawyer.

Inquiry #1:

Attorney represented Client in a domestic matter for 18 months. Attorney and Client exchanged e-mail messages, sometimes on a daily basis, regarding routine issues arising in Client's custody matter. Should the e-mail messages be retained, in either an electronic or paper format, as a part of Client's legal file?

Opinion #1:

A lawyer must exercise his or her legal judgment when deciding what documents or information to retain in a client's file. Whether the lawyer should retain an e-mail communication, or any other written communication or document, in a client's file depends upon the requirements of competent representation under the circumstances of the particular case. Rule 1.1. Competent representation includes organized record-keeping practices that safeguard documentation and information so that the lawyer remains abreast of the status of the case, and is adequately prepared to handle the client's matter. *See* Rule 1.1 cmt. [5]. Competent representation may also require the lawyer to retain sufficient documentation to protect the client's interests, to provide assistance to successor counsel, and to protect the lawyer in the event the representation of the client is ever questioned. *See generally* Rule 1.16(d) and cmt. [11].

Inquiry #2:

Attorney decides that an e-mail communication should be retained. The communication may be stored in electronic format (on the computer or by downloading the communication to a computer disk) or in a paper format by printing the communication. May Attorney store the communication in an electronic format or should it be printed to create a hard copy?

Opinion #2:

A lawyer must also exercise legal judgment, subject to the duty of competent representation, when deciding which format is the most appropriate for storing communications, documents, and information generated during the representation of a client. *See, e.g.*, RPC 234 (permitting the storage of inactive client files in an electronic format).

Inquiry #3:

Upon termination of the representation, Client requests her file. What is Attorney's duty with regard to production of e-mail communications generated during Client's representation?

Opinion #3:

Rule 1.16(d) states that, upon termination of a representation, a lawyer shall take steps as reasonably practicable to protect the client's interests, including "surrendering papers and property to which the client is entitled." CPR 3 ruled that, when a representation is terminated, the lawyer must give the client a copy of any document in the client's file that may be helpful to successor counsel except personal notes and unfinished work product. If a lawyer determines that an e-mail communication (whether in electronic format or hard copy) should be retained as a part of a client's file, at the time of the termination of the representation, the lawyer should provide the client with a copy of the retained -e-mail communication, together with the other documents in the client's file, subject to the limitations set forth in CPR 3.

Inquiry #4:

Attorney saved e-mail communications relating to Client's case in a file on his computer. Converting the e-mail communications to a paper format will be expensive and time-consuming. Upon the termination of the representation, may Attorney give Client a computer disk containing the e-mail communications (or transmit them to Client in some other electronic format) even if Client specifically requests paper copies of the e-mail communications?

Opinion #4:

Yes. Rule 1.16(d) requires the lawyer to take "reasonably practicable" steps to protect the interests of the client upon termination. In light of the widespread availability of computers, this standard is met if Attorney provides Client with a computer disk containing the retained e-mail communications or otherwise transmits them to Client in an electronic format.

2002 Formal Ethics Opinion 6

January 24, 2003

Providing Pleading to Unrepresented Adverse Party

Opinion rules that the lawyer for the plaintiff may not prepare the answer to a complaint for an unrepresented adverse party to file pro se.

Inquiry #1:

A lawsuit must be filed to obtain a divorce order and certain marital property can only be divided by court order. However, other issues between divorcing spouses are often resolved by agreement without filing suit. Frequently, the parties resolve their differences amiably, through formal mediation or otherwise, and filing suit to obtain the divorce or a property distribution order is a mere formality.

The Ethics Committee has been asked, on a number of occasions, whether a lawyer representing one spouse in an amiable marital dissolution may prepare for the other, unrepresented, spouse simple responsive pleadings that admit the allegations of the complaint. It is argued that, if this practice is allowed, the expense of additional legal counsel will be avoided and the proceedings will be expedited. The committee has consistently held, however, that a lawyer representing the plaintiff may not send a form answer to the defendant that admits the allegations of the divorce complaint nor may the lawyer send the defendant an "acceptance of service and waiver" form waiving the defendant's right to answer the complaint. CPR 121, CPR 125, CPR 296. The basis for these opinions is the prohibition on giving legal advice to a person who is not represented by counsel. *See also* RPC 165 (lawyer may not prepare a pleading that appears to represent the position of the adverse party).

Rule 2.2 allows a lawyer to act as an intermediary between clients with potentially conflicting interests provided certain conditions are met. Rule 2.2 seems to permit the conduct prohibited in the ethics opinions cited in the preceding paragraph. If the conditions in Rule 2.2 are satisfied, may a lawyer act as the intermediary for divorcing spouses and, in this capacity, prepare the divorce pleadings and appear as counsel of record for both parties?

Opinion #1:

No, one lawyer may not appear in court as legal counsel for opposing parties no matter how "friendly" the lawsuit. *See* Rule 1.7, Cmt. [8].

Inquiry #2:

Assume that the conditions for intermediation between divorcing spouses are satisfied and that the lawyer has been representing both spouses on non-litigation matters. May the lawyer draft the pleadings for both parties but give an unsigned pleading to one party (presumably the defendant) who will appear in the litigation *pro se*?

Opinion #2:

No. The *pro se* client may be confused about the extent of the lawyer's representation in the litigation. The *pro se* client must be treated as an unrepresented person under Rule 4.3

Inquiry #3:

A lawyer represents only the husband in a domestic dissolution. However,

the wife agrees to the divorce and the parties are on amiable terms. The wife is unrepresented and does not want to incur the expense of hiring a lawyer to represent her. May the lawyer prepare a waiver or an answer admitting the allegations of the divorce complaint and give the pleading to the wife to sign and file *pro se*?

Opinion #3:

No. *See* CPR 121, CPR 125, CPR 296, and RPC 165.

2002 Formal Ethics Opinion 7

January 24, 2003

Disclosure of Deceased Client's Confidences in a Will Contest Proceeding

Opinion clarifies RPC 206 by ruling that a lawyer may reveal the relevant confidential information of a deceased client in a will contest proceeding if the attorney/client privilege does not apply to the lawyer's testimony.

Inquiry:

RPC 206 rules that a lawyer may disclose the confidential information of a deceased client to the personal representative of the deceased client's estate but not to the heirs of the estate. The opinion relies upon the duty of confidentiality which continues after the death of a client. That duty prohibits the lawyer from revealing the client's confidences unless the disclosure is allowed by the exceptions to the duty of confidentiality set forth the Rules of Professional Conduct. (At the time of the adoption of RPC 206, the confidentiality rule was Rule 4. During the revision of the rules in 1997, the confidentiality rule was renumbered as Rule 1.6.) The opinion states:

> [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) [now Rule 1.6(d)(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.

RPC 206 does not address whether the lawyer for a deceased client may testify in a will contest or other litigation about the distribution of the decedent's estate if such testimony will require the disclosure of client confidences. May the lawyer for a deceased client testify in such litigation?

Opinion:

Yes, if the personal representative calls the lawyer as a witness in the will contest, the lawyer may testify because the personal representative consents to the disclosure. *See* Rule 1.6(d)(2). Rule 1.6(d)(3) also permits a lawyer to disclose client confidences if required by law or court order. If someone other than the personal representative calls the lawyer as a witness, the lawyer may testify to relevant confidential information of the deceased client if the lawyer determines that the attorney/client privilege does not apply as a matter of law or the court orders the lawyer to testify on this basis.

RPC 206 continues to be an appropriate application of the duty of confidentiality as set forth in Rule 1.6 of the Revised Rules of Professional Conduct and is not changed by this opinion.

2002 Formal Ethics Opinion 8

January 24, 2003

Direct Contact with Lawyer Appointed Guardian Ad Litem for Minor Plaintiff

Opinion rules that a lawyer who is appointed the guardian ad litem for a minor plaintiff in a tort action and is represented in this capacity by legal counsel, must be treated by opposing counsel as a represented party and, therefore, direct contact with the guardian ad litem, without consent of counsel, is prohibited.

Inquiry #1:

An action alleging medical malpractice was brought on behalf of Child, who was injured, and Child's Mother and Father. Plaintiff-Attorneys represent Child, Mother, and Father. The defendants are represented by Defense-Attorneys. A private lawyer (Guardian Ad Litem) was appointed by the court to serve as guardian ad litem for the minor. At mediation, Defense-Attorneys asked to meet privately with Guardian Ad Litem to discuss Child's case. Plaintiff-Attorneys denied the request, maintaining that Guardian Ad Litem is their client and, pursuant to Rule 4.2(a) of the Rules of Professional Conduct, Defense-Attorneys may not communicate with their represented client without their consent. Defense-Attorneys contend that, as a lawyer, Guardian Ad Litem "represents" Child and, therefore, has a professional responsibility to exercise independent professional judgment on behalf of Child, which includes making an independent inquiry of Defense-Attorneys' proposals and positions. Defense-Attorneys further contend that Plaintiff-Attorneys may not interfere with Guardian Ad Litem's decision on whether to communicate privately with Defense-Attorneys.

If a guardian ad litem is a lawyer, is he or she still a client represented by counsel for the purposes of Rule 4.2, thus prohibiting direct contact by opposing counsel without consent of the guardian ad litem's lawyer?

Opinion #1:

Rule 17(a) and (b) of the North Carolina Rules of Civil Procedure require an action to be brought by the "real party in interest" and, in the case of a minor, by a general guardian or, if there is none, by an appointed guardian ad litem. As a party, the guardian ad litem may choose to be represented by legal counsel and permit legal counsel to make decisions about the strategy for the litigation. *See* Rule of Professional Conduct 1.2, cmt. [1] ("In questions of means, the lawyer should assume responsibility for technical and legal tactical issues…."). The fact that the guardian ad litem is a lawyer does not make him or her co-counsel for the purpose of litigating the case. Therefore, opposing counsel must comply with Rule 4.2 and respect the decision of the guardian ad litem's trial counsel to deny a request to communicate privately with their client, the guardian ad litem.

The role and responsibilities of a guardian ad litem are established by the court making the appointment as well as by statute and case law. *See, e.g.*, N.C.G.S. 1A-1, Rule 17; *Satler v. Purser,* 12 NC App 206, 182 SE 2d 850 (1971). These remain the same whether the person appointed is a lawyer or not. Nevertheless, if a lawyer is appointed, he or she must fulfill the responsibilities of the guardian ad litem in a manner that is consistent with the requirements of the Rules of Professional Conduct. This means that the lawyer must be honest, avoid conflicts of interest, and exercise professional judgment in making decisions about matters that are within the purview of the guardian ad litem such as whether a settlement proposal should be accepted.

Inquiry #2:

If separate legal counsel represents a guardian ad litem who is a lawyer, is the guardian ad litem entitled to a court-awarded attorney's fee?

Opinion #2:

Whether a guardian ad litem who is a lawyer is entitled to a court-awarded fee is a question for the court and not for the Ethics Committee. *See* Rule .0102(g) of the Procedures for Ruling on Questions of Legal Ethics, 27 N.C.A.C. 1D, Section .0100 (Ethics Committee generally does not respond to inquiries that seek opinions on issues of law).

2002 Formal Ethics Opinion 9

January 24, 2003

Delegation to Nonlawyer Assistant of Certain Tasks Associated with a Residential Real Estate Transaction

Opinion rules that a nonlawyer assistant supervised by a lawyer may identify to the client who is a party to such a transaction the documents to be executed with respect to the transaction, direct the client as to the correct place on each document to sign, and handle the disbursement of proceeds for a residential real estate transaction, even though the supervising lawyer is not physically present.

Introduction:

The North Carolina State Bar was asked to reconsider Formal Ethics Opinions 2001-4 and 2001-8. These opinions, together with Formal Ethics Opinion 99-13, rule that competent legal practice requires the physical presence of the lawyer at the closing conference for both a purchase and a refinancing of residential real estate.

This opinion is issued after full consideration and investigation of the issues raised by the entities requesting the review. The opinion supersedes Formal Ethics Opinions 99-13, 2001-4, and 2001-8 to the extent that they are inconsistent with the conclusions expressed herein.

Inquiry:

In connection with a residential real estate transaction, a lawyer is retained to ensure that the documents are properly executed and that the loan and sale proceeds are properly distributed, in addition to other services, if any, that the lawyer is retained to provide. May the lawyer assign to a nonlawyer assistant the tasks of presiding over the execution of the documents and the disbursement of the closing proceeds necessary to complete the transaction?

Opinion:

Yes. The lawyer may delegate the direction of the execution of the documents and disbursement of the closing proceeds to a nonlawyer who is supervised by the lawyer provided, however, the nonlawyer does not give legal advice to the parties.

As is the case with any task that a lawyer delegates to a nonlawyer, competent practice requires that the lawyer determine that delegation is appropriate after having evaluated the complexity of the transaction, the degree of difficulty of the particular task, the training and ability of the nonlawyer, the client's sophistication and expectations, and the course of dealings with the client. Rule 1.1 and Rule 5.3.

When and how to communicate with clients in connection with the execution of the closing documents and the disbursement of the proceeds are decisions that should be within the sound legal discretion of the individual lawyer.[1] Therefore, the requirement of the physical presence of the lawyer at the execution of the documents, as promulgated in Formal Ethics Opinions 99-13, 2001-4, and 2001-8, is hereby withdrawn. A nonlawyer supervised by the lawyer may oversee the execution of the closing documents and the disbursement of the proceeds even though the lawyer is not physically present. Moreover, the execution of the documents and the disbursement of the proceeds may be accomplished by mail, by e-mail, by other electronic means, or by some other procedure that would not require the lawyer and the parties to be physically present at one place and time. Whatever procedure is chosen for the execution of the documents, the lawyer must provide competent representation and adequate supervision of any nonlawyer providing assistance. Rule 1.1, Rule 5.3, and Rule 5.5.

In considering this matter, the State Bar received strong evidence that it is in the best interest of the consumer (the borrower) for the lawyer to be physically present at the execution of the documents.[2] This ethics opinion should not be interpreted as implying that the State Bar disagrees with that evidence.

Endnotes

1. It is already common for lawyers, exercising their sound legal discretion, to delegate to their nonlawyer assistants certain other tasks in connection with a residential real estate transaction, such as the search of the public records and the recording of documents.
2. Transcript of the investigatory meeting of the Special Committee on Real Estate Closings, June 7, 2002. The transcript of the evidence received at the meeting is available from the North Carolina State Bar upon request.

2003 Formal Ethics Opinion 1

April 18, 2003

Representation of a General Contractor and Surety

Opinion rules that a lawyer must withdraw from joint representation of a general contractor and a surety if a position advanced on behalf of the general contractor is frivolous, for the purpose of delay or interferes with a legal duty owed by the surety to the claimant.

Inquiry:

In North Carolina, a general contractor working on a public project in excess of a certain amount must acquire performance and payment bonds executed by one or more surety companies. The payment bond serves to protect subcontractors and materialmen providing labor, equipment, materials, and supplies for use on public projects. If a general contractor fails to pay a subcontractor or a subcontractor fails to pay a supplier, either the subcontractor or the supplier may make a claim against the general contractor's bond. The surety will respond to a demand by requesting a proof or affidavit of claim with supporting documentation. The surety will also reserve its right to assert any defenses available to the general contractor. Without action by the general contractor to tender a defense, the surety will ordinarily pay the claim.

A supplier advances a payment bond claim for materials supplied to a subcontractor for use on a public project. The supplier has provided the surety with documentation including invoices and delivery tickets clearly indicating that the materials were delivered to the project. The subcontractor disappears. The general contractor has paid the subcontractor in full for the project. According to the law, this does not abrogate the payment bond claim, so the general contractor is obligated to pay twice. If the general contractor allows the surety to pay, the surety will look to the general contractor for indemnification.

The general contractor gives notice that it is tendering a defense on behalf of itself and the surety. Discussions between the surety and the claimant cease. The claimant files a complaint to perfect the bond claim. The complaint names the subcontractor, the general contractor, and the surety as defendants who are jointly and severally liable for the debt.

The surety has an obligation to the claimant, absent valid defenses, timely to resolve a payment bond claim. The general contractor does not have any valid defenses under the law, but wants to delay the proceeding to avoid payment. Under these circumstances, may one lawyer represent both the surety and the general contractor in defense of the claim?

Opinion:

Ordinarily, the interests of the surety and the general contractor will be aligned in defending a payment bond claim. However, the lawyer has an obligation to assert only valid defenses to the claims asserted and to avoid unnecessary delay in the proceedings. Rule 3.1 and Rule 3.2. The lawyer should explain these duties to both parties at the outset. If the general contractor insists upon a course of conduct that would violate the Rules of Professional Conduct, the lawyer must withdraw from the joint representation and advise both the general contractor and the surety to obtain separate counsel. *See* Rule 1.7(b).

Similarly, if the lawyer believes that an appropriate defensive action taken on behalf of the general contractor would interfere with a legal duty the surety owes to the claimant/supplier, such that the surety could be exposed to a bad faith claim, a conflict arises. In this situation, the lawyer must withdraw from the representation of both parties and may only continue with the representation of the general contractor with the consent of the surety. Rule 1.9(a).

2003 Formal Ethics Opinion 2

October 24, 2003

Responding to Opposing Counsel's Mental Health Problem

Opinion rules that a lawyer must report a violation of the Rules of Professional Conduct as required by Rule 8.3(a) even if the lawyer's unethical conduct stems from mental impairment (including substance abuse).

Inquiry #1:

Attorney A and Attorney B represent opposing parties in a legal matter. Attorney A's behavior has led Attorney B to suspect that Attorney A has a serious mental health problem (or possible substance abuse problem) that may be interfering with the representation of Attorney A's client. May Attorney B report her concerns directly to Attorney A's client?

Opinion #1:

No, Rule 4.2(a) prohibits communications about the representation with a person a lawyer knows is represented by another lawyer unless the other lawyer consents. There is no exception in the rule for reporting concerns about a lawyer's mental competency to the opposing party.

Inquiry #2:

May Attorney B take advantage of Attorney A's erratic behavior for the benefit of her client? What if her client instructs her to do this?

Opinion #2:

Although a lawyer must competently and diligently represent her clients, she does not have a duty to press every advantage for a client particularly when such conduct is inconsiderate or repugnant. The client establishes the legal objectives of the representation, but the lawyer is primarily responsible for choosing the means by which those objectives are obtained. As noted in Rule 1.2(a)(2), a lawyer does not violate the duty to abide by the client's decisions relative to the objectives of the representation, "…by avoiding offensive tactics, or treating with courtesy and consideration all persons involved in the legal process."

A lawyer may resolve the conflict between the duty of competent repre-

sentation and the desire not to take advantage of the impaired lawyer by making a confidential report to the Lawyer Assistance Program (LAP) of the State Bar and/or seeking the court's oversight when appropriate. If the client is insistent and the client-lawyer relationship is no longer functional because of the disagreement about tactics, the lawyer may withdraw from the representation pursuant to Rule 1.16(b)(4).

Inquiry #3:

Is Attorney B required to report her observations about Attorney A's mental health to the State Bar or other authority?

Opinion #3:

No, reporting to the State Bar is not required unless a lawyer has knowledge of an actual violation of the Rules of Professional Conduct by the other lawyer. Specifically, Rule 8.3(a) requires a lawyer "who knows 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] inform the North Carolina State Bar or the court having jurisdiction over the matter." The Preamble to the Rules of Professional Conduct, Rule 0.1, cmt. [6], on the other hand, underscores a lawyer's obligations to the legal system and would encourage the lawyer to communicate the situation of a distressed lawyer to LAP.

Inquiry #4:

If Attorney B does not have knowledge that Attorney A has violated the Rules of Professional Conduct, may she report her observations about Attorney A's mental health to LAP or other lawyer assistance program approved by the State Bar?

Opinion #4:

Yes, Attorney B may report, and professionalism would encourage her to communicate her observations about Attorney A's mental health to an approved lawyer assistance program without regard to whether she had knowledge of a violation of the Rules of Professional Conduct by Attorney A. *See, e.g.*, Rule 1.6(b); *see also*, 27 N.C.A.C. 1D, Rule .0613 of the Rules Governing the Lawyer Assistance Program.

Inquiry #5:

Attorney A's representation of his client is clearly incompetent in violation of Rule 1.1 of the Rules of Professional Conduct. Is Attorney B required to report this conduct to the State Bar? Will a report to LAP satisfy the reporting requirement?

Opinion #5:

Attorney B must report to the State Bar, or a court having jurisdiction, any violation of the Rules that raises a substantial question about another lawyer's fitness to practice law. A lawyer's violation of the duty of competent representation, set forth in Rule 1.1, may raise a substantial question about a lawyer's fitness to practice law and, therefore, be sufficient to trigger the reporting requirement under Rule 8.3(a).

If a disclosure of client confidential information is necessary to make the report, the client's consent must be obtained. Rule 8.3(c). Whether the opposing counsel's conduct alone constitutes confidential client information is debatable. *See* Rule 1.6(a). The clear incompetence of opposing legal counsel may afford an apparent advantage to Attorney B's client in the matter at hand, and reporting (and thereby possibly terminating) such incompetent representation arguably would be contrary to the client's interests. However, the termination of a somewhat conjectural individual advantage gained through the obvious incompetence of opposing counsel is not the kind of detriment to the client that would normally preclude reporting particularly when the failure to report may produce disproportionate future harm to current and future clients of Attorney A.

The report of misconduct should be made to the Grievance Committee of the State Bar if a lawyer's impairment results in a violation of the Rules that is sufficient to trigger the reporting requirement. The lawyer must be held professionally accountable. *See, e.g.*, Rule .0130(e) of the Rules on Discipline and Disability of Attorneys, 27 N.C.A.C. 1B, Section .0100 (information regarding a member's alleged drug use will be referred to LAP; information regarding the member's alleged additional misconduct will be reported to the chair of the Grievance Committee).

Making a report to the State Bar, as required under Rule 8.3(a), does not diminish the appropriateness of also making a confidential report to LAP. The bar's disciplinary program and LAP often deal with the same lawyer and are not mutually exclusive. The discipline program addresses conduct; LAP addresses the underlying illness that may have caused the conduct. Both programs, in the long run, protect the public interest.

Inquiry #6:

Another lawyer in Attorney B's law firm is demonstrating mental health problems that may be affecting the representation of his clients. What duty does Attorney B have to notify the lawyer's clients? What duty does Attorney B have to report this conduct to LAP or the State Bar?

Opinion #6:

Attorney B should intervene to assist the lawyer and to avoid harmful consequences to the lawyer's clients. *See, e.g.*, Rule 5.1(a). Such intervention may include, if necessary, notifying the clients and switching their representation to another lawyer in the firm. Rule 4.2 does not prohibit direct communications with the clients of other lawyers in a firm.

For a discussion of reporting another lawyer's mental health problem to LAP or the State Bar, see Opinions #3, #4, and #5 above.

Inquiry #7:

Attorney X attends a LAP support group meeting that Attorney A is attending. During the meeting, Attorney A discloses conduct that is otherwise reportable to the State Bar pursuant to Rule 8.3(a). Is Attorney X required to report this conduct to the State Bar?

Opinion #7:

No. 2001 Formal Ethics Opinion 5 holds that disclosures made by a lawyer during a LAP support group meeting are confidential and not reportable to the State Bar under Rule 8.3.

2003 Formal Ethics Opinion 3

October 24, 2003

Advertising Membership in Organization with Self-Laudatory Title

Opinion rules that a lawyer may advertise that he is a member of an organization with a self-laudatory title, provided it is a legitimate, disinterested organization with objective and verifiable standards for admission.

Inquiry:

Attorney would like to run an advertisement in the yellow pages that will include the following statement:

> Member, Million Dollar Advocates Forum. Membership is limited to successful trial lawyers who have demonstrated exceptional skill, experience, and excellence in advocacy by achieving a trial verdict, award, or settlement in the amount of One Million Dollars or more.

The advertisement would also state, "We do not represent that similar results will be achieved in your case. Each case is different and must be evaluated separately."

May Attorney advertise his services in this way under the Rules of Professional Conduct?

Opinion:

Yes, provided advertising membership in such an organization does not violate Rule 7.1. Rule 7.1 prohibits a lawyer from making a false or misleading communication about the lawyer or the lawyer's services. A communication is misleading if it creates unjustified expectations about the results a lawyer can achieve or makes a comparison with the services of another lawyer that cannot be factually substantiated. *See* Rule 7.1(a)(2) and (3). Information about a lawyer's verdict record can be misleading if it is not provided in context. *See* 99 FEO 7 and 2000 FEO 1. Therefore, to avoid a misleading communication, a lawyer may only advertise his membership or participation in an organization with a self-laudatory name or designation if the following conditions are satisfied: 1) the organization has strict, objective standards for admission that are verifiable and would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience, or expertise indicated by the designated membership; 2) the standards for membership are explained in the advertisement or information on how to obtain the membership standards is provided in the advertisement; 3)

the organization has no financial interest in promoting the particular lawyer; and 4) the organization charges the lawyer only reasonable membership fees. Moreover, when the membership information may create unjustified expectations, such as the expectation that a lawyer obtains a million dollar verdict in every case, a disclaimer, similar to the one in this inquiry, must be included in the advertisement. Whether Million Dollar Advocates Forum satisfies these conditions must be determined by Attorney prior to the publication of the advertisement.

2003 Formal Ethics Opinion 4

July 25, 2003

Communicating with a Represented Person through an Agent

Opinion rules that a lawyer may not proffer evidence gained during a private investigator's verbal communication with an opposing party known to be represented by legal counsel unless the lawyer discloses the source of the evidence to the opposing lawyer and to the court prior to the proffer.

Inquiry #1:

Attorney represents the employer and the workers' compensation carrier in a workers' compensation case filed by Plaintiff, an injured employee. Attorney knows that Plaintiff is represented by legal counsel. Attorney hired a private investigator to watch Plaintiff to see if Plaintiff engaged in any physical activity indicating that he is not injured to the extent that he claims. Attorney instructed the private investigator not to engage Plaintiff in conversation. During the surveillance, the investigator ignored Attorney's instructions and engaged Plaintiff in a conversation about a motel property located next to Plaintiff's property. As a pretext for the communication, the investigator told Plaintiff he was interested in purchasing the motel property. During the conversation, Plaintiff stated that he was repairing the motel property from storm damage. The investigator's observations of Plaintiff during the remainder of the surveillance, without further verbal contact with Plaintiff, indicate that Plaintiff is physically able to work.

May Attorney proffer the private investigator's testimony about his conversation with Plaintiff as evidence in the workers' compensation trial?

Opinion #1:

Rule 4.2(a) of the Rules of Professional Conduct (2003) prohibits a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the other lawyer consents or the communication is authorized by law. A lawyer may not do through an agent that which the lawyer is prohibited by the Revised Rules of Professional Conduct (2003) from doing himself. *See* Rule 5.3.

The Ethics Committee declines to opine on the admissibility of evidence. However, to discourage unauthorized communications by an agent of a lawyer and to protect the client-lawyer relationship, the lawyer may not proffer the evidence of the communication with the represented person, even if the lawyer made a reasonable effort to prevent the contact, unless the lawyer makes full disclosure of the source of the information to opposing counsel and to the court prior to the proffer of the evidence. *See* Rule 3.3, Rule 4.1, and ABA Comm. On Ethics and Professional Responsibility, Formal Op. 95-396 (1995).

Inquiry #2:

If the information gained from the investigator's conversation with Plaintiff may not be used at trial, may Attorney still offer the evidence gained through the investigator's visual observations of Plaintiff?

Opinion #2:

Yes. Visual observation is not a direct contact or communication with a represented person and does not violate Rule 4.2(a).

2003 Formal Ethics Opinion 5

July 25, 2003

Participating in Misrepresentation of Prior Record Level in Sentencing Proceeding

Opinion rules that neither a defense lawyer nor a prosecutor may participate in the misrepresentation of a criminal defendant's prior record level in a sentencing proceeding even if the judge is advised of the misrepresentation and does not object.

Introduction:

Chapter 15A, Article 81B of the North Carolina General Statutes provides for the structured sentencing of persons convicted of crimes (the "Structured Sentencing Act"). The Act requires the court to sentence an offender to a term of imprisonment within the range specified in the Act for the class of offense and the offender's prior record level. *See* N.C. Gen. Stat. §15A-1340.13 and §15A-1340.20. An offender's prior record level is determined by the calculation of points assigned, by statute, to various kinds of convictions. *See* N.C. Gen. Stat. §15A-1340.14 and §15A-1340.21.

Inquiry #1:

Lawyer represents Defendant who is convicted of a crime. At the sentencing hearing, Prosecutor gives the court a sentencing worksheet showing a prior record level for Defendant. Lawyer knows that the worksheet does not include some prior convictions from other jurisdictions that would increase Defendant's point level. Defendant and Lawyer did not criminally or fraudulently conceal the prior convictions. When the court asks Lawyer, "Do you stipulate to the prior record level as shown on the worksheet," may Lawyer respond, "The State has the burden of proof to establish the defendant's prior record"?

Opinion #1:

Yes. Formal Ethics Opinion 98-5 rules that a defense lawyer may remain silent while the prosecutor presents an inaccurate driving record to the court provided the lawyer and the client did not criminally or fraudulently misrepresent the driving record to the prosecutor or the court.

Inquiry #2:

Prosecutor and Lawyer are negotiating a plea for Defendant #2. Prosecutor is unwilling to reduce the charge but she is willing to leave some of Defendant's prior convictions off of the worksheet. This will reduce the prior record level and thereby reduce Defendant #2's exposure to active prison time. Defendant #2 instructs Lawyer to accept the plea offer. At the plea hearing, Prosecutor tenders a sentencing worksheet to the court that does not include some of Defendant #2's prior convictions. The court asks Lawyer to stipulate to the worksheet. May Lawyer do so? May Lawyer respond by telling the court that the prosecutor has the burden of proof?

Opinion #2:

No. Both the prosecutor and the defense lawyer are required by the duties of honesty and candor to the tribunal to disclose to the court all the material terms of the negotiated plea. RPC 152; Rule 3.3(b) of the Revised Rules of Professional Conduct (2003).

Inquiry #3:

Would the response to Inquiry #2 be different if the judge was advised and agreed that Defendant #2's prior record level would exclude some of Defendant's known prior convictions?

Opinion #3:

No. Prosecutor and Lawyer may not collude with the judge to avoid the requirements of the Structured Sentencing Act. Such conduct violates Rule 8.4 (c) because it involves dishonesty and misrepresentation. It also violates the prohibitions in Rule 8.4(d) and (f) on conduct that is prejudicial to the administration of justice and on knowingly assisting a judge to violate the rules of judicial conduct or other law.

2003 Formal Ethics Opinion 6

July 25, 2003

Contracting with Professional Employer Organization to Handle Human Resources, Payroll, and Other Functions for Law Firm

Opinion rules that a law firm may contract with a professional employer organization (PEO) to perform human resources, payroll, and other non-operational employment functions, including the employment of the lawyers of the firm, provided the PEO does not control or influence the lawyers' exercise of independent professional judgment.

Inquiry:

A professional employer organization (PEO), as described in N.C. Gen. Stat. §58-89-5(6) and (8), provides a small business with an alternative to the

traditional employment relationship between a company and its workers. An employer that enters into a service agreement with a PEO agrees that human resource, payroll, and other non-operational employment functions will be "outsourced" to the PEO. The PEO becomes the employing unit of the client company's workers. The service agreement typically obligates the PEO to pay the employees, pay and withhold payroll taxes, maintain workers' compensation coverage, provide employee benefit programs, establish protocols for consistent administration of human resource complaints, and provide worksite safety guidance. However, the worksite employees continue to be employees of the client company for all operational purposes. The client company continues to supervise and direct its core business operations and the employees who are operating the company. The PEO does not assume responsibility for the client company's business, does not direct or supervise the work, and does not participate in the profit and losses of the client company. The PEO's compensation is calculated as a percentage of payroll cost. The compensation is not related to the client company's operational income or the outcome of a client company's business transactions.

Formal Ethics Opinion 2001-2 ruled that there is no prohibition on a law firm entering into a contract with a management company to employ the nonlawyers in the firm, in the same manner as a PEO, provided the lawyers in the law firm can continue to fulfill their ethical duties, including the duty to exercise independent professional judgment, the duty to protect client property, and the duty to maintain client confidences. The opinion did not consider whether such an arrangement would be permissible if the employment of the firm's lawyers, as well as its nonlawyers, is outsourced.

To maximize efficiency and the economic benefit to a law firm, the entire employment function, including the employment of lawyers and nonlawyers, should be outsourced to the PEO. The PEO would not supervise or interfere with the law practice of the lawyers. The lawyers would be employees of the PEO only for payroll, tax reporting, benefit plans, workers' compensation, and other human resource-related functions. The compensation paid to the lawyers in the firm would be determined by the agreement between the lawyers who own or manage the firm. Is this arrangement prohibited by the Revised Rules of Professional Conduct (2003)?

Opinion:

Rule 5.4(a) of the Revised Rules of Professional Conduct (2003) prohibits sharing legal fees with a nonlawyer and Rule 5.4(d) prohibits a lawyer from practicing in a professional corporation or association if a nonlawyer has the right to direct or control the professional judgment of a lawyer. As noted in comment [2], Rule 5.4 expresses the "traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another."

There is no specific prohibition in the Rules on the arrangement described in this inquiry. Provided the PEO does not control, seek to influence, or interfere with the lawyers' exercise of professional judgment and the compensation paid to the PEO is a percentage of the payroll costs and not a percentage of the legal fees earned by the firm, the employment outsourcing arrangement described in this inquiry does not violate Rule 5.4. Moreover, if the law firm retains complete control of the legal practice, there should be no problems with conflicts of interest, protecting client property that is entrusted to the firm, or maintaining client confidentiality. *See, e.g.*, 2001 FEO 2.

2003 Formal Ethics Opinion 7

January 16, 2004

Preparation of Power of Attorney for Principal Upon Request of Prospective Attorney-in-Fact

Opinion rules that a lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

Inquiry #1:

Adult Child asks Attorney to prepare a durable power of attorney for her father to execute. No explanation is given as to why the father is not present to make the request. Adult Child has asked that specific powers be included in document, including the power to transfer to her, as Attorney-in-Fact, title to any of her father's assets. Adult Child asks that the document contain the condition that it will be effective upon its execution by her father. Adult Child will take the Power of Attorney to her father to execute. She does not want the document to contain provisions whereby witnesses can attest to either her father's capacity or whether he is under undue influence at the time he executes the document. Adult Child is ready to write out a check for the fee.

May Attorney draft the power of attorney?

Opinion #1:

Yes, but not based solely on the instructions of Adult Child. Attorney must clarify that she represents the father and, therefore, has certain duties to the father as a client. When a lawyer is engaged by a person to render legal services to another person, the lawyer may not allow the third party to direct or regulate the lawyer's professional judgment in rendering such legal services. Rule 5.4(c). Similarly, Rule 1.8(f) provides that when a lawyer's services are being paid for by someone other than the client, the lawyer may not accept the compensation unless the client gives informed consent, there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and confidential information relating to the representation of the client is protected. Competent representation of the father in this situation requires an independent consultation with the father to obtain his informed consent to the representation and to determine whether he wants or needs the power of attorney and, if so, who should be appointed attorney-in-fact and what powers should be granted to that person. For guidance on the representation of a client who may have diminished capacity, see Rule 1.14.

The situation described in this inquiry is distinguishable from a commercial or business transaction in which the lawyer is engaged by one person to prepare a power of attorney for execution by another person. Frequently, the power of attorney names the person requesting the legal services as the attorney-in-fact. If the document is being prepared to facilitate a specific task for the benefit of this person, such as the transfer of stock or real estate, the lawyer represents the person requesting the legal services and does not represent the signatory on the power of attorney. Thus, the purpose and goals of the engagement determine the identity of the client, not the signatory on the document prepared by the lawyer.

A lawyer may be asked by a client to prepare a document for the signature of a third party under circumstances that give rise to a reasonable belief that the client may be using the lawyer's services for an improper purpose such as actual or constructive fraud or the exertion of undue influence. If so, the lawyer may not assist the client and must decline or withdraw from the representation. Rule 1.2(d) and Rule 1.16(a)(1).

Inquiry #2 (facts are unrelated to facts in Inquiry #1):

Mom is elderly and, although she lives on her own, depends upon the assistance of Daughter, her adult child. Although Daughter believes Mom's mental and physical capacities are diminishing and that Mom can no longer care for herself in her own home, Mom's mental competency is not the immediate issue. Daughter contacts Attorney, stating that she is doing so "on Mom's behalf" to have Daughter appointed as Mom's attorney-in-fact and for assistance placing Mom in a nursing home. Daughter asked for a consultation at which Mom will not be present.

May Attorney meet with Daughter alone and, if so, who will be the client, Daughter or Mom?

Opinion #2:

Attorney may meet with Daughter alone to discuss the representation. However, because the purpose of the representation is to benefit Mom, Mom is the client. *See* Opinion #1. Attorney must explain to Daughter, in a timely and clear manner, that Attorney represents Mom and does not represent Daughter. Rule 4.3. Further, Attorney must inform Daughter that, in the event Mom and Daughter become antagonistic, Attorney will continue to represent only Mom and any information provided to Attorney by Daughter may be used to further the representation of Mom.

Inquiry #3:

May Attorney represent both Mom and Daughter?

Opinion #3:

Yes, however, because the representation of one of the clients may be mate-

rially limited by Attorney's responsibilities to the other client, Attorney must satisfy the conditions of Rule 1.7(b) before asking the clients to consent to the joint representation. In particular, Attorney must be able to make a reasonable determination that she can provide competent and diligent representation to each affected client and she must provide sufficient information about the potential conflict to obtain Mom's and Daughter's informed consents. Their consents must be confirmed in writing. Rule 1.7(b)(1) and (4).

In a family situation such as this, a lawyer may readily determine that the parties are working together for a common goal that is in the best interest of the elderly parent. However, these situations are fraught with the potential for abuse of the elderly client or conflicts between the relative's goal for the representation (e.g., putting Mom in a nursing home) and the parent's goal (e.g., independent living). In the current situation, for example, Attorney must advise Mom that she can choose anyone to be the attorney-in-fact and is not required to name Daughter.

Comment [29] to Rule 1.7 offers these cautionary words:

> In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recriminations . . . Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good.

Inquiry #4:

Would the following disclosure and consent form satisfy the requirements of Opinion #2?

> I, [Daughter], understand that Attorney does not represent me regarding issues that concern my mother. I understand that Attorney may be representing my mother after Attorney meets with her. I also understand that whatever I say to Attorney may be used against my interests by Attorney in her representation of my mother. I understand I could hire my own lawyer and I have chosen not to do so. I have read this document and understand its contents.

Opinion #4:

Yes.

Inquiry #5:

Daughter signs the disclosure form described in Inquiry #4. Mom refuses to move to a nursing home and Daughter brings a guardianship proceeding. May Daughter's statements to Attorney in the initial interview be used by Attorney to defend Mom's competency in the guardianship proceeding brought by Daughter?

Opinion #5:

Yes.

2003 Formal Ethics Opinion 8

October 24, 2003

Duties to Prospective Clients

Opinion interprets various provisions of Rule 1.18.

Inquiry #1:

Rule 1.18(d) of the Rules of Professional Conduct, adopted in 2003, states that "representation" of a client with interests materially adverse to those of a prospective client in the same or substantially related matter

> is permissible if both the affected client and the prospective client have given informed consent in writing, or:
>
> (1) the disqualified lawyer is timely screened from any participation in the matter; and
>
> (2) written notice is promptly given to the prospective client.

Does the definition of "representation" under Rule 1.18(d) include an initial consultation with a client?

Opinion #1:

Yes. The term "representation" in the above context includes not only services provided subsequent to the formation of an attorney-client relationship, but also any initial consultation for the purpose of establishing an attorney-client relationship. *See* Rule 1.18, cmt. [1].

Inquiry #2:

Rule 1.18(d)(2) requires that written notice be given promptly to the prospective client. What comprises sufficient written notice under Rule 1.18(d)(2)?

Opinion #2:

Written notice should be given as soon as practicable after the need for screening becomes apparent and before any confidential information is leaked, even inadvertently, to the other lawyers in the firm. The notice should include a description of the screened lawyer's prior representation and of the screening procedures employed. Rule 1.18, cmt. [8]. Such procedures may include the following: the screened lawyer will acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter; other lawyers in the firm will not communicate with the screened lawyer concerning the matter; the firm will employ special procedures to ensure the screened lawyer has no contact with other personnel, firm files, or other materials associated with the matter; and there will be periodic reminders of the screen to all members of the firm. Rule 1.0, cmt. [9].

Inquiry #3:

Lawyer conducts an initial consultation with Client 1 on January 1, 2002. Client 1 does not retain Lawyer for any further representation. On April 1, 2003, Client 2 calls Lawyer to seek an initial consultation in the same matter.

Which client is the "prospective client" and which is the "affected client?"

Opinion #3:

Client 1 is a former "prospective client" and Client 2 is an "affected client" under Rule 1.18(d).

Inquiry #4:

Assume the facts in Inquiry #3. Firm drafts the following policy to handle inquiries of this nature:

> No such consultation from Client 2 will be accepted unless a period of no less than three months has elapsed between the date of the prior meeting with Client 1 and the telephone call of Client 2. At such time as a consultation with Client 2 and Lawyer is scheduled, a letter will be sent promptly to Client 2 stating that Lawyer conducted an initial consultation with Client 1 on January 1, 2002. As a result of the prior representation, if Client 2 chooses to continue with the initial consultation, Lawyer will be screened from any and all participation in the matter. "Screening" means that Lawyer will be locked out of all files and databases related to the matter and an internal memo will be immediately circulated advising all employees of the firm of the screen and requiring that no employee of the firm engage in any interaction with Lawyer on the matter.
>
> Does this policy sufficiently address the requirements of Rule 1.18?

Opinion #4:

Rule 1.18 requires that written notice, as the type described above, be given to the former "prospective client" rather than the "affected client." In Inquiry #3, the prospective client is Client 1, and the affected client is Client 2. Therefore, Client 1 must receive this notice before Lawyer proceeds with Client 2's consultation, presuming the conflict and need for screening are discovered at that time. It is not necessary to obtain Client 1's consent to the representation if Lawyer implements screening measures in a timely fashion.

See Opinion #2 for a description of effective screening techniques to include in the notice.

2003 Formal Ethics Opinion 9

January 16, 2004

Representation of Clients with Similar Claims After Participation in a Confidential Settlement Agreement for Another Client

Opinion rules that a lawyer may participate in a settlement agreement that contains a provision limiting or prohibiting disclosure of information obtained during the representation even though the provision will effectively limit the lawyer's ability to represent future claimants.

Inquiry #1:

Attorney represents Plaintiff in an employment dispute with Employer. There are several other employees with factually similar potential claims. Attorney does not represent these employees and they have not yet asserted claims against Employer.

Attorney negotiates his client's claim with counsel for Employer. Counsel for Employer explains to Attorney that Employer is willing to negotiate the matter and perhaps settle it if it can be done confidentially to avoid additional claims by the other potential plaintiffs. At this point Attorney has no intention of representing the other potential plaintiffs and tells Counsel for Employer this. Based on this representation, Counsel for Employer agrees to provide Attorney with information about Employer's financial status, insurance coverage, and other facts about the case.

While negotiating the terms of a settlement that will be favorable to Plaintiff, Counsel for Employer requests that the settlement agreement include a provision prohibiting Attorney from representing any other employee who has a factually similar potential claim against Employer. May Counsel for Employer propose such a settlement provision and, if so, may Attorney participate in a settlement agreement that includes such a provision?

Opinion #1:

No. Rule 5.6(b) of the Rules of Professional Conduct provides that "[a] lawyer shall not participate in offering or making. . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties." An agreement not to represent other claimants against the opposing party denies members of the public access to the very lawyer who may be best suited, by experience and background, to represent them. RPC 179 ("Although public policy favors settlement, the policy that favors full access to legal assistance should prevail.") In addition, such agreements result in a personal conflict for the lawyer who is asked to give up future representations in the interest of a current client. ABA Formal Opinion 00-417, 1101: 204 (2000). Restrictive provisions of this nature also raise public policy concerns that the ultimate settlement figure will bear less of a relationship to the merits of the case than to the amount necessary to "buy off" defendant's counsel. *Id.*

Inquiry #2:

Counsel for Employer withdraws the request for a term in the settlement agreement that would prohibit Attorney from representing other employees. Instead, he requests that the agreement include the following provision:

> Confidentiality: The parties stipulate, acknowledge, and agree that the Agreement and its terms shall remain confidential to the maximum extent allowable under North Carolina law and that such confidentiality is of the essence of the Agreement and its underlying terms. The parties agree not to disclose to anyone the terms of the Agreement, save and except to their tax return preparers, accountants, auditors, lenders, attorneys, courts, or to governmental agencies where such disclosure is required by law or administrative regulation, only as necessary, and to that extent the parties agree to use their best efforts to assure that such disclosure of the terms of the Agreement is not further disclosed.

May Counsel for Employer propose such a settlement provision and, if so, may Attorney participate in a settlement agreement that includes such a provision?

Opinion #2:

Yes. The confidentiality provision above does not specifically prohibit Attorney's use of confidential information learned during the representation or representation of other claimants with similar claims against Employer. Instead, it restricts only the disclosure of certain information gained in the representation. The provision is not proscribed by Rule 5.6(b) which is silent on participation in a settlement agreement that prohibits a lawyer from revealing information about the matter or the terms of the settlement. In fact, such a provision is consistent with the lawyer's continuing duty to not reveal the confidential information of a client or a former client without the informed consent of the client or the former client. Rule 1.6 and Rule 1.9(c). Accord, ABA Formal Opinion 00-417.

Inquiry #3:

A settlement agreement containing the confidentiality provision set forth in Inquiry #2 is entered into by Plaintiff and Employer, and Plaintiff's representation by Attorney is concluded. May Attorney subsequently agree to represent the other employees on their similar claims against Employer?

Opinion #3:

Yes, provided it can be done without revealing Plaintiff's confidential information, including the terms of the settlement agreement, and without exposing Plaintiff to liability under the agreement.

Attorney may be able to represent other employees without revealing Plaintiff's confidential information to them or to any third party. However, it will be difficult for Attorney to represent other employees without using Plaintiff's confidential information to advance their claims—for example, to obtain certain records from Employer, to subpoena witnesses, or in settlement negotiations.

Rule 1.9(c) prohibits a lawyer who has formerly represented a client in a matter from using information relating to the representation to the disadvantage of the former client except as permitted by the Rules or when the information has become generally known. Thus, Attorney may not use the confidential information of Plaintiff to advance the interests of new clients if doing so will harm the interests of Plaintiff. Attorney's use of Plaintiff's confidential information to represent the other employees, even without overt disclosure of the information, would violate Rule 1.9(c) if it exposed Plaintiff to liability under the confidentiality provision of the settlement agreement. In this event, Attorney would be prohibited from representing other employees because Attorney's failure to use Plaintiff's confidential information would materially limit his representation of the other employees. Rule 1.7(a)(2). *But see*, ABA Formal Opinion 00-417.

As to whether representation of the other employees may expose Plaintiff to liability under the agreement, it is beyond the purview of the Ethics Committee to interpret contractual language in a settlement agreement.

2003 Formal Ethics Opinion 10

January 16, 2004

Fee Sharing with Nonlawyer/Claimant's Representative in Social Security Case

Opinion rules that a Social Security lawyer may agree to compensate a nonlawyer/ claimant's representative for the prior representation of a claimant.

Inquiry:

The Social Security Act permits nonlawyers to represent claimants in matters before the Social Security Administration (SSA) including representing claimants at administrative hearings before an administrative law judge (ALJ). However, only a lawyer may represent a client who is appealing an unfavorable decision of the SSA to federal district court. The nonlawyer representatives, as well as the lawyers who represent claimants before the SSA, do so almost exclusively on a contingent-fee basis.

A claimant's representative (whether a lawyer or nonlawyer) does not have to file a fee petition with the SSA if, at the time the representation commences, the representative submits a copy of his or her fee agreement with the claimant to the SSA. In most situations, if the fee agreement complies with the law capping the fee for representation of a claimant, the fee is automatically approved. If the claim is denied at the administrative level and an appeal to district court must be filed, a lawyer representative may pursue the legal fees available under the Equal Access to Justice Act in addition to the contingent fee payable under the fee agreement with the claimant.

Inevitably, some nonlawyer representatives die or decide to stop represent-

ing claimants. On occasion, a nonlawyer representative turns over a case to a lawyer to pursue an appeal to federal district court. Given the prohibition on sharing legal fees with nonlawyers set forth in Rule 5.4(a) of the Rules of Professional Conduct, may a lawyer negotiate an agreement with a nonlawyer representative of Social Security claimants by which the lawyer takes over the representation of a claimant from the nonlawyer and agrees to compensate the nonlawyer representative for his or her work on the case in the event the case is favorably resolved for the claimant?

Opinion:

Rule 5.4(a) prohibits a lawyer from sharing legal fees with a nonlawyer except in limited circumstances which are inapplicable here. The purpose of the prohibition, as noted in comment [1] to the rule, is to protect the lawyer's professional independence of judgment from interference from a nonlawyer. The prohibition also prevents solicitation of cases by lawyers and discourages nonlawyers from engaging in the unauthorized practice of law. (The latter reason for the prohibition is not implicated here because the Social Security Administration authorizes nonlawyer representation before a claim is appealed to federal court.)

When a lawyer represents a client on a Social Security claim, it is presumed that the lawyer utilizes his or her legal knowledge, skill, and professional judgment for the benefit of the client. Indeed, some Social Security claimants may seek out a lawyer to represent them precisely because these attributes are not held by nonlawyer representatives.

Rule 5.4(a) should not be applied in a way that may make it difficult or impossible for a claimant to switch to a lawyer representative. Nor should the rule be applied in a way that ignores the prior work the nonlawyer representative did on the case or the fact that the nonlawyer representative may be compensated, by law, on a contingent fee basis. Therefore, a lawyer representative may negotiate an agreement with a nonlawyer representative to transfer a claimant's case and to compensate the nonlawyer although the compensation will be paid from the legal fee ultimately paid on behalf of the client from the Social Security benefits awarded. The amount of the compensation paid to the nonlawyer representative must be reasonable and must be related to the work actually performed by the nonlawyer on behalf of the claimant. To guard against the potential dangers of fee sharing with a nonlawyer, there must be full disclosure to the presiding ALJ or federal judge. This can be accomplished by submitting a fee agreement with the claimant that recites the lawyer's arrangement for compensation with the prior representative even if such compensation is a percentage of the fee ultimately approved by the court.

2003 Formal Ethics Opinion 11

April 23, 2004

Duty of Departed Lawyer When Dividing Fee with Former Firm

Opinion rules that a lawyer must deal honestly with the members of her former firm when dividing a legal fee.

Inquiry #1:

Attorney X worked for ABC Law Firm when she began the representation of Client in a workers' compensation claim. Prior to the resolution of the workers' compensation claim, Attorney X left the firm to join another firm. Client chose to continue to be represented by Attorney X. The Industrial Commission entered an order releasing ABC Law Firm from further representation and acknowledged ABC's entitlement to a portion of any legal fee ultimately awarded in the case by the Industrial Commission.

Client's workers' compensation case settled. An order was entered by the Industrial Commission approving the settlement and the total attorney's fee to be paid from the settlement. The settlement proceeds have not been delivered to Attorney X for disbursement. Separate checks for the client's settlement proceeds and the approved legal fee will be sent to Attorney X. Is Attorney X required to notify ABC Law Firm that the Industrial Commission has awarded a legal fee in the case and to notify the firm of the amount of the fee?

Opinion #1:

Yes, the Rules of Professional Conduct require lawyers to deal honestly with each other and to comply with the law and court orders. Rule 8.4(c) and (d).

Inquiry #2:

When the check for the legal fee is received by Attorney X, where should it be deposited?

Opinion #2:

Rule 1.15-2(g) requires mixed funds to be deposited in a lawyer's trust account 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."

Inquiry #3:

Should Client's consent be obtained prior to disbursing any of the legal fees from the money deposited into Attorney X's trust account?

Opinion #3:

No, if the Industrial Commission has already approved the total amount of the legal fee and Client has no liability to ABC Law Firm for the fee, the dispute is between ABC and Attorney X and Client's consent is irrelevant

Inquiry #4:

Is Attorney X required to advise Client of Client's obligations relative to ABC Law Firm or any other party with a claim against the settlement funds?

Opinion #4:

Yes. Rule 1.4(b) requires a lawyer to explain a matter to a client to the extent reasonably necessary to make informed decisions about the representation. If Client is liable to ABC for litigation expenses or to a provider for medical expenses, Attorney X should advise Client of this and may withhold the funds to pay medical liens as provided in 2001 Formal Ethics Opinion 11.

Inquiry #5:

May Attorney X determine the amount of her share of the legal fee and disburse that amount to herself without the specific consent of ABC Law Firm

Opinion #5:

Yes, if Attorney X, acting in good faith, determines that her entitlement to a specified portion of the legal fee is undisputed, she may withdraw this amount from the trust account and pay it to herself. She should also disburse any undisputed portion of the remaining fee to ABC Law Firm. The disputed portion of the legal fee must remain on deposit in the trust account until the dispute with ABC Law Firm is resolved by agreement or litigation. In determining the amount of her fee, Attorney X must be guided by her duty of honesty to the members of ABC Law Firm. *See* Opinion #1 above.

2003 Formal Ethics Opinion 12

October 22, 2004

Advising Insured and Insurance Company on Settlement Value of Case

Opinion rules that an insurance defense lawyer may give the insured and the insurance carrier an evaluation of a pending case, including settlement prospects, but may not recommend that the carrier decline to settle and go to trial if this recommendation is contrary to the wishes of the insured.

Inquiry #1:

Attorney is retained by Insurance Company to represent Physician in medical malpractice lawsuit involving significant injuries to the plaintiff. Physician has a professional liability policy with a limit of $1,000,000 per claim. Plaintiff is seeking $5,000,000 in damages. After discovery, Attorney is of the opinion that Physician has a 60% chance of prevailing on the merits. However, if Physician loses the case, Attorney believes that the jury verdict will be between $1,250,000.00 and $1,500,000.00, resulting in personal exposure for the Physician. Physician has advised Attorney that she wants to avoid personal exposure and has made a demand on the insurance company that the case be settled for an amount at or less than the policy limit.

Insurance Company requests Attorney's advice on (1) his evaluation of the likelihood of an adverse verdict on liability; (2) his evaluation of the likely verdict range if the jury returns a liability verdict against Physician; and (3) the amount it should pay in settlement. Attorney believes that the case could be settled for an amount between $500,000 and $750,000. If Attorney recommends settlement in this range, he recognizes that the Insurance Company may refuse to offer up to the policy limit to settle the claim, as demanded by Physician.

May Attorney provide Insurance Company with a letter stating his evaluation of the likelihood of a verdict adverse to Physician on liability, the likely amount of the verdict if the jury reaches the damages issue, and the amount he believes the plaintiff's counsel would accept to settle the case?

Opinion #1:

Yes.

Prior ethics opinions have firmly established that a lawyer defending an insured at the request of an insurer represents both clients. Rule 1.7, cmt. [29] to [33]; *see also* RPC 56, 92, 118. The lawyer's primary duty of loyalty, however, is to the insured. RPC 56, 92, 118.

Because both the Physician and Insurance Company are Attorney's clients, they are each entitled to Attorney's full, candid evaluation of all aspects of the claim, including but not limited to (1) the probability of an adverse liability verdict, (2) the range of potential verdicts, and (3) probable settlement amounts. *See* Rule 1.4(b), Rule 1.7, cmt. [31], and RPC 91. Prior opinions established that "the attorney should keep the insured informed of his or her evaluation of the case as well as the assessment of the insurance company." RPC 92. RPC 92 envisioned that this work product would be shared with the insurance company so that both clients are fully informed of their lawyer's opinion on this central issue of the representation. Id.

Inquiry # 2:

If the plaintiff does not accept a settlement within the estimated range, may Attorney recommend to Insurance Company that it decline to settle the case?

Opinion # 2:

No.

Because of the potential conflict between Insurance Company, which might prefer to press for a lower settlement, and Physician, who has clearly expressed her desire to avoid personal exposure and for a settlement up to Insurance Company's policy limits, Attorney cannot recommend an upper limit as the amount Insurance Company should offer short of proceeding to trial. In this situation, Attorney should advise Insurance Company of Physician's wishes regarding settlement. RPC 91. Then, after advising both clients of Attorney's evaluation of liability, damages, and likely settlement prospects, Attorney should advise Physician and Insurance Company to consider employing separate counsel to represent them on issues concerning whether the case should be settled within Insurance Company's policy limits. *See* RPC 91, RPC 92, RPC 111. This opinion is not intended to preclude Attorney from suggesting settlement strategies or negotiating a settlement that benefits both clients.

2003 Formal Ethics Opinion 13

January 16, 2004

Filing Suit After the Statute of Limitations Has Run

Opinion rules that an attorney may file a time-barred claim on behalf of a client, even when the defendant is unavailable and can only be served by publication.

Inquiry #1:

Attorney consults with a Client who has a valid tort claim for money damages against Defendant. Upon further review of the facts, Attorney discovers the statute of limitations has run on the claim. Client insists that Attorney bring an action against Defendant.

Is it ethical to file a lawsuit, knowing that the statute of limitations has run on the claim?

Opinion #1:

The question is whether filing a time-barred claim is "frivolous" under Rule 3.1 of the Rules of Professional Conduct. Rule 3.1 provides as follows:

> *A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.*

Filing suit after the limitations period has expired does not affect the validity of the claim, nor does it divest a court from having jurisdiction to hear the matters raised therein. ABA Formal Opinion 94-387, 1001:235, 237 (1994). Instead, the statute of limitations is merely an affirmative defense to an otherwise enforceable claim. Id. The defendant must plead the statute of limitations in his answer or it is waived. *Northampton County Drainage Dist. No. 1 v. Bailey*, 92 N.C. App. 68, 373 S.E.2d 560 (1988), *rev'd in part and aff'd in part*, 326 N.C. 742, 392 S.E.2d 352 (1990). In addition, the expiration of the limitations period does not prevent a plaintiff from continuing to negotiate settlement with an opposing party who is unaware of the limitations period. ABA Formal Opinion 94-387 at 236-237. Because a time-barred claim can be enforced by a court if the defense raises no objection, filing suit under these circumstances would not violate the prohibition against an attorney advancing a frivolous claim under Rule 3.1.

Inquiry #2:

Assume the same facts as in Inquiry #1, except that Defendant has disappeared and all reasonable efforts to locate him or to effect personal service upon him have failed.

May Attorney file suit against a missing defendant, with the intent to serve the lawsuit by publication, knowing the statute of limitations has run on the claim?

Opinion #2:

There is no basis for reaching a different conclusion when the defendant is unavailable. Service by publication is another means by which a party is given notice of a legal action against him, but such service can only be used when all other efforts to serve the party have failed. Rule 4(j1), Rules of Civil Procedure. If the facts warrant service by publication, and if service is in accordance with statutory law, then service in this fashion will be sufficient to confer jurisdiction over the matter upon the courts. *In the Matter of Phillips,* 18 N.C. App. 65, 196 S.E.2d 59 (1973). A client with a valid claim should not be penalized because a defendant successfully evades personal service during the period of the statute of limitations. If service by publication is procedurally appropriate under the circumstances, an attorney may file suit against a missing defendant, even when the claim is time-barred.

2003 Formal Ethics Opinion 14

October 22, 2004

Conflicts Involving Successive Government and Private Employment

Opinion rules that if a current representation requires cross-examination of a former client using confidential information gained in the prior representation, then a lawyer has a disqualifying conflict of interest.

Inquiry #1:

Assistant District Attorney (ADA) was formerly in private practice, concentrating in criminal defense matters. ADA's current duties include prosecuting habitual felons. To be charged as a habitual felon, a defendant must have three prior felonies for which the dates of conviction and the dates of occurrence do not overlap.

A habitual felon trial involves two phases:

1. The underlying felony trial in which the jury is not informed of the second trial for determination of habitual felon status, and

2. The habitual felon trial at which the same jury hears the habitual felon charge if the defendant was convicted of the underlying felony.

During the second phase of the habitual felon trial, the prosecutor usually introduces certified copies of the defendant's three prior felony convictions, as well as live testimony identifying the defendant as the person named in the previously certified judgments. At the same time, the defendant's lawyer will raise arguments for disallowing evidence of the prior convictions or attacking the sufficiency of the habitual felon charge.

ADA is assigned to prosecute the defendant as a habitual felon. ADA previously represented the defendant on one of the prior felonies that will be used to support habitual felon status. If the defendant is convicted in phase one, then ADA must introduce evidence regarding the prior convictions in the subsequent phase. Prosecution of either phase of the habitual felon trial may require ADA to cross-examine the defendant, his former client.

May ADA prosecute the underlying felony phase and/or the habitual felon phase of the criminal action against defendant?

Opinion #1:

ADA may not prosecute either the underlying felony phase or the habitual

felon phase against defendant if he must cross-examine his former client using confidential information gained in the prior professional relationship. In prosecuting either phase of the trial, it is possible that ADA will need to cross-examine his former client. Conflicts involving cross-examination of former clients arise most frequently in two situations: 1) a lawyer misuses confidential information previously obtained in the professional relationship, or 2) a lawyer fails to cross-examine the witness effectively for fear of misusing confidential information. If ADA needs to use confidential information to effectively cross-examine his former client about the prior conviction, then ADA may not prosecute the case.

One exception, under Rule 1.9(c) of the Rules of Professional Conduct, permits a lawyer to reveal confidential information of a former client "when the information has become generally known." A criminal conviction may be considered generally known if, in addition to public record information, the fact of the conviction is known to all relevant parties. *See* Rule 1.9, cmt. [8]. Thus, if ADA need only to present a certified copy of the prior conviction as evidence in phase two and cross-examination of the defendant is unnecessary, then this exception will apply and ADA may continue the representation. If, on the other hand, ADA must cross-examine his former client about the conviction using confidential information, then ADA is disqualified. As stated in 98 Ethics Decision 9 (unpublished), it is rare that cross-examination about a prior criminal record can be limited to the fact of the convictions alone.

> Given the high probability that the lawyer will delve into facts relative to the conviction that are not public record and are, therefore, subject to the confidentiality rule or, in foregoing such questions, fail adequately to represent the lawyer's current client, it must be concluded that the lawyer is prohibited from representing the current client due to a conflict of interest.

98 Ethics Decision 9.

If ADA concludes that effective representation of the State requires inquiry into one or more prior convictions for which he provided representation to the defendant, then ADA should not undertake prosecution of this matter. Instead, another member of the district attorney's staff should be assigned to prosecute the case and ADA should be screened from participation in the matter. *See* Rule 1.11, cmt. [2].

Inquiry #2:

Attorney was formerly a prosecutor but left the district attorney's office to enter private practice as a criminal defense attorney. Attorney has been retained to represent Client on felony charges. Client has also been indicted as a habitual felon. Attorney discovers that he was the prosecutor for one of the felony convictions being used to establish that Client is a habitual felon. In a habitual felon case, the defense attorney must scrutinize the charges, ascertain if there are irregularities in the prior convictions, and attack the propriety of using the convictions that form the basis of the habitual felon charge if there is a legal or factual basis for doing so. In this case, however, Attorney does not believe there is any basis for disallowing the convictions.

May Attorney represent Client in any phase of the habitual felon case?

Opinion #2:

No. Although Attorney does not believe there is a basis for disallowing the convictions, his judgment may be impaired because his evaluation of the prior conviction is not impartial. It is not possible for a lawyer to scrutinize his own work while exercising independent professional judgment on behalf of a criminal defendant. Rule 1.7(a)(2). Therefore, Attorney has a conflict of interest and is disqualified from representing Client during the second phase of the habitual felon trial. Because the same jury is empaneled for both phases of the trial, the better practice would be to withdraw from the entire matter.

Notwithstanding Attorney's disqualification, Rule 1.11(b) permits another lawyer in Attorney's firm to continue representation of Client if Attorney is screened in a timely fashion and appropriate written notice is given to the district attorney's office. *See also* Rule 1.0(l).

2003 Formal Ethics Opinion 15

January 16, 2004

Providing an Accounting of Disbursements to Medical Lienholders in Personal Injury Cases

Opinion rules that an attorney may provide an accounting of disbursements of sums recovered for a personal injury claimant as required by N.C.G.S. § 44-50.1.

Inquiry:

Attorney A represents Client in a personal injury matter. Several medical providers treated Client and now have valid medical liens against any funds awarded. N.C.G.S. § 44-50.1 provides that medical lienholders may request an accounting of disbursements made on behalf of a lawyer's client when certain conditions are met. May Attorney A provide an accounting of the disbursements from Client's settlement proceeds to the medical providers?

Opinion:

N.C.G.S. § 44-50.1 imposes a duty, in limited situations, to account for the manner in which settlement proceeds are disbursed. Attorney A does not violate the Revised Rules of Professional Conduct by complying with the mandates of the statute. Rule 1.6(b)(1).

2003 Formal Ethics Opinion 16

July 16, 2004

Representation of Absent Respondent in Dependency Proceeding

Opinion rules that a lawyer who is appointed to represent a parent in a proceeding to determine whether the parent's child is abused, neglected, or dependent, must seek to withdraw if the client disappears without communicating her objectives for the representation, and, if the motion is denied, must refrain from advocating for a particular outcome.

Inquiry:

At an initial non-secure custody proceeding, Attorney is appointed by the court to represent Mother who is a respondent in a proceeding brought by the local department of social services to determine whether Mother's minor son is an abused, neglected, or dependent juvenile. Another lawyer is appointed to represent Father. Although Mother is present at the time of the appointment, she and Father subsequently disappear. At the time of the appointment, Attorney had minimal conversation with Mother and he does not know what position she would take in the proceedings.

"Dependent juvenile" is defined in the Juvenile Code, G.S. 7B-101(9), as "[a] juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement."

Attorney knows that the parents are missing and, therefore, there is no parent responsible for the son's care. May Attorney advocate for an adjudication of dependency in the proceeding?

Opinion:

No. As stated in Rule 1.2(a) of the Rules of Professional Conduct, "…a lawyer shall abide by a client's decisions concerning the objectives of representation…." Comment [1] adds that the rule "confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." If the client is not present to give instructions to the lawyer as to the objectives of the representation, the lawyer may not substitute his own objectives even if the facts appear to support a particular position.

A lawyer is required to make a motion to withdraw when the client has disappeared and the lawyer is ignorant of the client's objectives for the litigation. RPC 223. Such a motion is appropriate only after the lawyer has used reasonable diligence to locate the client but is unsuccessful. Id.

If Attorney's motion to withdraw is denied, Attorney may participate in the proceedings to the limited extent that such participation is consistent with the known objectives of the missing client and the court's order of appointment. However, Attorney may not advocate for any particular position or outcome in the proceeding and Attorney does not have a duty to file an appeal.

2003 Formal Ethics Opinion 17

January 16, 2004

Post-Hearing Submission of Ex Parte Written Communications to a Judge

Opinion rules that an attorney may only provide a judge with additional authority post-hearing if the communication is permitted by the rules of the tribunal and a copy of the writing is furnished simultaneously to opposing counsel.

Inquiry:

Attorney A and Attorney B argue a motion before a judge. Following the motion hearing, the judge delays ruling on the motion until a later date or takes the arguments under advisement. While awaiting the judge's decision, Attorney A finds additional authority to support his position. Attorney A believes the newly discovered authority is directly on point and may be decisive on the issue argued. Attorney A would like to provide the judge with the case law and accompanying argument in support of his client's position.

Under these circumstances, may Attorney A, subsequent to a hearing, engage in written *ex parte* communications with a judge by providing additional authority and argument in support of his position?

Opinion:

Attorney A may only provide the judge with additional authority and argument in writing if the rules of the tribunal permit the communication and a copy of the writing is furnished simultaneously to Attorney B, opposing counsel. Rule 3.5(a)(3)(B) permits a written *ex parte* communication with a judge so long as the "writing is furnished simultaneously to the opposing party[.]" While this rule appears to permit unlimited written communications with a judge provided a copy is furnished to opposing counsel, 98 FEO 13 qualifies the type of communications that may be submitted:

> *To avoid the appearance of improper influence upon a tribunal, informal written communication 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 instruction;
>
> 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.

By limiting the kinds of written communications that may be submitted *ex parte*, 98 FEO 13 strives to preserve the integrity of the legal system, to avoid the appearance of improper influence on a tribunal, and to prevent one party from gaining unfair advantage by using *ex parte* communications to introduce new evidence, to argue the merits, or to cast opposing counsel in a bad light. At the same time, a court cannot reach a just and informed result unless it is apprised of material and relevant facts as well as authoritative case law. A wholesale restriction on submission of additional, potentially decisive authority would frustrate a court's ability to make informed decisions.

A resolution of this issue requires a balancing of equally compelling interests. 98 FEO 13 permits a written *ex parte* communication if "permitted by law or the rules or written procedures of the particular tribunal." Thus, if the local rules would permit the submission of additional authority subsequent to arguments in open court, then it is not unethical to do so. A copy of the writing must be furnished to opposing counsel simultaneously, however. Allowing the written submission of additional authority and supporting arguments promotes the interest in informed decision-making of the tribunal. Requiring the writing to be copied to opposing counsel gives opposing counsel the opportunity to respond in kind and reduces the likelihood that the *ex parte* communication will result in unfair advantage to one party.

Notwithstanding the above, the attorney making the *ex parte* submission to the judge post-hearing should include only that authority which he in good faith believes is decisive, on point, and not otherwise cumulative in nature.

2004 Formal Ethics Opinion 1

April 23, 2004

Participation in On-Line Legal Matching Service

Opinion rules that a lawyer may participate in an on-line service that is similar to both a lawyer referral service and a legal directory provided there is no fee sharing with the service and all communications about the lawyer and the service are truthful.

Inquiry #1:

A commercial Internet company (the company) operates a website that matches prospective clients with lawyers. A prospective client logs onto the website where he registers and is given an identification number to preserve anonymity. The prospective client posts an explanation of his legal problem on the website and consents to contact from participating lawyers. There is no charge to the prospective client for the standard service but, for more individualized and faster service, there is a fee.

The company solicits lawyers to participate in its service. To participate, a lawyer must be licensed and in good standing with the regulatory agency of his state of licensure. A participating lawyer is charged a one-time registration fee that covers expenses for verifying credentials, technical system programming, and other set-up expenses. An annual fee is charged to each participating lawyer for ongoing administrative, system, and advertising expenses. The amount of the annual fee varies by lawyer based on a number of components, including the lawyer's current rates, areas of practice, geographic location, and number of years in practice.

Only participating lawyers can access the information posted by a prospective client on the website. A local participating lawyer who is interested in a posted case may list his qualifications and send the prospective client an offer message setting forth an explanation of the services he can provide and his qualifications. The prospective client can review offer messages from lawyers and learn more about these lawyers by reviewing the company's on-line lawyer profiles and consumer rating information. If a lawyer has a website, the prospective client may also visit it. Using this information, the prospective client selects a lawyer and contacts the lawyer at which time the prospective client reveals his identity.

If a client-lawyer relationship is formed between a participating lawyer and a user of the service, it is done without the participation of the company. The company does not get involved in the lawyer-client relationship or in related financial matters such as fees, retainers, invoicing, or payment.

May a lawyer participate in this service?

Opinion #1:

Yes, provided there is no fee sharing with the company in violation of Rule 5.4(a), and further provided the participating lawyer is responsible for the veracity of any representation made by the company about the lawyer or the lawyer's services or the process whereby lawyers' names are provided to a user.

This on-line service has aspects of both a lawyer referral service and a legal directory. On the one hand, the on-line service is like a lawyer referral service because the company purports to screen lawyers before allowing them to participate and to match a prospective client with suitable lawyers. On the other hand, it is like a legal directory because it provides a prospective client with the names of lawyers who are interested in handling his matter together with information about the lawyers' qualifications. The prospective client may do further research on the lawyers who send him offer messages. Using this information, the prospective client decides which lawyer to contact about representation.

A lawyer may participate in an on-line legal directory provided the information about the lawyer in the directory is truthful. RPC 241. A lawyer may also participate in a lawyer referral service subject to the following conditions set forth in Rule 7.2(d):

> (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 prospective 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: (A) 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 (B) explain the method by which the needs of the prospective client are matched with the qualifications of the on-line recommended lawyer.

It appears that the on-line service satisfies all of the conditions of Rule 7.2 except that it is operated for a profit, potential clients are charged a fee if they chose the priority service, and the website does not include a statement on how the names of all participating lawyers may be obtained.

Nevertheless, the company's on-line service is not strictly a referral service and failure to meet all of conditions set forth in Rule 7.2(d) should not prohibit a lawyer from participating. Unlike the passive recipient of a referral from a lawyer referral service, a user of the company's website must evaluate the information and offers he receives from potentially suitable lawyers and decide for himself which lawyer to contact. Thus, the potential harm to the consumer of a pure lawyer referral service is avoided because the company does not decide which lawyer is right for the client.

A lawyer's participation in on-line service is subject to the other requirements of the Rules. Notably, the prohibition on fee sharing with a nonlawyer must be observed. Although a participating lawyer may pay a proportionate share of the reasonable costs of operating the service, the lawyer may not pay the company any portion or percentage of legal fees earned from clients obtained through the service. Rule 5.4(a).

In addition, a participating lawyer is responsible for the truthful content of any information the company provides, via the Internet or otherwise, to prospective clients about the lawyer or the lawyer's services. Rule 7.1; *see also* Rule 7.2, cmt. [7]. The lawyer is also responsible for the veracity of any representations made by the company on the website or elsewhere about the screening and qualifications of the lawyers who participate in the service and the matching process and may not participate if such representations are untruthful or misleading.

Inquiry #2:

The company provides a satisfaction guarantee. If a dispute arises between the client and a lawyer engaged through the on-line service, a customer services representative from the company will try to resolve the problem. If this fails, the client and the lawyer will be directed to voluntary arbitration. If an arbitration judgment is awarded to the client, the company will pay up to $1000 ($5000 for priority service cases) to the client if the lawyer fails to pay.

Rule 1.5(f) requires a lawyer who has a fee dispute with a client to participate in the State Bar's program of fee dispute resolution. How does the guarantee relate to this requirement?

Opinion #2:

The guarantee may not interfere with a lawyer's compliance with the requirements of Rule 1.5(f) to notify a client of the State Bar's fee dispute resolution program and, if the client so requests, to participate in good faith. If the company's guarantee provides a duplicative dispute resolution procedure, it is only beneficial for clients.

2004 Formal Ethics Opinion 2

April 23, 2004

Offer of Promotional Merchandise in a Targeted Direct Mail Solicitation Letter

Opinion rules that an attorney may not offer promotional merchandise in a targeted direct mail solicitation letter as an inducement to call the attorney's office.

Inquiry:

Attorney sends out targeted direct mail letters to accident victims. He would like to include in his letter an offer to send the recipient free promotional merchandise, such as a calculator, key chain, pen, coffee mug or similar object, if they call his office in response to the direct mailing. The promotional item would contain the firm's name and address and would be sent to the caller irrespective of whether the caller is accepted as a client.

May Attorney include an offer for promotional merchandise to callers in his targeted direct mail advertisements?

Opinion:

No. As a general proposition, it is not a violation of the Rules of Professional Conduct to include the name of a lawyer or law firm and contact information on merchandise such as t-shirts, mugs, pens, magnets, golf balls, etc. These objects do not solicit legal business themselves, but instead are just another type of media through which attorneys may advertise, like the yellow pages or a billboard. Rule 7.2(a).

A promise of promotional merchandise as an inducement to call the lawyer or law firm, however, is an improper solicitation. The recipient of the letter may call the lawyer for the purpose of receiving the promotional item, having no intent to initiate a lawyer- client relationship. But because the recipient initiated the call to the lawyer, the lawyer may then solicit that person directly over the telephone. Rule 7.3(a) prohibits lawyer-initiated live telephone solicitation of a prospective client because of the potential for abuse inherent in live telephone contact by a lawyer with a person known to be in need of legal services.

> The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to 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 overreaching.

Rule 7.3, cmt. [1]. Therefore, Attorney may not promise to send promotional merchandise to callers in a targeted direct mail solicitation letter. Nevertheless, an attorney may include promotional merchandise of minimal value (i.e., magnets and pens) in targeted direct mail letters.

2004 Formal Ethics Opinion 3

April 23, 2004

Common Representation of Lender and Trustee on a Deed of Trust

Opinion rules that a lawyer may represent both the lender and the trustee on a deed of trust in a dispute with the borrower if the conditions on common representation can be satisfied.

Inquiry:

Mr. Doe is the trustee on a deed of trust securing a loan from Lender to Borrower. Lender notified Mr. Doe that Borrower was in default and asked Mr. Doe to initiate a foreclosure proceeding. Soon after the foreclosure was commenced, Borrower filed a lawsuit naming Lender as the defendant and alleging unfair debt collection practices. Mr. Doe is also named as a party to the proceeding in order to enjoin the foreclosure proceeding. Lender asks Attorney A to represent it in the lawsuit and would like Attorney A to also represent Mr. Doe. Mr. Doe wants to be represented by Attorney A.

May Attorney A represent both Lender and Mr. Doe in his capacity as trustee on the deed of trust?

Opinion:

A lawyer may not engage in common representation of multiple clients if the common representation involves a concurrent conflict of interest. Rule 1.7(a). A concurrent conflict of interest exists whenever the representation of one client will be materially limited by the lawyer's responsibilities to another client. Rule 1.7(a)(2). However, a lawyer may proceed with the representation, despite the concurrent conflict, if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client and the representation is not prohibited by law, does not involve the assertion of a claim by one client against another in the same proceeding, and each affected client gives informed consent. Rule 1.7(b).

Comment [29] to Rule 1.7 provides additional guidance on when common representation is appropriate. It observes, "because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained."

Attorney A may proceed with the common representation of Lender and

Mr. Doe if she concludes that she can maintain her impartiality as between the clients and the other conditions of Rule 1.7(b) are satisfied. In making this determination, she must remember that the trustee's role in a foreclosure is a neutral role. If Attorney A cannot represent both clients in a manner that will preserve Mr. Doe's neutrality (as trustee), then she cannot satisfy the condition requiring her to provide both clients with competent and diligent representation.

The situation described in this inquiry must be distinguished from the limitations placed upon a lawyer who is actually serving as the trustee on a deed of trust. There are a number of ethics opinions that hold that a lawyer who serves as a trustee must be neutral as between the interests of the lender and the interests of the borrower and may not, therefore, represent either party individually while initiating a foreclosure proceeding. *See* RPC 46, RPC 82, and RPC 90. Since Attorney A is providing legal representation to the trustee but is not herself serving in that neutral role, common representation with the lender is not prohibited if the conditions of Rule 1.7(b) can be satisfied.

2004 Formal Ethics Opinion 4

July 16, 2004

Communication with Represented Opposing Party Via a Witness Deposition in Unrelated Litigation

Opinion rules that a lawyer may ask questions of a deponent that were recommended by another lawyer, although the deponent is the defendant in the other lawyer's case, provided notice of the deposition is given to the deponent's lawyer.

Inquiry #1:

Attorney A represents Roe, a plaintiff in a medical malpractice lawsuit against Dr. Jones (Lawsuit #1). Dr. Jones is represented by Attorney X. Attorney B represents Doe, a plaintiff in an entirely different medical malpractice lawsuit against Dr. Smith (Lawsuit #2). Dr. Smith is represented by Attorney Y. The two cases are unrelated and involve different plaintiffs, hospitals, defendants, and venues. Attorney A and Attorney B are also in different law firms. The medical treatment/procedure that is the basis for the malpractice claims is the same in both lawsuits.

At the request of Attorney Y, Dr. Jones agrees to act as an expert witness for the defense in Lawsuit #2. Attorney B schedules Dr. Jones' deposition. Prior to the deposition, Attorney A hears that the defendant in his lawsuit will be testifying as an expert witness in Lawsuit #2. Attorney A asks Attorney B to include a series of questions in the deposition of Dr. Jones. The questions do not relate to the specific facts in either case but rather ask the doctor to explain or opine about the medical treatment/procedure that is at issue. The answers to the questions will be relevant to both lawsuits. Attorney A does however hope that the questions will solicit answers from Dr. Jones that will be helpful to the plaintiff's case against Dr. Jones. Attorney A does not notify Attorney X that he has submitted questions for Dr. Jones to Attorney B.

Is Attorney A violating the prohibition in Rule 4.2 on communications with a represented party?

Opinion #1:

No. Rule 4.2(a) of the Rules of Professional Conduct prohibits a lawyer, during the representation of a client, from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the other lawyer consents or the communication is authorized by law. A lawyer may not circumvent the prohibition in the rule by asking another person to engage in the prohibited communications for him. Nevertheless, lawyers are encouraged to consult with other lawyers who practice in the same field or who handle similar cases in order that they might learn from each other and thereby improve the representation of their clients. *See, e.g.*, Rule 1.1 ("A lawyer shall not handle a legal matter that the lawyer knows of should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter….).

Inquiry #2:

Attorney A would also like Attorney B to include questions in the deposition that relate to the treatment of Roe and the facts specifically at issue in Lawsuit #1. May Attorney B ask these questions?

Opinion #2:

Yes, provided, however, if the proposed questions will probe the facts and circumstances at issue in Lawsuit #1, Attorney A must notify Attorney X of the date and location of the deposition. Rule 4.2 helps to prevent the dangers of overreaching, interference with the client-lawyer relationship, and uncounseled disclosure of information relating to the representation. In the current inquiry, these dangers can be avoided if Dr. Jones's lawyer is notified of the scheduled deposition of Attorney X's client so that Attorney X may chose to attend the deposition. The duty to provide this notice falls upon Attorney A, the lawyer for the plaintiff in the action against Dr. Jones, because the potential for unrepresented communication arises in that lawsuit.

2004 Formal Ethics Opinion 5

January 21, 2005

Solicitation of Claimants in a Class Action

Opinion rules that a solicitation letter to prospective members of a class action must contain the words "This is an advertisement for legal services" pursuant to Rule 7.3(c).

Inquiry #1:

Attorney filed a class action on behalf of 65 individual plaintiffs, three of whom are designated class representatives. The class has not yet been certified by the court. Attorney believes there are unknown North Carolina class members numbering approximately 250. Through discovery, the defendants in the action will send to Attorney the names and addresses of all the prospective members of the class. Attorney will file a motion to certify the class, but he expects defendants will oppose the motion on several grounds, including the inability of the class representatives to represent adequately the prospective class.

In a class action, there are generally three categories of communications sent to prospective class members. The first type is a notice from the court, which may be drafted by the parties, informing the prospective class members of the existence and nature of the class action, that the Court has certified the lawsuit as a class action, and giving the recipients the choice to opt out of the class. If the prospective class member opts out, then he or she is free to pursue claims against the defendant individually. A second category of communications includes informal communications by the litigants' counsel with prospective class members on a wide array of topics prior to class certification. Third, plaintiffs' counsel may send a communication that asks a prospective class member if he or she wants to hire Attorney's firm or seeks to expand the number of class representatives that may share in the cost of litigation.

Must any of the above communications with prospective members of a class action include the statement "This is an advertisement for legal services" pursuant to Rule 7.3(c)?

Opinion #1:

Rule 7.3(c) of the Rules of Professional Conduct requires that "[e]very written. . . communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words, 'This is an advertisement for legal services' on the outside of the envelope. . . and at the beginning of the body of the written or recorded communication…."

As set forth in the inquiry, the first type of communication is a notice from the court to class members. This notice need not include the advertising disclaimer because it is a communication by the court, is authorized by law, and is not a solicitation by a lawyer. *See* Rule 7.2, cmt. [4]. The second category of communications are those typically associated with class action litigation and necessary for counsel on both sides to adequately represent the interests of the parties. These communications do not solicit professional employment, and therefore are not covered by Rule 7.3 either. However, these communications remain subject to such limitations as may be imposed by Rule 4.2, *Communication with Person Represented by Counsel*, and Rule 4.3, *Dealing with Unrepresented Person.* The third type of communication with prospective class members is a written solicitation by a lawyer to persons known to be in need of particularized legal services, and must contain the words "This is an advertisement for legal services" on the outside of the envelope and at the beginning of the body of the communication. Rule 7.3(c).

Inquiry #2:

Attorney plans to send out a mass mailing to prospective class members early in the litigation. The notice from the court advising prospective class members of their rights due to class certification has not been sent as of yet. Attorney would like to send his own letter (1) to inform prospective class members of the class action, (2) to find out whether the prospective class members have discoverable information which may be helpful to the litigation, and (3) to determine whether the prospective class members want to hire Attorney's firm and to share in the cost of litigation as a class representative. Attorney is concerned that if he includes the language "This is an advertisement for legal services" on the outside of the envelope, prospective class members may discard the letter without opening it.

Must this communication with prospective members of a class action include the statement "This is an advertisement for legal services" pursuant to Rule 7.3(c)?

Opinion #2:

Yes, unless otherwise authorized by the Court. It is clear from the facts presented, that Attorney's mailing to prospective class members includes a solicitation component, and that the notice will be sent to persons known to be in need of particularized legal services. Rule 7.3(c).

2004 Formal Ethics Opinion 6

July 16, 2004

Disclosure of Confidential Information in Suit to Collect a Fee

Opinion rules that a lawyer may disclose confidential client information to collect a fee, including information necessary to support a claim that the corporate veil should be pierced, provided the claim is advanced in good faith.

Inquiry:

Attorney was engaged by Husband to represent a corporation in several matters. Husband's wife (Wife) is the corporation's sole shareholder. Husband and the corporation failed to pay the fee for Attorney's services. Pursuant to Rule 1.5(f), Attorney's firm sent the necessary notice of right to participate in the State Bar's fee dispute resolution program to the client. The client did not respond to the notice within the requisite 30 days. Attorney would now like to sue the corporation to collect the fee, and he would like to include a claim in the complaint that the corporate veil should be pierced in order to impose personal liability on Wife and gain access to her assets.

During his representation of the corporation, Attorney learned that Husband has experienced legal trouble before and, therefore, titled most of his assets in Wife's name. By reason of the representation of the corporation, Attorney is also aware that the corporation does not follow the corporate formalities.

In the litigation, may Attorney reveal the information that he learned during the representation of the corporation in order to establish the basis for asking the court to pierce the corporate veil?

Opinion:

Rule 1.6(b)(6) allows a lawyer to disclose confidential client information, "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client…." Comment [12] to the rule specifies that "[a] lawyer entitled to a fee is permitted by paragraph (b)(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." Nevertheless, Comment [15] cautions that disclosures under paragraph (b) of the rule must be limited:

> …a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that 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.

In light of limited nature of the disclosure allowed under Rule 1.6(b)(6), Attorney may disclose the information necessary to establish the claim that the corporate veil should be pierced, provided Attorney has a good-faith belief that the piercing claim is war ranted by the law and the facts and, further provided, appropriate protective orders or actions are undertaken to limit access to the information.

2004 Formal Ethics Opinion 7

July 16, 2004

Advertising Combined Legal Experience

Opinion rules that it is misleading to advertise the number of years of experience of the lawyers with a firm without indicating that it is the combined legal experience of all of the lawyers with the firm.

Inquiry:

An advertisement for Jones, Smith & Johnson, PA, contains the statement, "Put our 30 years of experience to work for you." The law firm employs a number of lawyers.

Although the combined legal experience of these lawyers is 30 years, no single lawyer with the firm has practiced law for more than ten years. Is this statement in an advertisement allowed under the Rules of Professional Conduct?

Opinion:

No. Rule 7.1 prohibits false and misleading communications about a lawyer or a lawyer's services. A communication is false or misleading if omits a fact necessary to make the statement considered as a whole not materially misleading. Rule 7.1(a). To comply with the rule, the Jones, Smith & Johnson advertisement must state that the "combined legal experience" of the lawyers with the firm is 30 years.

2004 Formal Ethics Opinion 8

October 22, 2004

Advertising Contingent Fees

Opinion rules that unless the lawyer invariably makes the repayment of costs advanced contingent upon the outcome of each matter, an advertisement for legal services that states that there is no fee unless there is a recovery must also state that costs advanced must be repaid at the conclusion of the matter.

Inquiry #1:

Lawyers who advertise that they will represent clients in personal injury matters on a contingent fee basis frequently include statements such as the following in their legal advertisements:

- No fee unless you collect.
- No fee unless we recover money for you.
- No recovery-no fee.
- No fee unless we win.

Are advertisements containing statements of this nature false or misleading, in violation of Rule 7.1 of the Rules of Professional Conduct, because the advertisements do not also state that a client may have to repay court costs and expenses of litigation advanced on the client's behalf by the lawyer even if there is no recovery on the client's claim?

Opinion #1:

Yes, these statements are misleading if the lawyer who is advertising his or her services does not make the repayment of court costs and expenses of litigation contingent upon the outcome of the matter in every contingent fee representation that he or she undertakes.

Consumers of legal services may be mislead by the statements such as those set forth above because they do not distinguish between payment of legal fees and the repayment of costs advanced by the lawyer on the client's behalf. Although Rule 1.8(e) permits a lawyer to "advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter," the lawyer has the option of requiring the client to reimburse the lawyer for costs advanced even if there is no recovery. Therefore, unless the lawyer always waives the costs that he or she advances for clients in contingent fee matters, it is misleading to state in an advertisement that there is "no fee unless you recover." If the lawyer does not invariably waive the costs advanced, the advertisement must state that the client may be required to repay the costs advanced regardless of success of the matter.

Inquiry #2:

May a lawyer advertise "no attorney's fee unless we win" in lieu of including a statement in the advertisement that specifies that costs may be subject to repayment?

Opinion #2:

Yes, the statement is not misleading because it is limited to the obligation to pay the lawyer's fee which is contingent upon the outcome of a matter.

2004 Formal Ethics Opinion 9

October 22, 2004

Trade Name Implying Affiliation with Financial Planning Company

Opinion rules that a trade name for a law firm that implies an affiliation with a financial planning company is misleading and prohibited.

Inquiry #1:

Attorney A wants to organize a law firm as a professional corporation or professional limited liability company. Attorney A will be the sole owner of the firm. The law firm will lease space in a building called the "North Star Building" which is owned and occupied by North Star Financial Group. Attorney A's firm will have separate space in the building and will be able to maintain the confidentiality of client files. The firm will provide estate planning and real estate services to clients, some of whom will be referred by North Star Financial Group. The law firm will not share legal fees with the financial planning company nor will referral fees be paid to the company.

May Attorney A form a professional corporation or professional limited liability company with the official name of "North Star Law Office"?

Opinion #1:

No, the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law require the official name of a professional corporation or a professional limited liability company to contain the surname of one or more of its shareholders or members (or the surname of one or more lawyers who owned an interest in an immediate predecessor law firm) and prohibit the official name from containing any other name, word, or character with limited exceptions.1

Inquiry #2:

If Attorney A forms a professional corporation or a professional limited liability company using his surname in the official name in the articles of incorporation or the articles of organization, may he register "North Star Law Office" with the State Bar as the trade name of the law firm?

Opinion #2:

No. Rule 7.5(a) permits a lawyer to use a trade name for a law firm if the name is not false or misleading in violation of Rule 7.1 and the trade name is registered with the State Bar for a determination of whether the name is misleading. In this situation, "North Star Law Office" is misleading. The trade name, together with the location of the law firm in the North Star Building, implies that North Star Financial Group and Attorney A's firm are affiliated. Clients who are referred by the financial planning company to the law firm for legal services associated with their financial plan may erroneously conclude that they do not have a right to legal counsel of their choice but must use the services of Attorney A. Moreover, clients who use the services of the North Star Financial Group may not understand that the services that they receive from the financial planning company do not carry with them the protections afforded by the client-lawyer relationship such as confidentiality and the prohibitions on conflicts of interest. *See, e.g.*, Rule 5.7, cmt. [2].

Endnote

1. The regulations allow the name of a professional corporation or professional limited liability company to contain the surname of a deceased or retired shareholder or member. The regulations also allow the use of a trade name if permitted by the Rules of Professional Conduct. 27 NCAC 1E, Rule .0102(a)(2) and (5).

2004 Formal Ethics Opinion 10

July 14, 2005

Preparation of Deed When Representing Buyer in Closing

Opinion rules that the lawyer for the buyer of residential real estate may prepare the deed without creating a client-lawyer relationship with the seller provided the lawyer makes specific disclosures to the seller and clarifies her role for the seller.

Inquiry #1:

Attorney A represents Buyer for the purpose of closing on the purchase of residential real property. Seller is not represented by a lawyer. The purchase contract states that the property is to be conveyed by Seller to Buyer by a deed but the form of the deed may or may not be specified in the contract. If Attorney A prepares the deed as a part of her representation of Buyer, is it assumed that she also represents Seller?

Opinion #1:

No. Attorney A may prepare the deed as an accommodation to the needs of her client, the buyer, without becoming the lawyer for Seller. Prior to the execution of the deed by Seller, Attorney A must explain to Seller that her client is Buyer, that she does not represent Seller, and that she cannot give legal advice to Seller other than the advice to secure legal counsel. Rule 4.3(a). Furthermore, Attorney A must inform Seller that she will prepare the deed consistent with the specifications in the purchase agreement, if any, but, in the absence of such specifications, she will prepare a deed that will protect the interests of her client and, therefore, Seller may desire to seek legal advice. These disclosures avoid the risk of overreaching or misleading Seller. *See* Rule 8.4(c). To the extent that this opinion is contrary to CPR 100 or RPC 210 (Opinion #3), this opinion controls.

This situation is distinguishable from the situation addressed in 2002 FEO 6 which holds that a lawyer for a plaintiff may not prepare the answer to a complaint for an unrepresented adverse party to file pro se because the lawyer may not give legal advice to an unrepresented adverse party. An answer to a complaint, unlike a deed, is an adversarial document that sets forth the defendant's legal position without regard to the interests of the plaintiff. A deed, on the other hand, does not represent the unilateral interests of the seller because the buyer is the specific and intended beneficiary of the deed even though the buyer is not a signatory on the deed. Therefore, as long as the lawyer clarifies her role, makes the disclosures specified above, and does not give the seller legal advice, the lawyer may prepare the deed to further the interests of her client, the buyer. *See, e.g.,* 2003 FEO 7 ("[T]he purpose and goals of the engagement determine the identity of the client, not the signatory on the document prepared by the lawyer.) Note, however, that preparing documents for the seller other than a deed may mislead the seller as to the lawyer's role and raise a presumption that the lawyer has duties to the seller. *See, e.g.*, *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).

Although the disclosures required by this opinion do not have to be in writing and the written consent of the seller is not required, it is the better practice for the closing lawyer to include the disclosures in a written statement that is provided to the seller prior to the seller's execution of the deed.

Inquiry #2:

If the legal fee for preparing the deed is allocated to Seller do the responses to the prior inquiries change?

Opinion #2:

No, provided Attorney A makes the disclosures required in Opinion #1 above and follows the requirements of Rule 1.8(f). Rule 1.8(f) permits a lawyer to accept compensation for a representation from someone other than the client provided the client gives informed consent, there is not interference with the lawyer's professional judgment or the client-lawyer relationship, and the confidentiality of client information is protected.

2004 Formal Ethics Opinion 11

January 21, 2005

Lawyer Appointed as Guardian-ad-Litem

Opinion explores the role of a lawyer who is appointed guardian-ad-litem for respondent parent with diminished capacity.

Inquiry #1:

Attorney A is appointed guardian-ad-litem (GAL) for a respondent parent with diminished capacity in a Termination of Parental Rights (TPR) action. The parent is indigent and, pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), has

also been appointed legal counsel, Attorney B. In *In re Shepard*, 03-212 (N.C. App. filed January 20, 2004), the court of appeals held that, in a TPR action based upon parental "incapability," a parent's GAL, who is a lawyer but is not providing legal representation to the parent, "may testify as to the ward's parental capability, and ultimately against the interest of their ward as to the termination hearing." *Id.* at 1. The basis for the court's decision stems from the observation that the North Carolina State Bar's Rules of Professional Conduct do not appear to govern the conduct of a GAL who acts "purely as a guardian and not an attorney." *Id.* at 8. The court also suggested that the role of the GAL is to ensure that the parent receives procedural due process by helping to explain and execute his or her rights.

Is a lawyer, appointed solely as GAL for the parent, governed by the Rules of Professional Conduct?

Opinion #1:

The court in *Shepard* recognized that some of the Rules of Professional Conduct create duties that are owed only in the professional client-lawyer relationship. For example, the confidentiality rule only applies when a lawyer has a client-lawyer relationship or has agreed to consider the formation of one. Scope, cmt. [4]. Conversely, there are other rules that apply although a lawyer is acting in a non-professional capacity. For example, a lawyer who commits fraud in a business transaction has violated Rule 8.4 by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Preamble, cmt. [3].

The GAL does not have a client-lawyer relationship with the parent, and therefore, would not be governed by the Rules of Professional Conduct relating to duties owed to clients. *See* RPC 249. Notwithstanding the above, it may be prudent for the GAL to explain fully to the parent, to the extent possible, his or her role in the litigation, specifically that the GAL is not acting as the parent's lawyer.

Inquiry #2:

If the court appointed a lawyer to serve both as lawyer for the parent and as the parent's GAL, do the Rules of Professional Conduct require that the lawyer keep all communications confidential?

Opinion #2:

Yes. A lawyer serving as both lawyer and GAL for a parent in a TPR action must comply with Rule 1.6 of the Rules of Professional Conduct. Rule 1.6 generally prohibits a lawyer from revealing information acquired during the professional relationship unless the client gives informed consent or one of the exceptions allowing disclosure applies.

Inquiry #3:

If the court appoints the same lawyer as lawyer for the parent and as the parent's GAL, does the lawyer have a conflict of interest?

Opinion #3:

The *Shepard* court acknowledged that there exists little guidance on the role or specific duties of a GAL, but suggested that the role of the GAL is guardian of the parent's procedural due process. *Shepard*, at 7. If the role of the GAL is limited to ensuring procedural due process for the parent by helping to explain and execute his or her rights, then this role is consistent with the role of a lawyer representing a client. Therefore, there is no conflict of interest in undertaking representation as both GAL and lawyer. The Ethics Committee takes no position at this time as to whether the GAL has additional responsibilities or whether an expanded role could result in a conflict of interest.

Inquiry #4:

Assume the parent has separate appointed counsel. Under *Shepard*, how can the parent's GAL perform his duties with competence if the parent has been advised by her lawyer that she should not share confidential information with the GAL?

Opinion #4:

The performance of the GAL's duties, as distinct from a lawyer's duties to a client, is not a matter upon which the Ethics Committee can opine.

Inquiry #5:

Assume the facts in Inquiry #4. Can the parent's lawyer ever advise the client to confer candidly with the GAL under the Rules of Professional Conduct?

Opinion #5:

Yes. In light of the Shepard decision, a lawyer should inform the parent, to the extent possible, that the GAL does not owe the parent a duty of confidentiality and that the GAL could be called upon to testify as to parental capability. Then, the lawyer must analyze each case and determine whether the parent's full disclosure to the GAL will accomplish the goals of the representation. If the lawyer believes full disclosure is appropriate under the circumstances, he or she may advise the client that he may be candid with the GAL. Likewise, a lawyer may reasonably conclude that full disclosure would not be in the parent's interests and may advise the client against it.

Proposed 2004 Formal Ethics Opinion 12

October 21, 2005

Hiring an Independent Title Search Company

Editor's Note: At a meeting on October 21, 2005, in the absence of a majority vote of all members of the committee as required by the Procedures for Ruling on Questions of Legal Ethics, 27 N.C.A.C. 1D, Section .0100, no action was taken and no opinion will be henceforth proposed by the committee on the inquiry that was previously designated Proposed 2004 FEO 12, *Hiring an Independent Title Search Company.*

2004 Formal Ethics Opinion 13

January 21, 2005

Forming A Law Partnership of Professional Corporations

Opinion rules that a lawyer may form a professional corporation for the practice of law and the professional corporation may enter into a law partnership with another such professional corporation.

Inquiry:

Attorney A and Attorney B have practiced law together since 1982. Originally, they practiced together in a partnership but, after a few years, they filed articles of incorporation to form A & B, Professional Corporation. Each lawyer owns 50% of the shares of the professional corporation. Over time, the personal financial objectives of Attorney A and Attorney B have diverged, primarily with regard to their retirement objectives. Attorney A, for example, does not want to contribute to the firm's 401(k) plan. Attorney B, on the other hand, wants to contribute the maximum amount to the plan. They have reached an impasse over this issue and other business issues.

Attorney B would like to retain his professional relationship with Attorney A while accommodating each lawyer's individual financial needs. To accomplish this, he suggests that each lawyer form his or her own professional corporation[1] in which he or she would be the sole shareholder. The two professional corporations would then form a partnership for the practice of law. From an accounting perspective, Attorney B has been advised that this approach will allow the two lawyers to meet their individual financial goals.

Rule 5.4(b) provides that "[a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." As noted in comment [2], the rule "expresses the traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another."

Technically, the arrangement proposed by Attorney B would create a partnership of nonlawyers—the professional corporations—and, therefore, be prohibited under Rule 5.4(b). However, by law, all of the shareholders of a North Carolina professional corporation formed for the practice of law must be licensed North Carolina lawyers. G.S. §55B-4(2).[2] Therefore, all of the humans involved in the management and operation of the partnership would be licensed lawyers and there would be no risk that a nonlawyer could interfere with the independent professional judgment of the lawyers in their representations of clients. May Attorney A and Attorney B organize their law practice in this manner?

Opinion:

Yes. As noted in Rule 0.2, Scope, the Rules of Professional Conduct are

"rules of reason" and "[t]hey should be interpreted with reference to the purposes of legal representation and of the law itself." The purpose of Rule 5.4(b) is to prevent the creation of law firm in which a person who does not have a law license has the authority as a partner, or otherwise, to interfere in a lawyer's decisions about the representation of a client. Where, as here, all of the owners of the constituent professional corporations are themselves licensed as lawyers, that risk is not present. So long as the signage and the letterhead for the partnership disclose the relationship between the professional corporations and correctly identify the shareholders in the constituent professional corporations as required by Rule 7.1, this arrangement does not violate Rule 5.4(b). The same would be true of a partnership of professional limited liability companies formed for the practice of law.

Endnotes

1. Alternatively, one or both of the lawyers could form a professional limited liability company with the same effect.
2. Similarly, G.S. §57C-2-01(c) requires that all of the members of a professional limited liability company formed for the practice of law must be licensed North Carolina lawyers.

2005 Formal Ethics Opinion 1

October 21, 2005

Appearance Before Judge Who Is a Family Member

Opinion rules that a lawyer may not appear before a judge who is a family member without consent from all parties and, although consent is not required, the other members of the firm must disclose the relationship before appearing before the judge.

Inquiry #1:

Law Firm hires Attorney A, who is married to District Court Judge B. Attorney A is also the daughter of Senior Resident Superior Court Judge C. Judges B and C are in the same judicial district and the lawyers in Law Firm regularly appear before judges in this district, including Judges B and C.

May a member of Law Firm, other than Attorney A, appear before Judges B and C?

Opinion #1:

Yes. While Attorney A may not personally appear before Judges B and C without consent from all parties involved in the matter, a member of Attorney A's firm is not disqualified. *See* CPR 225 (lawyer permitted to appear before judge who is his brother with consent from all parties to the matter). A previous ethics opinion held that the personal disqualification of a lawyer from practicing before a family member ordinarily is not imputed to the other members of the lawyer's firm. CPRs 226 and 367. Nonetheless, a judge may determine independently that he must recuse himself if his impartiality may be reasonably questioned by reason of financial interests or some other special circumstances. Canon III D of the Code of Judicial Conduct; *see also* 97 Formal Ethics Opinion 1.

Inquiry #2:

May Attorney A work on a case which is pending before either Judge B or C, so long as she does not make an appearance in the matter and does not appear in court while the matter is being heard?

Opinion #2:

No, unless there is disclosure.

A lawyer's personal disqualification from appearing before a judge closely related[1] to her protects the integrity of the judicial system and avoids the appearance of impropriety or judicial partiality. Strictly speaking, a lawyer who appears before a judge with whom she has a familial relationship does not have a conflict of interest because the representation does not disadvantage or prejudice the lawyer's own client. Rule 1.7. It is also unlikely that the lawyer's judgment would be impaired or that she could not exercise independent professional judgment on behalf of the client under the circumstances. Instead, the client may appear to be advantaged by his lawyer's relationship with the judge, and it is this appearance of unfair advantage that both the Code of Judicial Conduct and our ethics opinions strive to avoid.

While the Rules of Professional Conduct do not prohibit Law Firm[2] from appearing before Judge B or C in this situation, Law Firm must disclose Attorney A's familial relationship to opposing counsel as soon as it becomes apparent that the matter will be heard by either Judge B or C. Disclosure of the familial relationship is required whenever a law firm appears before the family member of one of its members.*3* Disclosure serves the interest of promoting the administration of justice and the public confidence in a fair and impartial judicial system. *See* 0.1 Preamble, cmt. [6].

Inquiry #3:

Assume that Attorney A has no involvement in a matter coming before Judge B, her husband. The matter involves fees for Law Firm either because it is a collection case on behalf of Law Firm or because there is a claim for attorney's fees associated with the underlying claim (e.g., custody or child support in district court; Rule 11 in Superior Court).

May members of Law Firm appear before Judge B without disclosing Attorney A's relationship?

Opinion #3:

No. If Attorney A stands to benefit directly from a favorable outcome, then Judge B, Attorney A's husband, would also benefit financially. Under these circumstances, Law Firm may seek first to have the matter heard by someone other than Judge B if possible. If it is not possible, disclosure should be made to opposing counsel so that he has the opportunity to move for recusal. Law Firm should disclose Attorney A's relationship, even where Attorney A would not directly benefit financially from the outcome. *See* Opinion #2, above. In addition, Judge B may independently determine that he must recuse himself under the Code of Judicial Conduct because his impartiality may be reasonably questioned under the circumstances.

Inquiry #4:

Assume the same facts as in Inquiry #3, except that a member of Law Firm is appearing before Judge C, Attorney A's father.

May members of Law Firm appear before Judge C without disclosing Attorney A's relationship?

Opinion #4:

No.

Inquiry #5:

May Attorney A appear before judges other then Judges B and C in the same judicial district?

Opinion #5:

Yes.

Inquiry #6:

What disclosures, if any, do the Rules of Professional Conduct require Law Firm to make to clients concerning Attorney A's relationship to local judges?

Opinion #6:

Pursuant to Rule 1.4, a lawyer must provide information and explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation. Whether a matter will go to trial, or be heard by a particular judge, may be speculative at the outset of the representation. If a lawyer knows that she will need to seek opposing counsel's consent to proceed before Judge B or C, then the lawyer should also inform her client. Ordinarily, it will be in the lawyer's discretion to determine whether disclosure about the relationship between a firm lawyer and a judge is appropriate under the circumstances.

Endnotes

1. For purposes of this opinion, a "close relative" is defined consistently with Canon 3C of the Code of Judicial Conduct: a person within the third degree of relationship to the lawyer or the lawyer's spouse, or a spouse of such person. The third degree of relationship includes parent or child, grandparent or grandchild, great grandparent or great grandchild, sibling, uncle, aunt, niece or nephew.
2. The duties applicable to a "Law Firm," in this opinion arise only to the extent a lawyer in the firm has knowledge of such relationship. "Knowledge" is defined as "actual knowledge of the fact in question," however, "[a] person's knowledge may be inferred from the circumstances." Rule 1.0(g).
3. In a large or multistate law firm, the familial relationship between a firm member and a judge may not be known to all lawyers of the firm. The judge, who presumably would be aware of the relationship, would assess whether he must recuse himself because his impartiality may be reasonably questioned under the circumstances. Canon 3C, Code of Judicial Conduct.

2005 Formal Ethics Opinion 2

April 15, 2005

Employment of Nonlawyer to Represent Social Security Claimants

Opinion rules that a law firm that employs a nonlawyer to represent Social Security claimants must so disclose to prospective clients and in any advertising for this service.

Inquiry #1:

The Social Security Act permits lawyers and nonlawyers to represent claimants before the Social Security Administration; however, nonlawyers are not allowed to represent claimants on appeals to a federal district court. 42 U.S.C. §406. The Social Security Administration currently withholds up to one-quarter of a claimant's past due benefits for payment of legal fees but it does not withhold funds to pay nonlawyer representatives. Nonlawyer representatives must collect their fees directly from claimants. In 2005 this practice will change and nonlawyer representatives who pass an open book test will be eligible for withholding. Although some firms already employ nonlawyer representatives, with the change to allow withholding, it is anticipated that more law firms will employ nonlawyer representatives to represent Social Security claimants.

A law firm that employs a nonlawyer representative need not assign a firm lawyer to oversee the work of the nonlawyer. Therefore, a claimant may never meet with a firm lawyer.

If a law firm advertises that its services include representation before the Social Security Administration, should the advertisement disclose that a nonlawyer will provide the representation?

Opinion #1:

Yes. Rule 7.1 prohibits a lawyer from making a false or misleading communication about the lawyer or the lawyer's services. The prohibition extends to a communication that omits a fact necessary to make an entire statement not materially misleading. Rule 7.1(a)(1). Most consumers assume that a lawyer will provide any representational services advertised by a law firm. Therefore, when representation will be provided by a nonlawyer, as allowed by law, the law firm must disclose this fact in its advertising.

Inquiry #2:

If a law firm employs a nonlawyer to represent Social Security claimants, is the conduct of the nonlawyer governed by the Rules of Professional Conduct?

Opinion #2:

Yes. Although a task is assigned to a nonlawyer employee of a law firm, the lawyers in the firm are responsible for assuring that the conduct of the nonlawyer is in compliance with the professional obligations of the lawyers. Rule 5.3. This is true even when the nonlawyer may, by law, provide unsupervised representation.

Inquiry #3:

If a law firm employs a nonlawyer claimants' representative, what disclosures must be made to a prospective client who seeks representation before the Social Security Administration and who will be assigned to the nonlawyer representative?

Opinion #3:

The prospective client must be advised that the person who will be providing the representation is not a lawyer. The prospective client must also be informed if any of the protections afforded by the client-lawyer relationship will not be present. For example, the attorney-client privilege not to testify to communications made for the purpose of obtaining or providing legal assistance may not extend to the client's communications with the nonlawyer representative. (Whether the privilege extends to communications with a nonlawyer representative who, although an agent of the law firm, will be providing representation without supervision from a lawyer, is a question of law outside the purview of the Ethics Committee.) Nevertheless, the prospective client may be assured that the nonlawyer must comply with the professional obligations of the firm's lawyers including the duty of confidentiality and the duty to avoid conflicts of interest.

2005 Formal Ethics Opinion 3

July 14, 2005

Immigration Prosecution to Gain An Advantage in a Civil Matter

Opinion rules that a lawyer may not threaten to report an opposing party or a witness to immigration officials to gain an advantage in civil settlement negotiations.

Inquiry:

During the discovery phase of a civil lawsuit, the defense lawyer learns that the plaintiff may be in the country illegally. Some of the plaintiff's witnesses may also be in the country illegally. The plaintiff's immigration status is entirely unrelated to the civil suit.

May the defense lawyer threaten to report the plaintiff or a witness to immigration authorities to induce the plaintiff to capitulate during the settlement negotiations of the civil suit?

Opinion:

This is a matter of first impression. The Rules of Professional Conduct and the ethics opinions have previously addressed only the issue of threatening criminal prosecution to gain an advantage in a civil matter.

Before 1997, Rule 7.5 of the Rules of Professional Conduct made it unethical for a lawyer "to present, participate in presenting, or threaten to present criminal charges primarily to obtain an advantage in a civil matter." The rule was not included in the Rules of Professional Conduct when they were comprehensively revised in 1997. Nevertheless, a lawyer may not use a threat of criminal prosecution with impunity. Threats that constitute extortion, compounding a crime, or abuse of process are already prohibited by other rules. *See* Rule 3.1 (meritorious claims); Rule 4.1 (truthfulness in statements to others); Rule 4.4 (respect for rights of third persons); Rule 8.4(b) and (c)(prohibiting criminal or fraudulent conduct). Moreover, 98 FEO 19 provides that a lawyer may present or threaten to present criminal charges in association with the prosecution of a civil matter but only if the criminal charges are related to the civil matter, the lawyer believes the charges to be well grounded in fact and warranted by law, and the lawyer does not imply an ability to improperly influence the district attorney, the judge or the criminal justice system.

The present inquiry involves the threat, not of criminal prosecution, but of disclosure to immigration authorities. Whether making such a threat is criminal extortion is a legal determination outside the purview of the Ethics Committee. If it is, the conduct is prohibited under Rule 8.4(b). Even where a lawyer may lawfully threaten to report a party or a witness to immigration authorities to gain leverage in a civil matter, the exploitation of information unrelated to the client's legitimate interest in resolving the lawsuit raises some of the same concerns as threatening to pursue the criminal prosecution of the opposing party for an unrelated crime.

In ABA Formal Opinion No. 92-363, threats of criminal prosecution are permitted only when there is a nexus between the facts and circumstances giving rise to the civil claim, and those supporting criminal charges. As explained in the opinion, requiring a relationship between the civil and criminal matters

> tends to ensure that negotiations will be focused on the true value of the civil claim, which presumably includes any criminal liability arising from the same facts or transaction, and discourages exploitation of extraneous matters that have nothing to do with evaluating that claim. Introducing into civil negotiations an unrelated criminal issue solely to gain leverage in settling a civil claim furthers no legitimate interest of the justice system, and tends to prejudice its administration.

ABA Formal Op. No. 92-363; *see also* Rule 8.4(d)(prohibiting conduct that is prejudicial to the administration of justice).

There is no valid basis for distinguishing between threats to report unrelated criminal conduct and threats to report immigration status to the authorities: the same exploitation of extraneous matters and abuse of the justice system may occur. Rule 4.4(a) prohibits a lawyer, when representing a client, from using means that have no substantial purpose other than to embarrass, delay, or burden a third person. In addition, the prohibition on conduct that is prejudicial to the administration of justice "should be read broadly to proscribe a wide variety of conduct including conduct that occurs outside the scope of judicial proceedings." Rule 8.4, cmt. [4]. The threat to expose a party's undoc-

umented immigration status serves no other purpose than to gain leverage in the settlement negotiations for a civil dispute and furthers no legitimate interest of our adjudicative system. Therefore, a lawyer may not use the threat of reporting an opposing party or a witness to immigration officials in settlement negotiations on behalf of a client in a civil matter.

2005 Formal Ethics Opinion 4

April 21, 2006

Disclosure of Confidences of Parent Seeking Representation for Minor

Opinion rules that absent consent to disclose from the parent, a lawyer may not reveal confidences received from a parent seeking representation of a minor.

Inquiry #1:

Daughter schedules an office consultation with Lawyer A to discuss her father's estate. At the time the appointment was made, Lawyer A did not discuss the nature of Daughter's legal problem or whether Daughter was the person in need of representation. Daughter meets with Lawyer A and initially describes her father's estate as follows: Father left a holographic will naming his Brother as executor. Father was survived by Son, who is a lawyer, and by Daughter. Father's will makes provisions for Widow, then leaves everything else to Grandchild, the 15-year-old son of Daughter. The will specifically disinherits Son and Daughter. Brother qualified as executor and retained Son as attorney for the estate. Brother is also guardian of the minor's estate until Grandchild reaches age 25. The will was probated two years ago.

Next, Daughter discloses that Brother has made some unauthorized disbursements from the estate. First, Brother executed a document ("Renunciation Document") purporting to renounce the estate's interest in $100,000, and then paid that money in equal shares to Son and Daughter. Son was acting as attorney for the estate at this time.

Second, Brother and Son entered into a "Settlement Agreement" which recites that Son has raised questions about and has threatened to challenge the validity of the will. The agreement provides for payment to Son of the sum of $250,000 and a deed to a tract of real estate in exchange for Son's renunciation of any and all rights to his father's estate and any right to contest the will. Brother and Son took the Settlement Agreement to a superior court judge, without notice to Daughter or Grandchild, and the judge signed an order approving the settlement agreement.

Daughter asks Lawyer A whether he will provide representation to have the "Settlement Agreement" overturned and have Brother replaced as executor and guardian.

If Lawyer A agrees to take the case, who will be the client?

Opinion #1:

Daughter seeks Lawyer A's assistance in protecting Grandchild's interest in Father's estate. To accomplish this goal, Grandchild must be the client. Although Daughter asks that Lawyer A overturn the Settlement Agreement only, it is likely that a lawyer representing Grandchild would also seek to overturn the Renunciation Document, thereby adversely affecting Daughter's interests. Thus, if Lawyer A agrees to take the case, he would represent Grandchild, but he may not also represent Daughter because Daughter's interests are adverse to those of her son's. *See* Rule 1.7(a).

Lawyer A should explain to Daughter that if hired to represent Grandchild, he would require both Daughter and her husband to consent to the representation, and that he may seek appointment of a guardian ad litem to protect Grandchild's interests. To obtain informed consent, Lawyer A must explain that as Grandchild's lawyer, Lawyer A also would challenge the validity of the Renunciation Document, which could result in Daughter being required to return the $50,000 she received. *See* Rule 1.7(b).

Inquiry #2:

Assume Lawyer A has explained the limits of his representation as recited in Opinion #1 and Daughter leaves his office to confer with her husband. Later, Daughter leaves Lawyer A a voicemail message indicating they would consider hiring Lawyer A to represent their son, but only if he would agree to limit his representation to overturning the Settlement Agreement and getting Brother replaced as executor and guardian.

May Lawyer A agree to the representation under these circumstances?

Opinion #2:

No. *See* Opinion #1. Lawyer A cannot agree to accept the representation with these restrictions because to do so would curtail his ability to exercise independent professional judgment on behalf of Grandchild, and because these instructions may be prejudicial to Grandchild's interests.

Inquiry #3:

Assume that Lawyer A declines representation, and that Daughter will not authorize Lawyer A to disclose any information imparted to him in the consultation, may Lawyer A use or reveal any information learned from Daughter to protect Grandchild's interests?

Opinion #3:

> Every lawyer consulted about a legal matter incurs certain ethical obligations to the person who consulted the lawyer, even if the relationship goes no further. These obligations—confidentiality, loyalty, and competence—are separate from the lawyer's duties under agency, contract, and tort law. Because they exist by virtue of ethics rules rather than legal precepts, the obligations arise even in the absence of a cognizable lawyer-client relationship.

ABA/BNA Lawyer's Manual on Professional Conduct 31:151 (2005).

When someone consults with a lawyer in good faith for the purpose of seeking professional legal advice, the ethics rules impose, at a minimum, a duty of confidentiality on the lawyer consulted. Rule 1.18(b). This duty arises even when the individual is seeking a second opinion but does not intend to form a client-lawyer relationship, or when the individual is consulting the lawyer about a legal issue on behalf of a friend or family member. The person who divulges information to an attorney in either case has the reasonable belief, induced by the lawyer's conduct, that the information imparted will be held in confidence. *See generally* Rule 1.18.

Here, Daughter consulted with Lawyer A to determine whether to employ him. After the consultation, Lawyer A declined representation of Daughter based upon a conflict of interest, and ultimately did not undertake representation of Grandchild. Clearly, there was no client-lawyer relationship between Lawyer A and Daughter or Grandchild.

Nevertheless, Daughter was owed the duty of confidentiality inasmuch as she disclosed confidential information to Lawyer A and sought legal advice from Lawyer A to determine how to proceed on behalf of her son. She had the reasonable belief that the information discussed with Lawyer A would be held in confidence. Absent any disclaimer from Lawyer A that the information discussed in the consultation may be revealed, Lawyer A owed a duty of confidentiality to Daughter. *See* Rule 1.18, cmt [3] (lawyer prohibited from using or revealing information imparted in a consultation, even if the client or lawyer decides not to proceed with a representation).[1]

The question then becomes whether, absent consent from Daughter, Lawyer A may disclose Daughter's confidences to assist Grandchild regardless of whether he represents Grandchild. Unless one of the exceptions to the confidentiality rule applies, Lawyer A is required to maintain Daughter's confidences pursuant to Rule 1.6.

Rule 1.6 enumerates seven exceptions to the duty of confidentiality when there is no authorization to disclose. Only two of those exceptions merit consideration here. First, a lawyer may reveal information protected from disclosure "to comply with the Rules of Professional Conduct, the law or court order[.]" Rule 1.6(b)(1). Lawyer A is not subject to any law or court order requiring him to reveal Daughter's confidences. The Rules of Professional Conduct also do not require disclosure under these circumstances.[2]

Second, Rule 1.6(b)(2) permits disclosure of confidential information to the extent reasonably necessary "to prevent the commission of a crime by the client[.]" Even assuming the fraudulent conduct amounts to a crime, the conduct in question has already occurred and the person committing the crime is not the client. While it is true that Lawyer A has information that could undo the fraud, Rule 1.6 does not permit disclosure to rectify past conduct, unless the lawyer's services were used to perpetrate the crime or fraud. Rule 1.6(b)(4).

Inquiry #4:

May Lawyer A ever reserve the right to reveal confidential information of a prospective client who does not ultimately retain his services?

Opinion #4:

Pursuant to Rule 1.18, cmt. [5],

> a lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. . . . If the agreement *expressly* so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client. [Emphasis added.]

A general disclaimer stating that the initial consultation does not create a client-lawyer relationship is insufficient to overcome the duty of confidentiality. *See e.g.*, RPC 244. An effective disclaimer must clearly demonstrate the prospective client's informed consent to the disclosure and use of confidential information, even against his or her interests. In addition, the disclaimer must be made before any disclosures are made to the lawyer and the consent to disclosure must be confirmed in writing. Rule 1.0(f), cmt. [1].

Endnotes

1. The duty of confidentiality owed to prospective clients under Rule 1.18 is the same as that owed to former clients under Rule 1.9. Rule 1.9 incorporates the confidentiality requirements in Rule 1.6, except that a lawyer may use confidential information of a former client "when the information has become generally known."
2. Rule 3.3, Candor Toward the Tribunal, requires a lawyer to reveal, if necessary, a fraud upon the court when the lawyer represents a client in an adjudicative proceeding and knows of criminal or fraudulent conduct related to the proceeding. Rule 3.3(b). This duty to rectify the fraud only continues to the conclusion of the proceeding. Here, Lawyer A has no obligation to disclose Daughter's confidences under this rule because he has no client with respect to the matter and because all proceedings involving the fraudulent conduct have concluded.

2005 Formal Ethics Opinion 5

July 21, 2006

Communications with Government Entity Represented by Counsel

Opinion explores the extent to which a lawyer may communicate with employees or officials of a represented government entity.

Inquiry #1:

Attorney A represents a former employee of County in an employment dispute with County. County Attorney is a full-time employee of County. Attorney A has had no communications with County Attorney on this particular matter. However, County Attorney has defended County in other employment litigation brought by Attorney A in the past. In prior employment litigation cases, County Attorney asked Attorney A that communications with senior county staff, such as the county manager and department heads, concerning litigation or threatened litigation against County, be directed to County Attorney. Attorney A now wants to write a letter to County's human resources director and the county manager on behalf of his current client, threatening litigation if the employment matter is not settled.

May Attorney A address his letter directly to the human resources director and the county manager under these circumstances?

Opinion #1:

No. Under Rule 4.2(a), "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 to do so by law or court order." Rule 4.2(a) prohibits direct communications with represented persons even prior to the commencement of formal proceedings. *See* Rule 4.2, cmt. [6]. Notwithstanding this general rule, there is some authority that the Rule 4.2(a) prohibition should only apply to communications with a government agency or employee if the communication relates to negotiation or litigation of a specific claim of a client. We agree.

The *Restatement of the Law Governing Lawyers* § 101(2) (2000) "permits direct lawyer contact with a government officer or employee except when the governmental client is represented with respect to negotiation or litigation of a specific claim…." Routine communications on general policy issues or administrative matters would not require prior approval from government counsel. The rationale for this partial exception is that the limitations on communications under Rule 4.2(a) should be confined to those instances where the government stands in a position analogous to a private litigant or any other private organizational party. Under these circumstances, the government agency or official should be protected because the opportunity for abuse is clear. Additionally, if Rule 4.2(a) were applied broadly to cover all communications with government employees, "any matter disputed with the governmental agency could be pursued with safety only through the agency's lawyer[,]" which would "compromise the public interest in facilitating direct communication between representatives of citizens and government officials . . . ." *Restatement of the Law Governing Lawyers* § 101, cmt. b., p. 102 (2000).

Because Attorney A's proposed letter to County's employees concerns a specific claim and threatens litigation, Rule 4.2(a) applies to this communication. The question then becomes, if Rule 4.2(a) applies, to which employees does the anti-contact protection of the rule extend?

Even when a lawyer knows an organization is represented in a particular matter, Rule 4.2(a) does not restrict access to all employees of the represented organization. *See e.g.*, 97 FEO 2 and 99 FEO 10 (delineating which employees of a represented organization are protected under Rule 4.2). Counsel for an organization, be it a corporation or government agency, may not unilaterally claim to represent all of the organization's employees on current or future matters as a strategic maneuver. *See* "Communications with Person Represented by Counsel," Practice Guide, *Lawyers' Manual on Professional Conduct* 71:301 (2004)(list of cases and authorities rejecting counsel's right to assert blanket representation of organization's constituents). The rule's protections extend only to those employees who should be considered the lawyer's clients either because of the authority they have within the organization or their degree of involvement or participation in the legal representation of the matter. *See* 97 FEO 2; 99 FEO 10.

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs, or consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. It also prohibits communications with any constituent of the organization, regardless of position or level of authority, who is participating or participated substantially in the legal representation of the matter.

Rule 4.2, cmt. [9].

The protections under Rule 4.2(a) only extend to County Manager and department heads if, with respect to this employment matter, 1) they supervise, direct, or consult with County Attorney, 2) they can bind or obligate County as to its position in litigation or settlement, 3) their acts or omissions are at issue in the litigation, or 4) they have participated substantially in the legal representation of County. Because it is likely that the human resources director and the county manager fall within one or more of these categories in an employment dispute, and because Attorney A should have known that County Attorney represented County on this matter, Attorney A must obtain consent from County Attorney before communicating a threat of litigation directly to County Manager and Human Resources Director. To the extent this opinion conflicts with RPC 67 and RPC 132, they are hereby overruled.

Inquiry #2:

Even when a government entity is represented under Rule 4.2(a), Rule 4.2(b) permits direct contact with elected officials under certain circumstances. Attorney A gives written notice stating that he intends to contact members of the elected Board of County Commissioners, but does not specify if he will be addressing them in session, or individually. Nor does the letter state when he intends to contact them. When called by County Attorney for clarification on these points, Attorney A acknowledges that these details are absent, but contends the notice is still sufficient.

Is the "adequate notice" requirement of Rule 4.2(b)(2) met under these circumstances?

Opinion #2:

No. Under Rule 4.2(b), in representing a client who has a dispute with a represented government agency or body, a lawyer may communicate orally about the subject of the representation with elected officials who have authority over such government agency or body so long as the lawyer gives "adequate

notice to opposing counsel." Adequate notice should be meaningful notice: that is, sufficient information for opposing counsel to act on it to protect the client's interests. The time and place of the intended oral communication with the elected official must be included as well as the identity of the elected official or officials to whom the communication will be directed. Notice must also be reasonable and give opposing counsel enough time to act on it and be present if he so chooses.

Inquiry #3:

Attorney A appears at a public meeting of the elected Board of County Commissioners. Prior to the board meeting, Attorney A approaches a member of the board to tell him that he is there to advise the board of a grave injustice that has been done to his client, and that County Attorney is trying to prevent Attorney A from bringing this matter to the board's attention.

Does this communication with an elected board member violate Rule 4.2(b)?

Opinion #3:

Yes. Pursuant to Rule 4.2(b), a communication with an elected official may only occur under the following circumstances: 1) in writing, if a copy is promptly delivered to opposing counsel, 2) orally, with adequate notice to opposing counsel, or 3) in the course of official proceedings. To the extent RPC 202 differs from this opinion and Rule 4.2(b), it is hereby overruled.

2005 Formal Ethics Opinion 6

October 21, 2005

Compensation of Nonlawyer Employee Who Represents Social Security Claimants

Opinion rules that the compensation of a nonlawyer law firm employee who represents Social Security disability claimants before the Social Security Administration may be based upon the income generated by such representation.

Inquiry #1:

Law Firm employs Legal Assistant, a nonlawyer, to assist Attorney with the representation of disability claimants before the Social Security Administration (SSA). Because nonlawyer representation of claimants before the SSA is allowed by the Social Security Act, see 42 U.S.C. A7406, and Attorney believes that Legal Assistant is competent, Legal Assistant frequently represents the claimant in the hearing before the SSA Administrative Law Judge (ALJ) without the involvement of Attorney. Prospective clients are advised of this arrangement as required by 05 FEO 2 and Attorney represents any claimant who files an appeal to federal district court. Legal Assistant is currently paid a salary and bonuses.

Legal Assistant has informed Attorney that she is leaving the firm to become an independent claimant's representative on Social Security disability claims. After Legal Assistant establishes her separate business, may Attorney refer disability claimants to her, including claimants that he was representing when Legal Assistant was still employed by the firm?

Opinion #1:

Yes. If Attorney believes that Legal Assistant is competent to represent claimants before the SSA and that it is in the best interest of a client to be represented before the SSA by Legal Assistant, he may refer clients to her. *See* Rule 1.1.

Inquiry #2:

Attorney and Legal Assistant work on a client's disability claim before Legal Assistant leaves the firm to establish her own practice. After she leaves the firm, Attorney refers the client to Legal Assistant for representation before the SSA. Disability benefits are awarded to the client and the ALJ also awards a fee for the representation to Legal Assistant. From that fee, may Legal Assistant reimburse Law Firm for the work performed by Legal Assistant and/or Attorney while the matter was still with Law Firm?

Opinion #2:

Yes. There is nothing in the Rules of Professional Conduct that prohibits a lawyer or a law firm from accepting such compensation provided it is otherwise lawful. Cf. 03 FEO 10 (Social Security lawyer may agree to compensate a nonlawyer/claimant's representative for the prior representation of a claimant).

Inquiry #3:

Legal Assistant wants to remain an employee of Law Firm but she would like her salary to be based upon the fees that she generates from the representation of claimants before the SSA. May the compensation a law firm pays to a nonlawyer employee who represents claimants before the SSA take into consideration the income generated from the representations?

Opinion #3:

Yes.

Rule 5.4(a) specifically prohibits a lawyer or a law firm from sharing "legal fees" with a nonlawyer except in certain specific situations that are not relevant to this inquiry. As noted in comment [1] to the rule, "The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment." In reliance upon this prohibition, RPC 147 holds that a lawyer may pay a paralegal a bonus for productivity but the bonus may not be a percentage of the income the firm derives from legal matters upon which the paralegal has worked.

The present inquiry is distinguishable. Rule 5.4(a) regulates the distribution of fees that, because of the prohibition on the unauthorized practice of law, may only be earned by a lawyer. However, nonlawyers are legally permitted to represent disability claimants before the SSA and to be awarded fees for such representation. When generated by a nonlawyer as authorized by law, such a fee cannot be designated a "legal fee" subject to the limitations of Rule 5.4(a). *See e.g.*, 03 FEO 10. Moreover, the nonlawyer's participation in the fee does not impair a lawyer's independent professional judgment when the nonlawyer may, by law, represent the claimant without the supervision or participation of the lawyer.

Inquiry #4:

May Legal Assistant and Law Firm enter into an agreement clarifying how fees from Legal Assistant's representation of Social Security disability claimants will be distributed between Legal Assistant and Law Firm in the event Legal Assistant leaves the firm?

Opinion #4:

Yes.

2005 Formal Ethics Opinion 7

October 21, 2005

Recommending Services of a Third Party to Bankruptcy Client

Opinion rules that an attorney may recommend that a prospective client use a computer in the attorney's office and the services of an Internet-based company to complete a required bankruptcy certification form.

Inquiry:

The Bankruptcy Abuse Prevention and Consumer Protection Act ("the Act") makes sweeping changes to the Bankruptcy Code, almost all of which will go into effect on October 17, 2005. Two of the more significant changes to the code are as follows:

1. The requirement that (with certain narrow exceptions) no individual may file any chapter of bankruptcy without first obtaining an "individual or group briefing (including a briefing conducted by telephone or on the Internet) that outline[s] the opportunities for available credit counseling and assist[s] such individual in performing a related budget analysis" (the entrance requirement). 11 U.S.C. A7109(h) (1).

2. The requirement (again, with certain narrow exceptions) that no individual may receive a discharge under chapter 7 or chapter 13 of the amended Bankruptcy Code without first completing "an instructional course concerning personal financial management described in section 11185" (the exit requirement). 11 U.S.C. A7A7 727 ((a)(11) and 1328(g) (1).

A newly formed North Carolina non-profit corporation, Hummingbird Credit Counseling and Education ("HCCE"), intends to offer the entrance and exit requirements via the Internet. HCCE will market low-cost and free financial education to the consumer. HCCE's goal is to provide the necessary entrance requirement in a completely unbiased way.

When a client seeks information and/or advice from a bankruptcy attorney, the attorney must inform the client that the client cannot file a bankruptcy case without first completing the entrance requirement. Time is usually of the

essence when filing for bankruptcy. Consequently, the client must immediately comply with the entrance requirement and the Internet offers the best solution. A bankruptcy attorney could refer a client to HCCE and allow the client to complete the interactive program that HCCE provides on a computer in the attorney's office. The bankruptcy attorney would verify that the debtor, and not someone else, participated in the program. At the conclusion of the case, the client would return to the attorney's office and perform the exit requirement, utilizing the HCCE service, on the attorney's computer and again pay the appropriate fee to the attorney.

The costs associated with using HCCE's programming and support will be approximately $40.00 per entrance requirement. Potential bankruptcy filers usually do not have credit cards or should not use them. Since the only practical way to collect fees for Internet services is via a credit card, HCCE proposes that HCCE's certification fees be billed to the attorney's credit card on a monthly basis and the attorney will then collect the fees from his/her clients. The attorney will not receive any financial compensation for referrals to HCCE.

Due to the billing and identity verification concerns, the entrance and exit requirements will only be available at the attorney's office until such time as HCCE develops adequate direct delivery to consumers.

May a bankruptcy attorney offer prospective clients the opportunity to perform the entrance requirement via the Internet utilizing a computer provided by the attorney for this purpose and the services of HCCE?

Opinion #1:

Yes. Rule 1.1 requires competent representation and Rule 1.7 requires the exercise of independent professional judgment. Further, Rule 1.4 (a)(2) requires that the attorney reasonably consult with the client about the means by which the client's objectives are to be accomplished. When recommending that a client use the business services of a third party, the attorney's recommendation must be based upon a determination that the client needs the service, and upon an informed, unbiased analysis of the businesses that offer the service and the quality thereof.

Before the attorney may undertake representation of a prospective client for purposes of filing a bankruptcy petition, the attorney is required by the Act to advise the prospective client of the entrance requirement. It is therefore appropriate for the attorney to offer prospective clients the opportunity to perform the entrance requirement via the Internet in the attorney's office, on a computer provided by the attorney for this purpose, as a service that is related to anticipated legal services.

However, the attorney must determine that the use of the services of HCCE, or whatever third party company he recommends, is in the best interest of the client. To avoid conflicts of interest, the attorney may not earn a commission or a fee on the entrance requirement. *See* RPC 238. There must be full disclosure to the prospective client that the fee for the entrance requirement is being paid to the third party provider and that no portion of that fee goes to the attorney.

Inquiry #2:

Is it proper for the bankruptcy attorney to allow one of his/her employees to assist a prospective client in completing the entrance requirement via the Internet in the attorney's office?

Opinion #2:

Yes. The attorney may also bill the prospective client for any time devoted by the attorney's staff to assisting the prospective client. Rule 1.5.

Inquiry #3:

May the attorney collect HCCE's fee in cash from the prospective client and allow HCCE to charge the attorney's credit card?

Opinion #3:

Yes. *See* Opinion #1.

Inquiry #4:

May the attorney also verify the identity of the debtor prior to allowing the individual to complete the entrance requirement via the Internet?

Opinion #4:

Yes.

2005 Formal Ethics Opinion 8

October 21, 2005

URL for Firm Website is Trade Name and Must Register with Bar

Opinion rules that the URL for a law firm website is a trade name that must register with the North Carolina State Bar and meet the requirements of Rule 7.5(a).

Inquiry:

Rule 7.5(a) provides as follows:

> A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not 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 for a determination of whether the name is misleading.[1]

Attorney V is setting up a website and would like to use a Uniform Resource Locator (URL) for the website that is not the same as the name of his law firm. Does Attorney V have to register the URL with the State Bar as a trade name?

Opinion:

Yes. A trade name is any designation adopted and used by a lawyer or a law firm to identify the lawyer, the firm, or the services rendered by the lawyer or firm. The comment to the rule clearly contemplates that a URL may be a trade name for a firm. As noted in Comment [1] of the rule, "[a] lawyer or law firm may also be designated by a distinctive website address or comparable professional designation." Therefore, if a URL for a law firm's website is more than a minor variation on the official name of the firm, it must be registered with the State Bar in accordance with Rule 7.5(a) and the conditions and limitations on registration set forth in Comment [1].

Endnote

1. To register a trade name, a lawyer must complete and submit an Application for Trade Name Registration to the State Bar. This form can be found on the State Bar website at www.ncbar.gov. (Click "Resources and Forms" from the main menu.) There is no fee for applying. The application will be reviewed to determine whether the requested trade name is misleading. If the name is approved and registered, the lawyer will receive a certificate of registration.

2005 Formal Ethics Opinion 9

January 20, 2006

Lawyer for Publicly Traded Company May "Report Out" Pursuant to SEC Regulations

Opinion rules that a lawyer for a publicly traded company does not violate the Rules of Professional Conduct if the lawyer "reports out" confidential information as permitted by SEC regulations.

Background:

Section 307 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. §7245 ("SOX §307") required the Securities and Exchange Commission (the Commission) to issue rules setting forth minimum standards of professional conduct for attorneys appearing and practicing before the SEC including a rule

> (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
>
> (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

In response to this directive, the Commission adopted Rule 205, *Standards for Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer,* which became effective on August 5, 2003, 17 C.F.R. Part 205 ("Rule 205"). Section 205.3 of Rule 205 sets forth the duty of an attorney appearing and practicing before the Commission to report evidence of a material violation of securities law or breach of fiduciary duty to the chief legal officer and chief executive officer of the client company

and, if an appropriate response is not forthcoming, to the audit committee of the board of directors or to the board itself (commonly referred to as "reporting up"). Paragraph (d)(2) of section 205.3 contains a provision permitting, but not requiring, what is commonly referred to as "reporting out" as follows:

> (2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:
>
> (i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;
>
> (ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or
>
> (iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

Section 205.6 of Rule 205 addresses sanctions and discipline. Paragraph (c) provides:

> (c) An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.

Inquiry:

Have the duties of a North Carolina attorney under the Rules of Professional Conduct been affected by the regulations promulgated by the Securities and Exchange Commission under Section 307 of the Sarbanes-Oxley Act of 2002, which authorize a lawyer to disclose confidential or privileged information of a publicly traded company under certain circumstances?

Opinion:

A North Carolina attorney who represents or is employed by a publicly traded company and who appears and practices before the Commission faces a potential dilemma. Pursuant to Rule 205, under certain circumstances such an attorney may disclose or "report out" corporate confidential information relative to a material violation of securities law, breach of fiduciary duty, or similar violation by the corporation. Nevertheless, under Rule 1.13(c) of the North Carolina Rules of Professional Conduct, an attorney for any organization, whether it is a publicly traded company or not, who has fulfilled the duty set forth in Rule 1.13(a) to report internal misconduct to the highest authority for the organization and the highest authority 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, may reveal confidential client information outside the organization only to the extent permitted by Rule 1.6, the confidentiality rule (Rule 1.13 and Rule 1.6 collectively are referred to as the "NC Rule"). In this situation, disclosure outside the organization might be permitted by Rule 1.6(b)(2), which allows disclosure of client confidences to prevent the commission of a crime by the client, or Rule 1.6(b)(4), which permits disclosure of client confidences to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the attorney's services were used. However, in the rare instances that the activity that a North Carolina attorney desires to disclose pursuant to Rule 205 does not involve a crime or the attorney's services were not used to advance the activity, the attorney may not know whether he or she faces professional discipline if the attorney chooses to "report out."

The potential conflict between Rule 205 and the NC Rule raises the question of whether the NC Rule is preempted by Rule 205. A federal regulation validly promulgated carries the force of federal law, with no less preemptive effect than federal statutes. *Fidelity Federal v. de la Cuesta*, 458 U.S. 141 (1982). According to *de la Cuesta*, the questions upon which resolution of preemptive effect of a regulation rests is whether the agency means to preempt state law, and if so, whether that action is within the scope of the agency's delegated authority. *de la Cuesta* at 154. The Commission's intention to preempt state ethics rules conflicting with Rule 205 is unambiguous. In its letter discussing the implementation of the final version of Rule 205, the Commission states:

> The language we adopt today clarifies that this part does not preempt ethical rules in United States jurisdictions that establish more rigorous obligations than imposed by this part. At the same time, the Commission reaffirms that its rules shall prevail over any conflicting or inconsistent laws of a state or other United States jurisdiction in which an attorney is admitted or practices.[1]

In determining whether the regulation is validly promulgated, the courts are directed by the Supreme Court in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.,* 457 U.S. 837 (1984) to conduct a two-prong inquiry. First, the court must determine whether Congress has directly spoken on the precise question at issue (the "First Prong"). However, if Congress has not addressed the precise issue and the statute is ambiguous, then the question is whether the agency's interpretation of the statute and the regulation promulgated is based on permissible construction of the statute (the "Second Prong"). SOX §307 mandates the Commission to require "reporting up" in its regulations There is no provision in SOX, however, that expressly authorizes the Commission to adopt "reporting out" regulations. Good faith arguments can be made for both propositions, i.e., that SOX does, and does not, implicitly grant such authority to the Commission.

It has been argued that there is no conflict between Rule 205 and the North Carolina Rules. Because Rule 205 is permissive, the argument goes, one can comply with a more stringent state requirement while not offending federal law, i.e. compliance with both regulatory regimes is not a "physical impossibility." Once again, *de la Cuesta* is instructive. In that case, the court noted that the more stringent state law effectively created an obstacle to the achievement of "the full purposes and objective" of the federal regulation. Following the reasoning in *de la Cuesta*, the NC Rule undeniably impinges on the flexibility provided by Rule 205, and a reviewing court would likely hold that if Rule 205 was validly promulgated, it preempts the NC Rule.

It is beyond the capacity of an ethics opinion to determine whether or not the "reporting out" provision of Rule 205 was validly promulgated. Therefore, unless and until the Fourth Circuit Court of Appeals or the US Supreme Court determines that Rule 205 was not validly promulgated, (a) there will be a presumption that Rule 205 was promulgated by the Commission pursuant to a valid exercise of authority and (b) a North Carolina attorney may, without violating the North Carolina Rules of Professional Conduct, disclose confidential information as permitted by Rule 205 although such disclosure would not otherwise be permitted by the NC Rule.

Endnote

1. US Securities & Exchange Commission, Final Rule: Implementation of Standards of Conduct for Attorneys, Release Nos. 33-8185, 34-47276, IC-25929, republished in Practicing Law Institute, Corporate Law and Practice Course Handbook Series 489, 494 (May 2005).

2005 Formal Ethics Opinion 10

January 20, 2006

Virtual Law Practice and Unbundled Legal Services

Opinion addresses ethical concerns raised by an internet-based or virtual law practice and the provision of unbundled legal services.

Inquiry #1:

Law Firm markets and provides legal services via the internet under the name Virtual Law Firm (VLF). VLF plans to offer and deliver its services exclusively over the internet. All communications in the virtual law practice are handled through email, regular mail, and the telephone. There would be no face-to-face consultation with the client and no office in which to meet.

May VLF lawyers maintain a virtual law practice?

Opinion #1:

Advertising and providing legal services through the internet is commonplace today. Most law firms post websites as a marketing tool; however, this opinion will not address passive use of the internet merely to advertise legal services. Instead, the opinion explores use of the internet as an exclusive means of promoting and delivering legal services. Many lawyers already use the internet to offer legal services, answer legal questions, and enter into client-lawyer relationships. While the Rules of Professional Conduct do not prohibit the use

of the internet for these purposes, there are some key concerns for cyberlawyers who use the internet as the foundation of their law practice. Some common pitfalls include 1) engaging in unauthorized practice (UPL) in other jurisdictions, 2) violating advertising rules in other jurisdictions, 3) providing competent representation given the limited client contact, 4) creating a client-lawyer relationship with a person the lawyer does not intend to represent, and 5) protecting client confidences.

Advertising and UPL concerns are endemic to the virtual law practice. Cyberlawyers have no control over their target audience or where their marketing information will be viewed. Lawyers who appear to be soliciting clients from other states may be asking for trouble. *See* South Carolina Appellate Court Rule 418, "Advertising and Solicitation by Unlicensed Lawyers" (May 12, 1999)(requiring lawyers who are not licensed to practice law in South Carolina but who seek potential clients there to comply with the advertising and solicitation rules that govern South Carolina lawyers). Advertising and UPL restrictions vary from state to state and the level of enforcement varies as well. At a minimum, VLF must comply with North Carolina's advertising rules by including a physical office address on its website pursuant to Rule 7.2(c). In addition, VLF should also include the name or names of lawyers primarily responsible for the website and the jurisdictional limitations of the practice. Likewise, virtual lawyers from other jurisdictions, who actively solicit North Carolina clients, must comply with North Carolina's unauthorized practice restrictions. *See* N.C. Gen. Stat. § 84-4. 2.1. In addition, a prudent lawyer may want to research other jurisdictions' restrictions on advertising and cross-border practice to ensure compliance before aggressively marketing and providing legal services via the internet.

Cyberlawyers also tend to have more limited contact with both prospective and current clients. There will rarely be extended communications, and most correspondence occurs via email. The question becomes whether this limited contact with the client affects the quality of the information exchanged or the ability of the cyberlawyer to spot issues, such as conflicts of interest, or to provide competent representation. *See generally* Rule 1.1 (requiring competent representation); Rule 1.4 (requiring reasonable communication between lawyer and client). Will the cyberlawyer take the same precautions (i.e., ask the right questions, ask enough questions, run a thorough conflicts check, and sufficiently explain the nature and scope of the representation), when communications occur and information is exchanged through email?

While the internet is a tool of convenience and appears to respond to the consumer's need for fast solutions, the cyberlawyer must still deliver competent representation. To this end, he or she should make every effort to make the same inquiries, to engage in the same level of communication, and to take the same precautions as a competent lawyer does in a law office setting.

Next, a virtual lawyer must be mindful that unintended client-lawyer relationships may arise, even in the exchange of email, when specific legal advice is sought and given. A client-lawyer relationship may be formed if legal advice is given over the telephone, even though the lawyer has neither met with, nor signed a representation agreement with the client. Email removes a client one additional step from the lawyer, and it's easy to forget that an email exchange can lead to a client-lawyer relationship. A lawyer should not provide specific legal advice to a prospective client, thereby initiating a client-lawyer relationship, without first determining what jurisdiction's law applies (to avoid UPL) and running a comprehensive conflicts analysis.

Finally, cyberlawyers must take reasonable precautions to protect confidential information transmitted to and from the client. RPC 215.

Inquiry #2:

VLF offers its legal services to pro se litigants and small law firms seeking to outsource specific tasks. VLF aims to provide more affordable legal services by offering an array of "unbundled" or discrete task services. Unbundled services are legal services that are limited in scope and presented as a menu of legal service options from which the client may choose. In this way, the client, with assistance from the lawyer, decides the extent to which he or she will proceed *pro se*, and the extent to which he or she uses the services of a lawyer. Examples of unbundled services include, but are not limited to, document drafting assistance, document review, representation in dispute resolution, legal advice, case evaluation, negotiation counseling, and litigation coaching. Prior to representation, VLF will ask that the prospective client sign and return a limited scope of representation agreement. The agreement will inform the prospective client that VLF will not be monitoring the status of the client's case, will only handle those matters requested by the client, and will not enter an appearance on behalf of the client in his or her case.

May VLF lawyers offer unbundled services to clients?

Opinion #2:

Yes, if VLF lawyers obtain informed consent from the clients, provide competent representation, and follow Rule 1.2(c). The Rules of Professional Conduct permit the unbundling of legal services or limited scope representation. Rule 1.2, Comment 6 provides:

> The scope of services to be 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….A limited representation may be appropriate because the client has limited objectives for the representation. In addition the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

Rule 1.2, comment [7], however, makes clear that any effort to limit the scope of representation must be reasonable, and still enable the lawyer to provide competent representation.

> Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely.

VLF's website lists a menu of unbundled services from which prospective clients may choose. Before undertaking representation, lawyers with VLF must disclose exactly how the representation will be limited and what services will not be performed. VLF lawyers must also make an independent judgment as to what limited services ethically can be provided under the circumstances and should discuss with the client the risks and advantages of limited scope representation. If a client chooses a single service from the menu, e.g., litigation counseling, but the lawyer believes the limitation is unreasonable or additional services will be necessary to represent the client competently, the lawyer must so advise the client and decline to provide only the limited representation. The decision whether to offer limited services must be made on a case-by-case basis, making due inquiry into the facts, taking into account the nature and complexity of the matter, as well as the sophistication of the client.[1]

Endnote

1. The ABA Standing Committee on the Delivery of Legal Services has created a website encouraging the provision of "unbundled" legal services and assisted pro se representation. The Standing Committee believes unbundling is an important part of making legal services available to people who could not otherwise afford a lawyer. The website has also has compiled a list of state ethics opinions addressing limited scope representation. *See* abanet.org/legalservices/deliver/delunbund.html

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2005 Formal Ethics Opinion 11

January 20, 2006

Interim Account for Costs Associated with Real Estate Closings

Opinion examines the requirements for an interim account used to pay the costs for real estate closings and also rules that the actual costs may be marked up by the lawyer provided there is full disclosure and the overcharges are not clearly excessive.

Inquiry #1:

ABC Law Firm limits its practice to residential real estate sale and refinance transactions. On a monthly basis, it processes a high volume of such transactions involving real estate in both the county where its office is located and in contiguous counties.

RPC 44 and North Carolina's Good Funds Settlement Act, Chapter 45A of the North Carolina General Statutes, prohibit disbursement of funds from a lawyer's trust account prior to recording if the lender so requires. Lenders' instructions often require the recording of documents prior to disbursement of

loan proceeds.

A number of the lenders providing financing to ABC's clients require the closing lawyer to estimate the settlement charges and disbursements, including courier and recording costs, prior to the issuance of the final loan package. Once the loan package is issued, the closing lawyer is not permitted to deviate from the figures specified in the loan package because the lenders are subject to scrutiny, and potential liability, for deviations between their "good faith estimate" of closing costs and the actual closing costs. Not infrequently, however, the actual costs for recording and overnight mail/couriers exceed the initial estimates.

ABC Law Firm has adopted the following procedure to address the above-described situation:

1. ABC established with its depository bank a depository account called the "Recording Account;"

2. ABC prepares for each real estate client, each of whom reviews and signs prior to closing, a closing affidavit making various disclosures, including the following:

I/we hereby acknowledge and agree that certain charges on my HUD-1 Settlement Statement, including but not limited to overnight/courier and recording fees, may not reflect the actual costs and in fact may be more than the actual costs to the settlement agent. The additional amount(s) may vary and are to help cover the administrative aspects of handling the particular item or service. I/we hereby consent to and accept the above-referenced up-charges.

3. ABC marks up the estimated overnight/courier fees and recording fees it provides to lenders by anywhere from $2.00 to $15.00, and reflects the marked-up amount on the HUD-1 Settlement Statement on line 1201 denominated as "Recording Fees."

4. When the transaction closes, the amount reflected on the HUD-1 Settlement Statement as "Recording Fees" is transferred from ABC's trust account to ABC's Recording Account, and disbursements to recording offices and for reimbursement for overnight/courier fees are made from the Recording Account.

5. All amounts reflected on the HUD-1 Settlement Statement which are payable to ABC, including the Recording Fees, are reported by ABC as business income, and all disbursements from the Recording Account for overnight/courier fees and recording charges are reported as business expenses.

6. ABC considers all funds in the Recording Account to be funds of ABC, and from time to time, surplus funds are drawn from the Recording Account and transferred to the firm's Operating Account, or if necessary, funds are transferred from the Operating Account to the Recording Account.

After a closing but before the recording of the documents, may ABC transfer the amount for Recording Fees, as reflected on the HUD-1, from the law firm trust account to the Recording Account and write a check to the Register of Deeds (and courier/overnight service) against those funds to tender to the Register of Deeds when the documents are recorded?

Opinion #1:

No, unless the Recording Account is maintained as a lawyer's trust account in accordance with Rule 1.15-1 to Rule 1.15-3 of the Rules of Professional Conduct. Although the transaction has closed, the funds to cover costs of the closing, including recording and overnight/courier fees, remain client funds until disbursed and must be segregated from the lawyer's funds and be deposited and disbursed in accordance with the trust accounting rules.

As a trust account, the funds in the Recording Account would be client funds and not the funds of ABC. Funds could not be transferred from the Recording Account to the firm's operating account unless earned by the firm or payable to the firm as reimbursement for costs advanced.

Inquiry #2:

ABC does not want the Recording Account to be a trust account. Therefore, ABC deposits its own money into the Recording Account. Checks for the recording and overnight/courier fees for a closing are written from this account. At closing, the line item for these closing costs on the HUD-1 reflects payment to the law firm to reimburse the firm for advancing these costs. After the closing and the recording of the documents, ABC deposits the check to the firm from the closing into the Recording Account to reimburse the firm for advancing the funds to cover these costs. Does this procedure comply with the trust accounting rules?

Opinion #2:

Yes. Because the Recording Account contains only the funds of the law firm, it does not have to be maintained as a lawyer's trust account.

Inquiry #3:

ABC would like to avoid advancing the funds of the law firm to cover the recording and courier/overnight fees. If the closing lawyer tenders a firm trust account check, written against the loan proceeds on deposit in the trust account, to the Register of Deeds at the time that the documents are recorded, has the lawyer complied with the lender's requirement that documents be recorded before the loan proceeds are disbursed?

Opinion #3:

Yes.

Inquiry #4:

The Fourth Circuit in *Boulware v. Crosland Mortgage*, 291 F.3d 261 (4th Cir. 2002), the Seventh Circuit in *Krzalic v. Republic Title Company*, 314 F.3d 875 (7th Cir. 2002), and the Eighth Circuit in *Haug v. Bank of America*, 317 F.3d 832 (8th Cir. 2003) have all ruled that "up charges," or markup, by mortgage lenders and settlement agents for recording fees and other expenses of settlement is not a violation of the Federal Real Estate Settlement Procedures Act.

If there is disclosure to its clients as set forth in Inquiry #1 above, may ABC inflate its estimate of the costs for recording and overnight/couriers fees that will be incurred in closing a transaction and, if the actual costs prove to be less than the estimated costs, retain the overcharges?

Opinion #4:

Yes, provided this practice is not prohibited by law, the disclosure is made to the lender as well as the seller, the overcharges are not clearly excessive in violation of Rule 1.5(a), and the clients are not misled, in violation of Rule 8.4(c), about the fact that the overcharges will be kept by the law firm as profit.

2005 Formal Ethics Opinion 12

January 20, 2006

Payment of Legal Fees By Third Parties

Opinion explores a lawyer's obligation to return legal fees when a third party is the payor.

Inquiry #1:

Lawyer receives a $5,000 advance fee from Client in a domestic case. After Lawyer expended $2,000 in fees, Lawyer receives a telephone call from "Ronnie," who says Client stole the $5,000 from him and he wants it back. Lawyer confronts Client, who denies having stolen the money or even knowing Ronnie.

What is Lawyer's ethical obligation with respect to the $5,000?

Opinion #1:

A lawyer may not accept funds the lawyer knows to be obtained illegally or fraudulently. *See* Rule 8.4. In the above inquiry, however, Lawyer has no actual knowledge that the funds were stolen. Ronnie could be an interloper. Without knowledge to the contrary, Lawyer owes no duty to a third party claiming an interest in the funds. Furthermore, Lawyer has an obligation to follow the client's directive with respect to funds belonging to the client. Rule 1.15-2(m).

Inquiry #2:

Lawyer receives a $5,000 advance fee from domestic Client. At the time Lawyer receives the funds, Client says that the $5,000 was a gift from her boyfriend. After Lawyer has expended $2,000 of the fee, Boyfriend and Client break up. Boyfriend calls Lawyer and demands the unused portion of the fee back. Prior to this telephone call, Lawyer has never had any contact with Boyfriend. Client maintains that the $5,000 was a gift to her, with no strings attached, and directs the Lawyer not to return the funds.

What is Lawyer's ethical obligation with respect to the $5,000?

Opinion #2:

Lawyer again has no duty to the ex-boyfriend under these facts. Lawyer may rely upon Client's representation that the $5,000 was a gift and follow Client's directive as to how to use those funds. Lawyer may also need to advise Client about any legal obligations she may have to the ex-boyfriend if the $5,000 was a loan rather than a gift.

Inquiry #3:

Lawyer receives a $5,000 advance fee from domestic Client. Client says the $5,000 is a general loan from her mother. After Lawyer expends $2,000, Mom calls Lawyer and says she didn't know Client would use the funds for legal fees, and she doesn't support her daughter's case. Mom asks that the unused portion of the funds be returned to her. Client does not consent and demands that Lawyer retain the money and pursue her case. Prior to this telephone call, Lawyer has never had any contact with Mom.

Must lawyer return the unused portion of the fee to Mom?

Opinion #3:

No. Again, Mom is a third party claiming an interest in the $5,000. Client agrees that the funds were a loan from Mom, but it is unclear whether there were any restrictions placed upon the loan. This is a dispute between Client and Mom, inasmuch as Lawyer was never involved in the original loan from Mom to Client. Lawyer should follow Client's directive as to the use of these funds and advise Client of any legal obligations she may have to Mom.

Inquiry #4:

Adult Client and her mother come to Lawyer's office together. Mother agrees to pay a $5,000 advance fee for representation of Client in her domestic case. Pursuant to Rule 1.8, Lawyer makes sure Mother understands that Lawyer represents only Client's interests, not Mother's, and that information received from Client during the course of the representation remains confidential. Client consents to the payment of her fees by Mother, and Mother agrees to pay under these terms. Lawyer deposits the $5,000 in his trust account and begins billing against it.

Shortly thereafter, Mother and Client having a falling out, and Mother demands the unused portion of the $5,000 back. Client wants Lawyer to keep the funds and continue with the representation.

Must Lawyer return the unearned portion of the fees to Mother?

Opinion #4:

Yes. Under these facts, Lawyer understands that the legal fees were paid by a third party for the purpose of Client's representation. *See* Rule 1.8(f). The unearned funds held in trust belong to the third party, not the client. In the event the payor wants the funds returned, Lawyer is obliged to do so. Lawyer should explain to both Client and the third-party payor, at the outset, that the funds belong to the third party, that the funds will remain in trust until earned, and that if the third-party payor demands return of the unearned funds, Lawyer must return the funds to the payor. In addition, Lawyer may continue representation and seek payment from Client. If Client is unable to pay, Lawyer must decide whether withdrawal from representation is appropriate under Rule 1.16(b)(6).

Inquiry #5:

Assume the same facts as in Inquiry #4, except that Lawyer received a $5,000 flat fee from Mother to represent Client in her domestic matter. Lawyer explained to Client and Mother that the fee is earned immediately and will be placed in Lawyer's operating account. Lawyer also explained that the flat fee would not vary based upon the amount of time expended and assured them that this was the only legal fee owed to him. After Lawyer has begun work on the case, Mother demands the fee back. Client does not consent.

What should Lawyer do?

Opinion #5:

If the flat fee is earned immediately and it is not "clearly excessive" under the circumstances, then the fee will ordinarily belong to the lawyer. *See* Rule 1.5(a). Lawyer need not return any portion of the fee to Mother. If, upon conclusion of the representation, however, Mother disputes the amount of fee charged, Lawyer must notify Mother of the State Bar's program of fee dispute resolution. Lawyer should place the disputed portion of the funds back in his trust account and must participate in good faith in the fee dispute process if Mother submits a proper request to the State Bar. *See* Rule 1.5(f).

2005 Formal Ethics Opinion 13

January 20, 2006

Unearned Portion of a Minimum Fee Must Be Returned to the Client

Opinion rules that a minimum fee that will be billed against at an hourly rate and is collected at the beginning of representation belongs to the client and must be deposited into the trust account until earned and, upon termination of representation, the unearned portion of the fee must be returned to the client.

Inquiry #1:

Law Firm is made up of five partners and one associate. Partnership expenses, debts, and profits are divided equally among all partners irrespective of gross receipts and are paid weekly.

Partner C, who practiced family law litigation, typically used a fee contract referred to by the firm as a "minimum fee" contract. The contract provides that the initial fee charged to the clients is the greater of (1) the flat fee established in the contract, or (2) an hourly rate applied to actual time that will be spent in representation of the client. A minimum fee paid by the client was deposited into the firm's general account. The contract, however, did not state that the fee was deemed earned and payable to the attorney upon receipt.

Partner C left Law Firm and opened his own practice. Most of his clients chose to follow C for continued representation. These clients paid the minimum fee, according to the terms of the fee contract, to Law Firm prior to C's departure. Shortly after C's departure, C sent a letter to Law Firm requesting a transfer of his clients' remaining funds to C. The remaining funds are the difference between the fees collected at the beginning of each representation and the value of the hourly services performed by C for each client prior to leaving Law Firm.

Law Firm refused to comply with C's request reasoning that the fees were deposited into the firm's operating account and used to pay ongoing expenses, including partnership draws, of which C received his share. At C's direction, the clients then began to contact Law Firm demanding a refund of their remaining funds so that the money could be paid to C for continued representation. If the remaining funds are not returned, C's clients may be precluded from having C continue to represent them.

Are the lawyers remaining with Law Firm required to refund any funds to C's clients?

Opinion #1:

Yes. Law Firm incorrectly deposited the "minimum fees" into the firm's operating account. 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. *See* RPC 158. Even with the consent of the client, only true retainers and flat fees are deemed earned by the lawyer immediately and therefore can be deposited into the operating account upon receipt. A minimum fee that will be billed against at the lawyer's hourly rate is client money and belongs in the trust account until earned. *See* Rule 1.15-2 (b). In the present case, at some point during the representation, Law Firm would calculate the number of hours C spent on the case and determine whether the client owed more money. The fee arrangement was therefore neither a true retainer nor a flat fee. Furthermore, Law Firm's fee contract did not make an allowance for the fee to be deposited into the firm's operating account. Therefore, those portions of the minimum fees that were not earned by C's labor while with Law Firm remain client funds and must be returned to the clients. *See* Rule 1.16(d). If Law Firm does not return the unearned portions of the funds to C's clients, they will have collected an excessive fee in violation of Rule 1.5(a).

Inquiry #2:

Will the answer be different if by subsequent agreement the client consents to the deposit of the minimum fee into Law Firm's operating account?

Opinion #2:

No. A client has the right to terminate the representation at any time with or without cause. *See* 97 Formal Ethics Opinion 4. 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. *See* 2000 Formal Ethics Opinion 5. *See also* Opinion #1.

Inquiry #3:

What duties are owed by Law Firm and/or C to former clients of Law Firm for whom legal work is ongoing, with respect to (a) an accounting for fees previously paid to Law Firm pursuant to the fee contract, (b) a request for refund

of fees, and (c) providing future legal services in accordance with the fee contract?

Opinion #3:

(a) Law Firm and C are responsible for providing an accounting of the fees to the client, upon request or at the end of the representation. *See* Rule 1.15-3 (d).

(b) All of the lawyers in Law Firm, whether in its current incarnation or at the time the fees were collected, are responsible for refunding any unearned portions of the fees. *See* Opinion #1.

(c) Once a fee agreement is reached between attorney and client, the attorney has an ethical obligation to fulfill the contract and represent the client's best interest, subject to the right or duty to withdraw under Rule 1.16. *See* Rule 1.5, comment 5.

Inquiry #4:

Is it ethical for C to instruct former clients of Law Firm, who are represented by C, to seek a refund of fees so that they can pay for their continued representation by C?

Opinion #4:

Yes. *See* Opinion #1.

2005 Formal Ethics Opinion 14

January 20, 2006

Identifying Information in URL for Law Firm Website

October 20, 2005

Opinion rules that the URL for a law firm website does not have to include words that identify the site as belonging to a law firm provided the URL is not otherwise misleading.

Inquiry:

2005 FEO 8 ruled that the URL for a law firm website is a trade name that must be registered with the State Bar, in compliance with Rule 7.5(a), and may not be misleading.

Lawyers have applied to the State Bar to register the following URLs for their law firm websites: "Asbestos-Mesothelioma.com" "DrugInjury.com" and "NCworkinjury. com". None of the URLs contain language sufficient to indicate to a user that the URL is for the website of a law firm. May a law firm use a URL that does not include words or language sufficient to identify it as the address of a website of a law firm?

Opinion:

Yes, provided the URL is not otherwise false or misleading and the homepage of the website clearly and unambiguously identifies the site as belonging to a lawyer or a law firm.

Rule 7.1 and Rule 7.5(a) prohibit lawyers and law firms from using trade names that are misleading. Nevertheless, the Rules of Professional Conduct are rules of reason and should be interpreted with reference to the purposes of legal representation. Rule 0.2, Scope, cmt. [1]. None of the URLs listed in the inquiry make false promises or misrepresentations about a lawyer or a lawyer's services. Although a person who is using the internet to research a medical condition, such as mesothelioma, or injuries caused by prescription medications or on the job, may be given one of these website addresses in a response to an internet browser search, if the user is not interested in legal advice relative to the medical condition or the injury, the user does not have to click on the URL or, having done so, may exit the website as soon as he or she determines that it does not contain the information being sought. At worst, the URLs may cause the user of the internet an extra click of the mouse and, at best, they may provide a user with helpful information about legal rights. Therefore, as long as a URL of a law firm is not otherwise misleading or false and the homepage of the website identifies the sponsoring law firm or lawyer, the URL does not have to contain language specifically identifying the website as one belonging to a law firm.

2006 Formal Ethics Opinion 1

April 21, 2006

Withholding Information from Employer at Direction of Workers' Compensation Carrier in Joint Representation

Opinion rules that a lawyer who represents the employer and its workers' compensation carrier must share the case evaluation, litigation plan, and other information with both clients unless the clients give informed consent to withhold such information.

Inquiry:

As a defense attorney for workers' compensation cases, Attorney A is retained by an insurance company or a third-party administrator to represent both the carrier and the employer. In most workers' compensation insurance policies, the carrier has the right to direct the litigation and to resolve the claim without approval of the employer. Attorney A frequently receives general instruction from the carrier/third-party administrator not to provide the employer with a copy of any correspondence that includes an evaluation of the claim or a discussion of the litigation strategy. In addition, the following are common situations in which a defense lawyer is faced with the dilemma of what information relative to the evaluation of the claim or the litigation strategy may or should be provided to the employer:

1. The employer's representative and the plaintiff are the same person (i.e., the plaintiff owns the business).

2. The employer's representative and the plaintiff are related or close friends. Anything Attorney A sends to the representative will be forwarded to the plaintiff.

3. Two or more insurance carriers provided coverage for the employer over different time periods and the interests of the carriers are adverse. If Attorney A sends an evaluation to the employer, it can be anticipated that it will be forwarded to the other carrier(s).

What duty does the defense lawyer have, in these situations, to provide the employer with copies of correspondence to the carrier/third-party administrator that contain evaluations of the claim or discussions of the litigation plan?

Opinion:

Attorney A represents both the employer and the carrier and therefore has a duty to keep each client informed about the status of the matter. As noted in comment [31] to Rule 1.7, "…common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation." The comment continues as follows:

> This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential.

Loyalty to a client is impaired when a lawyer cannot keep the client reasonably informed or promptly comply with reasonable requests for information. Rule 1.4(a); RPC 153; 03 FEO 12. The employer and the carrier are both entitled to Attorney A's full, candid evaluation of all aspects of the claim. *See* 03 FEO12. If the carrier will not consent to Attorney A providing the same information to employer or the employer will not agree that certain information will be withheld, then Attorney A has a conflict and must withdraw from the representation of the employer and the carrier. If the carrier hires another lawyer to represent only the employer, Attorney A may—with the employer's consent—continue to represent the carrier and withhold evaluation and litigation strategy information from the employer.

2006 Formal Ethics Opinion 2

April 21, 2006

Referring Client to a Financing Company

Opinion rules that a lawyer may only refer a client to a financing company if certain conditions are met.

Inquiry #1:

Lawyer receives an unsolicited email from a representative of ABC Financial, a company that purchases notes secured by deeds of trust, mortgages, and contracts. ABC Financial also will pay its clients a lump sum of cash in exchange for a client's interest in lottery winnings, structured insurance settlements, and rental income. ABC Financial would like Lawyer to refer his clients to them.

May Lawyer do so?

Opinion #1:

Lawyer may only make the referral if certain conditions are satisfied. Pursuant to 2000 Formal Ethics Opinion 4, a lawyer may refer a client in need of money for living expenses to a finance company if the lawyer is satisfied that the company's financing arrangement is legal, the lawyer receives no consideration from the financing company for making the referral, and, in the lawyer's opinion, the referral is in the best interest of the client. In no event should Lawyer refer a client to ABC Financial merely as a means to pay Lawyer for his legal services.

The Ethics Committee cannot opine as to the legality of any financing arrangement with ABC Financial.

Inquiry #2:

If Lawyer determines that the financing arrangement is legal and that the referral is in the best interest of the client, may Lawyer accept a "finder's fee" from ABC Financial in exchange for the referral?

Opinion #2:

No. *See* Opinion #1 above.

2006 Formal Ethics Opinion 3

January 23, 2009

Representation in Purchase of Foreclosed Property

Opinion rules that a lawyer who represented the trustee or served as the trustee in a foreclosure proceeding at which the lender acquired the subject property may represent all parties on the closing of the sale of the property by the lender provided the lawyer concludes that his judgment will not be impaired by loyalty to the lender and there is full disclosure and informed consent.

Inquiry #1:

Seller (a financial institution) acquires property as a result of the foreclosure by execution of the power of sale contained in a deed of trust securing its own note or a note that it was servicing. Buyer entered into a contract with Seller to buy the property that was repossessed via foreclosure.

Attorney A regularly handles foreclosure proceedings for Seller either serving as the trustee or as the lawyer for the trustee (both roles are referred to herein as the "foreclosure lawyer"). In the current proceeding Attorney A served as the foreclosure lawyer.

Buyer would like Attorney A to close the sale. May Attorney A represent both Buyer and Seller on the closing of the transaction, including examining title and giving an opinion as to title to Buyer or on behalf of Buyer?

Opinion #1:

Yes, provided there is full disclosure to Buyer of all potential risks and Buyer gives informed consent. Multiple representation of parties to a real estate closing is allowed in RPC 210 and in 97 FEO 8. The latter opinion holds that a lawyer who regularly represents a real estate developer may represent the buyer and the developer in the closing of residential real estate. Rule 1.7 permits multiple representation notwithstanding the existence of a concurrent conflict of interest if the lawyer concludes that he or she can provide competent and diligent representation to each affected client and the clients give informed consent which is confirmed in writing.

If Attorney A's relationship with Seller is such that Attorney A's personal financial interests in preserving and protecting his relationship with Seller impairs his independent professional judgment, ability to provide competent and diligent representation to Buyer, and/or his ability to be objective and impartial when making disclosures necessary to obtain informed consent, then Attorney A may not seek the informed consent of Buyer and may not represent Buyer in the closing.

If Attorney A concludes that, under the circumstances, he can still exercise independent professional judgment on behalf of all of the parties to the closing, he may seek the informed consent of Buyer. Obtaining the informed consent of the buyer in this situation means that the buyer must be advised of the potential risks to a purchaser of property that was previously foreclosed including the distinctions between marketable and insurable title and between a non-warranty and a warranty deed. The buyer must also be advised of his potential liability for homeowners' association dues. Most importantly, the lawyer must disclose his prior participation in the foreclosure and explain that the lawyer must examine his own work on the foreclosure to certify title to the property.

Attorney A may represent all of the parties to the closing even if Buyer procures financing to purchase the property (including financing provided by Seller). Attorney A must be able fully to explain, without objection from the lender/seller the loan documents, setting forth the terms of repayment (and potentially including a balloon payment and/or prepayment penalty), and the status of title including any material exceptions between the lender's and owner's title insurance policies.

If Buyer consents to the representation, Attorney A may proceed unless and until it becomes apparent that he cannot manage the potential conflict between the interests of the lender/seller and the buyer. If the lawyer determines that he can no longer exercise his independent professional judgment on behalf of both clients, he must withdraw from the representation of both clients.

Inquiry #2:

Under the facts of Inquiry #1, the contract signed by Buyer provides that Seller will select the title and closing agent. However, the contract specifies that the buyer is also entitled to legal representation at the buyer's own expense. Seller names Attorney A as the "title/closing agent" for the sale to Buyer. While serving in the capacity of "title/closing agent", Attorney A proposes to provide legal representation to both Buyer and Seller with the consent of both parties. May Attorney A represent both Buyer and Seller on the closing of the transaction, including examining title and giving an opinion as to title to Buyer?

Opinion #2:

No. Although 97 FEO 8 allows a lawyer to represent both the developer and the buyer of a house in a subdivision with the informed consent of the buyer, the purchase of foreclosed property presents special risks to a purchaser that are not present in the purchase of a subdivision property. The purchaser of foreclosed property requires legal representation that is completely unimpaired by even the potential of a conflict of interest. The fact that Attorney is named in the contract as the title/closing agent indicates that there is a close business and professional relationship between Attorney A and Seller. It is apparent that, under these circumstances, it is in Attorney A's personal financial interest to preserve and protect his relationship with Seller. This self-interest will impair Attorney A's independent professional judgment and his ability to be objective and impartial when making the disclosures necessary to obtain informed consent from Buyer. Therefore, Attorney A may not seek the informed consent of Buyer and may not represent Buyer in the closing.

Inquiry #3:

Under the facts of Inquiry #2, Attorney B regularly represents Seller on various matters but did not represent the trustee on the foreclosure of the subject property and did not act as trustee. May Attorney B represent both Buyer and Seller on the closing of the transaction, including examining title and giving an opinion as to title to Buyer?

Opinion #3:

Yes, subject to fulfilling the conditions on common representation set forth in Opinion #1.

Inquiry #4:

Under the facts of Inquiry #2, Attorney A intends to represent only the interests of Seller and does not intend to represent Buyer in closing the transaction. May Attorney A limit his representation in this manner?

Opinion #4:

Yes, Attorney A may limit his representation to Seller. However, if he does so, in light of the provisions of the purchase contract, it is possible that Buyer will be misled about Attorney A's role. Therefore, Attorney A must fully disclose to Buyer that Seller is his sole client, he does not represent the interests of Buyer, the closing documents will be prepared consistent with the specifications in the contract to purchase and, in the absence of such specifications, he will prepare the documents in a manner that will protect the interests of his client, Seller, and, therefore, Buyer may wish to obtain his own lawyer. *See, e.g.,* RPC 40 (disclosure must be far enough in advance of the closing that the buyer can procure his own counsel), RPC 210, 04 FEO 10, and Rule 4.3(a). Because of the strong potential for Buyer to be misled, the disclosure must be thorough and robust.

Inquiry #5:

Under the facts of Inquiry #4, if Attorney A limits his representation to Seller, but closes the transaction, does he have any duty to disclose or discuss any of the following with Buyer: defects of title; the difference between insurable title and marketable title; the exceptions contained in the title policy and the need for exception documents at closing; and the terms of the sales contract?

Opinion #5:

If Attorney A explicitly limits his representation to Seller, he cannot give any legal advice to Buyer except the advice to secure counsel. Rule 4.3(a). In light of the significant issues involved for Buyer, Attorney A should advise Buyer to obtain his own lawyer.

Inquiry #6:

Under the facts of Inquiry #4, Attorney A closes the transaction. The contract required the buyer to pay the closing agent's "customary closing fee," therefore, Buyer pays a fee to Attorney A as the title/closing agent. Subsequently, a defect of title caused by Seller is discovered. May Attorney A be held liable to Buyer for malpractice?

Opinion #6:

This is a legal question that is outside the purview of the Ethics Committee.

Inquiry #7:

Under the facts of Inquiry #1, the contract to buy the property signed by Buyer contains the following conditions: Seller will select the title and closing agent; Seller will pay the title examination fee and the premium for the owner's title insurance policy; Buyer will pay the title/closing agent's "customary closing fee"; and all closing transactions will be held at the title/closing agent's office. The contract specifies that the buyer is entitled to legal representation at the buyer's own expense. Seller names Attorney A as the "title/closing agent" for the sale to Buyer.

May Attorney A represent both Buyer and Seller on the closing of the transaction, including examining title and giving an opinion as to title to Buyer?

Inquiry #7:

No, *see* Opinion #2 above.

Inquiry # 8:

Under the facts of Inquiries #2, 3 and 4, Buyer asks Attorney Y to represent him on the closing of the purchase of the property. Buyer wants Attorney Y to examine the title to the property, give his opinion as to title, and act as Buyer's agent at the closing.

Attorney A insists that the contract requires Buyer to accept him as the closing agent for the transaction even if he only represents Seller. May Attorney A refuse to allow Attorney Y to participate in the closing as Buyer's lawyer?

Opinion #8:

No. Clients are entitled to legal counsel of their choice. *See, e.g.*, RPC 48. A lawyer may not participate in any scheme or contract that states or implies that a party to the transaction does not have the right to obtain independent legal counsel to represent his interests. Drafting such a provision for a client or agreeing to provide representation pursuant to such a provision is unethical because the provision will chill the buyer's right to independent legal counsel even if the enforceability of the provision is doubtful.

Attorney A may, by the terms of the purchase agreement, be the designated closing agent for the sale. However, if Buyer hires a lawyer to represent his interests by examining and giving him an opinion on title and participating in the closing on his behalf, the other lawyer may not interfere with this representation. *See, e.g.*, Rule 4.2. In addition, Attorney A must comply with the prohibition in Rule 4.2(a) on direct communications with a represented person without the consent of the lawyer for the represented person. Any funds that are delivered by Buyer to Attorney A are held by Attorney A in a fiduciary capacity for Buyer and must be disbursed in accordance with and upon fulfillment of the conditions of the contract. *See* Rule 1.15-2(a). If Buyer chooses to obtain his own lawyer, Attorney A may not interfere with Buyer's representation by his chosen lawyer or needlessly complicate the ability of that lawyer to represent Buyer. Both lawyers shall endeavor to insure that closing responsibilities are completed expeditiously and in compliance with RPC 191 and the Good Funds Settlement Act (if applicable). Specifically, both lawyers shall endeavor expeditiously to provide and review draft documents, to resolve title issues subject to the terms of the contract, to deliver the executed documents, to update title, and to disburse the closing funds.

Inquiry #9:

Under the facts of Inquiries #2, 3, and 4, Attorney A agrees that Attorney Y will represent Buyer's interests at the closing. However, Attorney A claims that he is still entitled to a fee from Buyer because the terms of the contract.

May the legal fee for Attorney A's representation of Seller be charged to Buyer?

Opinion #9:

Whether the contract to purchase the property requires Buyer to pay Attorney A's fee for representation of Seller is a legal question outside the purview of the Ethics Committee. However, a lawyer may be paid by a third party, including an opposing party, provided the lawyer complies with Rule 1.8(f) and the fee is not illegal or clearly excessive in violation of Rule 1.5(a). *See* RPC 196. Attorney A's time and labor relative to the closing may be reduced because of the legal services performed by Attorney Y on behalf of Buyer. If so, this fact should be taken into account in determining whether the "customary fee" for closing the transaction is excessive and an appropriate reduction in the fee should be made. Rule 1.5(a). Because Buyer is represented by Attorney Y, Attorney A may not charge or collect any money for representing Buyer.

Inquiry #10:

A real estate agent prepared the purchase contract. It alters the usual closing arrangements, waives many "normal" rights of a buyer, and favors the seller by allowing the seller to terminate the contract for any reason and return the deposit without further liability. Is the real estate agent engaged in the unauthorized practice of law when preparing the contract? Does it matter whether the real estate agent is a buyer's agent, a seller's agent, or a dual agent? Does it matter whether the seller and the buyer have different real estate agents? Is consumer protection legislation needed?

Opinion #10:

These questions do not relate to the professional responsibilities of lawyers and cannot be answered by the Ethics Committee.

2006 Formal Ethics Opinion 4

July 21, 2006

Participation in a Prepaid Legal Service Plan

Opinion rules that a lawyer may not participate in a prepaid legal services plan unless all the conditions for participation are met and participation does not otherwise result in a violation of the Rules of Professional Conduct.

Inquiry #1:

Estate Plans is a prepaid legal service plan registered with the North Carolina State Bar. In its solicitation letter, Estate Plans states that it provides various “plans of protection” from the most basic, consisting of a will, trust documents, power of attorney, health care power of attorney, and living will, to more comprehensive estate planning services. For a yearly fee, the solicitation letter claims clients would have access to “qualified local attorneys” who would draft these legal documents for about half the price the client would normally pay.

In addition, Estate Plans also claims to be "approved" by the State Bar.

May a lawyer participate in Estate Plans and provide legal services to persons covered under the plan?

Opinion #1:

No. A lawyer may only participate in a prepaid legal service plan if the plan meets the conditions of participation in Rule 7.3(d)(2). A prepaid legal services plan is "any arrangement by which a person, firm, or corporation, not 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." Rule 7.3(d)(1).

For a lawyer to ethically participate with a prepaid legal services plan, the following conditions must be satisfied:

(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.

Rule 7.3(d)(2).

Estate Plans has failed to meet at least one of the conditions for participation by a North Carolina lawyer. Although Estate Plans may represent that it is registered with the North Carolina State Bar, it may not state or imply that the State Bar has approved its plan. Rule 7.3(d)(2)(E). Under these circumstances, a lawyer must inform Estate Plans that it cannot participate in the plan unless its solicitation letter complies with Rule 7.3(d)(2)(E). Even if a prepaid services plan was at one time operating in compliance with the Rules of Professional Conduct, a lawyer participating in such a plan has an ongoing duty to determine that the plan continues to operate in accordance with the Rules.

Inquiry #2:

Estate Plans claims that its legal services plan can save clients money because the clients meet directly with its employees, who are qualified estate planning consultants, rather than a lawyer. It is unclear whether or to what extent the client has contact with the lawyer drafting the estate planning documents.

May a lawyer participate with Estate Plans under these circumstances?

Opinion #2:

Rule 5.4(c) states 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." The lawyer also has an obligation to provide competent representation and to communicate with the client to the extent necessary to do so. Rules 1.1 and 1.4.

The lawyer need not be present during communications with a prospective insured relative to participate in the plan. However, the lawyer must communicate with the insured client in order to fulfill the duties described above. If a third party decides what services the lawyer ultimately will provide to the client, then the lawyer has been deprived of the ability to exercise independent judgment to determine what services may be appropriate under the circumstances in violation of Rule 5.4(c). In addition, the lawyer needs to make sure he has received and has given enough information to the client so that he can provide competent representation. Certainly, there is no issue with a third party recording intake information; however, the lawyer must be able to engage in a dialogue with the client in order to elicit the information necessary to provide competent representation. *See* 2003 FEO 7.

Inquiry #3:

A lawyer believes the initial packet provided by Estate Plans to clients contains information that may be misleading.

May the lawyer participate with Estate Plans under these circumstances?

Opinion #3:

No. If a lawyer believes the information Estate Plans is providing to the client is misleading, then he should not participate in the plan.

2006 Formal Ethics Opinion 5

April 21, 2006

County Tax Attorney Purchasing Property at Tax Foreclosure Sale

Opinion rules that the county tax attorney may not bid at a tax foreclosure sale of real property.

Inquiry #1:

Attorney A is the tax attorney for the county. If the county's tax collector is unsuccessful in collecting taxes, the case is referred to Attorney A for legal action. Ordinarily, Attorney A sends a demand letter to the delinquent taxpayer. If the demand letter does not result in payment, Attorney A files a foreclosure action. If service of the lawsuit does not result in the payment of taxes, the presiding judge appoints Attorney A as the commissioner to foreclose upon the real property to satisfy the taxes due. Attorney A then follows all statutory procedures for a foreclosure action. The county always "bids in" the property for the amount of back taxes owed plus the costs that have accrued.

On at least one occasion, a property owner contacted Attorney A after receiving the demand letter and offered to sell her property directly to Attorney A to satisfy her tax liability. Attorney A agreed to purchase the property directly from the property owner. On another occasion, Attorney A instructed his paralegal to attend the public auction and submit a bid in excess of the amount bid by the county if no one else bid on the property. The paralegal submitted the only other bid and later transferred the real property to Attorney A for the amount bid at auction. May Attorney A, who is the appointed commissioner, submit a bid on her own account at a tax foreclosure sale she is conducting?

Opinion #1:

No. As the appointed commissioner, Attorney A has a duty to oversee the sale of the foreclosed property in a fair and impartial manner. Advancing a personal interest by bidding on the foreclosed property violates this duty. G.S. §105-374; *Hinson v. Morgan*, 225 N.C. 740, 36 S.E. 2d 266 (1945); Rule 8.4(d); *see also* RPC 24 and RPC 82.

Inquiry #2:

If Attorney A may not submit a bid, may she have an agent or employee bid on her behalf?

Opinion #2:

No. Attorney A must insure that the conduct of her employee is compatible with her own professional obligations. Rule 5.3(b)(c).

Inquiry #3:

May Attorney A agree to purchase property from a delinquent taxpayer who offers to sell her property to Attorney A prior to the initiation of a formal tax foreclosure proceeding?

Opinion #3:

No, Attorney A may not purchase property directly from a delinquent taxpayer unless she has a reasonable belief that her personal interest in the property will not adversely affect the representation of the county, the transaction is fair, and she has obtained the informed consent of the county, confirmed in writing. Rule 1.7 and Rule 1.8(b). The duty to disclose and obtain the consent of the county arises as soon as the lawyer decides to act in her own interest by offering to purchase the property in written or oral communications with the taxpayer.

If Attorney A obtains the consent of the county, she must also follow the disclosure requirements in Rule 4.3 when dealing with unrepresented taxpay-

ers. Specifically, she may not state or imply that she is disinterested and she must make reasonable efforts to correct any misunderstandings in this regard. She must also refrain from giving legal advice to unrepresented taxpayers other than the advice to secure counsel.

2006 Formal Ethics Opinion 6

April 21, 2006

Editor's Note: Amendments to Rule 7.3(c) were approved after this opinion was adopted. The amendments supersede this opinion. *See also* 2007 FEO 15.

Requirements for Extraneous Statements on Envelope of Solicitation Letter

Opinion rules that a lawyer may put extraneous statements on the envelope of a solicitation letter provided the statements do not mislead the recipient and the font used for the statements is smaller than the font used for the advertising disclaimer required by Rule 7.3(c).

Inquiry #1:

After one of his employees goes to the court house to copy recent accident reports from the public records, Attorney A sends targeted direct mail letters to the people involved in the automobile accidents. The purpose of the letters is to solicit professional employment. Attorney A complies with the requirements of Rule 7.3(c) by including the words "This is an advertisement for legal services" on the outside envelope and at the beginning of the body of the letter in print as large as Attorney A's firm name in the return address and letterhead. Attorney A would like to include a copy of the accident report with each letter and put the statement "Accident Report Enclosed" on the envelope.

May Attorney A put the statement "Accident Report Enclosed" on the envelope of a targeted direct mail letter?

Opinion #1:

Rule 4.1 requires a lawyer to be truthful in his statements to others. As noted in comment [1] to Rule 4.1, "[m]isrepresentations can …occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." Although Attorney A includes a copy of the accident report in each solicitation letter, the statement "Accident Report Enclosed" implies that the solicitation letter is an official communication and omits the fact that the enclosed document is a copy of the public record. As a result, a recipient may believe that the solicitation letter is an official communication and open it without reading or heeding the advertising disclosure. The statement appears designed to mislead the recipient about the importance and purpose of the correspondence.

If extraneous statements, such as this, are put on the envelope of a solicitation letter, the statements must provide enough information to avoid misleading the recipient. Therefore, Attorney A may state on the envelope of a targeted direct mail letter that a copy of the accident report is enclosed but only if the statement makes clear that (1) the report is a copy of a public record and (2) the solicitation letter itself is not an official communication of a government agency.

Inquiry #2:

What size font should be used for an extraneous statement on the envelope of a solicitation letter?

Opinion #2:

The purpose of the advertising disclaimer required by Rule 7.3(c) is to forewarn the recipient as to the nature of the communication. For this reason, the rule requires the disclaimer to be conspicuous by dictating that it must be in a font that is at least as large as the name of the lawyer or the firm name in the return address. However, if other statements on the envelope are in a font that is larger than the advertising disclaimer, the disclaimer will no longer be conspicuous. Therefore, to preserve the intent and purpose of Rule 7.3(c), the print used for the advertising disclaimer must be as large or larger than the print used for the name of the lawyer or the law firm in the return address and any other statement on the envelope.

2006 Formal Ethics Opinion 7

October 20, 2006

Participation in a For-Profit Networking Organization

Opinion rules that a lawyer may be a member of a for-profit networking organization provided the lawyer does not distribute business cards and is not required to make referrals to other members.

Inquiry #1:

Attorney wants to become a member of a for-profit referral and networking organization that has numerous chapters around the world. Each chapter consists of various professionals and business people who seek business referrals through networking with others. Only one person from any given profession or line of business can become a member in any particular chapter. The annual fee for a membership is approximately $295.00.

Each chapter holds weekly meetings. Members are required to attend these meetings (exceeding a maximum number of absences results in termination of membership), and they may bring guests. Among the activities at each meeting, each member gives a short presentation (which may be described as a 60-second "commercial") advertising his/her services to those present.

Members are encouraged to provide each other with business referrals, although no tangible compensation is provided for such referrals and there is no penalty for not providing referrals to other members. To keep track of referrals, a member is expected to fill out a "ticket" for each referral he/she provides to another member. The ticket is given to the member receiving the referral, and the referring member retains a copy.

The organization's website states in part:

> Belonging to [this organization] is like having dozens of sales people working for you...because all of them carry several copies of your business card around with them. When they meet someone who could use your products or services, they hand out your card and recommend you.* It's as simple as that! It's simple because it's based on a proven concept by [the organization's] founder…. If I give you business you'll give me business and we'll both benefit as a result.

(*) Note, some professions, specifically attorneys and certain health care professionals, may not be permitted to seek direct referrals through in-person solicitation through the use of business cards pursuant to their ethical code. Members of [the organization] that belong to these professions are directed to follow their profession's own ethical guidelines.

May Attorney become a participating member of this organization?

Opinion #1:

Yes, provided participation does not require Attorney to violate the Rules of Professional Conduct.

When advising a client to use the services of a third party, a lawyer must exercise independent professional judgment and give competent advice. Rule 1.7 and Rule 1.1. In addition, the lawyer may not give anything of value to a person for recommending the lawyer's services (with certain limited exceptions not relevant here), and may not engage in in-person solicitation of prospective clients either directly or by use of an agent. Rule 7.2(b) and Rule 7.3(a).

Therefore, a lawyer may participate in a networking organization, such as the one described in this inquiry, only if making referrals to other members of the organization is not a condition of membership and the lawyer is not required to fill out referral "tickets." If the lawyer refers a client to another member of the organization, he may only do so upon receiving the informed consent of the client, and after determining that the client would benefit from the referral, the other member's credentials are legitimate, and the other member is qualified to provide services to the client.

The lawyer is prohibited from making a referral to another member of the organization on a quid pro quo basis. The lawyer must emphasize to the other members of the organization that any referral to him should be based upon the member's independent analysis of his qualifications.

Any lawyer who participates in an organization of this nature is expected to act in good faith. If, in fact, reciprocal referrals are an explicit or implicit condition of membership in the organization, the lawyer may not participate.

Inquiry #2:

If Attorney may participate in the organization, may Attorney make pre-

sentations regarding his/her services to members and their guests at weekly meetings?

Opinion #2:

Yes.

Inquiry #3:

May Attorney provide his/her business cards to other members for distribution to third parties?

Opinion #3:

No, because of the risk of in-person solicitation by the other members on the lawyer's behalf.

Inquiry #4:

May Attorney ask other members to refer business to Attorney?

Opinion #4:

No. However, Attorney may provide the other members with information about his qualifications.

2006 Formal Ethics Opinion 8

July 21, 2006

Disbursement of Trust Funds

Opinion rules that a lawyer may disburse against deposited items in reliance upon a bank's funding schedule under certain circumstances.

Inquiry:

Attorney receives insurance company checks for payment of workers' compensation and personal injury settlements. Upon receipt, Attorney deposits these checks into her trust account. Because the insurance checks are not among the identified instruments in the Good Funds Settlement Act, G.S. §45A-4, she must wait until the funds have been "irrevocably credited" or collected before disbursing from the trust account to the client. RPC 191. Attorney has been unable to locate a bank that is willing to confirm when deposited funds have been collected.

Attorney has consulted with other lawyers in her locality with similar practices. Rather than call the bank to confirm that the funds have been collected, the lawyers routinely disburse against items deposited in the trust account, based upon prior dealings with the banks, in accordance with the following funding schedule: 3 business days for an in-state check and 7 business days for an out-of-state check. Attorney would like to follow this funding or "float" schedule for disbursements, as it appears to be the standard in her community.

May Attorney disburse funds from her trust account in reliance upon this schedule?

Opinion:

RPC 191 permits lawyers to disburse immediately from the trust account in reliance upon the deposit of funds provisionally credited to the account if the funds are in the form of cash, wired funds, or one of the enumerated instruments listed in the Good Funds Settlement Act. For all other instruments, a lawyer has an obligation to conduct reasonable due diligence to determine whether funds deposited into the trust account have been collected prior to disbursement.

Initially, a lawyer always should consult with her bank to determine when a particular instrument has been collected or funded. Before disbursing, a lawyer should also consider the source of the funds, i.e., whether the payor is reputable and whether the instrument is likely to be honored. If a lawyer receives confirmation by the bank that the funds deposited are collected, then the lawyer may rely upon this information and disburse against the funds. A lawyer reasonably may rely upon her bank's funding or "float" schedule or policy only when the lawyer is unable to confirm whether funds have been irrevocably credited to his account and he has no reason to believe a particular instrument will not be honored under the circumstances. In any case, if the lawyer subsequently learns that an instrument has been dishonored, the lawyer must act immediately to protect other trust account property by personally paying the amount of any failed deposit or arranging for payment from other sources. "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 an... item is dishonored." RPC 191.

Therefore, if Attorney is unable to confirm that a particular insurance check has been collected, she may reasonably rely upon and disburse in accordance with her bank's funding schedule as long as 1) she reasonably believes the trust account check will be honored, and 2) she is able to fund the check in the event it is ultimately dishonored.

2006 Formal Ethics Opinion 9

July 21, 2006

Pursuing Frivolous Claim at the Direction of GAL for Plaintiff

Opinion rules that if the lawyer concludes that pursuit of a lawsuit filed against a defendant is frivolous, but the GAL for the minor client insists on continuing the litigation, the lawyer must either move to withdraw from the representation or seek to have the GAL removed.

Inquiry #1:

Lawyer was hired by the mother of a minor (Minor) to file a personal injury action. The mother (GAL) is the appointed guardian ad litem for Minor. Minor was a passenger in a car driven by his maternal grandmother (Grandmother) when he was severely injured as a result of a collision between a truck and Grandmother's car. Based upon the limited information that was initially available, Lawyer brought an action against the driver of the truck but not against Grandmother. Subsequent scientific investigation by Lawyer's expert has led the expert to conclude that Grandmother was negligent and the truck driver was not negligent. Grandmother has substantial assets.

Lawyer and GAL disagree about the conduct of the litigation. Based upon the expert's analysis, Lawyer believes that the action against the truck driver is not warranted by the facts and should be dismissed. He also believes that the interests of Minor can only be protected if a personal injury lawsuit is initiated against Grandmother. GAL does not want a lawsuit filed against her mother.

Does Lawyer owe a duty of confidentiality to GAL?

Opinion #1:

Yes, in her representative capacity as GAL for Minor.

Minor and GAL, in her representative capacity, are both clients of Lawyer. 2002 FEO 8 provides:

> Rule 17(a) and (b) of the North Carolina Rules of Civil Procedure require an action to be brought by the "real party in interest" and, in the case of a minor, by a general guardian or, if there is none, by an appointed guardian ad litem. As a party, the guardian ad litem may choose to be represented by legal counsel and permit legal counsel to make decisions about the strategy for the litigation. *See* Rule of Professional Conduct 1.2, cmt. [1] ("In questions of means, the lawyer should assume responsibility for technical and legal tactical issues....").

Therefore, Lawyer's primary duty is to represent the interests of Minor, who is the real party in interest. *See* RPC 163.

Lawyer owes the duty of confidentiality to Minor and to GAL acting in her official capacity. *See e.g.*, RPC 195. To the extent GAL acts outside of her official capacity as the legal representative for Minor, the information learned by Lawyer may be disclosed, even over the objections of GAL, if necessary to represent Minor.

Inquiry #2:

If GAL insists that Lawyer continue to prosecute the lawsuit against the truck driver, what should Lawyer do?

Opinion #2:

Rule 3.1 states in pertinent part,

> [a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law...

If, based upon his expert's analysis, Lawyer believes that Minor does not have a claim against the truck driver and the litigation against the truck driver is, therefore, frivolous, Lawyer must file a motion to withdraw. *See* Rule 1.16(b)(8). As an alternative to withdrawal, if Lawyer believes GAL is failing to fulfill her fiduciary duties, Lawyer may seek to have GAL removed and replaced by an independent guardian ad litem who can evaluate the action against the truck driver and the claim against Grandmother objectively and

make an unbiased decision about the conduct of the litigation. *See e.g.*, Rule 1.14(b); *see also* RPC 163 and 2002 FEO 8.

Inquiry #3:

What communication should Lawyer have with his clients prior to filing a motion to withdraw?

Opinion #3:

Prior to filing a motion to withdraw, Lawyer must inform GAL and Minor of the status of the case, explain the reason he is moving to withdraw, and provide appropriate legal advice. Rule 1.2 and Rule 1.4.

Inquiry #4:

What information may Lawyer disclose about the dispute with GAL in either a motion to withdraw or a motion to remove GAL?

Opinion #4:

Lawyer may only disclose confidential client information if he is allowed to do so by Rules of Professional Conduct. Rule 1.6(b)(1) permits disclosure of confidential information to comply with the Rules, the law, or a court order. (The other exceptions to the duty of confidentiality that are found in Rule 1.6 are not relevant.) Lawyer's motion to withdraw may, therefore, disclose only that Lawyer believes that his withdrawal is required by Rule 1.16(a)(1) (representation will result in violation of the Rules of Professional Conduct), Rule 1.16(b)(2) (client insists on action that is contrary to the advice and judgment of the lawyer), and/or Rule 1.16(b)(8) (client insists upon presenting a claim or defense that is not warranted under existing law). To further protect the confidences of Minor, Lawyer may ask that the court consider the motion *in camera*.

A motion to remove and replace GAL should, similarly, avoid the disclosure of confidential information unless the disclosure is allowed by law or court order, or disclosure is impliedly authorized to carry out the representation. Rule 1.6(a). For example, Lawyer may disclose information about GAL relative to actions that violate her fiduciary duties to Minor.

Inquiry #5:

GAL is also named in her individual capacity as a plaintiff in the lawsuit against Grandmother in order to pursue her personal claim for reimbursement of medical expenditures made on behalf of Minor. Lawyer also represents her in this capacity. Does the dual representation of GAL in her personal and official capacities alter the responses set forth above?

Opinion #5:

Yes. Lawyer may not file a motion to remove GAL while GAL is represented by Lawyer in her personal capacity because this action would be directly adverse to GAL. Rule 1.7(a). Even if Lawyer withdraws from the representation of GAL in her personal capacity only (and continues to represent Minor and GAL in her official capacity as representative for Minor), Lawyer may not file a motion to remove and replace GAL because Rule 1.9(a) prohibits a lawyer from representing a person whose interests are materially adverse to those of former client in the same or a substantially related matter. Therefore, the only course of action available to Lawyer is to move to withdraw from the representation of all of the plaintiffs if he believes that the action against the truck driver is frivolous.

2006 Formal Ethics Opinion 10

July 21, 2006

Safeguarding Confidential Health Information of Clients and Third Parties

Opinion rules that a lawyer must use reasonable care under the circumstances to protect from disclosure a client's confidential health information and is encouraged, but not required, to use similar care with regard to health information of third parties.

Inquiry #1:

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) required the US Department of Health and Human Services to establish a set of national standards for the protection of certain health information including identifiable medical records of individual patients. Pursuant to this mandate, the US Department of Health issued Standards for Privacy of Individually Identifiable Health Information (the Privacy Rule) which establishes national standards for the protection of protected health information. The Privacy Rule applies to health plans, health care clearinghouses, and to any health care provider who transmits health information in electronic form in connection with certain specified transactions.[1]

Lawyers frequently obtain medical records and health information of both clients and opposing parties in conjunction with the prosecution or defense of medical malpractice and personal injury cases and other representations involving questions of injury or disability. It does not appear that lawyers or law firms are covered by the Privacy Rule.[2] However, in light of the public policy favoring the protection of sensitive medical information that is manifested by the Privacy Rule, what actions should a lawyer take to safeguard the health information of a client from disclosure to unauthorized persons?

Opinion #1:

The duty of confidentiality set forth in Rule 1.6 of the Rules of Professional Conduct prohibits a lawyer from revealing information acquired during the professional relationship unless the client gives informed consent, the disclosure is impliedly authorized to carry out the purpose of the representation, or the disclosure is otherwise permitted by the Rules. Comment [3] to Rule 1.6 observes that the confidentiality rule applies "not only to matters communicated in confidence by the client, but also to all information acquired during the representation." Therefore, health information obtained during the representation of a client is clearly covered by the duty of confidentiality.

Neither Rule 1.6 nor the comment to the rule provide guidance on the standard of care that a lawyer must use in fulfilling the duty of confidentiality. However, in the absence of a specific mandate, a lawyer is generally expected to use reasonable care in fulfilling his or her duties under the Rules. *See* Rule 0.2, Scope ("The Rules of Professional Conduct are rules of reason."). For example, RPC 133 states that a law firm is not required to shred waste paper that includes confidential client information and may recycle the waste paper provided the lawyer determines 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….[and] custodial personnel…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.

Similarly, RPC 215 provides that a lawyer may communicate confidential client information over a cellular or cordless telephone, despite the risk of interception, because the duty of confidentiality "does not require that a lawyer use only infallibly secure methods of communication." Instead, 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." *Id.; accord* RPC 133 (some client information may be so sensitive that the duty can only be satisfied by shredding waste paper). Thus, the standard of care for safeguarding client confidential information is reasonable care as dictated by the circumstances.

In determining the degree of protection and care with which a client's health information is handled, the public policy of providing substantial protection for the privacy of such information which is expressed in the Privacy Rule should inform the actions of lawyers and law firms, particularly with regard to the disposal of such records.

Inquiry #2:

Lawyers may receive the health information of an opposing party or other third party in conjunction with the representation of a client. What duty does a lawyer have to protect the privacy of the health information of a third party?

Opinion #2:

Any information acquired during the course of a representation, including information of third parties, is confidential and may only be disclosed as authorized by Rule 1.6. Nevertheless, even if disclosure is permitted under the Rules, lawyers are encouraged to respect the privacy of third parties and to handle and dispose of health information of third parties with the same care that would be used with regard to the health information of a client.

It goes without saying that if a lawyer determines that health information in his or her possession is subject to the requirements of the Privacy Rule, the lawyer must follow the mandates of the rule with regard to the retention, trans-

mission, or disposal of the health information.

Endnotes

1. *Summary of the HIPAA Privacy Rule*, OCR Privacy Brief, US Department of Health and Human Services, Office for Civil Rights. http://www.hhs.gov/ocr/privacysummary.pdf
2. *Id.*

2006 Formal Ethics Opinion 11

July 21, 2006

Preparation of Legal Documents at the Request of Another

Opinion rules that, outside of the commercial or business context, a lawyer may not, at the request of a third party, prepare documents, such as a will or trust instrument, that purport to speak solely for principal without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

Inquiry:

This inquiry seeks a clarification of the scope of 2003 Formal Ethics Opinion 7 which provides that a lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal. The opinion responds to an inquiry involving the preparation of a power of attorney, the conduct of the attorney-in-fact, and the appropriate actions of the lawyer who is asked to prepare the power of attorney. The opinion provides as follows:

> When a lawyer is engaged by a person to render legal services to another person, the lawyer may not allow the third party to direct or regulate the lawyer's professional judgment in rendering such legal services. Rule 5.4(c). Similarly, Rule 1.8(f) provides that when a lawyer's services are being paid for by someone other than the client, the lawyer may not accept the compensation unless the client gives informed consent, there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and confidential information relating to the representation of the client is protected….
>
> The situation described in this inquiry is distinguishable from a commercial or business transaction in which the lawyer is engaged by one person to prepare a power of attorney for execution by another person. Frequently, the power of attorney names the person requesting the legal services as the attorney-in-fact. If the document is being prepared to facilitate a specific task for the benefit of this person, such as the transfer of stock or real estate, the lawyer represents the person requesting the legal services and does not represent the signatory on the power of attorney. Thus, the purpose and goals of the engagement determine the identity of the client, not the signatory on the document prepared by the lawyer.
>
> A lawyer may be asked by a client to prepare a document for the signature of a third party under circumstances that give rise to a reasonable belief that the client may be using the lawyer's services for an improper purpose such as actual or constructive fraud or the exertion of undue influence. If so, the lawyer may not assist the client and must decline or withdraw from the representation. Rule 1.2(d) and Rule 1.16(a)(1).

Does 2003 FEO 7 apply only to the preparation of a power of attorney upon the request of the prospective attorney-in-fact or does it apply broadly to the preparation of other legal documents that purport to speak solely for the principal (such as a will, an advance directive, or a trust instrument) upon the request of another person?

Opinion:

2003 Formal Ethics Opinion 7 applies to the preparation of all such legal documents for the principal upon the request of another. (A notable exception is the preparation of documents in a business or commercial context as described in the quotation from 2003 FEO 7 above.) A lawyer should not undertake the representation of a client or the preparation of a legal document on behalf of that client without having consulted with the client to obtain his informed consent to the representation and to determine whether he needs or wants the legal services requested. Further, the lawyer must exercise his independent professional judgment, and advise the client accordingly, with respect to the advisability of and the scope of the requested legal services.

2006 Formal Ethics Opinion 12

October 20, 2006

Obtaining a Loan to Fund Litigation Costs

Opinion explores the circumstances under which a lawyer may obtain litigation funding from a financing company.

Inquiry #1:

ABC Litigation Funding (hereinafter "ABC") is a company that offers non-recourse loans to personal injury lawyers who need to borrow funds for expenses advanced in contingency cases. Lawyer is interested in obtaining financing for a large personal injury case for which he has already advanced some of the expenses. Lawyer will be unable to complete the matter unless he receives help with the costs.

Can a lawyer enter into a contract with a litigation funding company to finance the costs and expenses of a contingency fee case?

Opinion #1:

Yes, provided that the litigation funding company's practices are lawful and the lawyer otherwise complies with the Rules of Professional Conduct. Rule 1.8(e) specifically permits lawyers to advance the costs and expenses of litigation to clients. Before there were litigation funding companies, lawyers borrowed money from banks or drew from a line of credit to assist with costs associated with litigation. Such practices do not violate the fee sharing restrictions in the Rules because the lawyer could repay the loan with funds from any source and the amount to be repaid was unrelated to the lawyer's contingency fee in any given matter.

Financing arrangements that do not require that repayment be a percentage of the lawyer's fee in a given case or restrict repayment from a specific source of funds should be treated no differently than bank loans or lines of credit.

Inquiry #2:

Suppose that ABC's non-recourse loan is contingent upon Lawyer's willingness to give ABC a lien on the recovery in one or more of his pending personal injury cases.

May Lawyer obtain financing from ABC under these circumstances?

Opinion #2:

No. Lawyer may never put a client's funds at risk to obtain a loan. Lawyer, however, may put up his own assets, including his contingent fee in the case, as collateral to secure a loan.

Inquiry #3:

Suppose Lawyer puts up law firm assets as collateral for the loan from ABC. ABC now requires Lawyer to provide it with information about the nature and value of his clients' cases so that it can determine the amount to be loaned. ABC agrees not to be involved in any of Lawyer's cases and Lawyer has assumed that he will retain complete control of the matters.

May Lawyer contract with ABC under these circumstances?

Opinion #3:

Lawyer owes a duty of confidentiality to every client, and may not disclose information learned in the course of the representation without informed consent from the client. Rule 1.6. The nature and value of a case is certainly client confidential information, and Lawyer may not supply ABC with any confidential information without first seeking the client's informed consent. Consent will be informed only if Lawyer has had a full and frank discussion with the client concerning the advantages and risks of disclosure, including the risk that disclosure may result in a waiver of the attorney-client privilege.

Inquiry #4:

Assume ABC's financing agreement requires the lawyer to repay the amount borrowed plus a fee equivalent to 100% of the amount of funding ABC provided. So, for every dollar the lawyer borrows, he will have to repay two dollars if the case is successfully tried. If the lawyer is unsuccessful and there is no recovery, he will owe nothing to ABC Financial. ABC suggests that Lawyer can pass along the 100% financing charge to the client as an expense of litigation.

May Lawyer pass along the expense of obtaining litigation financing to the client?

Opinion #4:

Lawyer may pass along the expense of obtaining litigation financing to the client only if 1) the lawyer obtains informed consent, in a writing signed by the client, before Lawyer enters into the agreement with ABC, 2) the financing expense is not clearly excessive under the circumstances, and 3) the funds borrowed will be used only to pay expenses incurred on behalf of the client. Rule 1.5(a) and (c).

For consent to be fully informed, the fee agreement must evidence that the client understands and agrees that the lawyer will borrow funds to pay for litigation expenses incurred in the client's case, that the client will be responsible for the repayment of the interest or fee charged in the event the case is successfully tried (as defined by the financing company), and that the client agrees to the amount and terms of repayment. Disclosures about the terms of repayment must explain the client's responsibility in the event the ultimate recovery is substantially less than the damages sought or the client terminates the lawyer's services prior to completion of the matter. Furthermore, prior to asking the client to sign the fee agreement, a lawyer must discuss other financing arrangements, their availability, and the risks and advantages of each. *See* Rule 1.0(f).

2006 Formal Ethics Opinion 13

October 20, 2006

Nonlawyer Signing a Lawyer's Name to a Pleading

Opinion rules that if warranted by exigent circumstances, a lawyer may allow a paralegal to sign his name to court documents so long as it does not violate any law and the lawyer provides the appropriate level of supervision.

Inquiry:

Paralegal works in Law Firm. Supervising Attorney A would like Paralegal to sign Attorney A's name to pleadings in the event Attorney A is unavailable to do so. Paralegal would put her initials after the lawyer's signature so it is clear she is signing on the lawyer's behalf. Assume for purposes of this inquiry that Attorney A has either drafted the pleading herself or has closely supervised the form and substance of the pleading drafted by Paralegal.

May Attorney A delegate the signing of the pleadings to nonlawyer staff under these circumstances?

Opinion:

As a general matter, a lawyer should always sign court documents and pleadings and should only delegate the signing of her name to a nonlawyer when the lawyer is unavailable and no other lawyer in the firm is able to do so. Nonetheless, if exigent circumstances require the signing of a pleading in the lawyer's absence, a lawyer may delegate this task to a paralegal or other nonlawyer staff only if 1) the signing of a lawyer's signature by an agent of the lawyer does not violate any law, court order, local rule, or rule of civil procedure, 2) the responsible lawyer has provided the appropriate level of supervision under the circumstances, and 3) the signature clearly discloses that another has signed on the lawyer's behalf.[1] The following two rules are relevant to a lawyer's responsibilities under the circumstances.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

. . .

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

Rule 5.5 Unauthorized Practice of Law

(d) A lawyer shall not assist another in the unauthorized practice of law.

Before permitting a paralegal or other nonlawyer staff member to sign the lawyer's name to any court document, the lawyer must carefully review pertinent case law, local rules, or rules of civil procedure to determine whether such delegation is permissible and therefore, compatible with the lawyer's professional obligations. Rule 5.3 (see above). If, for example, a pleading signed by the paralegal on the lawyer's behalf would be legally insufficient, then the lawyer cannot condone this practice. Nothing herein is intended to opine as to the legal sufficiency of a pleading signed on behalf of a lawyer.

In addition, the lawyer must exercise the appropriate level of supervision to avoid aiding in the unauthorized practice of law. Rule 5.5(d). The preparation of a pleading is the practice of law. G.S. § 84-2.1 (2004). Nevertheless, a paralegal may prepare such a document under the close supervision of a lawyer. A lawyer must carefully and thoroughly review both the substance and form of a pleading prepared by a paralegal before filing the document with the court. Likewise, a lawyer may not permit her paralegal to sign the lawyer's name to a pleading, even in exigent circumstances, if the lawyer has not afforded the appropriate level of review and supervision.

Finally, the signature must evidence, on its face, that it is by another's hand to avoid misleading the court.

Endnote

1. A paralegal or paraprofessional may never sign and file court documents in her own name. To do so violates the statutes prohibiting the unauthorized practice of law.

2006 Formal Ethics Opinion 14

April 20, 2007

Payment of Fee for Consultation

Opinion rules that when a lawyer charges a fee for a consultation, and the lawyer accepts payment, there is a client-lawyer relationship for the purposes of the Rules of Professional Conduct.

Inquiry:

John Doe consulted Attorney A about a property line dispute with Mr. Doe's neighbor. At the request of Attorney A, Mr. Doe paid Attorney A a consultation fee of $100, which was accepted by Attorney A. Thereafter, Mr. Doe hired another lawyer to represent him in the property dispute.

Attorney A contends that Mr. Doe was a "prospective client," as that term is defined and addressed in Rule 1.18, *Duties to Prospective Client*, and that he owes Mr. Doe only the protections afforded a prospective client. Is Attorney A correct?

Opinion:

No. A client-lawyer relationship may be formed in an initial consultation although no legal fee is paid. However, a client-lawyer relationship is unequivocally established, for the purposes of the Rules of Professional Conduct, when a lawyer charges a fee for a service, regardless of how limited, and the fee is paid. The duties of loyalty and confidentiality exist with respect to the matter discussed. Rule 1.7. If the client does not retain the lawyer for further assistance, the client becomes a former client.

Ordinarily, a person who discusses the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client. A prospective client receives some, but not all, of the protections afforded clients and former clients. Rule 1.18. However, when a lawyer charges a fee that the heretofore prospective client pays, in exchange for the lawyer's time and/or advice, a client-lawyer relationship exists with respect to the provision of that service. If the representation proceeds no further—for example, the client does not retain the lawyer for additional assistance—the client becomes a former client. Rule 1.9.

2006 Formal Ethics Opinion 15

January 19, 2007

Dormancy Fee on Unclaimed Funds

Opinion rules that a lawyer may charge a reasonable dormancy fee against unclaimed funds if the client agrees in advance and the fee meets other statutory requirements.

Inquiry:

Rule 1.15-2(q) requires a lawyer to make due inquiry into the identity and location of the owner of unclaimed funds in his trust account. If this effort is unsuccessful and the provisions of G.S. 116B-53 are satisfied, the property shall be deemed abandoned. The lawyer must then follow the provisions of G.S. 116B for the escheat of abandoned property. Pursuant to G.S. 116B-57(a), the holder of abandoned or unclaimed funds may charge a reasonable "dormancy" fee, thereby reducing the amount of funds transferred to the State Treasurer's Office, so long as the holder has made a good faith effort to locate the owners of the funds, there is a valid and enforceable written contract which

imposes the charge, and the charge is applied on a regular basis.

Attorney A would like to start charging a dormancy fee for abandoned funds to cover some of the costs and time associated with reasonable efforts to locate the client. Attorney A proposes including the following language in all his fee contracts:

> A reasonable dormancy fee shall be charged against any remaining funds in the client's trust account which are not claimed after notice to the client and/or issuance of a refund check six months from the date of the finalization of client's case. The charge shall be based on time and effort spent making reasonable efforts to contact client and return funds. Said charges shall not exceed $200.00 per year.
>
> May Attorney A charge a dormancy fee as set forth in his fee contract?

Opinion:

Attorney A may charge a dormancy fee against unclaimed funds so long as (1) the client receives prior notice of and gives written consent to the dormancy fee, (2) the amount of the fee is appropriate under Rule 1.5(a) of the Rules of Professional Conduct, and (3) the fee complies with the statutory requirements of G.S. 116B-57(a) and any other restrictions imposed by the Unclaimed Property Program of the State Treasurer's Office.

2006 Formal Ethics Opinion 16

January 19, 2007

Distribution of Disputed Legal Fees

Opinion rules that under certain circumstances a lawyer may consider a dispute with a client over legal fees resolved and transfer funds from the trust account to his operating account to pay those fees.

Inquiry #1:

Attorney represents Client in a personal injury matter. Client signs a written fee agreement and agrees to pay Attorney 30% of any recovery made in his case. After negotiations with the insurance carrier, Attorney settles Client's case. Attorney receives the settlement check and release and places the funds in his trust account. Client signs the release but disputes the 30% contingent fee. Pursuant to Rule 1.15-2(g), Attorney holds the disputed fees in his trust account and disburses the remainder appropriately. Attorney then gives Client notice of the State Bar's Fee Dispute Resolution Program as required under Rule 1.5(f). Client elects to participate in the process by filing a petition. After Attorney provides a response to the petition and the State Bar staff reviews the file, it is determined that Client's dispute is not meritorious and the staff issues a dismissal letter.

Notwithstanding the dismissal, Client continues to object to the payment of the fee. Because fee dispute resolution is nonbinding, Attorney continues to hold the funds in his trust account. Attorney would like to transfer the funds from the trust account to his operating account.

When may Attorney consider the dispute resolved and transfer the funds without Client's consent?

Opinion #1:

A lawyer is required to hold disputed legal fees in his trust account until the dispute is resolved. Rule 1.15-2(g) and Rule 1.15, comment [13]. Therefore, a client who continues to dispute a legal fee but takes no action to recover the funds, in effect, forces the lawyer to hold the disputed funds in trust indefinitely. To avoid this anomalous result, the lawyer may transfer the funds from the trust account to his operating account after the dismissal of a petition by the State Bar's Fee Dispute Resolution Program, but only if he has given the client reasonable notice that the funds will be transferred to the operating account if no legal action is taken by a certain date. Providing 30 days notice for the client to take legal action to recover the funds should be a reasonable amount of time. If, within that time frame, the client files a lawsuit to recover the funds, the lawyer must continue to hold them in trust.

Inquiry #2:

Assume the same facts as in Inquiry #1, except that Attorney indicates, in his response to the fee petition, a willingness to reduce his fee to try to resolve the controversy. Attorney and Client agree to have their dispute mediated by the State Bar's Fee Dispute Resolution Program, but they reach an impasse during the mediation process. The State Bar staff sends a letter to Client and Attorney notifying them that the file has been closed due to an impasse.

If Client continues to dispute the fee but takes no legal action, may Attorney transfer the disputed funds from the trust account to his operating account?

Opinion #2:

Yes, so long as Attorney has given adequate notice to Client of his intent to transfer the funds as set forth in Opinion #1, and Client does not file a lawsuit to recover the funds within the notice period.

Inquiry #3:

Assume Client notifies Attorney that he disputes his 30% contingent fee, but fails to file a fee dispute petition or to initiate legal action to recover the disputed funds.

When may Attorney consider the dispute resolved and transfer trust funds to the operating account to pay his fee?

Opinion #3:

In the absence of oversight from the Fee Dispute Resolution program, a lawyer may transfer disputed funds in his trust account only if (1) he has given the client 30-days written notice of the fee dispute program required under Rule 1.5(f); (2) the client fails to elect fee dispute resolution; (3) the funds held in the trust account are for services rendered and are not clearly excessive; and (4) after the 30 days has expired with no fee petition filed by the client, the lawyer gives the client a second written notice, as required in Opinion #1, that the funds will be transferred to the operating account unless the client initiates legal action within 30 days. If, at any point during the 30 days, the client elects to participate in the fee dispute program or initiates legal action to recover the funds, the lawyer must hold the funds in trust pending resolution of the dispute.

2006 Formal Ethics Opinion 17

January 19, 2007

Editor's Note: ***G.S. § 75-104 may render this opinion moot.***

Autodialed Recorded Message to Potential Clients

Opinion rules that a lawyer may advertise by autodialing potential clients and playing a recorded telephone message with information about a legal issue or the lawyer's legal services provided the message does not include a mechanism to connect the recipient directly to the lawyer or an agent of the lawyer.

Inquiry:

Attorney would like to solicit professional employment by use of a recorded telephone message. He intends to obtain telephone numbers from the census bureau's database of persons who are not on the "do not call" list for commercial solicitations by telephone. Attorney's law firm (or a service hired by the firm) will autodial the people on the list. When a person answers the phone, he will hear the following recorded message:

> This is an announcement of the Tax, Estate & Elder Planning Center, a North Carolina law firm. Have you or your loved ones experienced the overwhelming cost of nursing home, assisted living, or in home care? The Tax, Estate & Elder Planning Center would like for you to know more about government programs that may help cover these costs while protecting your savings. If you would like to know more about these programs press one now.

If the recipient presses the number one on the key pad of his phone, he will hear a short pre-recorded informational message on programs such as Medicaid, Special Assistance, and veterans' benefits. Whether the recipient opts to listen to the message or not, he will hear the following recorded message at the end of the phone call:

> If you are interested in knowing more about how to qualify for these programs, then press two to be connected with a representative of the Tax, Estate & Elder Planning Center Law Firm. Thank you for taking time to listen to this announcement.

If the recipient of the phone call follows the prompts, he will be connected with a person at Attorney's law firm.

Does this comply with the Rules of Professional Conduct?

Opinion:

Rule 7.2(a) permits a lawyer to advertise services through "written, recorded, or electronic communications" subject to the requirements of Rule 7.1 and Rule 7.3. Rule 7.1 requires all communications about a lawyer and the lawyer's services to be truthful and not misleading. Rule 7.3 limits direct contact with potential clients for the purpose of soliciting business. Rule 7.3(a) provides that "A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a potential client when a significant motive of the lawyer's doing so is the lawyer's pecuniary gain…." The comment explains the prohibition as follows:

> [1] There is a potential for abuse inherent in direct in-person, live telephone, or real-time electronic 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 fully to 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, live telephone, or real-time electronic solicitation of potential 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 potential client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the potential client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

The rule and the comment distinguish a prohibited live telephone call from a lawyer in which "the layperson [is subject] to the private importuning of the trained advocate in a direct interpersonal encounter" from "recorded communications which may be…autodialed...without subjecting the potential client to direct in-person, telephone, or real-time electronic persuasion that may overwhelm the client's judgment."

Although it appears that recorded telephone advertising messages are permitted by the Rules of Professional Conduct, Rule 7.3(a) and the comment to the rule do not contemplate that a recorded message will lead to an interpersonal encounter with a lawyer (or the lawyer's agent) at the push of a button on the telephone key pad. To avoid the risks of undue influence, intimidation and, over-reaching, a potential client must be given an opportunity to contemplate the information about legal services received in a recorded telephone solicitation. This cannot occur if a brief, unexpected, and unsolicited telephone call leads to an in-person encounter with a lawyer, even if the recipient of the phone call must choose to push a number to be connected with the lawyer.

Therefore, Attorney may autodial potential clients and play a recorded message provided the message is truthful and not misleading. He may not, however, include a means for the recipient of the call to be immediately connected with a lawyer (or an agent of the lawyer). Instead, the message may provide a telephone number or other contact information for the lawyer or the lawyer's firm so that the potential client may subsequently call the lawyer or law firm after contemplating the information received from the recorded message. Comment [3] to Rule 7.3 supports this "clean" and "free" flow of information to potential clients:

> The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to potential client, rather than direct in-person, live telephone, or real-time electronic 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 can be 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, live telephone, or real-time electronic conversations between a lawyer and a potential client can be disputed and may not be 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.

2006 Formal Ethics Opinion 18

January 19, 2007

Surrender of Deposition Transcript

Opinion rules that, when representation is terminated by a client, a lawyer who advances the cost of a deposition and transcript may not condition release of the transcript to the client upon reimbursement of the cost.

Inquiry #1:

Attorney A represented Client in an action alleging that Client was beaten by guards at the county jail. Attorney A advanced over $2,000 for the cost of a deposition and the deposition transcript. Client discharged Attorney A and hired Attorney B to prosecute his claim. Attorney B requested the file, including the deposition transcript, from Attorney A. Attorney A refused to release the transcript unless he was paid for the cost of the deposition and the transcript.

May Attorney A condition release of the deposition transcript on reimbursement for the amount advanced for the deposition and the transcript?

Opinion #1:

No. Rule 1.16(d) requires a lawyer "[u]pon termination of representation…[to] take steps to the extent reasonably practicable to protect a client's interests, such as…surrendering papers and property to which the client is entitled..." RPC 79 is also on point. The opinion provides that a lawyer who advanced the cost of obtaining medical records to decide whether to take a case may not condition the release of the records to the client upon reimbursement for the cost. The following excerpt includes the operative provisions of the 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 [now Rule 1.16[1]] 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."…. 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.

Rule 1.16(d) does permit a lawyer to retain papers relating to the client "to the extent permitted by other law." However, the Ethics Committee is aware of no North Carolina statutory or case law that entitles a discharged lawyer to a general or retaining lien on the papers or other property received by the lawyer during the client's representation. Even in jurisdictions where retaining liens are permitted by law, the regulatory bars "generally have held that a lawyer's legal right to execute a lien granted by law to secure a fee or expense is subordinate to ethical obligations owed to the client." *Annotated Model Rules of Professional Conduct*, Fifth Ed., p. 275 (2003); *see also, Restatement of the Law Governing Lawyers*, §43 Comment b. ("A lawyer ordinarily may not retain a client's property or documents against the client's wishes."); Rule 1.16, cmt. [10]("The lawyer may never retain papers to secure a fee.").

Inquiry #2:

Attorney A would like to include the following provision in his legal services agreement:

> Except in the case of misconduct, client agrees not to settle, compromise, or litigate said claim, or to retain any other attorney to handle said claim, without first paying attorney the costs and expenses and fees above specified.

May Attorney A include this provision in his legal services agreement?

Opinion #2:

No, this provision is contrary to two key precepts of the Rules of Professional Conduct: the client's right to legal counsel of choice and the client's right to decide the objectives of his representation. A client has a right to discharge a lawyer at any time, with or without cause. Rule 1.16, cmt. [4]. Similarly, a client has an absolute right, at any time, to decide whether to settle, compromise, or litigate his claim. Rule 1.2(a). This provision is a violation of the Rules on its face and may not be included in a legal services agreement.

Endnote

1. Rule 1.16 replaced Rule 2.8 when the Rules of Professional Conduct were revised in 1997. Rule 1.16(d) is essentially identical to the paragraph in Rule 2.8 that it replaced.

2006 Formal Ethics Opinion 19

January 19, 2007

Communication by Guardian ad Litem with Represented Person

Opinion rules that the prohibition against communications with represented persons does not apply to a lawyer acting solely as a guardian ad litem.

Inquiry #1:

G.S. Section 7B-601 of the Juvenile Code provides for the appointment of a guardian ad litem (GAL) for every child alleged to be abused or neglected. The section 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 section also provides that the GAL and the attorney advocate have standing to represent the juvenile in all actions under the subject chapter.

Some of the duties of the GAL, as defined in G.S. 7B-601, include: investigating the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; facilitating, when appropriate, the settlement of disputed issues; exploring options with the judge at the dispositional hearing; and protecting and promoting the best interests of the juvenile.

It is alleged that Child A was sexually abused by her father. Attorney X and Guardian Ad Litem Y were appointed to represent Child A in the juvenile petition. Guardian Ad Litem Y is not an attorney. She is interested in interviewing the mother of Child A. The mother is represented in this matter by another attorney. Must Guardian Ad Litem Y obtain the approval of the mother's attorney before communicating with the mother?

Opinion #1:

No. Rule 4.2 only prohibits communications with a represented person "[d]uring [the lawyer's] representation of a client." This prohibition does not apply to Guardian Ad Litem Y because it does not apply to nonlawyers.

Inquiry #2:

Would Opinion #1 be different if Guardian Ad Litem Y is an attorney but is performing the role of guardian ad litem solely and is not performing the role of the attorney advocate?

Opinion #2:

No. Guardian Ad Litem Y may communicate with the mother without obtaining the consent of the mother's attorney. If Guardian Ad Litem Y is not acting as the attorney advocate but is only serving as the appointed special guardian "at law" of the child, she is not subject to the prohibition in Rule 4.2 because she is not acting in the course of her representation of a client. *See* Opinion #1.

Inquiry #3:

Would Opinion #1 change if the person with whom Guardian Ad Litem Y wanted to speak also had an appointed GAL?

Opinion #3:

No.

2006 Formal Ethics Opinion 20

July 13, 2007

Use of Departed Lawyer's Surname in Firm Name

Opinion rules that a law firm may not continue to use a former member's surname in the law firm name if the member continues the practice of law with another firm.

Inquiry #1:

Attorney John Doe is the sole shareholder of a professional corporation (PC) engaged in the practice of law. The PC goes by the name of The John Doe Law Firm. Attorney Doe has invested millions of dollars in the PC's marketing materials that contain his surname and likeness. He also uses trademarked slogans that incorporate his first name and/or his surname. Attorney Doe believes that, through his marketing efforts, his name and face have become synonymous with the "face" or "brand" of the PC.

Attorney Doe would like to have other lawyers join the PC as shareholders. Attorney Doe, however, wants to maximize the investment he has already made in the PC. Attorney Doe would like to grant to the PC the right to use his name and likeness under the following terms:

> The PC will purchase from Attorney Doe the right to use his name as a trade name of the PC, and to use his name and likeness in advertising and marketing materials for the private practice of law. The PC may not sell the name or likeness or use the name or likeness in the marketing or advertising of any other service or product. The PC may use the name during Attorney Doe's life and following his death.

May Attorney Doe grant to the PC the right to use Attorney Doe's name under these terms?

Opinion #1:

Yes, so long as the agreement complies with Rule 7.5. While the Rules of Professional Conduct do not specifically limit the use of the lawyer's name by a firm in which he is a member, Rule 7.5 does restrict the circumstances under which a surname can continue to be used when the lawyer ceases to practice with the firm. "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…." Rule 7.5, cmt. [1].[1]

Rule 7.5 permits a law firm to continue to use a lawyer's surname if he retires from the practice of law or after his death, so long as the lawyer was a member of the firm immediately preceding his retirement or death. Subsequent communications listing the former member's name on law firm letterhead, however, should clarify that the former member is deceased or retired so as not to mislead the public. If Attorney Doe leaves the PC and begins engaging in the private practice of law, the PC could not continue to use Attorney Doe's surname because it would be misleading pursuant to Rule 7.1. *See* Rule 7.5(a), cmt. [1]. Any agreement between Attorney Doe and the PC must reflect this restriction and may not violate Rule 5.6(a) of the Rules of Professional Conduct.

Inquiry #2:

May Attorney Doe grant to the PC the right to use Attorney Doe's likeness under these terms?

Opinion #2:

The agreement may grant to the PC the right to use Attorney Doe's likeness while he practices with the PC but not if he ceases to practice with the PC. As long as Attorney Doe practices with the PC, there is probably no danger that the use of his likeness will mislead, deceive, or confuse the public. However, if Attorney Doe ceases to practice with PC (whether by retirement, departure, or death), the PC's use of his likeness will be inherently misleading and confusing to the public, in violation of Rule 7.1, because of the specific fact that Attorney Doe, while the sole shareholder in the firm, invested substantial resources to make his likeness synonymous with the PC. Therefore, after Attorney Doe's departure from the PC, a disclaimer on the PC's advertisements and marketing communications would be insufficient to overcome the public perception that Attorney Doe's services are still available through the PC.[2] This opinion does not prohibit generally the accurate and nondeceptive use of the likeness of a retired or deceased member of a firm in marketing or advertising, as long as the likeness includes a clear statement of the attorney's status[3] so as not to imply ongoing involvement with the firm.

Inquiry #3:

Assume that the agreement between the PC and Attorney Doe further contemplates that Attorney Doe is free to leave the firm at any time and practice

elsewhere in the state, but restricts his ability to use his own name or likeness in any advertising materials promoting the new venture. The agreement states that once Attorney Doe leaves the PC, he is free to practice elsewhere using any proper firm name (not including his own surname) or State Bar approved trade name for advertising purposes. He may only use his surname, however, in listings on firm letterhead, telephone directories, and business cards.

Under this proposed agreement, can the PC continue to use Attorney Doe's surname as the name of the PC after Attorney Doe leaves the PC to engage in the private practice of law?

Opinion #3:

No. *See* Opinion #1 above.

Endnotes

1. As a point of clarification, Attorney Doe's surname is not a trade name, and the licensing of the name to a PC in which Attorney Doe is a member does not change the surname's classification. The terms "Law Firm" or "Law Office" are technically trade names, but because these are useful means of identifying law firms, lawyers may use either designation without registering the trade name.
2. Opinion #2 differs from Opinion #1 because of the potential misleading nature of a communication using Attorney Doe's likeness after Attorney Doe ceases to practice with the PC.
3. For example, the use of the likeness of a retired partner on a firm's website should clarify his status as a "retired partner" or "of counsel."

2007 Formal Ethics Opinion 1

October 19, 2007

Editor's Note: This proposed opinion is a substitute for the version of the opinion that was adopted by the State Bar Council on April 20, 2007, and subsequently withdrawn by the council on July 13, 2007.

Duty to Heirs When Filing Wrongful Death Action

Opinion rules that a lawyer owes no ethical duty to the heirs of an estate that he represents in a wrongful death action except as set forth in Rule 4.4.

Inquiry #1:

When a lawyer files a wrongful death action on behalf of an estate, what are the lawyer's duties to the heirs of the deceased?

Opinion #1:

Pursuant to RPC 137, a lawyer representing an estate represents the personal representative in his or her official capacity and the estate as an entity. Although the heirs are interested parties and may benefit from a successful wrongful death action, they are not clients of the lawyer in the matter. The personal representative and the estate are the lawyer's clients, to whom the lawyer owes the ethical duties of loyalty, confidentiality, accountability, and independent professional judgment. The ethical duties owed to the heirs are those set out in Rule 4.4 With regard to tort liability, see *Jenkins v. Wheeler*, 69 N.C. App. 140, 316 S.E.2d 354, *disc. rev. denied*, 311 N.C. 758, 321 S.E.2d 136 (1984)(holding that heir has standing as non-client third party to sue lawyer in tort for malpractice when lawyer gives erroneous advice to personal representative that causes heir harm).

Inquiry #2:

Can the lawyer advise the heirs of their respective rights to share or not to share in any recovery in the wrongful death action?

Opinion #2:

The lawyer does not represent the heirs and he should inform the heirs of his role in representing the estate. If the heirs are not represented by counsel, the lawyer may not give the heirs legal advice, other than the advice to secure their own counsel. Rule 4.3. With the consent of the estate's personal representative, the lawyer may provide the heirs with factual information concerning the wrongful death action. *See* Rule 1.6; Rule 1.2.

Inquiry #3:

On behalf of the estate, the lawyer settles a wrongful death claim for a decedent who is survived by her mother and father. The mother, as personal representative of the estate, asks the lawyer not to pay proceeds from the settlement to the father because the mother alleges that the father willfully abandoned the child during her lifetime. N.C. Gen. Stat. §31A-2 prohibits a parent who abandoned a child from participating in the proceeds of a wrongful death action.

May the lawyer communicate an offer from the mother to the father requesting the father to reduce his claim to the proceeds of the settlement to a nominal amount; may the lawyer convey offers and counter offers between the mother and the father without advising either party with respect to their rights or the likelihood of success at a hearing to determine abandonment?

Opinion #3:

Yes. Determining whether there is a legal prohibition to participation in the proceeds of the wrongful death settlement is an appropriate role of the personal representative of the estate and the lawyer should provide legal advice to the personal representative on this issue. Based upon this advice, the estate's personal representative will establish the objectives of the lawyer's representation of the estate on this issue. The lawyer's responsibility is to carry out those objectives provided they are consistent with the personal representative's fiduciary duties. In doing so, the lawyer continues to represent the estate and the personal representative in her official capacity. On behalf of the estate, the lawyer may negotiate with the father to reduce his claim to the wrongful death proceeds. The lawyer must make his role clear to the father and may not give the father legal advice. Rule 4.3.

Inquiry #4:

May the lawyer for the estate file an action to deny the father's right to share in the proceeds of the settlement pursuant to N.C. Gen. Stat. §31A-2?

Opinion #4:

Yes. The lawyer may file a motion with the court to determine whether the father is entitled to any proceeds from the settlement. The filing of such a motion comports with the lawyer's duty to see that the estate proceeds are properly administered.

2007 Formal Ethics Opinion 2

October 19, 2007

Taking Possession of Client's Contraband

Opinion rules that a lawyer may not take possession of a client's contraband if possession is itself a crime and, unless there is an exception allowing disclosure of confidential information, the lawyer may not disclose confidential information relative to the contraband.

Inquiry #1:

Defendant was arrested for drug trafficking and placed in jail. At the time of his arrest, Defendant was wearing a hat. The hat was confiscated by the police and put in the jail's repository for inmates' personal property along with Defendant's other clothes. Defendant was unable to post bond and remains in jail.

Attorney is appointed to represent Defendant. In an attorney-client consultation at the jail, Defendant tells Attorney that there is contraband hidden in the hat. It appears that the contraband has not been discovered by law enforcement or the jailers.

Attorney anticipates that Defendant will be convicted, probably by plea, and will be sentenced to prison. At that time, he will be asked about the disposition of his personal property. Personal clothing is not sent with inmates to prison; it is usually given to family or friends.

May Attorney take possession of the contraband for the purpose of destroying it, turning it over to the authorities, or giving it to a third party, such as another lawyer, who would be subject to the duty of confidentially, to be delivered to the authorities?

Opinion #1:

No. Attorney may not take possession of an item that is contraband nor may the lawyer facilitate its transfer to any other person in furtherance of a crime.

A lawyer should not engage in criminal conduct under any circumstance and may not assist a client in conduct that the lawyer knows is criminal. *See* Rule 1.2(d) and Rule 8.4(d). If possession of an item is itself a crime, as in the case of contraband, a lawyer may not take possession of the item. *Compare* RPC 221.

Standard 4-4.6 of the ABA Standards for Criminal Justice, The Prosecution

and Defense Function, 3rd ed. (1993), provides the following guidance:

> (a) Defense counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities only: (1) if required by law or court order, or (2) as provided in paragraph (d).
>
> …
>
> (d) If the item received is contraband, i.e., an item possession of which is in and of itself a crime such as narcotics, defense counsel may suggest that the client destroy it where there is no pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If such destruction is not permitted by law or if in defense counsel's judgment he or she cannot retain the item, whether or not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.
>
> (e) If defense counsel discloses the location of or delivers the item to law enforcement authorities under paragraphs (a) or (d), or to a third party under paragraph (c)(1), he or she should do so in the way best designed to protect the client's interests.

If there is a law requiring Attorney to disclose the location of the contraband to the authorities, Attorney must do so after notifying the client and explaining the legal consequences to the client. If there is no such law but the contraband is evidence in the pending case against Defendant or Attorney knows that there is a criminal investigation relative to the contraband, Attorney must discuss the matter with the client and recommend that the hat be surrendered to law enforcement, perhaps as a part of Defendant's plea bargain. If Defendant refuses and there is no law requiring disclosure to the authorities, Attorney may not disclose the location of the contraband to the authorities or anyone else unless an exception to the duty of confidentiality applies. *See* RPC 221.

Inquiry #2:

May Attorney disclose the location of the contraband to the authorities or to the family member or friend who is asked by Defendant to retrieve his personal property from the jail?

Opinion #2:

Rule 1.6(a) prohibits a lawyer from revealing information acquired during the professional relationship with a client unless the client consents, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by an exception set forth in paragraph (b) of the rule. The following exceptions might apply in this situation:

> (b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:
>
> (1) to comply with the Rules of Professional Conduct, the law, or court order;
>
> (2) to prevent the commission of a crime by the client;
>
> (3) to prevent reasonably certain death or bodily harm; or
>
> (4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used.

With regard to the exception in Rule 1.6(b)(1), if there is a law requiring Attorney to disclose the location of the contraband, she must do so as noted in Opinion #1 above. If disclosure is not legally required, Rule 8.4(d), which prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice, may permit disclosure if the contraband is evidence in the pending action against Defendant or the subject of a criminal investigation. *See also* Rule 3.4(a) (lawyer should not unlawfully obstruct access to evidence). If Attorney determines that this exception to confidentiality applies, Attorney should take steps to minimize the harm to Defendant. This would include encouraging Defendant to permit Attorney to use the information in plea negotiations.

The other exceptions to the duty of confidentiality may not apply. Whether the crime of actual or constructive possession of contraband is complete or continuing is a question of state or federal law; therefore, no opinion is expressed as to whether disclosure would be allowed to prevent the commission of a crime pursuant to Rule 1.6(b)(2). Unless the contraband is a weapon or some other dangerous item, disclosure is not necessary to prevent reasonably certain death or bodily harm as contemplated by the exception in Rule 1.6(b)(3). Finally, Attorney's services were not used to perpetrate Defendant's crime and disclosure is not necessary to rectify the consequences of Attorney's conduct as contemplated by the exception in Rule 1.6(b)(4).

Regardless of whether Attorney may disclose information relative to the contraband, Attorney must advise Defendant of the potential risk to a family member or friend who takes possession of the hat. Similarly, Attorney should advise Defendant of the legal and practical consequences of any course of action that he takes, including abandoning the hat and its contents.

No opinion is expressed on whether a lawyer with information about a client's possession of contraband is required to disclose that information to the tribunal in a plea hearing pursuant to the duty of candor in Rule 3.3. The resolution of this issue will vary substantially depending upon the facts of the particular case and upon the forum in which the lawyer is appearing. *See, e.g.*, United States Sentencing Guidelines §3E1.1 (making it a condition of a plea that the defendant "truthfully [admit] or not falsely [deny] any additional relevant conduct for which [the] defendant is accountable").

2007 Formal Ethics Opinion 3

April 20, 2007

Responding to Unauthorized Practice at Quasi-Judicial Hearing Before Government Body

Opinion explains the duties of a lawyer who represents a local government and of a lawyer who is elected to the governing body of the local government relative to a nonlawyer appearing in a representative capacity for a party at a zoning variance and other quasi-judicial hearings before the government body.

Inquiry #1:

In Authorized Practice Advisory Opinion 2006-1, *Appearances at Quasi-Judicial Hearings on Zoning and Land Use* (October 20, 2006), the Authorized Practice Committee of the North Carolina State Bar was asked whether it is the unauthorized practice of law for an individual who is not an active member of the State Bar to appear in a representative capacity for a party in a quasi-judicial hearing before a planning board, board of adjustment, or other body of local government. In the opinion, the Authorized Practice Committee observed that a hearing on an application for a special use permit or for a variance under zoning ordinances is quasi-judicial in nature, noting, among other things, that evidence is formally presented; witnesses are sworn, testify, and cross-examined; the body has the authority to issue subpoenas; a record is created and preserved; the decision must be based upon the evidence presented and include findings of fact; and the decision is reviewable by an appellate court based solely upon the record of the proceeding. The committee also observed that "the law is…clear that an appearance on behalf of another person, firm, or corporation in a representative capacity for the presentation of evidence through others, cross-examination of witnesses, and argument on the law … is the practice of law." The opinion concludes, therefore, that appearance in a representative capacity at such quasi-judicial proceedings is limited to active members of the State Bar. *See* N.C. Gen. Stat. §§ 84-2.1 and 84-4.

It is a regular practice, particularly in small communities, for a petitioner at a hearing on a variance to be represented by a nonlawyer such as an architect, landscape architect, engineer, or surveyor. The planning department of the local government is typically made a party to the proceeding and, because of limited resources, appears at the hearing through a nonlawyer employee. The staff usually presents a factual narrative of the zoning history of the property, the nature and effect of the variance requested, and the position of the planning department on the validity of the proposed variance and its consequences for the community. Typically, the staff does not advocate a particular outcome.

Lawyer A regularly represents City. In this capacity, he provides legal advice to the city council and to the administration of City. During a hearing on a petition for a variance, Lawyer A advises the council; he does not advise or represent the planning department or city administration.

Rule 5.5(d) of the Rules of Professional Conduct prohibits a lawyer from assisting another person in the unauthorized practice of law. At a hearing on a petition for a variance or other similar quasi-judicial proceeding, what is Lawyer A's duty pursuant to Rule 5.5(d)?

Opinion #1:

As soon as Lawyer A determines that a nonlawyer is appearing in a representative capacity for a petitioner, Lawyer A must inform the city council of the holding in Authorized Practice Advisory Opinion 2006-1 and advise the council on the legal implications of the opinion. If the council decides to proceed with the hearing despite the advice of Lawyer A, Lawyer A may continue to provide advice to the members of the council on any matter that arises during the remainder of the hearing.

Inquiry #2:

Is Rule 5.5(d) applicable to the conduct of a lawyer who is serving as an elected member of the governing body of a local government?

Opinion #2:

Many of the Rules of Professional Conduct are applicable to a lawyer's conduct without regard to whether the conduct occurs while the lawyer is acting in her capacity as a lawyer or in some other capacity. Rule 5.5(d), however, usually applies to conduct by a lawyer who is acting in her capacity as a lawyer. *See, e.g.,* Rule 5.5, cmt. [8]-[9]. The rule prohibits "assisting" a nonlawyer in the unauthorized practice of law. A lawyer who is an elected member of a governing body does not "assist" a nonlawyer in the unauthorized practice of law if she determines that it is her duty as an elected official to participate as a member of a hearing panel for the governing body although the petitioner is represented by a nonlawyer.

Inquiry #3:

Lawyer M is an elected member of City Council. She is appointed to chair a hearing on a petition for a variance. Is Lawyer M required to prohibit nonlawyers from appearing on behalf of the parties at the hearing?

Opinion #3:

No. *See* Opinion #2.

Inquiry #4:

When a question is raised about the appearance of the nonlawyer in representative capacity for the petitioner, a member of the city council makes a motion to permit the nonlawyer to appear for the petitioner. Is Lawyer M required by Rule 5.5(d) to vote against the motion?

Opinion #4:

No. *See* Opinion #2. However, if Lawyer M concludes that the activity is illegal, Lawyer M may have a fiduciary duty, as an elected official, to vote against the motion.

Inquiry #5:

The city council votes in favor of permitting the nonlawyer to appear in a representative capacity for the petitioner. Is Lawyer M required to object or to recuse herself from participating in the hearing?

Opinion #5:

No. *See* Opinion #2.

Inquiry #6:

Lawyer X is an employee of City and provides legal advice and representation to the city council and to the administration of the city. The administration informs Lawyer X that a nonlawyer employee of the planning department will appear on behalf of the planning department at every hearing on a petition for a variance. What is Lawyer X's duty pursuant to Rule 5.5(d)?

Opinion #6:

No opinion is expressed on whether it is the unauthorized practice of law for a nonlawyer employee of the planning department to appear on behalf of the department at a hearing on a variance petition. On this issue, Authorized Practice Advisory Opinion 2006-1 provides as follows:

> [This] opinion is … not intended to affect the ability of city and county planning staff to present factual information to the hearing board, including a recitation of the procedural posture of the application, and to offer such opinions as they may be qualified to make without an attorney for the government present, as the [Authorized Practice Committee] understands is the proper, current practice and role of the planning staff.

If the employee of the planning department is appearing in a representative capacity and not merely to present factual information or an opinion, and such conduct is the unauthorized practice of law, Lawyer X may not assist the employee to appear on behalf of the planning department at these hearings. Improper assistance would include preparing or assisting with the preparation of the nonlawyer's presentation or with any evidence the nonlawyer intends to present at a hearing. In addition, Lawyer X should advise the city administration of the ruling in Authorized Practice Advisory Opinion 2006-1, explain its legal implications, and give appropriate legal advice and guidance.

Inquiry #7:

Lawyer Y is in private practice but he is under contract to provide legal representation to City. Are Lawyer Y's responsibilities relative to Rule 5.5(d) the same as the duties of Lawyer X?

Opinion #7:

Yes.

Inquiry #8:

Lawyer Q is a member of the Board of Directors of ABC Corporation. ABC Corporation plans to have an architect represent the corporation at a hearing on a petition for a variance that was filed by ABC.

Is Rule 5.5(d) applicable to the conduct of Lawyer Q as a board member?

Opinion #8:

As a member of the board, Lawyer Q may have a fiduciary duty to inform the board that a nonlawyer appearing in a representative capacity for a party may constitute illegal activity, including the unauthorized practice of law, and to vote against the corporation's participation in illegal activities. Lawyer Q does not, however, violate Rule 5.5(d) if he does not take any other action to prevent the corporation's practice of sending a nonlawyer to represent the corporation at the hearing on the variance petition. *See, e.g.,* Opinion #2.

2007 Formal Ethics Opinion 4

April 25, 2008

Solicitation after Seminar, Gifts to Clients and Others, and Distribution of Business Cards

Opinion provides guidance on miscellaneous issues relative to client seminars and solicitation, gifts to clients and others following referrals, distribution of business cards, and client endorsements.

Inquiry #1:

May an attorney advertise and conduct educational seminars for non-clients and, at the end of the presentation, request that the attendees complete an evaluation feedback form which includes the attendee's name, contact, and family information, as well as check boxes to indicate areas of particular interest and a desire, or not, for a free, personal consultation?

Opinion #1:

An attorney may conduct educational seminars for non-clients. *See* RPC 36. The attorney may advertise the seminars so long as the advertisements comply with the Rules of Professional Conduct. *See* Rule 7.2. The attorney may request attendees to complete an evaluation feedback form that includes the attendee's name, contact, and family information, as well as check boxes to indicate areas of particular interest. After the seminar, the attorney may not contact an attendee by in-person or telephone solicitation, but must wait for the attendee to contact the attorney. Rule 7.3(a).

Inquiry #2:

May an attorney host a purely social, non-education function for clients and non-clients, including allied professionals, at no charge to them, who have referred prospective business to the attorney?

Opinion #2:

An attorney may host a social function for existing clients, non-clients, or both. *See* RPC 146. The attorney may invite non-clients, provided the attorney does not solicit business from the non-clients.

Inquiry #3:

May an attorney send a restaurant or store gift certificate to a client or non-client in appreciation for a referral from that person?

Opinion #3:

No. Rule 7.2(b) prohibits a lawyer from giving anything of value to a per-

son for recommending the lawyer's services.

Inquiry #4:

May an attorney send gifts of nominal value—such as holiday fruit baskets, flowers, or gift certificates—to existing clients or non-clients with whom the attorney has an existing professional relationship?

Opinion #4:

Yes, as long as a gift is not a quid pro quo for the referral of clients. Rule 7.2(b).

Inquiry #5:

If a client, non-client, fellow attorney, or allied professional requests one or more business cards or firm brochures from an attorney, may the attorney oblige the request?

Opinion #5:

Yes. The potential for abuse or overreaching is not present where an attorney gives multiple cards or brochures to a third party if there is no understanding that the recipient will engage in in-person solicitation on the attorney's behalf. Rule 7.3.

2006 FEO 7 is distinguishable because it deals with the distribution of business cards at a meeting of a for-profit networking organization whose stated purpose is to provide referrals to its members.

Inquiry #6:

Along with a thank-you letter from the attorney to a client for the client's having allowed the attorney to provide services to that client, may the attorney include a business card and/or firm brochure with the suggestion that the client, if so willing, pass it along to someone who the client thinks might need similar services?

Opinion #6:

Yes, so long as there is no incentive for the client to engage in in-person solicitation on the attorney's behalf. 2006 FEO 7 is distinguishable because it deals with members of a for-profit networking organization rather than a former client.

Inquiry #7:

At the conclusion of rendering services to the client, assume the attorney includes with a thank-you letter a "report card" form for the client to return, if so willing, indicating the client's level of satisfaction with various aspects of the attorney/client experience. If the client chooses to make favorable comments about the attorney or services and expressly consents to the use of those comments for the attorney's marketing purposes, may the attorney use those testimonials in any of its advertising media?

Opinion #7:

With the clients' consent, an attorney may use client endorsements if the clients' statements are truthful "soft" endorsements of the attorney's services that do not create unjustified expectations about the results that the attorney can achieve. A soft endorsement describes characteristics of the lawyer's client service and does not describe the results that the lawyer achieved for the client.

Inquiry #8:

If the attorney's office is in North Carolina but the attorney is also licensed to practice in or for clients in another state, and something is expressly allowed ethically by the other state but prohibited in North Carolina, is the attorney subject to discipline in North Carolina?

Opinion #8:

Yes, if the conduct is unethical under the North Carolina Rules of Professional Conduct and the lawyer's conduct occurred in North Carolina or the predominant effect of the conduct is in North Carolina. Rule 8.5(b)

Inquiry #9:

If any of the foregoing activities are prohibited, which ones must be reported to the State Bar pursuant to Rule 8.3?

Opinion #9:

As stated in Rule 8.3, a violation of the Rules of Professional Conduct that raises a substantial question about a lawyer's honesty, trustworthiness, or fitness must be reported to the State Bar.

2007 Formal Ethics Opinion 5

April 20, 2007

Use of the Title "Doctor" in Academia

Opinion rules that a lawyer may use the title "doctor" but only in a post-secondary school academic setting.

Inquiry #1:

Attorney X is licensed to practice law in North Carolina and holds a Juris Doctor degree from an accredited university. Attorney X is working as a full-time college instructor and is not engaged in the private practice of law. RPC 5 prohibits a lawyer from referring to himself as holding a doctorate or using the title "doctor" to refer to himself. Pursuant to the opinion, Attorney X does not refer to herself as "Doctor X." However, the title "doctor" is used by college administrators and faculty with doctorates in fields other than medicine without any apparent risk of misleading students or others within the academic community. The prevailing opinion at the college is that a law degree is of lesser stature or value than other degrees because the title "doctor" does not attach. May Attorney X, and other lawyers who work in academia, use the designation "doctor" within that community?

Opinion:

Yes. RPC 5 provides as follows:

> Since it does not appear to be normal practice to refer to a *Juris Doctor* degree as simply a [d]octorate 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.

Nevertheless, in academic communities, including community colleges and other post-secondary school institutions of higher education, where individuals with doctoral and other advanced degrees comparable to the juris doctor degree are routinely and traditionally referred to as "doctor," it is not misleading and not inappropriate for a person holding a *juris doctor* degree to refer to himself or herself as "doctor." The use of the designation "doctor," however, is specifically limited: a lawyer may use the designation only when working or otherwise participating in a function associated with a post-secondary school institution of higher education. In all other contexts, a lawyer may not refer to himself or herself as "doctor."

2007 Formal Ethics Opinion 6

April 20, 2007

Valuing Effect of Lawyer's Departure in Firm Agreement

Opinion rules that a partnership, shareholders, or other similar agreement may include a repurchase or buy-out provision that takes into account the loss in firm value generated by the lawyer's departure provided the provision is fair and is not based solely upon loss in value due to the loss of client billings.

Inquiry:

Law Firm requires all its shareholders to sign an agreement providing for the purchase of shares by incoming shareholders and the repurchase of those shares by the firm upon each shareholder's departure. Attorney A, a shareholder at Law Firm, is leaving to join another firm. A number of clients have elected to have Attorney A continue their representation after he leaves the firm.

Pursuant to the agreement, in the event a departing shareholder takes clients with him, the repurchase obligation of Law Firm is reduced according to the following formula:

> The purchase price shall be reduced . . . by an amount equal to one hundred twenty-five Percent (125%) of the work in process generated by employees of the corporation during the twelve (12) months preceding the event requiring or permitting the stock purchase on behalf of clients of the corporation for whom the shareholder or law firm with whom the shareholder is or becomes associated, performs legal services during the twelve (12) month period following the event requiring or permitting the stock purchase . . . .
>
> In no event does the stock purchase price become reduced below zero.

Assume that the value of Attorney A's stock is $20,000. After leaving Law Firm, Attorney A will continue to represent clients who have traditionally generated more firm revenue than the value of Attorney A's stock. Therefore, Law

Firm's repurchase obligation to Attorney A under the circumstances is zero.

Does the above provision violate the Rules of Professional Conduct?

Opinion:

Yes. Rule 5.6(a) of the Rules of Professional Conduct reads as follows:

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement;

Rule 5.6 protects two important ethical principles: the right of clients to legal counsel of their choice and lawyer mobility. Although this provision is not like a typical covenant not to compete in that it does not have geographical or temporal restrictions, it does tie the decrease in share value to the fact that the departed lawyer represents former clients of the firm. By so doing, the provision provides a disincentive for the departing lawyer to represent clients with whom the lawyer has a prior relationship, penalizes the departing lawyer for representing former clients of the firm, and restricts the lawyer's right to practice. Moreover, the provision does not appear to measure the devaluation of the lawyer's shares in the firm due to the lawyer's departure. If a provision in a firm agreement penalizes a lawyer for taking clients, will dissuade a lawyer from continuing to represent firm clients after his departure, or does not otherwise fairly represent the devaluation of ownership interest in the firm engendered by the lawyer's departure, it violates Rule 5.6(a). *See e.g.,* 2001 FEO 10 (purpose of employment agreement was to discourage competitive activity and was, therefore, unethical).

Nevertheless, Rule 5.6(a) does not prohibit a repurchase provision in a firm agreement that takes into account the financial effect of a lawyer's departure from a firm. However, the provision must include a more refined approach for evaluating the loss of value due to the lawyer's departure. For example, a provision that takes into account various economic factors that affect the value of the firm's shares, such as long-term financial commitments to staff and for space and equipment leases originally made by the firm in reliance upon the departing lawyer's continued contribution to the firm, may be acceptable under the rule. To the extent that a contractual provision represents a fair assessment of the forecasted devaluation in the ownership interest in the firm engendered by a lawyer's departure and does not penalize the lawyer for taking clients with him, the provision might not violate Rule 5.6(a).

2007 Formal Ethics Opinion 7

July 13, 2007

Continuing Chapter 13 Representation of Husband and Wife after Divorce

Opinion rules that a lawyer may continue to represent a husband and wife in a Chapter 13 bankruptcy after they divorce provided the conditions on common representation set forth in Rule 1.7 are satisfied.

Inquiry #1:

Husband and Wife hire Attorney A to file a Chapter 13 bankruptcy petition. While the proceeding is pending, Husband and Wife separate and ultimately divorce. Husband and Wife want Attorney A to continue to represent them jointly and they want to continue to pay creditors pursuant to the Chapter 13 plan. Husband and Wife have reached an agreement on how they will make the mortgage payment and the Chapter 13 plan payments. They believe that they can resolve amicably any other issues that may come up in the case. Attorney A has discussed the potential conflict of interest that might arise due to his common representation. Husband and Wife indicated that they cannot afford to hire other lawyers and that they consent to the common representation.

May Attorney A continue to represent Husband and Wife under these circumstances until an issue upon which they cannot agree arises?

Opinion #1:

Yes. Rule 1.7(b) permits a lawyer to represent two or more clients, despite a concurrent conflict of interest, provided the following conditions can be met:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Assuming the common representation is not prohibited by bankruptcy law and Husband and Wife do not, at this juncture, have any claims to assert against each other in the bankruptcy proceeding, Attorney A may proceed with the common representation provided he reasonably believes that he can provide competent and diligent representation to both Husband and Wife and he has the informed consent of both clients.

Inquiry #2:

Should Attorney A get something in writing about the issue?

Opinion #2:

Yes, the consent of each client must be confirmed in writing. Rule 1.7(b)(4). While the signature of the client on the written confirmation of consent is not required by the rule, asking a client to sign a statement confirming consent may help the client to understand the importance of the lawyer's disclosures relative to the conflict and the meaning of the consent.

Inquiry #3:

The law of privilege and disclosure requirements for a bankruptcy proceeding may be different than the ethical constraints on Attorney A arising out of the Rules of Professional Conduct. In light of this, is Attorney A required to ask the bankruptcy court for permission to stay in the case?

Opinion #3:

Whether the rules of the bankruptcy court or federal bankruptcy law require Attorney A to obtain the consent of the court is a question of law outside the purview of the Ethics Committee. Attorney A must examine the court rules and federal law to determine whether the court's consent is required. If it is not required, Attorney A may proceed with the common representation subject to the conditions set out in Opinion #1.

To obtain the informed consent of clients to a common representation, a lawyer must "communicate adequate information and explanation appropriate to the circumstances." Rule 0.1(f)(definition of "informed consent.") In the current situation, Attorney A must explain to Husband and Wife the effect, if any, that the law of privilege and disclosure requirements in a bankruptcy proceeding might have on the common representation. In addition, Attorney A must inform each client of the right to information about the representation. As noted in comment [31] to Rule 1.7, "[t]he lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other." *See* 2006 FEO 1.

2007 Formal Ethics Opinion 8

July 13, 2007

Charging a Client for Motion to Withdraw

Opinion rules that a lawyer may not charge a client for filing and presenting a motion to withdraw unless withdrawal advances the client's objectives for the representation or the charge is approved by the court when ruling on a petition for legal fees from a court-appointed lawyer.

Inquiry #1:

Attorney A is hired by Client to represent him on a matter in litigation. After representing Client for some period of time, Client informs Attorney A that he is no longer satisfied with his services and he discharges Attorney A. Pursuant to the requirements of Rule 1.16 and court rules, Attorney A prepares a motion to withdraw, files the motion, and successfully argues the motion to the court. After he withdraws, Attorney A prepares a final bill for his services that includes charges, at his regular hourly rate, for the time that he expended preparing and presenting the motion.

May Attorney A charge Client for the legal work necessary to withdraw from the case?

Opinion #1:

No. Rule 1.16(c) requires a lawyer "to comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." Once

a lawyer makes a formal appearance in a North Carolina court proceeding, the lawyer must obtain the tribunal's permission to withdraw. E.*g., N.C. General Rules of Practice for the Superior and District Courts,* Rule 16. Thus, the act of withdrawal is a professional obligation of the lawyer, for the benefit of the lawyer, and, with the exceptions described in opinions #5 and #6 below, the cost of withdrawal cannot be shifted to the client.

Inquiry #2:

Does it matter whether the lawyer decides to withdraw against the client's wishes or the client discharges the lawyer?

Opinion #2:

No. Whether the client or the lawyer is the first to conclude that the relationship must end, determining who is at fault or the motivation of the client or the lawyer when ending the relationship is often impossible and, ultimately, beside the point. Regardless of who may be at fault, the cost of the work necessary to file and argue a motion to withdraw must be incurred because the lawyer is required by the Rules of Professional Conduct and the court rules to obtain the permission of the court to withdraw. It is the lawyer's professional duty and, therefore, the lawyer may not shift the cost to the client. *Cf.*, 2000 FEO 7, *Charging a Legal Fee for Participation in the Fee Dispute Resolution Program* (participation in State Bar's fee dispute resolution program is a professional responsibility making it improper to charge the client for the time expended to participate).

Inquiry #3:

The court denies Attorney A's motion to withdraw. May Attorney A subsequently bill Client for the legal work necessitated by the motion to withdraw?

Opinion #3:

No, *see* Opinions #1 and #2 above.

Inquiry #4:

Attorney A wants to include a provision in his standard legal services agreement that states that the client will pay the cost of preparing, filing, and arguing a motion to withdraw if the client terminates the lawyer's services.

If a client consents to this provision in a legal services agreement, may Attorney A subsequently charge the costs to the client if the client terminates his services?

Opinion #4:

With the exception of the situation described in Opinion #5 below, a lawyer may not include a provision in his legal services agreement shifting the cost of withdrawal to the client. *See* Opinions #1 and #2 above. Such a provision would have an improper chilling effect on a client's right to terminate a lawyer's services at will.

Inquiry #5:

On occasion, a lawyer must file a motion to withdraw, with the consent of the client, to advance the client's objectives for the representation and not because the client is dissatisfied with the lawyer's services or the lawyer wishes to terminate the representation. For example, an insurance carrier hires a lawyer to defend its insured in a personal injury lawsuit. Before trial, the carrier offers the full policy limits to the plaintiff. The carrier hires another lawyer to file the appropriate motion seeking to have the carrier relieved of its duty to defend the insured. The lawsuit must go forward, however, to determine whether there is liability entitling the plaintiff to recover the proceeds from an underinsured or other excess liability insurance policy. If the motion to be relieved of the duty to defend is allowed, the lawyer originally hired to defend the insured must make a motion to withdraw to further the insurance carrier's objective of being relieved of the duty to defend. The insurance carrier typically anticipates and assumes that it will pay the legal fees associated with the preparation and presentation of the motion to withdraw.

If a lawyer must withdraw from the representation of a client in a lawsuit to advance the client's objectives for the representation, may the lawyer charge the client for the legal work necessary to withdraw? May the lawyer include a provision in his legal services agreement with the client stating that the client will pay the legal fees for withdrawal under these circumstances?

Opinion #5:

Yes, in this instance, the lawyer is providing a legal service to the client in addition to fulfilling his professional obligation under Rule 1.16(c). Subject to the limitation on clearly excessive fees in Rule 1.5, a lawyer may charge a client for the legal work necessary to withdraw if withdrawal advances the client's objectives for the representation and the lawyer may include a provision in his legal services agreement to this effect.

Inquiry #6:

The client-lawyer relationship between a court-appointed lawyer and a client is often difficult because the client does not select the lawyer. In addition, a court-appointed lawyer may not have an opportunity to check for conflicts of interest prior to being appointed or, in the criminal defense practice, a conflict of interest may not be apparent until the case evolves (e.g., the lawyer realizes that a plea agreement involves cooperation with the authorities that will negatively impact another client of the lawyer). If withdrawal from representation by a court-appointed lawyer is necessitated by a breakdown in the relationship or a conflict of interest or other similar circumstances, may the lawyer include the charges associated with filing and presenting the motion in a fee petition which is reviewed by the court?

Opinion #6:

Yes, provided the lawyer, in good faith, concludes that the lawyer's conduct is not the reason for the motion.[1] Judicial review provides oversight to insure that the fee charges are warranted and, unlike in private representation, seeking compensation for filing the motion will not have a chilling effect on the client's right to terminate the relationship.

Endnote

1. This opinion does not require the lawyer to itemize or describe the conduct of the client leading to the motion to withdraw in the petition for fees. In many instances, this information will be confidential and cannot be disclosed. Rule 1.6.

2007 Formal Ethics Opinion 9

July 13, 2007

Lawyer's Obligation to Disburse Closing Funds

Withdrawn April 25, 2008.

2007 Formal Ethics Opinion 10

January 25, 2008

Lawyer Employed by School Board as Hearing Officer

Opinion holds a lawyer employed by a school board may serve as an administrative hearing officer with the informed consent of the board.

Inquiry:

Before a decision to suspend or expel a student is made by the administration of a public school system, a student is afforded a hearing before an administrative hearing officer who makes findings of fact, conclusions of law, and a recommendation on discipline to the superintendent. These suspension and expulsion hearings precede an appeal to the board.

School Board hires Lawyer X as an employee to provide in-house legal services to the administration of the school system and to the board. As a part of her duties, Lawyer X is appointed by the superintendent as the administrative hearing officer for the initial suspension and expulsion hearings.

May Lawyer X serve in this capacity?

Opinion:

This opinion assumes that there are no due process prohibitions to the arrangement described in this inquiry. To the extent that this arrangement is held by a court to interfere with the due process rights of students, a lawyer may not participate.

Competent representation demands that the lawyer maintain her neutrality and act impartially when serving as a hearing officer to fulfill the board's obligation to provide a fair hearing and to avoid exposing her employer to subsequent hearings or liability. If Lawyer X reasonably believes that she will be able to provide competent and diligent representation to the board while serving in the capacity of hearing officer, she may accept the assignment provided the board gives informed consent, confirmed in writing. Rule 1.7(b). The lawyer's

service as the administrative hearing officer may create an appearance of unfairness. Therefore, the disclosure necessary to obtain the informed consent of the board must include warning the board about the appearance problem, advising the board about the practical legal effects of the problem, and advising the board that the problem could be avoided by retaining an independent lawyer, who is not an employee of the board, to serve as the hearing officer. If the board consents after this disclosure, Lawyer X may serve as the hearing officer. Thereafter, Lawyer X must continually reassess her ability to fulfill her obligation to maintain her neutrality as a hearing officer as her relationship with the board and the administration changes over time.

This situation is not governed by Rule 1.12(b) which prohibits a lawyer who is serving as a judge or other adjudicative officer from negotiating for employment with a person who is involved as a party in a matter before the lawyer. Lawyer X is already employed by the board; her decisions as the hearing officer will not be influenced by offers of employment. Similarly, RPC 138 is not applicable. That opinion cites Canon IX of the now superseded 1985 Rules of Professional Conduct as the basis for prohibiting a partner of a lawyer representing a party to an arbitration hearing from acting as an arbitrator. Canon IX set forth the general admonition that "A lawyer should avoid even the appearance of professional impropriety." The canons did not establish specific standards or provide clear guidance for lawyer conduct and, for these reasons, were eliminated from the Rules of Professional Conduct when they were comprehensively revised in 1997. Mine, *Executive Summary of the 1997 Revised Rules of Professional Conduct*. RPC 138 prohibits lawyers in the same firm from serving, respectively, as advocate and adjudicator because of the appearance of impropriety. In the present inquiry, the lawyer is serving solely as the hearing officer. Moreover, the potential that there will be an appearance of unfairness in the proceeding must be disclosed to the board, as explained above, but, if the lawyer concludes that she can perform the role competently, which includes acting impartially, and the board consents, there is no professional impropriety.

Rule 1.12(a) prohibits a lawyer from representing anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer unless all parties to the proceeding give informed consent confirmed in writing. Therefore, Lawyer X may not subsequently act as the advisor to the board or the prosecutor for the administration in an appeal to the board, nor may she represent the board in any further appeal of a disciplinary matter in which Lawyer X served as the initial hearing officer, unless all parties give informed consent confirmed in writing.

2007 Formal Ethics Opinion 11

July 13, 2007

Lawyer's Duties when Client Revokes Consent to Conflict

Opinion rules that a lawyer is not required to withdraw from representing one client if the other client revokes consent without good reason and an evaluation of the factors set out in comment [21] to Rule 1.7 and the Restatement (Third) of the Law Governing Lawyers indicates continued representation is favored.

Inquiry:

May a lawyer rely on a written waiver of conflict regarding the matter at hand signed, with informed consent, by two or more parties, after a subsequent, unforeseen falling out among those parties? (So that the lawyer is not required to relinquish representation of a long-term client/party to the original waiver due to one of the other party/signees revoking the waiver and objecting to the lawyer's continuing to represent the long-term client.)

Opinion:

Pursuant to Rule 1.7 comment [21], a client who has given consent to a conflict may revoke the consent at any time. According to comment [21], whether one client's revocation of consent to his own representation precludes the lawyer from continuing to represent the other client depends on the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client, and whether material detriment to the other client or the lawyer would result.

The *Restatement (Third) of the Law Governing Lawyers* indicates that if one client revokes his consent to representation without good reason, the lawyer may continue representing the other client in the matter if the lawyer and other client have already relied on the consent to their detriment. The *Restatement* provides that a joint client may be justified in revoking consent to multiple representation when a material change occurs in the factual basis on which the client originally gave informed consent, such as when the clients develop antagonistic positions; the lawyer favors the other client; or the other client takes harmful action. *Restatement (Third) of the Law Governing Lawyers* § 122 cmt. f (2000). Examples of detrimental reliance by the non-revoking client or the lawyer include the investment of substantial time and money in the representation; the disclosure of confidential information; the development of a relationship of trust and confidence between the lawyer and the non-revoking client; and the election by the lawyer or the non-revoking client to forego other opportunities in reliance on the consent.

The consent agreement may specify the effect of one client's repudiation upon the other client's right to continued representation and the lawyer's right to continue to represent the other client. The DC Bar suggests the following language:

> You have the right to repudiate this waiver should you later decide that it is no longer in your interest. Should the conflict addressed by the waiver be in existence or contemplated at that time, however, and should we or the other client(s) involved have acted in reliance on the waiver, we will have the right—and possibly the duty, under the applicable rules of professional conduct—to withdraw from representing you and (if permitted by such rules) to continue representing the other involved client(s) even though the other representation may be adverse to you.

DC Bar Legal Ethics Committee Opinion 317 (2002).

In the absence of specific language in the consent agreement addressing the effects of repudiation, a lawyer is not required to withdraw from representing one client if the other client revokes consent without good reason and an evaluation of the factors set out in comment [21] and the *Restatement* favors continued representation.

2007 Formal Ethics Opinion 12

April 25, 2008

Outsourcing Legal Support Services

Opinion rules that a lawyer may outsource limited legal support services to a foreign lawyer or a nonlawyer (collectively "foreign assistants") provided the lawyer properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client's advanced informed consent.

Inquiry:

May a lawyer ethically outsource legal support services abroad, if the individual providing the services is either a nonlawyer or a lawyer not admitted to practice in the United States (collectively "foreign assistants")?

Opinion:

The Ethics Committee has previously determined that a lawyer may use nonlawyer assistants in his or her practice, and that the assistants do not have to be employees of the lawyer's firm or physically present in the lawyer's office. *See, e.g.,* RPC 70, RPC 216, 99 FEO 6, 2002 FEO 9. The previous opinions emphasize that the lawyer's use of nonlawyer assistants must comply with the Rules of Professional Conduct. Generally, the ethical considerations when a lawyer uses foreign assistants are similar to the considerations that arise when a lawyer uses the services of any nonlawyer assistant.

Pursuant to RPC 216, a lawyer has a duty under the Rules of Professional Conduct to take reasonable steps to ascertain that a nonlawyer assistant is competent; to provide the nonlawyer assistant with appropriate supervision and instruction; and to continue to use the lawyer's own independent professional judgment, competence, and personal knowledge in the representation of the client. *See also* Rule 1.1, Rule 5.3, Rule 5.5. The opinion further states that the lawyer's duty to provide competent representation mandates that the lawyer be responsible for the work product of nonlawyer assistants. *See also* Rule 5.3.

2002 FEO 9 states that, in any situation where a lawyer delegates a task to a nonlawyer assistant, the lawyer must determine that delegation is appropriate after having evaluated the complexity of the transaction, the degree of difficulty of the task, the training and ability of the nonlawyer, the client's sophistication and expectations, and the course of dealing with the client. *See also* Rule 1.1

and Rule 5.3.

Therefore, as long as the lawyer's use of the nonlawyer assistant's services is in accordance with the Rules of Professional Conduct, the location of the nonlawyer assistant is irrelevant. Rule 5.3(b) requires lawyers having supervisory authority over the work of nonlawyers to make "reasonable efforts" to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

When contemplating the use of foreign assistants, the lawyer's initial ethical duty is to exercise due diligence in the selection of the foreign assistant. RPC 216 states that, before contracting with a nonlawyer assistant, a lawyer must take reasonable steps to determine that the nonlawyer assistant is competent. 2002 FEO 9 states that the lawyer must evaluate the training and ability of the nonlawyer in determining whether delegation of a task to the nonlawyer is appropriate. The lawyer must ensure that the foreign assistant is competent to perform the work requested, understands and will comply with the ethical rules that govern a lawyer's conduct, and will act in a manner that is compatible with the lawyer's professional obligations.

In the selection of the foreign assistant, the lawyer should consider obtaining background information about any intermediary employing the foreign assistants; obtaining the foreign assistants' resumes; conducting reference checks; interviewing the foreign assistants to ascertain their suitability for the particular assignment; obtaining a work product sample; and confirming that appropriate channels of communication are present to ensure that supervision can be provided in a timely and ongoing manner. Individual cases may require special or further measures. *See* New York City Bar Ass'n. Formal Opinion 2006-3; San Diego County Bar Ass'n. Ethics Opinion 2007-1.

Another ethical concern is the lawyer's ability adequately to supervise the foreign assistants. Pursuant to RPC 216, to supervise properly the work delegated to the foreign assistants, the lawyer must possess sufficient knowledge of the specific area of law. The lawyer must also ensure that the assignment is within the foreign assistant's area of competency. In supervising the foreign assistant, the lawyer must review the foreign assistant's work on an ongoing basis to ensure its quality; have ongoing communication with the foreign assistant to ensure that the assignment is understood and that the foreign assistant is discharging the assignment in accordance with the lawyer's directions and expectations; and review thoroughly all work-product of foreign assistants to ensure that it is accurate, reliable, and in the client's interest. The lawyer has an ongoing duty to exercise his or her professional judgment and skill to maintain the level of supervision necessary to advance and protect the client's interest.

If physical separation, language barriers, differences in time zones, or inadequate communication channels do not allow a reasonable and adequate level of supervision to be maintained over the foreign assistant's work, the lawyer should not retain the foreign assistant to provide services.

A lawyer must retain at all times the duty to exercise his or her independent judgment on the client's behalf and cannot abdicate that role to any assistant. A lawyer who utilizes foreign assistants will be held responsible for any of the foreign assistants' work-product used by the lawyer. *See* Rule 5.3. A lawyer may use foreign assistants for administrative support services such as document assembly, accounting, and clerical support. A lawyer may also use foreign assistants for limited legal support services such as reviewing documents; conducting due diligence; drafting contracts, pleadings, and memoranda of law; and conducting legal research. Foreign assistants may not exercise independent legal judgment in making decisions on behalf of a client. Additionally, a lawyer may not permit any foreign assistant to provide any legal advice or services directly to the client to assure that the lawyer is not assisting another person, or a corporation, in the unauthorized practice of law. *See* Rule 5.5(d). The limitations on the type of legal services that can be outsourced, in conjunction with the selection and supervisory requirements associated with the use of foreign assistants, insures that the client is competently represented. *See* Rule 5.5(d). Nevertheless, when outsourcing legal support services, lawyers need to be mindful of the prohibitions on unauthorized practice of law in Chapter 84 of the General Statutes and on the prohibition on aiding the unauthorized practice of law in Rule 5.5(d).

Another significant ethical concern is the protection of client confidentiality. A lawyer has a professional obligation to protect and preserve the confidences of a client against disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *See* Rule 1.6, cmt. [17]. When utilizing foreign assistants, the lawyer must ensure that procedures are in place to minimize the risk that confidential information might be disclosed. *See* RPC 133. Included in such procedures should be an effective conflict-checking procedure. *See* RPC 216. The lawyer must make certain that the outsourcing firm and the foreign assistants working on the particular client matter are aware that the lawyer's professional obligations require that there be no breach of confidentiality in regard to client information. The lawyer also must use reasonable care to select a mode of communication that will best maintain any confidential information that might be conveyed in the communication. *See* RPC 215.

Finally, the lawyer has an ethical obligation to disclose the use of foreign, or other, assistants and to obtain the client's written informed consent to the outsourcing. In the absence of a specific understanding between the lawyer and client to the contrary, the reasonable expectation of the client is that the lawyer retained by the client, using the resources within the lawyer's firm, will perform the requested legal services. **See** Rule 1.4, 2002 FEO 9; San Diego County Bar Ass'n. Ethics Opinion 2007-1.

2007 Formal Ethics Opinion 13

January 25, 2008

Billing at Hourly Rate for Intra-Office Communications

Opinion rules that, to insure honest billing predicated on hourly charges, the lawyer must establish a reasonable hourly rate for his services and for the services of his staff; disclose the basis for the amounts to be charged; avoid wasteful, unnecessary, or redundant procedures; and make certain that the total cost to the client is not clearly excessive.

Inquiry:

Attorney's standard contract for legal services provides that the client will be billed for the lawyer's services on a time-expended basis. Attorney charges $200.00 per hour for his legal services. He bills his paralegal's time at $75.00 per hour and his secretary's time at $50.00 per hour. Intra-office email communications are typically billed to clients in the following manner: Attorney A bills for the time that it takes him to type and send an email to a member of the staff; the staff member (secretary or paralegal) bills for the time expended reading Attorney's email and responding; Attorney bills for the time he spends reading the responsive email. Over the course of several months, the charges to a client for intra-office email communications may be in the hundreds of dollars. May a lawyer bill for both the time that it takes the drafter to write an email and the time that it takes the recipient in the same office to read the same email?

Opinion:

Yes. A lawyer may bill for intra-office communications about a client's matter. For example, a lawyer and a paralegal (or two or more lawyers) who meet to discuss a client's case may both bill for the time expended in the meeting provided the meeting advances the representation of the client and the participation of both billing staff members is necessary. Email communications to instruct, update, or confer with other members of the firm is no different and, on occasion, may involve the expenditure of less time by the participants than an in-person meeting (and, therefore, be less expensive for the client). Nevertheless, to insure honest billing predicated on hourly charges, the lawyer must establish a reasonable hourly rate for his services and for the services of his staff; disclose the basis for the amounts to be charged; avoid wasteful, unnecessary, or redundant procedures; and make certain that the total cost to the client is not clearly excessive.

Establishing a Reasonable Hourly Rate for Services

Rule 1.5 prohibits a lawyer from charging or collecting a clearly excessive fee. The rule includes a non-exclusive list of factors to be considered in determining whether a fee is clearly excessive, 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;

(2) the fee customarily charged in the locality for similar legal services;

(3) the amount involved and the results obtained; and

(4) the experience, reputation, and ability of the lawyer or lawyers performing the services. Rule 1.5(a).

The prohibition on charging an excessive fee also applies to the amount charged per hour. When establishing an hourly rate for a lawyer's time or for a staff member's time, the factors set forth in the rule must be considered. In particular, the experience, reputation, and ability of the lawyer or staff member performing the services must be honestly evaluated. If the lawyer or staff member is inexperienced or of modest ability, the hourly rate should so reflect.

With regard to establishing hourly rates for staff members, if a lawyer's hourly rate takes into consideration overhead costs for staff, the lawyer must consider whether the work of a particular staff member advances the legal representation of the client or is so derivative of the lawyer's work that the expense should be subsumed in the lawyer's hourly rate. For example, the services of a typist, filing clerk, receptionist, scheduler, or billing clerk may fall into the latter category.

Disclosing the Basis for the Amounts to be Charged

Rule 1.5(b) provides that "[w]hen the lawyer has not regularly represented the client, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." Although not required by the rule, a written memorandum of the fee arrangement with each client is strongly encouraged particularly when there is the possibility that the client does not understand that hourly charges may include charges for time expended communicating with, instructing, and supervising others, by email communications and otherwise. As noted in the comment to the rule,

> [g]enerally, furnishing the client with a simple memorandum or copy of the lawyer's customary fee arrangements will suffice, provided that the writing states the general nature of the legal services to be provided, the basis, rate, or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

See also Rule 1.4(b) (lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation). When a particular billing practice may be a subsequent source of misunderstanding, a lawyer should consider disclosing this billing practice at the beginning of the representation and including an explanation in the fee memorandum.

The duty to disclose the basis for the amounts to be charged is "a two-fold duty, including not only an explanation at the beginning of engagement of the basis on which fees and other charges will be billed, but also a sufficient explanation in the statement so that the client may reasonably be expected to understand what fees and other charges the client is actually being billed." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993). "In an engagement in which the client has agreed to compensate the lawyer on the basis of time expended at regular hourly rates, a bill setting out no more than a total dollar figure for unidentified professional services will often be insufficient to tell the client what he or she needs to know in order to understand how the amount was determined." *Id.* Gerald F. Phillips in *Time Bandits: Attempts by Lawyers to Pad Hours Can Often Be Uncovered by a Careful Examination of Billing Statements*, 29 W. St. U. L. Rev. 265 (2002), suggests that a lawyer has a duty to disclose the hourly rates of each timekeeper in each billing statement "so that the client may reasonably understand what fee is being billed and how it was calculated." *Id.* at 274.

Avoiding Wasteful, Unnecessary, or Redundant Procedures

The fiduciary character of the client-lawyer relationship requires a lawyer to act in the client's best interests and to deal fairly with the client. When billing on an hourly basis, fair dealing requires that the lawyer provide an hour's worth of legal services for each hour billed. This means that a lawyer must avoid wasteful, unnecessary, or redundant procedures that do not serve to advance the client's representation. Time padding, or billing a client for time that was not actually expended on a client's matter, and task padding, or billing a client for unnecessary tasks, are both dishonest and unethical. Phillips at 267; Rule 7.1 and Rule 8.4(c). The comment to Rule 1.5 admonishes, "[a] lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures." As further noted in ABA Formal Op. 93-379,

> continuous toil on or over-staffing a project for the purpose of churning out hours is...not properly considered "earning" one's fees. One job of a lawyer is to expedite the legal process. Model Rule 3.2. Just as a lawyer is expected to discharge a matter on summary judgment rather then proceed to trial if possible, so too is the lawyer expected to complete other projects for a client efficiently.

Whether a bill for intra-office communications or consultations, by email, telephone, or meeting, constitutes task padding or is a fair charge for a service rendered must be evaluated on a case-by-case basis.

Total Cost to the Client May Not Be Clearly Excessive

Rule 1.5 "deals not only with the determination of a reasonable hourly rate, but also with total cost to the client." ABA Formal Op. 93-379. In light of all services rendered and the factors set forth in Rule 1.5(a), the total cost to the client, on whatever basis charged, must not be clearly excessive. If the inclusion of charges at a lawyer's or a staff member's hourly rate for giving or receiving instructions via intra-office email or otherwise renders the total cost to the client clearly excessive, a lawyer should exclude these charges from the client's bill.

2007 Formal Ethics Opinion 14

January 25, 2008

Advertising Inclusion in List in North Carolina Super Lawyers and Other Similar Publications

Editor's note: This opinion was withdrawn by the council on October 25, 2019.

Opinion rules a lawyer may advertise the lawyer's inclusion in the list of lawyers in North Carolina Super Lawyers and other similar publications and may advertise in such publications subject to certain conditions

Inquiry #1:

North Carolina Super Lawyers is a listing of lawyers published by Key Professional Media, Inc., a for-profit corporation, as a special advertising supplement in North Carolina newspapers and city and regional magazines. It is also published as a magazine and distributed to all active members of the State Bar, corporate counsel of Russell 3000 companies, and libraries of ABA-approved North Carolina law schools.

The selection process for inclusion in an edition of *North Carolina Super Lawyers* is described on the *Super Lawyers* website (www.superlawyers.com/about/opinion_39.html) as a "very thorough quantitative and qualitative selection process" that is based upon three steps: creation of the candidate pool, evaluation of the lawyers in the pool, and peer evaluation by practice area. The process, as described on the website and in the advertising supplements and the magazine, involves the following activities and includes the following standards:

- An annual ballot to all active lawyers in North Carolina who are licensed for five years or more with procedures and systems to detect and manage manipulation attempts.
- An annual search during which Law & Politics, a division of Key Professional Media, Inc., seeks out candidates who should be considered but have not been identified through the balloting process. This search includes the use of professional databases and sources, the review of local and national legal journals, and interviews with managing partners and marketing directors of law firms in North Carolina.
- Law & Politics examines the background and experience of each candidate, searching for evidence of peer recognition and professional achievement.
- Candidates are grouped by primary area of practice and reviewed by lawyers with demonstrated expertise in the relevant practice areas.
- Research by Law & Politics during which each candidate is scored on a 12-point evaluation of peer recognition and professional achievement.
- Lawyers selected for inclusion in *Super Lawyers* are checked for their standing with the bar, including verification that they are not subject to disciplinary proceedings, criminal prosecution, or other legal action that reflects adversely on fitness.
- Lawyers cannot pay to be selected for inclusion in *Super Lawyers;* they cannot vote for themselves; and they cannot pay to be editorially featured.
- Lawyers are not included or excluded depending upon whether they

advertise in *Super Lawyers*. Every lawyer named in the *Super Lawyers* list receives a free listing in the *Super Lawyers* advertising supplement or magazine.

■ Inclusion in a *Super Lawyers* list is limited to the top five percent of the active members of the State Bar based upon points awarded pursuant to the process described above.

The *Super Lawyers* website also explains the "advertising opportunities" that are available in *Super Lawyers* advertising supplements or magazines. There are two "profile" options for advertising in the supplement or the magazine. A standard profile is a one-ninth of a page advertisement that includes a color photo, contact information, and 100-word biography for the profiled lawyer. A platinum profile is a full or half-page advertisement that focuses on an individual lawyer or all lawyers chosen for the *Super Lawyers* list from a law firm. It also includes a color photo, contact information, and biographies of the profiled lawyers. In the alphabetical listing in the supplement or magazine, the names of lawyers who have purchased a "profile" advertisement are listed in red boldface type instead of the black type used for the other lawyers on the list.

In addition to the profiles, a lawyer or law firm may purchase a display advertisement within and adjacent to the *Super Lawyers* listing in the supplement or magazine. These display advertisements may be full, half, or quarter-page advertisements. Usually a display advertisement purchased by a law firm congratulates the lawyers with the firm who are included in the *Super Lawyers* list.

May North Carolina lawyers listed in *North Carolina Super Lawyers*, or other similar publications with titles that imply that the lawyers listed in the publication are "super," "the best," "elite," or a similar designation, advertise or publicize that fact?

Opinion #1:

Yes, subject to certain conditions.

Rule 7.1(a) prohibits a lawyer from making false or misleading communications about himself or his services. The rule defines a false or misleading communication as a communication that contains a material misrepresentation of fact or law or omits a necessary fact; one that is likely to create an unjustified expectation about results the lawyer can achieve; or one that compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated. The question is whether advertising one's inclusion in the *Super Lawyers* list is a material misrepresentation because the term "super" creates the unjustified expectation that the lawyer can achieve results that an ordinary lawyer cannot or, by implying superiority, compares lawyer's services with the services of other "inferior" lawyers without factual substantiation.

Rule 7.1 derives from a long line of Supreme Court cases holding that lawyer advertising is commercial speech that is protected by the First Amendment and subject to limited state regulation. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Supreme Court first declared that First Amendment protection extends to lawyer advertising as a form of commercial speech. The Court held that a state may not constitutionally prohibit a lawyer's advertisement for fees for routine legal services although it may prohibit commercial expression that is false, deceptive, or misleading and may impose reasonable restrictions as to time, place, and manner. Subsequent Supreme Court opinions clarified that the commercial speech doctrine set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission of N.Y.,* 447 U.S. 557 (1980) is applicable to lawyer advertising. *See In re* R.M.J., 455 U.S. 191 (1982). Specifically, a state may absolutely prohibit inherently misleading speech or speech that has been proven to be misleading; however, other restrictions are appropriate only where they serve a substantial state interest, directly advance that interest, and are no more restrictive than reasonably necessary to serve that interest.

Seventeen years after *Bates*, in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), a plurality of the Supreme Court concluded that a lawyer has a constitutional right, under the standards applicable to commercial speech, to advertise his certification as a trial specialist by the National Board of Trial Advocacy (NBTA). The Court found NBTA to be a "bona fide organization," with "objectively clear" standards, which had made inquiry into Peel's fitness for certification and which had not "issued certificates indiscriminately for a price." *Id.* at 102, 110. If a state is concerned that a lawyer's claim to certification may be a sham, the state can require the lawyer "to demonstrate that such certification is available to all lawyers who meet objective and consistently applied standards relevant to practice in a particular area of the law." Id. at 109. In concluding that the NBTA certification advertised by Peel in his letterhead was neither actually nor potentially misleading, the Court emphasized "the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decision-making than is concealment of such information." *Id.* at 108.

Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy, 512 U.S. 136 (1994), similarly held that a state may not prohibit a CPA from advertising her credential as a "Certified Financial Planner" (CFP) where that designation was obtained from a private organization. As in *Peel*, the Court found that a state may not ban statements that are not actually or inherently misleading such as a statement of certification, including the CFP designation, by a "bona fide organization." *Id.* at 145. The Court dismissed concerns that a consumer will be mislead because he or she cannot verify the accuracy or value of the designation by observing that a consumer may call the CFP Board of Standards to obtain this information. *Id.*

In 2003 FEO 3, the Ethics Committee considered whether a lawyer may advertise that he or she is a member of an organization with a self-laudatory title such as the "Million Dollar Advocates Forum." The opinion rules that a lawyer may advertise such membership but, to avoid a misleading communication, the following conditions must be satisfied:

1) the organization has strict, objective standards for admission that are verifiable and would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience, or expertise indicated by the designated membership;

2) the standards for membership are explained in the advertisement or information on how to obtain the membership standards is provided in the advertisement;

3) the organization has no financial interest in promoting the particular lawyer; and

4) the organization charges the lawyer only reasonable membership fees.

Super Lawyers appears to be a bona fide organization, as described in *Peel* and *Ibanez*, in that it has objectively clear and consistently applied standards for inclusion in its lists and inclusion is available to all lawyers who meet the standards. For example, all active North Carolina lawyers who are licensed for five years or more are eligible for inclusion and inclusion is limited to the top five percent of eligible lawyers based upon an objective point system.

As observed by the Supreme Court in *Peel*, Peel's advertisement of his certification by NBTA "is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, but is simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice." *Peel*, 496 U.S. at 101. Similarly, advertising inclusion in the *Super Lawyers* list is not an opinion on the quality of a listed lawyer's work or a promise of success, it is information from which a consumer may draw inferences based upon the standards for inclusion in the list. The Ethics Committee therefore concludes that an advertisement that states that a lawyer is included in a listing in *North Carolina Super Lawyers*, or in a similar listing in another publication, is not misleading or deceptive provided the relevant conditions from 2003 FEO 3 are satisfied; to wit:

1) the publication has strict, objective standards for inclusion in the listing that are verifiable and would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience, or expertise indicated by the listing;

2) the standards for inclusion are explained in the advertisement or information on how to obtain the standards is provided in the advertisement (referral to the publication's website is adequate if the standards are published therein); and

3) no compensation is paid by the lawyer, or the lawyer's firm, for inclusion in the listing.

In addition, the advertisement must make clear that the lawyer is included in a listing that appears in a publication which is identified (by using a distinctive typeface or italics) and may not simply state that the lawyer is a "Super Lawyer." A statement that the lawyer is a "Super Lawyer," without more, implies superiority to other lawyers and is an unsubstantiated comparison prohibited by Rule 7.1(a). Finally, since a new listing is included in each annual

edition of the *Super Lawyers* supplement and magazine (and, it is presumed, in other similar publications), the advertisement must indicate the year in which the lawyer was included in the list.

Inquiry #2:

May a North Carolina lawyer purchase a profile or display advertisement in a *North Carolina Super Lawyers* advertising supplement or magazine or in other similar publications?

Opinion #2:

Yes, subject to the conditions set forth in Opinion #1. If the standards for inclusion in the listing are published in the supplement or the magazine, the advertisement does not have to include information on how to obtain the standards.

Inquiry #3:

May a North Carolina lawyer participate in the selection process for the lawyers who are included in such publications?

Opinion #3:

Yes, provided the lawyer's recommendations and evaluations of other lawyers are founded on knowledge and experience of the other lawyers, truthful, and not provided in exchange for a recommendation from another lawyer.

2007 Formal Ethics Opinion 15

April 25, 2008

Clarification of the Requirements for Targeted Direct Mail

Opinion provides clarification of the technical requirements for targeted direct mail letters set forth in Rule 7.3(c) of the Rules of Professional Conduct.

Inquiry #1:

Rule 7.3(c) allows a lawyer to solicit professional employment from a potential client known to be in need of legal services by written, recorded, or electronic communication provided the statement, in capital letters, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES" (the advertising notice) appears on a specified part of the communication. If the solicitation is by letter, Rule 7.3(c)(1) requires the advertising notice to "be printed at the beginning of the body of the letter in a font as large or larger than the lawyer's or law firm's name in the letterhead or masthead." Where must the advertising notice be placed in the letter to be "at the beginning of the body of the letter"?

Opinion #1:

Black's Law Dictionary, 5th Edition (1979), defines "[b]ody of an instrument" as follows: "The main and operative part; the substantive provisions, as distinguished from the recitals, title, jurat, etc." Consistent with this definition, the body of a letter is that part of the letter that appears below the salutation. However, the Rules of Professional Conduct, being rules of reason, should be interpreted and applied in a reasonable manner. Rule 0.2, Scope, cmt. [1]. Therefore, the requirement in Rule 7.3(c) that the advertising notice "be printed at the beginning of the body of the letter" is satisfied if the advertising notice appears anywhere between the top of the page to immediately below the salutation of a direct mail letter.

Inquiry #2:

Rule 7.3(c)(1) requires direct mail letters to potential clients to be placed in an envelope. The advertising notice must be printed on the front of the envelope, in a font that is as large as any other printing on the envelope and the front of the envelope "shall contain no printing other than the name of the lawyer or law firm and return address, the name and address of the recipient, and the advertising notice." Many law firms have designed a distinguishing sign or mark ("insignia") or special border that is used in conjunction with the firm's name wherever and whenever the firm name appears in print on official written communications on behalf of the firm such as letterhead. Examples of such insignia include a stylized version of the scales of justice or the surname initials of the named partners in a distinct enlarged font. May the front of the envelope for a direct mail letter contain an insignia or border connected with the firm name in the return address on the envelope if the insignia is a picture or symbol but does not contain any letters or printing?

Opinion #2:

Yes, if the insignia or border is used consistently by the firm in official communications on behalf of the firm, the insignia or border is considered a part of the firm name and may appear next to the firm name in the return address on the front of the envelope provided the advertising notice remains conspicuous.

Inquiry #3:

May the front of the envelope for a direct mail letter contain an insignia connected with the firm name in the return address on the front of the envelope if the insignia is a design that incorporates the surname initials of the named partners of the firm? If so, do the initials have to be in a font that is the same size or smaller than the advertising notice printed on the front of the envelope?

Opinion #3:

The front of the envelope may contain an insignia with initials that are in a font that is larger than the font used for the advertising notice provided the insignia is used consistently by the firm in official communications on behalf of the firm, the advertising notice is in a font that is the same size or larger than the font used for the firm name, and the advertising notice remains conspicuous.

Inquiry #4:

May an insignia appear on the back of the envelope and, if so, are there any restrictions on the size?

Opinion #4:

The insignia may appear on the back of the envelope subject to the requirements set forth in opinions #2 and #3 above.

Inquiry #5:

ABC Law Firm uses the motto "Attorneys for Injured People" and prints the motto just below its name in all of its official written communications. May the front of the envelope for a direct mail letter contain a motto connected with the law firm name in the return address on the envelope?

Opinion #5:

No. A motto will detract from the conspicuousness of the advertising notice. However, the motto may appear on the back of the envelope subject to the font size requirements in Rule 7.3(c).

Inquiry #6:

May the URL or website address for a law firm appear in the return address on the front of the envelope for a direct mail letter?

Opinion #6:

No. It may appear on the back of the envelope subject to the font size requirements in Rule 7.3(c).

2007 Formal Ethics Opinion 16

January 25, 2008

Cross Examination of Law Enforcement Officer by Criminal Defense Lawyer Who is Also Elected Official

Opinion rules that a lawyer who serves on a city council or board of county commissioners may represent a criminal defendant in a criminal proceeding in which a law enforcement officer employed by the council or board is a witness who will be cross examined by the lawyer provided the city or county has adopted a form of government that limits the lawyer's influence on employment decisions relative to the officer.

Inquiry #1:

Attorney is a criminal defense lawyer in private practice. He is presently a candidate for city council for City M. The city charter of City M provides for the council-manager form of government pursuant to Chapter 160A, Article 7, Part 2, of the General Statutes. In this form of government, the city manager, who is hired by the city council and serves at its pleasure, has the sole authority to hire, fire, promote, or make salary decisions relative to all city officers, department heads, and employees in administrative service (and not elected) except the city attorney. N.C.G.S. 160A-148. The city manager's authority to make employment decisions extends to the chief of police and to all employees of the police department. City M's city charter and local ordinances specify that the city manager, not the city council, is responsible for hiring, firing, and promoting police officers.

RPC 63 and RPC 73 hold that a lawyer who has the potential to influence the salary or employment prospects of a law enforcement officer may not rep-

resent criminal defendants in cases in which a law enforcement officer is a witness who must be cross examined by the lawyer. The opinion effectively disqualifies a lawyer who is serving on a governing body, such as the city council, from representing criminal defendants in the judicial district where he serves as a city councilor.

If a lawyer is elected to serve on a city council organized and operated under the council-manager form of government, as described above, in which the lawyer will have no ability directly to influence the salary or employment decisions relative to any law enforcement officer testifying in a criminal case, may the lawyer represent criminal defendants in criminal proceedings in the judicial district where he serves as a city councilor and cross-examine witnesses who are law enforcement officers?

Opinion #1:

Yes. RPC 73 ruled that a lawyer serving on a city council or similar governing board, with authority directly to influence employment decisions relative to government employees, is prohibited from cross-examining law enforcement officers because of "the threat that the law enforcement officer might not feel free to testify truthfully and fully in the face of such an opponent." In the council-manager form of government, the city council and councilors have no direct authority over the salary or employment prospects of any city employee. Therefore, a law enforcement officer's ability to testify truthfully in a criminal case will be unaffected by the defense lawyer's role on the city council.

Inquiry #2:

Chapter 153A, Article 5, Part 2 of the General Statutes provides the counties may adopt the county-manager plan of government in which the county manager is hired by the board of commissioners to serve at its pleasure. Although similar to the council-manager form of government for muncipalities, the county-manager form of government gives the county manager less discretion in employment decisions. The county manager is the chief administrator of county government and appoints, with the approval of the board of commissioners, and suspends or removes all non-elected county officers, employees, and agents. N.C.G.S. 153A-82(1). The county manager is also responsible for preparing position classification and pay plans for county officers and employees for submission to the board of commissioners and for administering the pay plan and any position classification plan in accordance with general policies and directives adopted by the board. N.C.G.S. 153A-92(c).

If a lawyer is elected to serve on a board of commissioners organized and operated under the county manager form of government, as described above, in which the lawyer will have no authority to influence a decision to suspend or remove a law enforcement officer and limited authority to influence the employment and compensation of a law enforcement officer testifying in a criminal case, may the lawyer represent criminal defendants in criminal proceedings in the judicial district where he serves as a county commissioner and cross-examine witnesses who are law enforcement officers?

Opinion #2:

Yes. Although the board of commissioners in a county-manager form of government has more authority over employment decisions including approval of appointments and establishing the pay plan and position classifications, it is doubtful that the limited influence on a law enforcement officer's salary or employment prospects held by the criminal defense lawyer will affect or interfere with the law enforcement officer's duty to testify truthfully.

2008 Formal Ethics Opinion 1

April 25, 2008

Disclosure of Client Alias in Workers' Compensation Action

Opinion rules that lawyer representing an undocumented worker in a workers' compensation action has a duty to correct court documents containing false statements of material fact and is prohibited from introducing evidence in support of the proposition that an alias is the client's legal name.

Inquiry:

In a workers' compensation action, what duties does a lawyer have to the court if the lawyer learns that his client, who is an undocumented worker, has been using an alias and that the court documents have been filed under the alias rather than the client's legal name?

Opinion:

The protection of client confidences is one of the most significant responsibilities imposed on a lawyer. Rule 1.6(a) of the Rules of Professional Conduct provides that a lawyer shall not reveal information acquired during the professional relationship with a client unless (1) the client gives informed consent; (2) the disclosure is impliedly authorized; or (3) one of the exceptions set out in Rule 1.6(b) applies. One of the exceptions set out in Rule 1.6(b) allows a lawyer to reveal confidential information to the extent the lawyer reasonably believes necessary to comply with the Rules of Professional Conduct. Rule 1.6(b)(1).

Rule 3.3(a)(1) prohibits a lawyer from knowingly making a false statement of material fact to a tribunal and requires a lawyer to correct any false statement of material fact previously made. Whether a lawyer has a duty under Rule 3.3 that would require the lawyer to breach a client's confidences to correct previously filed court documents depends on whether the documents contain false statements of material fact.

If the client's name is an issue of material fact in the workers' compensation action, then the lawyer has a duty to correct the filed court documents. The North Carolina Workers' Compensation Act applies to "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed." N.C.G.S. A7 97-2. Arguably, the fact that the lawyer's client is an undocumented worker would not affect the client's right to compensation under the Act. On the other hand, issues of credibility may affect the client's action. A determination of the materiality of the client's use of an alias in a workers' compensation action is a legal question outside the purview of the Ethics Committee.

Before taking any necessary remedial measures, the lawyer should advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the correction of the false statements in the filed court documents.

Materiality does not affect the lawyer's duty to refrain from offering false evidence in the future. Rule 3.3(a)(3) provides that a lawyer shall not offer any evidence that the lawyer knows to be false. Therefore, the lawyer would be prohibited from introducing any evidence in support of the proposition that the alias is the client's true name, including the client's own testimony. *See* RPC 33. If the client cannot agree to the lawyer's proposed terms of the continued representation, the lawyer must seek to withdraw from the action in accordance with Rule 1.16.

2008 Formal Ethics Opinion 2

April 25, 2008

Roles of School Board Lawyers in Administrative Proceedings

Opinion holds that a lawyer is not prohibited from advising a school board sitting in an adjudicative capacity in a disciplinary or employment proceeding while another lawyer from the same firm represents the administration; however, such dual representation is harmful to the public's perception of the fairness of the proceeding and should be avoided.

Inquiry:

A student who is suspended from public school for more than ten days may appeal the suspension to the school board. Similarly, when a certified employee of a school system is dismissed, the employee may appeal the dismissal to the school board. An administrative hearing is held, with the board sitting in a quasi-judicial capacity, to determine whether the decision of the administration should be upheld.

Lawyers with ABC Law Firm have extensive experience and special expertise in education law. School Board retains Law Firm to provide all legal representation to the board and, through the board, to the administration of the school system.

Lawyer A and Lawyer B are both education lawyers employed by ABC Law Firm. May Lawyer A represent the administration in a suspension case against a student in an appeal to the board while Lawyer B advises the board on the legal and procedural issues that arise during the hearing? Similarly, may Lawyer A represent the administration in a dismissal case against an employee in an

appeal to the board while Lawyer B advises the board?

Opinion:

This inquiry presents an interesting technical issue of professional responsibility relative to whether there is a conflict of interests created by this form of dual representation. The opinion concludes there is no conflict of interests but that this form of dual representation should be avoided to foster the public's perception of the integrity and fairness of the process.

Rule 1.7(a) provides, in part, that it is a concurrent conflict of interest if the representation of one client will be directly adverse to another client or the representation of one or more clients may be materially limited by the lawyer's professional responsibilities to another client or a former client. Under Rule 1.10, a conflict of interest for one lawyer in a firm is imputed to the other lawyers in the firm unless it is a personal conflict of interest.

It is not a concurrent conflict of interest for one lawyer in a firm to present the administration's position to the school board while another lawyer in the same firm advises the board on the legal and procedural issues that arise during the hearing. Both lawyers, whether acting in the role of prosecutor or the role of advisor, represent the school board and not the student or employee appearing before the board. The arrangement described in the inquiry, therefore, does not present a conflict of interest relative to the student or the employee because no duty of loyalty is owed to them by the lawyers with ABC Law Firm.

Although it is assumed that there is no due process prohibition on the dual representation described in this inquiry and no opinion is expressed on this legal issue, see *Hope v. Charlotte-Mecklenburg Board of Education*, 110 N.C. App. 599 (1993), it is clear that the dual representation creates a perception of unfairness in the minds of students (and their parents) and employees appearing before the board. During the public comment period on this proposed opinion, numerous commentators stated that respondents, upon learning that the board will be advised by a lawyer who works in the same firm as the lawyer who will be presenting the administration's position, conclude that the board will receive legal advice that is biased in favor of the administration and, for this reason, the proceeding cannot be fair and impartial.

In Rule 0.1, Preamble: A Lawyer's Professional Responsibilities, it is observed that "[w]ithin the framework of [the] Rules [of Professional Conduct]..., many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional moral judgment guided by the basic principles underlying the Rules." One of the basic principles underlying the Rules is the duty of a lawyer, as an officer of the court, to uphold the legal process and to seek improvement in the administration of justice. Rule 0.1, cmts. [5] - [6]. As noted in comment [6] to the Preamble, "a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in constitutional democracy depend on popular participation and support to maintain their authority." This admonition applies to administrative proceedings as well as to judicial proceedings. The dual representation described in this inquiry creates a perception of unfairness that undermines the public's confidence in the rule of law and the fairness of the proceeding. For this reason, lawyers are **strongly** urged to avoid such dual representation and to recommend that the school board obtain other legal counsel to either advise the board or represent the administration.[1]

Endnote

1. In the event lawyers in the same firm do not heed the admonition of the Ethics Committee to avoid this form of dual representation, it is recommended that the lawyers protect the integrity of the adjudicative process by avoiding communications between themselves about a pending disciplinary or employment proceeding. Screening the lawyers from each other would avoid the appearance that the lawyer presenting the administration's position may influence the lawyer advising the board of education and would be consistent with the prohibitions on improper communications about a pending matter with a judge or other adjudicative official or body in Rule 3.5(a). *See* Rule 1.0(l) ("'screened' denotes the isolation of a lawyer from any participation in a professional matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.")

2008 Formal Ethics Opinion 3

January 23, 2009

Assisting a Pro Se Litigant

Opinion rules a lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

Inquiry:

Without appearing in a proceeding or otherwise disclosing or ensuring the disclosure of his assistance to the court, may a lawyer assist a pro se litigant by giving advice on the content and format of documents to be filed with the court including pleadings, by drafting those documents for the litigant, or by giving advice about what to do in court including which witnesses to call, what evidence to present, and how to make opening and closing arguments?

Opinion:

Yes, a lawyer may assist a pro se litigant without disclosing his participation or ensuring that the litigant discloses his assistance unless the lawyer is required to do so by law or court order. Allowing such assistance is consistent with the duty of confidentiality in Rule 1.6, the authority to limit the scope of representation in Rule 1.2, and the duty to assist individuals who cannot afford legal representation as expressed in the Preamble and Rule 6.5. Remaining undisclosed does not violate the duty of honesty set forth in Rules 1.2(d), 4.1, or 8.4(c) or the duty of candor to the tribunal set forth in Rule 3.3(b) unless there is a court order or a law that requires the lawyer to make the disclosure.

In ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-446 (2007), the ABA Standing Committee on Ethics and Professional Responsibility held that a lawyer may provide legal assistance to a pro se litigant without disclosing or ensuring the disclosure of the nature or extent of the assistance. With regard to whether it is dishonest or a violation of the duty of candor to the tribunal for the lawyer's assistance to remain undisclosed, the committee wrote that the answer to the question depends on:

> whether the failure to disclose that fact would constitute fraudulent or otherwise dishonest conduct on the part of the client, thereby involving the lawyer in conduct violative of [Model] Rules 1.2(d), 3.3(b), 4.1(b), or 8.4(c). In our opinion, the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation. Litigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure. *Id.*

The committee added the following on whether it is dishonest for the lawyer's assistance to be undisclosed:

> [the question] turns on whether the court would be misled by failure to disclose such assistance. The lawyer is making no statement at all to the forum regarding the nature or scope of the representation….Absent an affirmative statement by the client, that can be attributed to the lawyer, that the documents were prepared without legal assistance, the lawyer has not been dishonest within the meaning of Rule 8.4(c). For the same reason, we reject the contention that a lawyer who does not appear in the action circumvents court rules requiring the assumption of responsibility for their pleadings. Such rules apply only if a lawyer signs the pleading and thereby makes an affirmative statement to the tribunal concerning the matter. Where a pro se litigant is assisted, no such duty is assumed. *Id.*

The conclusion that the Model Rules of Professional Conduct do not compel disclosure of a lawyer's background assistance to a pro se litigant is sound and equally applicable to the North Carolina Rules of Professional Conduct.

In response to the decision of a federal magistrate judge in *Delso v. Trustees for the Retirement Plan for the Hourly Employees of Merck & Co., Inc.,* 2007 WL 766349 (D.N.J. 2007), holding that a lawyer violated New Jersey Rule of Professional Conduct 3.3 by "ghostwriting" pleadings for a pro se litigant, the New Jersey Supreme Court Advisory Committee on Professional Ethics issued an ethics opinion that holds that a lawyer who provides drafting assistance to a pro se litigant is not required to notify the court of his role unless "such assistance is a tactic by a lawyer or party to gain advantage in litigation by invoking

traditional judicial leniency toward pro se litigants." New Jersey Supreme Court Advisory Committee on Professional Ethics, Op. 713 (2008). However, judicial leniency can not make up for the substantial disadvantage a nonlawyer who appears pro se experiences when the opposing party is represented in court by legal counsel. A lawyer who recommends that a client appear pro se for the sole purpose of gaining the tactical advantage of judicial leniency is providing incompetent legal advice in violation of Rule 1.1 and such conduct is prohibited on this basis regardless of whether there is disclosure to the court of the lawyer's assistance.[1]

A pro se litigant who seeks a lawyer's advice or assistance outside the courtroom is a client of the lawyer although the representation is limited in scope and the individual may not pay for the advice or assistance. Although the lawyer does not appear in court or sign pleadings, the lawyer must obey the Rules of Professional Conduct applicable to the representation of any client. This includes compliance with the prohibition in Rule 3.1 on filing or asserting frivolous pleadings. The duty of confidentiality in Rule 1.6(a) is also applicable and prohibits the lawyer from revealing information acquired in the professional relationship with the client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or one of the exceptions to the duty of confidentiality in Rule 1.6(b) applies. The only applicable exception allowing disclosure of the lawyer's assistance to a pro se litigant is found in Rule 1.6(b)(1). It allows disclosure of confidential information to comply with the Rules of Professional Conduct, law, or court order. As noted above, the Rules of Professional Conduct do not compel disclosure.

Rule 1.2(c) allows a lawyer to limit the scope of a representation if the limitation is reasonable under the circumstances. As noted in Comment [6] to the rule, "[t]he scope of services to be 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." Limiting the lawyer's representation to extrajudicial advice and assistance is reasonable when an individual cannot afford to be represented in court. In 2005 FEO 10, the utility of unbundled legal services, or "legal services that are limited in scope and presented as a menu of legal service options from which the client may choose," to clients of limited means was acknowledged. The opinion holds that an internet based law practice may offer unbundled legal services to pro se litigants provided the client gives informed consent to the limited representation and the lawyer makes an independent judgment as to the limited services that can be competently provided under the circumstances. The opinion permits the lawyer to provide assistance to a pro se litigant without entering an appearance in the client's case and without requiring disclosure of the lawyer's behind the scenes assistance.

The Rules of Professional Conduct and prior ethics opinions recognize the importance of providing assistance to individuals who cannot afford representation. The Preamble, Rule 0.1, states that "[t]he basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer." Rule 6.5, *Limited Legal Services Programs*, permits a lawyer operating under the auspices of a program sponsored by a non-profit organization or court to provide short term limited legal services to a client without expectation that the lawyer will provide continuing representation to client. These short-term services frequently include advice about the nature and content of pleadings the client should file and advice about what to expect and what to do in court. The rule does not require a participating lawyer to disclose his assistance to the court in which pleadings are filed or to ensure that the client makes the disclosure. The importance of encouraging lawyers to participate in such programs is manifested by the relaxation of the rules on conflicts authorized by Rule 6.5(a)(1) and (b).

Similarly, RPC 114 fosters legal assistance to individuals who cannot afford representation but fall outside the economic or subject matter eligibility requirements of legal services organizations. The opinion confirms that it is ethical for a legal services lawyer to draft a complaint for a pro se litigant's signature, explain how to file the complaint, and review courtroom procedure, including advice about strategy, tactics, or litigation techniques, without listing herself as the attorney of record. There should be no distinction between what a legal services lawyer and a lawyer in private practice may ethically do behind the scene to assist those who cannot afford full representation.

For the public policy reasons set forth above and because disclosure of the lawyer's assistance is not compelled by the Rules of Professional Conduct, a lawyer may assist a pro se litigant without disclosing his assistance to the court and without ensuring that the client discloses the assistance to the court unless the lawyer is compelled to make the disclosure by law or by a court order.[2]

Endnotes

1. Accord ABA Formal Opinion 07-446 (2007)(undisclosed assistance "will not secure unwarranted 'special treatment' for that litigant or otherwise unfairly prejudice other parties to the proceeding. Indeed, many authorities studying ghostwriting in this context have concluded that if the undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will be evident to the tribunal. If the assistance has been ineffective, the pro se litigant will not have secured an unfair advantage.").
2. Consistent with 32 CFR 776.57, a military lawyer who is licensed in another jurisdiction may provide legal advice and assistance to military personnel. This opinion does not limit or expand that authority.

2008 Formal Ethics Opinion 4

July 18, 2008

Use of Subpoena Power to Obtain Records

Editor's note: To the extent the opinions are in conflict, this opinion overrules RPC 236.

Opinion rules that a lawyer may issue a subpoena in compliance with Rule 45 of the Rules of Civil Procedure which authorizes a subpoena for the production of documents to the lawyer's office without the need to schedule a hearing, deposition or trial.

Inquiry:

Lawyer A represents Lender in pursuing a collection matter pertaining to a certain check. Lawyer A sent a subpoena to the drawee bank, which is not a party to the law suit, requesting a copy of the front and back of the check. Lawyer A provided notice of the subpoena to the other parties in the action. There is no hearing or deposition scheduled. Lawyer B, who represents the bank, believes that Lawyer A may not send a subpoena for documents to a third party unless the subpoena commands the production of the documents at a pending hearing, deposition, or trial.

May Lawyer A issue a subpoena to the bank without scheduling a hearing, deposition, or trial?

Opinion:

Yes. Opinion #3 of RPC 236 states:

> It is deceptive and a violation of the [Rules of Professional Conduct] 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 custodian 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.

See Rule 3.1 and Rule 8.4(c). Prior to 2003, North Carolina Rule of Civil Procedure 45 did not permit the issuance of a subpoena separately from a trial, hearing, or deposition. The current rule provides in pertinent part:

> **Rule 45. Subpoena.**
>
> (a) Form; Issuance.
>
> (1) Every subpoena shall state all of the following:
>
> ...
>
> b. A command to each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated records, books, papers, documents, or tangible things in the possession, custody, or control of that person therein specified.
>
> ...
>
> (2) A command to produce evidence may be joined with a command to appear at trial or hearing or at a deposition, or any subpoena may be issued separately.

Lawyers have an obligation to interpret the Rules of Civil Procedure in good faith and to apply sound legal reasoning to a rule's interpretation and application. The current version of Rule 45 permits the issuance of a subpoena to produce evidence together with a command to appear at a trial, hearing, or deposition or "[a] command to produce evidence may be issued separately."

Lawyer A may, therefore, subpoena a third party to produce records at

Lawyer A's office so long as Lawyer A follows all of the requirements set out in Rule 45, including service of the subpoena to each party which affords other parties the opportunity to file objections.

To the extent that this opinion conflicts with RPC 236, that opinion is overruled.

2008 Formal Ethics Opinion 5

July 18, 2008

Web-based Management of Client Records

Opinion rules that client files may be stored on a website accessible by clients via the internet provided the confidentiality of all client information on the website is protected.

Inquiry #1:

Rather than provide clients with hard copies of real estate closing documents, a lawyer would like to upload the files to a secure website and then email a link to his clients with a password so that they can download their files and print them if desired. The lawyer would offer his clients the option of receiving a hard copy of the closing documents rather than access to the website.

Does such a practice comply with the lawyer's responsibilities under the Rules of Professional Conduct?

Opinion #1:

Rule 1.16(d) provides that a lawyer must surrender papers and property to which the client is entitled upon the termination of the representation. Comment [10] to the rule adds that the client it entitled to anything in the file that would be helpful to successor counsel. However, the file documents do not have to be turned over in a paper format. RPC 234 allows lawyers to store client files in an electronic format. With the client's consent, the client's file may be turned over to the client in the form of a computer disk or by emailing a link to the client with a password so that the client can download the files from a website.

If the law firm chooses to use a system that allows clients to access and download their own files at the end of the representation, the confidentiality and security of each client's file must be protected. *See* Rules 1.6 and 1.15. Therefore, the law firm must enact appropriate measures to ensure that each client only has access to his or her own file. In addition, the law firm must ensure that third parties cannot gain access any client file.

Inquiry #2:

A patent lawyer would like to use a web-based management system that allows both the law firm and corporate clients access to a web-based docketing system. A large part of the lawyer's patent practice is the maintenance of patent dockets. The law firm currently has a docketing system that could be made available to clients via online access. However, the information for all patent clients of the firm is available on the system.

May the patent lawyer protect the confidential information of other clients by contractually obligating the in-house lawyer for a corporate client to view only information specific to his employer? Would the use of a web-based management system be acceptable if the law firm installed a security code access system that allows access only to the specific client's docket information?

Opinion #2:

The use of a web-based management system that allows both the law firm and the client access to the client's docketing information or other information in the client's file is permissible provided the lawyer can fulfill his obligation to protect the confidential information of all clients. A lawyer must take steps to minimize the risk that confidential client information will be disclosed to other clients or to third parties. *See* RPC 133 and RPC 215. It is not acceptable for one client to have access to another client's information absent client consent. This risk is not cured by an agreement from a client or a client's in-house counsel not to view the confidential information of another client. A security code access procedure that only allows a client to access its own confidential information would be an appropriate measure to protect confidential client information.

If the law firm will be contracting with a third party to maintain the web-based management system, the law firm must ensure that the third party also employs measures which effectively minimize the risk that confidential information might be lost or disclosed. *See* RPC 133.

2008 Formal Ethics Opinion 6

July 18, 2008

Hiring Nonlawyer Independent Contractor to Organize and Speak at Educational Seminars Related to Estate Planning

Opinion rules that a lawyer may hire a nonlawyer independent contractor to organize and speak at educational seminars so long as the nonlawyer does not give legal advice.

Inquiry #1:

May a lawyer hire a nonlawyer independent contractor to organize and speak at educational seminars at which the nonlawyer will present general information about wills, trusts, and estates?

Opinion #1:

Yes. The giving of legal advice is the practice of law. *See* N.C.G.S. § 84-1 (2004). A nonlawyer may provide educational information about the law to members of the public, so long as the nonlawyer does not exercise independent legal judgment and does not give legal advice or counsel to attendees as to their legal rights or responsibilities, or the legal rights or responsibilities of others. To avoid assisting in the unauthorized practice of law, the lawyer must exercise the appropriate level of supervision to ensure that the nonlawyer is not giving legal advice. *See* Rule 5.5(d).

The structure of the educational legal seminars makes it difficult to envision how a lawyer can ensure that the nonlawyer does not give legal advice, unless the lawyer is actually present. Therefore, a lawyer who hires and allows a nonlawyer to conduct an unsupervised educational seminar assumes the risk that he may assist in the unauthorized practice of law.

Inquiry #2:

If the answer to Inquiry #1 is yes, may the nonlawyer respond to questions from members of the seminar audience?

Opinion #2:

No, unless the question can be answered with general information about wills, trusts, and estates. The nonlawyer may not answer questions that require the exercise of independent legal judgment or the giving of specific legal advice. The hiring lawyer assumes the risk that the nonlawyer will cross the line between answering general informational questions and giving legal advice. *See* Rule 5.5(d).

Inquiry #3:

If the answer to Inquiry # 1 is yes, may the nonlawyer meet individually with seminar attendees, who request such a meeting, and inform the attendees about services that the lawyer provides that are relevant to the attendee's situation?

Opinion #3:

No. The determination of what legal services might benefit an individual attendee requires the exercise of independent legal judgment and is therefore the practice of law. *See* N.C.G.S. § 84-.1 (2004). The lawyer is prohibited by Rule 5.5(a) from assisting such conduct.

Inquiry #4:

Is the nonlawyer required to disclose to the seminar attendees the name of the lawyer who is paying for him to speak at the seminar?

Opinion #4:

Yes. The nonlawyer must disclose the name of the lawyer sponsoring the seminar in order to avoid misleading the seminar attendees in violation of Rule 7.1(a). However, if a seminar attendee asks the nonlawyer to recommend a lawyer, the nonlawyer should reply that he cannot recommend a specific lawyer. *See* Rule 7.3(a).

Inquiry #5:

If the answer to Inquiry #1 is yes, may the lawyer compensate the nonlawyer per seminar or per hour?

Opinion #5:

Rule 5.4(a) prohibits a lawyer from sharing legal fees with a nonlawyer

except in certain circumstances not relevant to this inquiry. Therefore, it would be inappropriate to compensate the nonlawyer based on the amount of legal fees generated by the nonlawyer's presentation of educational seminars. However, the hiring lawyer may compensate the nonlawyer based either on the number of seminars conducted by the nonlawyer or the number of hours worked by the nonlawyer.

2008 Formal Ethics Opinion 7

July 18, 2008

Lawyer's Obligation to Record or to Disburse Closing Funds

Editor's note: This opinion expands upon 99 Formal Ethics Opinion 9. To the extent that this opinion differs from 99 FEO 9, that opinion is overruled.

Opinion rules that a closing lawyer shall not record and disburse when a seller has delivered the deed to the lawyer but the buyer instructs the lawyer to take no further action to close the transaction.

Inquiry #1:

Attorney represented Small Corporation on the purchase of a residential lot from Development Company. After the closing conference, 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 proceed. What should Attorney do?

Opinion #1:

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. Comment [1] to Rule 1.2 of the 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." However, a closing lawyer must also comply with the conditions placed upon the delivery of the deed by the seller absent fraud. 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). Because title has passed to the buyer, the lawyer must satisfy the conditions of the transfer of the property by disbursing the sale proceeds. The lawyer must notify the buyer and the buyer can then take appropriate legal action to seek to have the sale rescinded. This opinion is applicable to closings on property used or developed for residential purposes.

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).

Inquiry #3:

Would the answer to Inquiry #1 be different if the buyer had instructed the lawyer not to disburse the sales proceeds after the closing conference, but before the deed was recorded?

Opinion #3:

Yes. Unless the real estate contract provides otherwise, or it is otherwise agreed between the parties, closing is presumed to be complete at the date and time of recording. If closing is not complete, upon receiving the buyer's instruction not to close, the lawyer should return the funds to lender and buyer, return the deed to seller, and retain the other closing documents in his file. The lawyer should hold any escrowed funds he received representing the earnest money deposit made at the time of the offer to purchase. If the earnest money was not initially deposited with the lawyer at the time of the offer to purchase, the lawyer shall have the right to return the deposit to the escrow account of the person, firm, or company that initially received the deposit.

Inquiry #4:

Assume that Attorney represents Development Company, the seller of the property. After the closing conference, but prior to recording the deed, Attorney received a telephone call from the seller asking the lawyer not to record the deed. What should attorney do?

Opinion #4

See Opinion #3.

2008 Formal Ethics Opinion 8

October 24, 2008

Division of Fees in Departure Provision of Law Firm's Employment Agreement

Opinion rules that a provision in a law firm employment agreement for dividing legal fees received after a lawyer's departure from a firm must be reasonable and may not penalize or deter the withdrawing lawyer from taking clients with her.

Background:

Rule 5.6(a) of the Rules of Professional Conduct prohibits a lawyer from participating in, offering, or making "a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship except an agreement concerning benefits upon retirement." This prohibition on restrictive covenants protects the freedom of clients to choose a lawyer and promotes lawyer mobility and professional autonomy. Rule 5.6, cmt. [1]; 2001 FEO 10 (agreement reducing the amount of deferred compensation lawyer receives if the lawyer leaves the firm and engages in private practice within a 50 mile radius of the lawyer's former firm violates Rule 5.6(a)); 2007 FEO 6.

Many law firms include provisions in a partnership, shareholders, or employment agreement (referred to collectively herein as "employment agreement") that address the division of legal fees received by a lawyer after she withdraws from the law firm for the representation of clients who followed the departing lawyer to her new firm. The provisions do not directly prohibit the withdrawing lawyer from engaging in competition with the firm, but may create financial disincentives for the lawyer's continued representation of former clients of the firm. These provisions frequently appear in employment agreements for personal injury law firms that regularly represent clients on a contingent fee basis. The provisions typically require the withdrawing lawyer to pay her former firm a percentage of any contingent fee that she subsequently receives for the representation of a client who left the law firm with her. The provisions may also include a requirement that the withdrawing lawyer reimburse the firm prior to the resolution of the case for costs advanced on behalf of a departing client.

Example provisions from three employment agreements appear below.

Employment Agreement No. 1

Attorney acknowledges that Law Firm will expend a considerable amount of time and money to assist in his education in the assigned practice areas. Additionally, Attorney acknowledges that Law Firm will transfer to him/her current cases which have a significant amount of current work in process and that the firm is NOT prorating or penalizing his bonus program for this work in process. Further, the firm will transfer to Attorney considerable technological information both substantive and operational. Finally, Attorney acknowledges that Law Firm has and will spend considerable sums of money in marketing and advertising the Medico-Legal practice areas. Attorney also acknowledges that under the North Carolina State Bar Rules, a client is free to choose, in the event a lawyer shall leave the employment of a firm, whether the client will stay with the firm or go with the departing lawyer. Attorney specifically agrees to the following should he leave the firm for any reason:

A. Upon a client choosing to have Attorney represent them in the future, Attorney shall, within 30 days, pay to the firm any funds the firm has advanced to the client.

B. Attorney agrees to pay to the firm 70% of the fees he may receive

from his continued representation of the client in the matter for which the firm was representing the client at the time of his departure. If this amount is greater than the amount of money that the firm could obtain as a legal fee, then the balance of the monies paid by Attorney to the firm under this provision shall be considered as compensation to the firm for the marketing, advertising, technological, and other information and knowledge provided by the firm to Attorney during his employment at the firm and as consideration for the work in process provided to Attorney on the cases he was assigned to at the beginning of his employment.

Employment Agreement Number 2

Costs and Escrows. At or as soon as is practicable on or after the Transfer Date [date file is transferred], the Firm shall provide departing Associate with a statement of costs for each Transferring Client (which may be in the form of one or more ledgers) showing expenses the Firm has advanced on the matter. Within five (5) days of receipt of such statement of costs, Associate shall pay the Firm the full amount of the costs advanced as reflected in such statement.

Compensation for Services Rendered to a Transferring Client. The parties acknowledge that in a typical Transferring Client matter, the Firm makes a substantial investment of initiative, goodwill, time, money, risk, and effort which the Firm will not ordinarily have been compensated at the time of the Transfer Date. That investment includes, but is not limited to: building the Firm's reputation for skillful, energetic, competent, effective, prompt, and dedicated service on behalf of clients; attracting clients to engage the services of the Firm; fostering the respect of other parties and tribunals for the legal services performed by the Firm and its attorneys; serving the needs of the Firm's clients; utilizing time, skill, and resources in investigation, client and witness interviews, collection and organization of medical and other records; factual and legal research; drafting of pleadings and correspondence; preparation for hearings; and many other tasks, too numerous and varied to mention, relating to a client's particular legal matter. Associate acknowledges that he/she has received or will receive compensation in the form of salary, benefits, and/or other Associate compensation for any work done or services performed by Associate on behalf of a Transferring Client prior to the Transfer Date; Associate understands and agrees that he/she has no right, claim, or interest in remuneration for work performed by Associate and/or the Firm prior to the Transfer Date on behalf of a Transferring Client or a Remaining Client. The parties agree that Associate should receive fair compensation, but no windfall, for work performed by the Associate subsequent to the Transfer Date on behalf of a Transferring Client. Furthermore, the Firm and Associate acknowledge that, with respect to a Transferring Client, any attempt to apportion fair compensation between the Firm and the Associate on a case-by-case basis, and to place a fair value on the Firm's investment (as referred to above), would be extremely complex, time-consuming, difficult, imprecise, uncertain, and debatable. In order to avoid uncertainty and litigation that might arise in connection with fee allocations performed on a case-by-case basis, and to insure that the Firm and Associate will each receive fair and equitable compensation for the value of their contributions and investments, the parties have developed the simple and easily-applied formulas set forth in the following paragraph in order to apportion the relative shares of compensation to which they would be respectively entitled upon consummation of an award, judgment, or settlement in a Transferring Client's case.

Compensation Formulas. For purposes of the formulas below, compensation for services rendered to a Transferring Client shall be allocated between the Firm and Associate as of the date the attorneys' fees or other remuneration or consideration in the matter are fixed (the "Fee Determination Date"). The Fee Determination Date shall be the earlier of (1) the date that payment of such fees, remuneration, or consideration is received or receivable; or (2) the date upon which a final and binding award of attorneys' fees is determined (as, for example, in the case of a fee award from a court or other tribunal) or can readily and positively be determined (e.g., as by applying a contractual contingency fee factor such as one-third to a final and binding award on behalf of the client). In the event that Associate has caused or allowed, or suffered the Fee Determination Date with respect to a matter concerning a Transferring Client to be unnecessarily and unjustifiably delayed, the Fee Determination Date shall be deemed to be the day before the Associate's Termination Date. The Firm and Associate hereby irrevocably agree that such compensation shall in each case concerning a Transferring Client be apportioned between the Firm and Associate in accordance with the formulas below:

Fee Determination

Date	Firm	Associate
On or Before Transfer Date	100%	0%
On or Before First Anniversary of Transfer Date	80%	20%
On or Before Second Anniversary of Transfer Date	60%	40%
After Second Anniversary of Transfer Date	50%	50%

Employment Agreement Number 3

Post Termination Fees. In the event that Employee's employment is terminated for any reason, voluntarily or involuntarily, or the Employee resigns, and a client requests that Employee, rather than Corporation, represent the client after Employee's employment is terminated, Employee shall pay to Corporation immediately out of any settlement, award, or verdict a portion of the attorney fee based on the following formula:

.20 x attorney fee + ((a - b)/a) x attorney fee = amount due to Corporation

- Where .20 or 20% of any such attorney fee shall be paid to Corporation representing the advertising and marketing costs of acquiring the client's case.
- Where "a" represents the total number of months or portion thereof Employee represented the client both before and after Employee's departure up to the date of the settlement, award, or verdict.
- Where "b" represents the number of months or portion thereof Employee represented the client after Employee's departure up to the date of the settlement, award or verdict.

As an example: If the client was represented a total of ten months, two of which were before departure and eight months after departure and the attorneys fee was $10,000, then Corporation would be entitled to 20% of 10,000 (representing market costs) plus 2/10 or 20% of $10,000 (representing time spent while working for Corporation on client's matter) for a total of $4,000.

In the event that clients of Corporation request that Employee continue to represent them after Employee's departure, Employee shall immediately reimburse Corporation for any outstanding expenses which Corporation has incurred as an expense or advanced as a disbursement in its representation of such clients. In the event that Employee is unable to immediately reimburse Corporation for such outstanding expenses, Employee shall give to Corporation a promissory note in the amount of such outstanding expenses payable in ninety (90) days from the date thereof with interest at [bank's] prime rate on the date of said note plus 2%.

Inquiry #1:

May a lawyer participate in the offering or making of an employment or other similar agreement that includes provisions, like those above, requiring a withdrawing or departing lawyer to pay her former firm some portion of any legal fee that she receives for the subsequent representation of a client who leaves the firm with the lawyer?

Opinion #1:

Yes, a lawyer may participate in the offering or making of an employment or other similar agreement that includes a provision for dividing fees following a lawyer's departure from a firm provided the formula or procedure for dividing fees is, at the time the agreement is made, reasonably calculated to compensate the firm for the resources expended by the firm on the representation as of the date of the lawyer's departure and will not discourage a departing lawyer from taking a case and thereby deny the client access to the lawyer of his choice.

In most jurisdictions, a contractual provision that imposes a financial disincentive on a withdrawing lawyer if the lawyer competes with the firm is prohibited because it may have the same effect as a restrictive covenant and prevent or discourage the departing lawyer from the representation of firm clients that want to follow the departing lawyer. *ABA/BNA Lawyers' Manual on Professional Conduct*, 51:1201- 1214, *Restrictions On Right To Practice* (51:1205). For example, Ohio (Supreme Court) Ethics Opinion 91-3 (1991), holds that an employment agreement that contains a provision requiring a departing associate to pay the law firm a percentage of fees earned from former firm clients who follow the departing associate is an unethical restriction on the lawyer's right to practice.

Whether a provision in a shareholders agreement constitutes a prohibited financial disincentive on competition after a lawyer leaves a firm was considered in 2007 FEO 6. This opinion examined a provision in shareholders agreement that reduced the repurchase value of a withdrawing lawyer's shares in the event the lawyer took clients with him. In the opinion, it was observed that the provision was

> not like the typical covenant not to compete in that it does not have geographical or temporal restrictions; [however] it does tie the decrease in share value to the fact that the departed lawyer represents former clients of the firm. By so doing, the provision provides a disincentive for the departing lawyer to represent clients with whom the lawyer has a prior relationship, penalizes the departing lawyer for representing former clients of the firm, and restricts the lawyer's right to practice.

Although the opinion prohibits financial disincentives on the continued representation of clients, it does not prohibit an agreement for repurchasing the shares of a withdrawing lawyer if the agreement "represents a fair assessment of the forecasted devaluation in the ownership interest in the firm engendered by a lawyer's departure and does not penalize the lawyer for taking clients with him."

Similarly, an agreement on the division of fees after a lawyer's departure from a firm may not be a prohibited restrictive covenant if the agreement seeks merely to compensate the firm for the loss of firm resources invested in the representation of a client who leaves the firm prior to the realization of the fee. As favorably noted in Ethics Decision 2000-6, agreements that resolve the division of contingent fees received after a lawyer leaves a law firm "prevent clients from being put in the middle of a dispute between lawyers." For this reason, lawyers are encouraged to enter into agreements that will resolve such potential disputes fairly and without rancor. Nevertheless, such agreements may not be so financially onerous or punitive as to deter a withdrawing lawyer from continuing to represent a client if the client chooses to be represented by the lawyer after the lawyer's departure from the firm. Any financial disincentive in an employment agreement that deters a lawyer from continuing to represent a client restricts the lawyer's right to practice in violation of Rule 5.6(a); 2007 FEO 6.

Each employment agreement must be analyzed individually to determine whether it violates Rule 5.6(a); however, some general principles can be articulated. The procedure or formula for dividing a fee must be reasonably calculated to protect the economic interests of the law firm while not restricting the right to practice law. It should fairly reflect the firm's investment of resources in the client's representation as of the time of the lawyer's departure and the investment of resources that will be required for the departing lawyer to complete the representation. *See* Maryland State Bar Ass'n., Op. 89-29 (1989) (approving employment agreement "sliding chart" for dividing fees based upon the time that the law firm worked on the case and the time required for the departed lawyer to resolve the case and collect the fee). The formula may take into account the work performed on the representation prior to the lawyer's departure, nonlawyer resources that the firm allocated to the representation not including costs advanced for the client, firm overhead that can be fairly allocated to the client's representation prior to departure, and the legal work, nonlawyer resources, and overhead that will be required of the withdrawing lawyer to complete the representation.

The provision in Employment Agreement No. 1 above, for example, does not satisfy the reasonableness standard. It requires the departing lawyer to pay 70% of any fee received from the continued representation of a client regardless of whether the departing lawyer provides the majority of the legal representation of the client after the lawyer's departure from the firm. Because it applies a "one size fits all" formula for the allocation of the fees and fails to take into account the amount of work performed and the resources expended on the representation before and after the lawyer's departure, the provision is likely to discourage a lawyer from taking any case that requires substantial additional legal work.

The formula for fee divisions in Employment Agreement No. 2 attempts to take into consideration the resources devoted to the representation of a client by allocating the fee according to the amount of time between the date the lawyer departs taking a case and the date on which the legal fee for the case is "determined" or realized. However, the formula relies on an arbitrary timeframe unrelated to the actual legal work performed within this timeframe and is likely to create a substantial financial disincentive for a lawyer to continue to represent clients. Accord Maryland Ethics Opinion 93-21 (1993) (prohibiting employment agreement requiring lawyer to divide fee with former firm according to arbitrary percentages based on number of days elapsed since client retained firm before leaving with lawyer).

With the exception noted below, the formula for fee division in Employment Agreement No. 3 is the best attempt at allocating the fee based upon the resources that the firm expended on the representation prior to the lawyer's departure. The formula allocates to the firm a percentage of the fee equivalent to the amount of time that the lawyer represented the client while the lawyer was employed by the firm and receiving compensation from the firm. Thus, the departed lawyer will be fully compensated for any work that he performs on a case after he leaves the firm and will not be discouraged from the continued representation of clients who desire her services.

With regard to compensating the law firm for overhead and nonlawyer resources devoted to a case (apart from costs advanced), a reasonable amount of the legal fee may be allocated to the firm for its overhead and nonlawyer expenses including the firm's investment in legal advertising and marketing. However, any such allocation must be reasonably related to the actual cost of such resources or expenses for the particular client. If it is not, the firm will receive a windfall that will deter the departing lawyer from taking cases. For example, the formula in Employment Agreement No. 3 above, which allocates 20% of every fee to the law firm to recover advertising and marketing costs, is not reasonable.

Inquiry #2:

Will any ethical infirmities in an employment agreement be cured by a provision in the agreement that guarantees that the departing lawyer will receive, at a minimum, hourly compensation for the time the lawyer expends on a case after the lawyer leaves the firm? An example of such a minimum compensation provision appears below:

> **No Effect in Restricting the Practice of Law.** Law Firm and Associate recognize that the client's right to choose counsel takes precedence over the fee division arrangement set forth in this section. The parties agree these provisions do not have the effect of restricting the practice of law or restricting any client's right to choose counsel so long as, for work performed for a Transferring Client, Associate receives hourly compensation at a rate of $150 per hour. To the extent that Associate does not receive compensation for his/her time on any Transferring Client's matter at a rate of at least $150 per hour, the Firm's allocation of fees calculated under paragraph 2.12 will be reduced (but not below zero) in order to increase Associate's compensation to the rate of $150 per hour; provided, however, that Associate shall be required to substantiate his/her time expended on each such matter by verified, contemporaneously maintained time records. In light of this arrangement, Associate will not decline to represent any Transferring Client for any financial reason.

Opinion #2:

Such a provision, by providing a floor below which the departing lawyer's compensation may not fall, may lessen the possibility that the formula or procedure for dividing fees will discourage the lawyer from taking a case after the lawyer leaves the firm. Therefore, such a provision is beneficial but it will not rectify a fee division provision that fails to take into consideration the factors set forth in Opinion #1 above. Moreover, the hourly rate set forth in a minimum compensation provision must be determined in a manner that is reasonable and fair under the circumstances. This means that it must take into consideration the skill, knowledge, and experience of the lawyer at the time that the lawyer leaves the firm, the difficulty of the work to be performed, and the hourly rates paid to lawyers of similar experience in the relevant geographic area.

Inquiry #3:

May the agreement for allocating legal fees include compensation to the law firm for the goodwill that initially induced the client to seek the legal services of the law firm?

Opinion #3:

Yes, if goodwill is valued fairly and reasonably and is not such a significant proportion of the fee that it creates a financial disincentive for the departing lawyer to continue the representation of clients who desire her services.

Inquiry #4:

May the agreement require the departing lawyer to reimburse the firm for the costs advanced (e.g., costs for depositions, expert witnesses, medical records, etc.) on behalf of a client immediately upon the departure of the lawyer or soon thereafter? May the agreement require the departing lawyer to sign a promissory note for the costs advanced?

Opinion #4:

No. The costs advanced for a client are the client's financial responsibility and the departing lawyer may not be made liable for this debt. Such a provision would have a chilling effect on the departing lawyer's willingness to continue the representation of a client. *See* Ethics Decision 2000-6 (by conditioning departing lawyer's ability to represent client on the satisfaction of client's financial obligation to former firm, provision imposes financial penalty that will discourage continued representation of clients). However, the firm may pursue any legal claim that it has against the client and the employment agreement may require the departing lawyer to protect the firm's interest in receiving reimbursement for costs advanced from any final settlement or judgment received by the client.

Inquiry #5:

Is an employment agreement that divides legal fees between a former law firm and a departed lawyer a violation of the prohibition in Rule 1.5(e) on the division of fees between lawyers who are not in the same firm?

Opinion #5:

No, comment [9] to Rule 1.5 provides that the prohibition on fee divisions in paragraph (e) of the rule does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Inquiry #6:

May an employment agreement include a mandatory arbitration or alternative dispute resolution provision in the event the departing lawyer and the former firm cannot amiably resolve disputes over the division of legal fees?

Opinion #6:

Yes. Lawyers are urged to include such provisions in employment agreements to foster early resolution of disputes without litigation and without drawing clients into the disputes. As observed in RPC 107, which approves of a mandatory alternative dispute provision in a fee agreement with a client, "[a]s 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." *See also* RPC 48 (clients should not be drawn into disputes upon dissolution of firm).

2008 Formal Ethics Opinion 10

October 24, 2008

Guidelines for Fees Paid in Advance

Opinion surveys prior ethics opinions on legal fees, sets forth the ethical requirements for the different types of fees paid in advance, authorizes minimum fees earned upon payment, and provides model fee provisions.

Background:

Although there are several ethics opinions on the ethical requirements relative to the different types of legal fees that are charged and collected at the beginning of the representation of a client, the information in these opinions is not gathered in one place and the opinions appear to provide contradictory or inconsistent advice. In addition, the confusion among lawyers as to the ethical requirements for legal fees paid prior to representation has lead to poorly crafted fee agreements. In response to these concerns, this opinion sets forth the key ethical obligations when charging and collecting legal fees, surveys the opinions on legal fees, reconciles the holdings in the opinions, and provides model provisions for fee agreements that satisfy the requirements of the Rules of Professional Conduct and the ethics opinions.

Key Ethical Obligations

Regardless of the type of fee, all legal fees must meet the following standard set forth in Rule 1.5(a) of the Rules of Professional Conduct:

A lawyer may not make an agreement for, charge, or collect an illegal or clearly excessive fee....The 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.

It may be difficult to determine whether a legal fee is clearly excessive until the representation is concluded and all of the relevant factors are taken into consideration. At that point, a lawyer may be required to disgorge some portion of a fee that he or she has already collected to insure that the total fee is not clearly excessive. 2000 FEO 5. If the client's funds were deposited in the lawyer's trust account, the money is available to return to the client. If, because of the nature of the fee (see discussion below) the client funds were paid to the lawyer, the lawyer may be required to make a refund to the client using his or her own funds.

In addition to avoiding clearly excessive fees, a lawyer must deposit any funds that belong to a client in the lawyer's trust account. Rule 1.15-2(a). This means that any payment that remains the property of the client until earned, usually by the performance of legal services, must be deposited into the lawyer's trust account and may not be withdrawn without the client's consent until earned. When the lawyer is discharged, any money that remains on deposit in the trust account must be paid back to the client.

Finally, a lawyer must deal honestly and fairly with his or her clients and should give a client sufficient information to make reasonable decisions about the representation including decisions about the fee arrangement. *See* Rule 1.4 and Rule 8.4(c).

Survey of the Opinions

RPC 50 holds that a lawyer may charge and collect a ***general retainer*** as consideration for the exclusive use of the lawyer's services in a particular matter. Such retainers are sometimes referred to as "true retainers" because the money is paid for nothing more than the reservation of the lawyer's time; the legal services provided by the lawyer are separately compensated. The opinion distinguishes the general retainer from an ***advance payment*** as follows:

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 "retain-

er" 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 158 holds that an ***advance payment*** to a lawyer for services to be rendered in the future, in the absence of an agreement with the client that the payment is earned immediately, is a deposit securing the payment of a fee which is yet to be earned. As such, it remains the property of the client and must be deposited in the lawyer's trust account. *See also* 2005 FEO 13 (minimum fee that is collected at the beginning of a representation and will be billed against at a lawyer's regular hourly rate is neither a general retainer nor a flat fee; therefore, minimum fee remains the client's money until earned by the provision of legal services and must remain on deposit in the trust account until earned).

RPC 158 also holds that a lawyer may charge and collect a ***flat fee*** for representation on a specific, discrete legal task such as resolution of a traffic infraction. If the client agrees that the money represents a flat fee to which the lawyer is immediately entitled, the lawyer may pay the money to himself or herself or deposit the money in the firm's general operating account rather than the firm trust account. The agreement of the client that the flat fee is earned upon payment is critical. The opinion warns, however,

> [w]hether 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 [the lawyer's] services are terminated before the end of the engagement.

97 FEO 4 amplifies the definitions for the ***general retainer*** and the ***flat fee***. Both types of fees may be charged and collected at the beginning of a representation and are considered "presently owed" to the lawyer. The ***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.'" [Citing and quoting Rule 1.15-1, cmt.[4].] "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 opinion admonishes that a general retainer, like all other fees, must not be clearly excessive and "[w]hat is customarily charged in similar situations may determine whether a specific true general retainer is clearly excessive."

A ***flat fee*** may be earned at the beginning of the representation and is payment "for specified legal services to be completed within a reasonable period of time." "[T]his 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 arrangement is "customarily identified with isolated transactions such as representations on traffic citations, domestic actions, criminal charges, and commercial transactions." The flat fee is collected at the beginning of the representation, treated as money to which the lawyer is immediately entitled, and paid to the lawyer or deposited in the lawyer's general operating account.

The opinion recognizes that a lawyer may charge a client ***hybrid fees***. Such hybrid fees include a payment that is part general retainer or flat fee and part advance to secure the payment of fees yet to be earned. With hybrid fees, one portion of the fee is earned immediately and the other portion remains the client's property and must be deposited in the trust account to be withdrawn as earned. "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."

With regard to an advance payment, the opinion reiterates that

> [t]he 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.

2000 FEO 5 prohibits the use of the term "nonrefundable fee" in fee agreements while further elucidating the differences between fees earned at the beginning of a representation and payments that are security for a fee which is yet to be earned. The opinion emphasizes that a lawyer may treat an advance payment as an earned fee (and deposit the money in the firm's operating account) "only if the client agrees that [the] payment may be treated as earned by the lawyer when it is paid." The opinion's most important paragraphs emphasize that there is a duty to refund "any portion of a fee that is clearly excessive regardless of the type of fee that was paid" and, therefore, no fee is truly nonrefundable. "To call such a payment a 'nonrefundable fee' is false and misleading in violation of Rule 7.1." However, a lawyer may agree with a client that "some or all of a 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."

Rather than calling a flat fee "nonrefundable," the opinion instructs a lawyer to refer to such a fee as a "***prepaid flat fee***."

The Types of Fees and Their Characteristics

Based upon the survey of the ethics opinions, these are the types of fees that are paid in advance and their characteristics:

Advance Payment: a deposit by the client of money that will be billed against, usually on an hourly basis, as legal services are provided; not earned until legal services are rendered; deposited in the trust account; unearned portion refunded upon the termination of the client-lawyer relationship.

General Retainer: consideration paid at the beginning of a representation to reserve the exclusive services of a lawyer but not used to pay for actual representation; generally used when corporate or business clients have a specific need to consult a lawyer on a regular basis; earned upon payment; paid to lawyer or deposited in firm operating account; some or all of the retainer is subject to refund if clearly excessive under the circumstances as determined upon the termination of the client-lawyer relationship.

Flat Fee or Prepaid Flat Fee: fee paid at the beginning of a representation for specified legal services on a discrete legal task or isolated transaction to be completed within a reasonable amount of time; fee pays for all legal services regardless of the amount of time the lawyer expends on the matter; if client consents, treated as earned immediately and paid to the lawyer or deposited in the firm operating account; some or all of the flat fee is subject to refund if clearly excessive under the circumstances as determined upon the termination of the client-lawyer relationship.

Hybrid Fee: fee paid at the beginning of a representation that is in part a general retainer or a flat fee and in part an advance payment to secure the payment of fees yet to be earned; one portion of the fee is earned immediately and the other remains the client's property on deposit in the trust account; client must consent and agree to the portion that is a flat fee or a general retainer and earned immediately; unearned portion of the advance payment refunded upon termination of the client-lawyer relationship; flat fee/general retainer portion subject to refund if clearly excessive under the circumstances as determined upon the termination of the client-lawyer relationship.

Reconciling the Opinions

If there is a seeming inconsistency in the ethics opinions it arises from the strict formulation of the general retainer. A lawyer is allowed to charge a general retainer as consideration for the reservation of the lawyer's services and to treat the money as earned immediately. But the client is not given a credit for future legal services up to the value of the retainer. This strikes many lawyers as detrimental to the client's interests and it has lead to the creation of hybrid fees. The strict formulation of the general retainer has been maintained by the Ethics Committee for three important reasons. It avoids the client confusion that is engendered if a client is told that a payment both reserves the lawyer's services and pays for future representation. In addition, requiring general retainers to be separate and distinct from advance fees means that, if an advance fee is charged for future legal services, there is no penalty to the client for deciding to change legal counsel before the advance fee is exhausted and, if a refund is owed to the client because expected services have not been performed, the money is readily available in the trust account.

Upon further reflection, the Ethics Committee has, nevertheless, determined that it is in the client's interest to receive legal services up to the value of a general retainer provided the client fully understands and agrees that the payment the client makes at the beginning of the representation is earned by

the lawyer when paid, will not be deposited in a trust account, and is only subject to refund if the charge for reserving the lawyer's services (as opposed to the charge for the legal services performed) is clearly excessive under the circumstances. This newly acknowledged form of fee payment made by a client at the beginning of a representation will be referred to as a minimum fee and have the following characteristics:

Minimum Fee: consideration paid at the beginning of a representation to reserve the exclusive services of a lawyer; lawyer provides legal services up to the value of the minimum fee; earned upon payment; paid to lawyer or deposited in firm operating account; some or all of the minimum fee is subject to refund if clearly excessive under the circumstances as determined upon the termination of the client-lawyer relationship.

To the extent any previous ethics opinion is inconsistent with this opinion, it is overruled.

Model Fee Provisions: Introduction

The Rules of Professional Conduct do not require fee agreements to be in writing unless the fee is contingent on the outcome of the matter. Rule 1.5(c). The fees discussed in this opinion are not contingent and technically a lawyer is not required to put a client's agreement to pay such fees in writing. Nevertheless, given the propensity of clients to misunderstand the purpose of a payment made prior to the commencement of a representation (and whether such a payment will be refunded), a lawyer would be prudent to put in writing any fee agreement that requires a client to make a payment in advance.

In addition to explaining and obtaining the client's consent to charge the specified payments prior to representation, a lawyer's written fee agreement with a client should also contain provisions that fully and clearly explain how fees and expenses are charged including, but not limited to, the following: how billable hours are calculated and the rates charged per hour for the services of the lawyers or staff members who will work on the client's matter; if some other method of billing is used, such as value billing, how the fee will be determined; and the expenses for which the client will be liable and how the cost of those expenses will be determined.

Model Fee Provisions

Note that the following paragraphs contain suggested or recommended language. Lawyers are not required to use these model fee provisions.

Advance Payment

As a condition of the employment of Lawyer, Client agrees to deposit $_____ in the client trust account maintained by Lawyer's firm. This money is a deposit securing payment for the legal work for Client that will be performed by Lawyer and his/her staff. Legal work will be billed on an hourly basis [or other appropriate basis] according to the schedule attached to this agreement. Client specifically authorizes Lawyer to withdraw funds from Client's deposit in the trust account when payment is earned by the performance of legal services for Client. When the deposit is exhausted, Lawyer reserves the right to require further reasonable deposits to secure payment. Lawyer will provide Client with a [monthly, quarterly, etc.] accounting [upon request] for legal services showing the legal fees earned and payment of the fees by withdrawal against Client's deposit in the trust account. Client should notify Lawyer immediately if Client retracts his/her consent to the withdrawal of money from Client's deposit in the trust account to pay for legal services. When Lawyer's representation ends, Lawyer will provide Client with a written accounting of the fees earned and costs incurred, and a refund of any unearned portion of the deposit that remains in the trust account [less expenses associated with the representation].

General Retainer

As a condition of the employment of Lawyer, Client agrees to pay $_____ to Lawyer. This money is a *general retainer* paid by Client to ensure that Lawyer is available to Client in the event that legal services are needed now or in the future and to insure that Lawyer will not represent anyone else relative to Client's legal matter without Client's consent.

Client understands and specifically agrees that:

- *the general retainer is not payment for the legal work to be performed by Lawyer*;
- *Client will be billed separately for the legal work performed by Lawyer* and his/her staff. Legal work will be billed on an hourly basis [or other appropriate basis] according to the schedule attached to this agreement;
- the general retainer will be earned by Lawyer immediately upon payment and *will be deposited in Lawyer's business account rather than a client trust account*; and
- when Lawyer's representation ends, *Client will not be entitled to a refund of any portion of the general retainer* unless it can be demonstrated that the general retainer is clearly excessive under the circumstances.

Flat Fee (or Prepaid Flat Fee)

As a condition of the employment of Lawyer, Client agrees to pay $_____ to Lawyer as a *flat fee* for the following specified legal work to be performed by Lawyer for Client: [*description of legal work*]

Client understands and specifically agrees that:

- *the flat fee is the entire payment for the specified legal work to be performed by Lawyer* regardless of the amount of time that it takes Lawyer to perform the legal work;
- the flat fee will be earned by Lawyer immediately upon payment and *will be deposited in Lawyer's business account rather than a client trust account*; and
- when Lawyer's representation ends, *Client will not be entitled to a refund of any portion of the flat fee* unless (1) the legal work is not completed, in which event a proportionate refund may be owed, or (2) it can be demonstrated that the flat fee is clearly excessive under the circumstances.

Minimum Fee

As a condition of the employment of Lawyer, Client agrees to pay $_____ to Lawyer. This money is a *minimum fee* for the reservation of Lawyer's services; to insure that Lawyer will not represent anyone else relative to Client's legal matter without Client's consent; and for legal work to be performed for Client.

Client understands and specifically agrees that:

- the minimum fee will be earned by Lawyer immediately upon payment and *will be deposited in Lawyer's business account rather than a client trust account*;
- Lawyer will provide legal services to Client on an hourly basis [or other appropriate basis] according to the schedule attached to this agreement until the value of those services is equivalent to the minimum fee; *thereafter, Client will be billed for the legal work performed by Lawyer* and his/her staff on an hourly basis [or other appropriate basis] according to the schedule attached to this agreement; and
- when Lawyer's representation ends, *Client will not be entitled to a refund of any portion of the minimum fee, even if the representation ends before Lawyer has provided legal services equivalent in value to the minimum fee*, unless it can be demonstrated that the minimum fee is clearly excessive fee under the circumstances.

2008 Formal Ethics Opinion 11

January 15, 2010

Representation of Beneficiary on Other Matters While Serving as Foreclosure Trustee

Opinion rules that a lawyer may serve as the trustee in a foreclosure proceeding while simultaneously representing the beneficiary of the deed of trust on unrelated matters and that the other lawyers in the firm may also continue to represent the beneficiary on unrelated matters.

Inquiry #1:

Attorney A is employed by Law Firm. The lawyers of the firm routinely represent various bank clients including Bank Z. Bank Z is one of the firm's largest clients and all of the lawyers in the firm perform some work for the bank.

Attorney A has been asked to serve as the substitute trustee for the foreclosure of a deed of trust securing a loan (the Loan) made by Bank Z to the grantor (the Borrower) of the deed of trust. Bank Z is the named beneficiary of the deed of trust. The lawyers at the firm did not represent Bank Z on the negotiation or securitization of the Loan. The lawyers have not previously represented the Borrower.

Attorney A and the other lawyers in Law Firm want to continue to represent Bank Z on unrelated legal matters throughout the course of the foreclosure proceeding. Bank Z does not object. Borrower has not been notified that

Attorney A and the other lawyers of the firm represent Bank Z on other unrelated matters.

May Attorney A continue to represent Bank Z on matters unrelated to the Loan and serve as substitute trustee for the foreclosure?

Opinion #1:

Attorney A may serve as trustee and continue to represent the bank on other matters because it is unlikely that his impartiality as trustee will be impaired by his duty of loyalty to and advocacy for the bank on other unrelated matters. Even when the proceeding is contested, Attorney A may serve as trustee and continue to represent the bank on other matters.

There are a number of ethics opinions that hold that a lawyer serving as trustee in a contested foreclosure proceeding may not act as the advocate for the beneficiary or the grantor in an adversarial proceeding arising from or connected with the deed of trust because the trustee is a fiduciary and, when exercising his discretion in the foreclosure, must play an impartial role relative to both parties. RPC 3, RPC 64, RPC 82, RPC 90, 04 Formal Ethics Opinion 3. *See also* N.C. Gen. Stat. 45-21.16(c)(7)b (notice to the debtor must contain a statement that a trustee is "a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding"). None of the ethics opinions, however, consider whether a lawyer is disqualified from serving as trustee if he continues to represent the lender on unrelated legal matters.

RPC 3, which rules that a lawyer may serve as a foreclosure trustee after representing the beneficiary of the deed of trust in the negotiation of the loan, explains the basis for prohibiting the lawyer from acting as an advocate in a contested foreclosure proceeding in the following passage:

> [T]he Trustee owes a duty of impartiality to both parties which is inconsistent with representing one of the parties in a contested proceeding...Generally, when an attorney is required to withdraw from representation or from a fiduciary role, it is either because of concerns [for the] confidences of the client under Rule 4 [now Rule 1.6] and its predecessors or because of conflicts of interest under Rule 5.1 [now Rule 1.7] 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 [beneficiary of the deed of trust], where he does not currently represent [beneficiary] in the foreclosure or related proceedings.

To clarify these earlier opinions, a foreclosure proceeding is contested when the grantor, or anyone else with standing, seeks to enjoin the proceeding or contests any of the following issues at the foreclosure hearing: jurisdiction, service of process, debt, default, notice, power of sale, and, in the case of residential mortgages, certification regarding subprime loans.[1] A borrower's motion to continue the proceeding or request to postpone the sale does not render the foreclosure contested. As with the trustee's own motion for a continuance or decision to postpone, these are procedural matters to which the trustee may respond within his or her discretion without impairing his or her ability to foreclose on the property consistent with the statutory requirements and the deed of trust.

If Attorney A represents Bank Z in other matters and the foreclosure is contested, Attorney A can maintain his impartiality as trustee if the bank represents itself or hires a lawyer to represent it in the foreclosure proceeding. Nevertheless, if Attorney A determines that he cannot protect and advance the interests of the bank in the unrelated matters while remaining impartial in a contested foreclosure proceeding where a substantial interest of the bank is at stake, Attorney A would have a conflict of interest requiring him to decide whether to continue to represent the bank on the unrelated matters and relinquish the trustee role to someone who will not be similarly compromised or to fulfill the role of trustee by withdrawing from the representation of the bank in all other matters. *See also* Rule 1.7(a)(1)(concurrent conflict of interest exists if representation of one or more clients may be materially limited by the lawyer's responsibilities to a third person).

Inquiry #2:

Perceiving that he has a personal conflict of interest, Attorney A withdraws from the representation of Bank Z on all unrelated matters in order to continue to serve as trustee. Are the other lawyers in Law Firm required to withdraw from the representation of Bank Z on matters unrelated to the Loan if Attorney A serves as the substitute trustee for the contested foreclosure?

Opinion #2:

No, the other lawyers in the firm may continue to represent Bank Z on unrelated matters.

Rule 1.10(a) provides that a disqualification based upon a personal interest of a lawyer that does not present a significant risk of materially limiting the representation of a client by the remaining lawyers in a firm is not imputed to the remaining lawyers in the firm. Comment [3] to Rule 1.10 specifies that "[t]he rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented." Serving in the role of trustee does not raise questions of client loyalty or protection of confidential information because the lawyer/trustee does not represent either party in the foreclosure. Therefore, Attorney A's disqualification from the representation of Bank Z to maintain his impartiality is not imputed to the other lawyers in the firm who are representing the bank on matters unrelated to the Loan and the foreclosure.

Inquiry #3:

Attorney B, another lawyer in Law Firm, intends to act as the lawyer for Bank Z in connection with the Loan including representation in the foreclosure proceeding. May Attorney B represent Bank Z on all matters related to the Loan, including the foreclosure, if another lawyer in his firm is serving as the trustee?

Opinion #3:

No, if the foreclosure is contested, Attorney B may not represent Bank Z at the foreclosure proceeding or on any matter related to the Loan. Attorney A's impartiality may be impaired if another lawyer from his firm appears in the foreclosure or related matters on behalf of the bank. To preserve the integrity of the process and the impartiality of the trustee, Attorney A's disqualification from serving as an advocate for one of the parties to a contested foreclosure in any matter related to the Loan is imputed to the other lawyers in the firm. *See* Rule 1.10(a).

Inquiry #4:

May another lawyer in the firm represent Attorney A in his capacity as trustee for the foreclosure?

Opinion #4:

Yes, and the lawyer may continue to do unrelated legal work for the bank while representing Attorney A as trustee. *See* Opinion #1 above. However, if Attorney A determines that he has a conflict of interest in serving as the trustee while continuing to represent the bank on unrelated matters and withdraws from the representation of the bank on unrelated matters to continue to serve as trustee, a lawyer representing Attorney A as trustee would be similarly disqualified. *See* Rule 1.10(a).

Inquiry #5:

Law Firm has set up a separate entity, Firmco, to serve as trustee on deeds of trust. Law Firm or its lawyers have a controlling ownership interest in Firmco. Firmco is substituted as trustee on the deed of trust securing the Loan made by Bank Z. May a lawyer in the firm represent Firmco in its capacity as trustee for the foreclosure? May the lawyer continue to do unrelated legal work for the bank?

Opinion #5:

Yes, the lawyer may represent Firmco as trustee and the lawyer representing Firmco may continue to do unrelated legal work for the bank. *See* Opinion #4. However, a lawyer for the firm may not simultaneously provide representation to Firmco and advocate for the lender in a contested foreclosure proceeding. *See* Opinion #1.

Inquiry #6:

Should the Borrower be informed that Attorney A and the other lawyers in Law Firm will continue to represent Bank Z on matters unrelated to the foreclosure?

Opinion #6:

Yes. The role of the trustee in a foreclosure proceeding is similar to the roles of arbitrator or mediator which are addressed in Rule 2.4. Rule 2.4(b) provides that when a lawyer serving as a third-party neutral knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third party neutral and a lawyer's role as one who represents a client. Similarly, explaining the role of the trustee and the role of the other lawyers in the firm (who continue to represent the bank) to a borrower in a foreclosure proceeding will help to avoid confusion and will allow the borrower to pursue his legal remedies to remove the trustee if he objects.

Inquiry #7:

If Borrower informally objects to Attorney A serving as the trustee because Attorney A and the other lawyers in the firm represent Bank Z on unrelated matters, is Attorney A required to withdraw from service as trustee?

Opinion #7:

No, Attorney A is not required to withdraw unless ordered to do so by a court.

Inquiry #8:

Do the responses to any of the preceding inquiries change if Bank Z is not one of the largest clients of Law Firm?

Opinion #8:

No.

Endnote

1. G.S. A745-105 allows the Commissioner of Banks (COB) to delay the time within which a lender can file a foreclosure proceeding on a subprime loan for a period of up to 30 days and to suspend a foreclosure on a subprime loan based upon its review of loan information that the lender must file with the Administrative Office of the Courts pursuant to G.S. A745-103. The clerk of court must find that the loan is not subprime or, if subprime, that the COB has not delayed the time for filing the foreclosure proceeding or suspended the foreclosure based its review of the loan information.

2008 Formal Ethics Opinion 12

April 24, 2009

Prohibition on Initiating Foreclosure on Client's Property While Still Representing Client

Opinion rules that a lawyer may not initiate foreclosure on a deed of trust on a client's property while still representing the client.

Inquiry #1:

Lawyer represents Client in a domestic case. In exchange for Lawyer's services, Client executed a promissory note, which was secured by a deed of trust on property that is not involved in the domestic action. Lawyer sent Client a "Notice of Demand" regarding payment on the note. Soon thereafter, Lawyer initiated foreclosure proceedings in an effort to collect on the deed of trust. Lawyer continues to represent Client in the domestic case.

May Lawyer initiate foreclosure proceedings against Client while continuing to represent Client ?

Opinion #1:

No. Although Lawyer could acquire a deed of trust on the property if he complied with Rule 1.8(a), enforcing the security interest while currently representing the grantor of the interest, even in an unrelated matter, creates a conflict of interest in violation of Rule 1.7(a)(2). Moreover, Rule 8.4(g) provides that it is professional misconduct for a lawyer intentionally to prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3. Lawyer should not initiate foreclosure proceedings against Client until the representation is concluded.

As a matter of procedure, comment [16] to Rule 1.8 provides that, prior to initiating a foreclosure on property subject to a lien securing a legal fee, a lawyer must notify a client of the right to require the lawyer to participate in the State Bar's mandatory fee dispute resolution program.

2008 Formal Ethics Opinion 13

July 24, 2009

Audit of Real Estate Trust Account by Title Insurer

Opinion rules that, unless affected clients expressly consent to the disclosure of their confidential information, a lawyer may allow a title insurer to audit the lawyer's real estate trust account and reconciliation reports only if certain written assurances to protect client confidences are obtained from the title insurer, the audited account is only used for real estate closings, and the audit is limited to certain records and to real estate transactions insured by the title insurer.

Inquiry #1:

Under North Carolina law, title insurance policies are issued upon receipt of title certification from a licensed North Carolina lawyer. A title insurer will only issue title assurances to approved lawyers as provided by N.C. Gen. Stat. §58-26.1. In the vast majority of real estate closings, the lender delivers the proceeds of the new loan (for the purchase or refinancing of the real estate) to the approved lawyer to be disbursed from the approved lawyer's trust account upon the closing of the transaction. Lenders and buyers/borrowers in real estate transactions frequently request title insurance coverage in the form of a closing protection letter in which the title insurer agrees to reimburse the lender and/or the buyer/borrower for, among other things, actual loss on account of the fraud or dishonesty of the approved lawyer in handling the lender's funds. Closing protection letters are necessary to facilitate real estate transactions in North Carolina as lenders are unwilling to risk their funds without these assurances from title insurers.

Title insurers are experiencing increasing liability for lawyer defalcations pursuant to closing protection letters and title insurance policies issued in connection with real estate transactions. In addition, parties to real estate transactions who are not covered by title insurance are suffering losses related to the misuse of funds deposited in real estate trust accounts.

To provide the assurances required by lenders and buyer/borrowers, title insurers need a way to assess whether funds from real estate trust accounts are being disbursed and accounted for properly. Real estate lawyers may use outside reconciliation services to reconcile their trust accounts. Title insurers would like to request either an audit of an approved lawyer's trust account and/or review of the lawyer's trust account reconciliation reports to ensure the safety of the funds and protect the interests of those whose funds are placed in the trust account and rely upon the appropriate disbursement of those funds.

Lawyer A is an approved lawyer with Title Insurer. Title Insurer has issued at least one closing protection letter for Lawyer A. May Lawyer A voluntarily permit Title Insurer to audit his trust account?

Opinion #1:

Yes, Lawyer A may voluntarily permit Title Insurer to audit any trust account used solely for real estate closings provided the audit is limited to transactions insured by Title Insurer and, further provided, Lawyer A obtains certain assurances from Title Insurer.

Rule 1.6 requires a lawyer to protect from disclosure all information acquired during the professional relationship including information about a client contained in the lawyer's trust account records. Nevertheless, confidential information may be revealed when the client gives informed consent, disclosure is impliedly authorized to carry out the representation, or a specific exception allowing disclosure set forth in paragraph (b) of Rule 1.6 applies. Although the specific exceptions are not applicable here, the general exception that permits disclosure to carry out the representation is applicable. A self-evident objective of both the lender and the buyer/borrower, the clients in a real estate transaction, is that the loan proceeds will be used for the purpose for which they were intended and not misused or misappropriated by the closing lawyer. Therefore, there is implied consent by real estate clients to disclose such information as may be necessary to prevent defalcations including information necessary for a title insurer to perform an audit of the lawyer's trust account.

It cannot be assumed that non-real estate clients impliedly authorize the disclosure of confidential information about their deposits to a lawyer's general trust account to a title insurance company. Moreover, it cannot be assumed that a real estate client's implied consent extends to title companies that did not insure the client's transaction. Absent the express consent of those clients

whose confidential information may be disclosed, a lawyer may only allow an audit that is limited to certain financial records related to a trust account used solely for real estate closings and to certain financial records related to real estate transactions insured by the title insurer. Specifically, the audit must be limited to review of the following records on the trust account: bank statements and deposit tickets for three months (not including copies of checks); reconciliation reports for three months (confidential client information redacted); and the general ledger for six months (names of payees redacted). The audit shall also be limited to the following records of real estate transactions insured by the title insurer: copies of cancelled checks; copies of deposited checks; cash receipts (if any); disbursement receipts; closing instructions; settlement statements (all drafts and final versions); pay-off statements; wiring instructions and wire confirmations; all recorded documents; the client-specific ledger; and the bank statement from any open interest-bearing account used for the transaction.

This opinion can be distinguished from 98 FEO 10 which holds 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. That opinion provides that a lawyer should not ask for the consent of the insured "[w]hen the insured could be prejudiced by agreeing and gains nothing" such that "a disinterested lawyer would not conclude that the insured should agree in the absence of some special circumstance." 98 FEO 10 presumes that the interests of the insured and the insurance carrier relative to the payment of legal fees are in conflict because the insured wants the best defense money can buy and the insurance carrier wants to limit its expenditures on legal fees. This is not the case with regard to audits of real estate trust accounts where a title insurer's interest in preventing the theft of closing funds by a lawyer can be presumed to be the same as that of the buyer and the seller of the property. Another distinction resides in the type of information that would be obtained in an audit of a bill for legal services and in the audit of trust account records for a real estate closing. The legal bill often contains detailed information about the representation which is clearly confidential and may also be privileged under the law of evidence. Although the limited client information gained in an audit of a real estate trust account is confidential, it is probably not privileged.[1] Therefore, the risk that the privilege will be waived as a consequence of the audit is remote.

To further protect confidential client information during the audit process, prior to an audit, Lawyer A must obtain written assurances from the title insurer of the following: (1) the information disclosed will be used for no other purposes than to confirm the proper use of funds and the lawyer's compliance with the trust accounting requirements in Rule 1.15; (2) the information will not be used by the title insurer for marketing or business purposes other than risk management; (3) access to the information will be limited to those employees of the title insurer who need the information to make risk management decisions; and (4) the disclosed information will not be shared with any third party except the State Bar and, in the event a defalcation is discovered, the information will be disclosed to the State Bar or other appropriate authorities. *See* Rule 1.15. Regardless of the title insurer's duty to report evidence of a defalcation to the State Bar, any North Carolina lawyer who has such knowledge is also required to report to the State Bar pursuant to Rule 8.3(a).

Although Lawyer A must obtain title insurer's written assurances relative to protecting confidential client information, he is not prohibited from allowing the title insurer's conclusions as a result of the audit to be released to a third party such as another title insurer.

Inquiry #2:

May Lawyer A voluntarily permit Title Insurer to examine and review Lawyer A's reconciliation reports whether generated by Lawyer A and his staff, or generated by an outside reconciliation service employed by Lawyer A?

Opinion #2:

Yes, provided the reconciliation reports are for a trust account that is used solely for real estate closings and the required written assurances from the title insurer set forth in Opinion #1 are obtained. *See* Opinion #1 above.

Inquiry #3:

Title Insurer conditions designation as an approved lawyer on the lawyer's agreement that Title Insurer may audit the lawyer's trust account and review the lawyer's reconciliation reports upon request. May a lawyer seek designation as an approved lawyer for Title Insurer?

Opinion #3:

Yes, provided the audit is limited to trust accounts, or the reconciliation reports therefore, that are used solely for real estate closings and the required written assurances from the auditor and the title insurer set forth in Opinion #1 are obtained. *See* Opinion #1 above.

Inquiry #4:

Would the responses to any of the preceding inquiries be different if multiple lawyers in the same firm use the same real estate trust account?

Opinion #4:

No.

Inquiry #5:

As noted above, many real estate lawyers use outside reconciliation services to reconcile their trust accounts. Is this practice permitted under the Rules of Professional Conduct?

Opinion #5:

Yes, a lawyer may delegate reconciliation to a company or to a nonlawyer who is not employed in the lawyer's firm provided the lawyer makes reasonable efforts to ensure that the person(s) providing the reconciliation services understands the lawyer's professional duties with regard to the management of the trust account under Rule 1.15 and also with regard to the protection of client confidences under Rule 1.6. The lawyer remains professionally responsible for the proper management and reconciliation of the account. *See* Rule 5.3.

Endnote

1. A privilege exists if (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated, and (5) the client has not waived the privilege. It is, however, a qualified privilege subject to the general supervisory powers of the trial court. *State v. McIntosh*, 336 NC 517, 444 S.E.2d 438 (1994).

2008 Formal Ethics Opinion 14

October 23, 2009

Attribution When Using the Written Work of Another

Editor's note: The original version of this opinion was adopted by the State Bar Council on January 23, 2009, and withdrawn by the council on July 24, 2009,

Opinion rules that it is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract, or pleading excerpts from a legal brief, contract, or pleading written by another lawyer.

Inquiry #1:

Lawyer A submitted a brief to the trial court that contained eight pages, verbatim, from an appellate brief previously drafted and filed by Lawyer B in an unrelated case. Lawyer B does not work for Lawyer A's firm. Lawyer A did not credit Lawyer B for the copied portion of the brief, or obtain Lawyer B's permission to incorporate the eight pages, entirely unchanged, into his own brief. Lawyer A added references to additional relevant case law. Lawyer A properly cited all court opinions, legal treatises, and published or copyrighted works upon which he had relied. The only pre-existing writings included within his brief without attribution were the relevant legal arguments submitted by Lawyer B in an earlier appeal.

Did Lawyer A violate any Rule of Professional Conduct through his unattributed use of eight pages of Lawyer B's brief?

Opinion #1:

No. It is not dishonest or unethical for a lawyer to incorporate excerpts from the written work of another lawyer in a brief or other written document without attribution. No opinion is expressed, however, on the legal question of whether a lawyer has intellectual property rights in the lawyer's written works including briefs, pleadings, discovery, and other legal documents.

Lawyers often rely upon and incorporate the work of others when writing a brief, whether that work comes from a law firm brief bank, a client's brief

bank, or a brief that the lawyer finds in a law library or posted on a listserv on the Internet. By its nature, the application of the common law is all about precedent, which invites the re-use of arguments that have previously been successful and have been upheld. It would be virtually impossible to determine the origin of the legal argument in many briefs. Moreover, the utilization of the work of others in this context furthers the interests of the client by reducing the amount of time required to prepare a brief and thus reducing the charge to the client. *See* RPC 190 (1994). It also facilitates the preparation of competent briefs by encouraging lawyers to use the most articulate, carefully researched, and comprehensive legal arguments.

When using the work of another, the lawyer must still provide competent representation. Rule 1.1. This means that the lawyer must verify any citations in the excerpt to insure that the content and interpretation of caselaw, statute, and secondary sources is correct.

Although consent and attribution are not required, if a lawyer uses, verbatim, excerpts from another's brief and the lawyer knows the identity of the author of the excerpt, it is the better, more professional practice, for the lawyer to include a citation to the source.

Inquiry #2:

If Lawyer B, or another lawyer, learns that Lawyer A submitted a brief to the court that contained verbatim portions of a brief previously drafted and filed by Lawyer B, does the lawyer have a duty to report Lawyer A to the State Bar?

Opinion #2:

No. *See* Opinion #1 above.

Inquiry #3:

Lawyer A's law firm maintains a "brief bank," consisting of memoranda of law and briefs previously written by members of the firm and filed with trial or appellate courts. Is it a violation of the Rules of Professional Conduct for Lawyer A to use, verbatim, a portion of a memorandum or brief contained in the brief bank without attribution?

Opinion #3:

No. *See* Opinion #1 above.

Inquiry #4:

Is it a violation of the Rules of Professional Conduct for Lawyer A to sign his name to a brief, written by an associate at Lawyer A's direction and under Lawyer A's supervision, without including the associate's name on the brief?

Opinion #4:

No, so long as Lawyer A does not charge the client for work he did not perform.

Inquiry #5:

Is it a violation of the Rules of Professional Conduct for Lawyer A to copy, verbatim and without attribution, clauses from a contract, pleading, discovery request, or other similar document prepared by someone else for use in a similar document that Lawyer A is preparing for a client?

Opinion #5:

No. It is not dishonest or misleading to incorporate such clauses in similar documents without consent of the author or attribution. *See* Opinion #1 above.

Inquiry #6:

May a law firm distribute a "canned" newsletter to its clients that is obtained from a commercial publishing company without disclosing that the lawyers in the law firm did not actually author the material?

Opinion #6:

No. If the content of a newsletter is portrayed as the original work of the firm's lawyers, the distribution of the newsletter under the law firm's name, without disclosing the true authorship of the material contained in the newsletter, is misleading and a violation of Rule 7.1(a).

2008 Formal Ethics Opinion 15

January 23, 2009

Civil Settlement That Includes Agreement Not to Report to Law Enforcement Authorities

Opinion rules that, provided the agreement does not constitute the criminal offense of compounding a crime and is not otherwise illegal, and does not contemplate the fabrication, concealment, or destruction of evidence, a lawyer may participate in a settlement agreement of a civil claim that includes a non-reporting provision prohibiting the plaintiff from reporting the defendant's conduct to law enforcement authorities.

Inquiry:

Attorney represents Client who has been sued in a civil action for misappropriation of funds under the exercise of a durable power of attorney. The complaint alleges that Client engaged in conduct that is both a civil wrong and a crime. Law enforcement was not contacted by the plaintiff and has never been involved in the matter. A settlement is offered by the plaintiff which includes a condition that the plaintiff will not contact law enforcement to report the alleged crime, but specifies that the plaintiff will cooperate with law enforcement in any investigation that may occur on the authorities' own initiative to the extent required by law (so as not to constitute obstruction of justice). Attorney believes that the settlement agreement is in Client's best interest and would like to recommend to Client that he accept the settlement offer.

May Attorney participate in the negotiation and settlement of the civil suit if the settlement includes the non-reporting condition?

Opinion:

Yes, provided the non-reporting condition does not constitute the criminal offense of compounding a crime and is not otherwise illegal, and the agreement does not contemplate the fabrication, concealment, or destruction of evidence, including witness testimony.

98 FEO 19 provides guidance for a lawyer representing a victim with a civil claim that also constitutes a crime and is analogous to the current inquiry. In 98 FEO 19, the victim's civil claim for fraud was related to the criminal charges of conspiracy to defraud. The opinion rules that if the victim's attorney has a well-founded belief that both the civil claim and the criminal charges are warranted by the law and the facts, and the victim's attorney has not attempted to exert or suggest improper influence over the criminal justice system, the victim's attorney does not violate the Rules of Professional Conduct by proposing that the victim acquiesce to a plea agreement in exchange for a confession of judgment from the defendant in the civil action. A critical component of the opinion is the condition that the proposed settlement of the civil claim may not exceed the amount to which the victim may be entitled under applicable law.

The purpose of the latter condition is to prevent the common law crime of compounding a felony which occurs when one with knowledge that another has committed a felony agrees not to inform the authorities in exchange for something of value. *State v. Hodge*, 142 N.C. 665, 55 S.E.2d 626 (1906).

98 FEO 19 rules that a lawyer may present, participate in presenting, or threaten to present criminal charges to resolve a civil matter provided 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 the law of North Carolina. The ABA Standing Committee on Ethics and Professional Responsibility has opined that under these same circumstances, a lawyer is permitted to partipate in a settlement agreement in which his client agrees to refrain from instigating prosecution. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 363 (1992); *see also* New York City Op. 1995-13 (lawyer whose client could be charged with both civil and criminal offense may offer a settlement in the civil matter that includes a condition that the opponent not inform law enforcement authorities of the criminal matter). Similarly, the Committee on Legal Ethics of the West Virginia State Bar held that, under limited circumstances, civil litigants should not be prevented from agreeing to forego the filing of criminal charges in exchange for money paid to resolve their civil suits. *See Committee on Legal Ethics v. Printz*, 416

S.E.2d 720 (1992). The opinion cautioned lawyers, however, that they must be careful not to use the threat of criminal prosecution to obtain more than is owed or have their clients agree not to testify at future criminal trials. ''Seeking payment beyond restitution in exchange for foregoing criminal prosecution or seeking any payments in exchange for not testifying at a criminal trial ... are still clearly prohibited.'' *Id.* at 727.

Although there is no express prohibition in the Rules of Professional Conduct against such an agreement, a lawyer must be careful to avoid the criminal offense of compounding a crime, which in turn would violate the prohibition in Rule 8.4(b) against "criminal act[s] that reflect adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." This means that the amount paid to settle the civil claim may not exceed the amount to which the plaintiff would be entitled under applicable law; in other words, ***no*** compensation may be paid to the plaintiff for the plaintiff's silence. Moreover, the lawyers for both the plaintiff and the defendant must also be careful to avoid any implication that the settlement includes the client's agreement to testify falsely or to evade a subpoena in a criminal proceeding should criminal charges subsequently be brought by the authorities. Such conduct clearly violates the prohibitions in Rule 3.4(a) and (b) on counseling or assisting another to destroy or hide evidence, testify falsely, or avoid serving as a witness. Finally, if there is a legal requirement to report certain conduct to the authorities, as, for example, there is with child abuse and neglect, a lawyer may not participate in a settlement agreement that includes a non-reporting provision that is illegal. *See e.g.* N.C.G.S. 7B-301.

Provided the settlement agreement does not constitute the criminal offense of compounding a crime, is not otherwise illegal, and does not contemplate the fabrication, concealment, or destruction of evidence (including witness testimony), a lawyer may participate in a settlement agreement of a civil claim that includes a provision that the plaintiff will not report the defendant's conduct to law enforcement authorities.

2008 Formal Ethics Opinion 17

January 23, 2009

Filing a Notice of Appeal in a Court-Appointed Juvenile Case

Opinion rules that a lawyer appointed to represent a parent at the trial of a juvenile case may file a notice of appeal to preserve the client's right to appeal although the lawyer does not believe that the appeal has merit.

Inquiry:

Indigent parents who are parties in abuse, neglect, dependency, and termination of parent rights (TPR) juvenile proceedings are entitled to appointed counsel at both the trial court and the appellate levels. N.C. Gen .Stat. §§7B-602; 7B-1101; 7A-27; 7A-451.

Rule 3A of the North Carolina Rules of Appellate Procedure, N.C. R. App. P. 3A, applies to juvenile cases alleging abuse, neglect, or dependency or in which a TPR was sought. Rule 3A provides, in part,

> ….If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal,…

The remaining provisions of the rule protect the privacy interests of the juvenile and provide for expedited procedures and calendaring priority.

An indigent parent has the right to appeal the trial court's decision. However, an appointed trial lawyer will, on occasion, decline to sign the notice of appeal, as required by N.C. R. App. P. 3A and as requested by the client, because the lawyer is concerned that the appeal lacks merit and the lawyer may be in violation of Rule 11(a) of the North Carolina Rules of Civil Procedure and Rule 3.1 of the Rules of Professional Conduct. N.C. R. Civ. P. 11(a) provides in part,

> …The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation….

An appellate lawyer is appointed by the Office of the Appellate Defender to represent an indigent parent on the appeal. This lawyer reviews the record to determine whether there are justiciable issues. On many occasions, the appellate lawyer finds justiciable issues that the trial lawyer did not identify. However, on some occasions, the appellate lawyer determines that there are no meritorious legal arguments to be made. In juvenile cases, the Supreme Court has ruled that an Anders-type brief may not be filed. *In re Harrison*, 136 N.C. App. 831, 526 S.E. 2d 502 (2000). Therefore, the appellate lawyer will advise the client that the appeal is without merit and ask the client to withdraw the appeal. If the client refuses to do so, the lawyer files a motion to withdraw from the representation.

In appeals of juvenile cases, when the client has indicated that he or she wants to appeal and is prepared to sign the notice of appeal as required by N.C. R. App. P. 3A, is it unethical for the appointed trial lawyer to sign the notice of appeal to preserve the client's right to appeal even if the trial lawyer has doubts as to the merit of the appeal?

Opinion:

No, it is not unethical for the trial lawyer to sign the notice of appeal to preserve an indigent client's right to appeal in a juvenile case. Whether signing the notice violates Rule 11 of the Rules of Civil Procedure is outside the purview of the Ethics Committee. Nevertheless, the committee can opine on whether the lawyer is in violation of the prohibition in Rule 3.1 of the Rules of Professional Conduct on bringing a proceeding or asserting an issue unless there is a basis in law and fact for doing so that is not frivolous. In TPR and other juvenile cases, the state's interest in ensuring due process for parents is demonstrated by the statutory requirement for court appointed-trial and appellate counsel for indigent parents. In light of this public policy, and when the notice of appeal serves to preserve the client's right to appeal but does not assert a particular legal argument, it is not unethical for the appointed trial lawyer for an indigent parent to sign a notice of appeal although the trial lawyer may not believe that the appeal has merit. Moreover, the trial lawyer may rely upon the court-appointed appellate lawyer's subsequent review of the record to determine whether to pursue the appeal.

2009 Formal Ethics Opinion 1

January 15, 2010

Review and Use of Metadata

Opinion rules that a lawyer must use reasonable care to prevent the disclosure of confidential client information hidden in metadata when transmitting an electronic communication and a lawyer who receives an electronic communication from another party or another party's lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document.

Background

In the representation of clients in all types of legal matters, lawyers routinely send emails and electronic documents, spreadsheets, and PowerPoint presentations to a lawyer for another party (or directly to the party if not represented by counsel). The email and the electronic documents contain metadata[1] or embedded information about the document describing the document's history, tracking and management[2] such as the date and time that the document was created, the computer on which the document was created, the last date and time that a document was saved, "redlined" changes identifying what was changed or deleted in the document, and comments included in the document during the editing process. Pennsylvania Bar Ass'n. Comm. on Legal Ethics and Professional Responsibility, Formal Opinion 2007-500, *reconsidered* Pennsylvania Formal Op. 2009-100, notes that, although most metadata contains "seemingly harmless information," it may also contain "privileged and/or confidential information, such as previously deleted text, notes, and tracked changes, which may provide information about, e.g., legal issues, legal theories, and other information that was not intended to be disclosed to opposing counsel." This embedded information may be readily revealed by a "right click" with a computer mouse, by clicking on a software icon, or by using software designed to discover and disclose the metadata.[3] On occasion, one software application automatically displays or uses metadata that another software application hides from the user. The sender of the document may be unaware that there is metadata embedded in the document or mistakenly believe that the metadata was deleted from the document prior to transmission. The Ethics Committee is issuing this opinion sua sponte in light of the importance of the

ethical issues raised by metadata.

Inquiry #1:

What is the ethical duty of a lawyer who sends an electronic communication to prevent the disclosure of a client's confidential information found in metadata?

Opinion #1:

Rule 1.6(a) of the Rules of Professional Conduct prohibits a lawyer from revealing information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or disclosure is permitted by one of the exceptions to the duty of confidentiality set forth in paragraph (b) of the rule. As noted in comment [20] to the rule, "[w]hen transmitting a communication that includes information acquired during the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients." Therefore, a lawyer who sends an electronic communication must take reasonable precautions to prevent the disclosure of confidential information, including information in metadata, to unintended recipients.[4]

RPC 215 addressed the preservation of confidential client information when using modern forms of communication including cellular phones and email. The opinion states that the professional obligation to use reasonable care to protect and preserve confidential information extends to the use of communications technology; "[h]owever, this obligation does not require that a lawyer use only infallibly secure methods of communication." Nevertheless, "a lawyer must take steps to minimize the risks that confidential information may be disclosed in a communication."

Lawyers have several options to minimize the risk of disclosing confidential information in an electronic communication. Lawyers should exercise care in using software features that track changes, record notes, allow "fast saves," or save different versions, as these features increase the amount of metadata within a document. Metadata "scrubber" applications remove embedded information from an electronic document and may be used to remove metadata before sending an electronic document to opposing counsel. Finally, lawyers may opt to use an electronic document type that does not contain as much metadata, such as the portable document format (PDF), or may opt to use a hard copy or fax. Both commercial and freeware software solutions exist to help lawyers avoid inadvertently disclosing confidential information in an electronic communication.

What is reasonable depends upon the circumstances including, for example, the sensitivity of the confidential information that may be disclosed, the potential adverse consequences from disclosure, any special instructions or expectations of a client, and the steps that the lawyer takes to prevent the disclosure of metadata. Of course, when electronic communications are produced in response to a subpoena or a formal discovery request in civil litigation, the responding lawyer may not remove or restrict access to the metadata in the communications if doing so would violate any disclosure duties under law, the Rules of Civil Procedure, or court order.

Inquiry #2:

May a lawyer who receives an electronic communication from another party or the party's lawyer search for and use confidential information embedded in the metadata of the communication without the consent of the other party or lawyer?

Opinion #2:

No, a lawyer may not search for confidential information embedded in metadata of an electronic communication from another party or a lawyer for another party. By actively searching for such information, a lawyer interferes with the client-lawyer relationship of another lawyer and undermines the confidentiality that is the bedrock of the relationship. Rule 1.6. Additionally, if a lawyer unintentionally views confidential information within metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party.

The New York State Bar was the first to adopt the position that a lawyer should not search metadata for confidential information. The state bars of Alabama, Arizona, Florida, and Maine have followed this position.[5] New York Ethics Opinion 749 holds that,

> in light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship, use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege, the work product doctrine, or that may otherwise constitute a "secret" of another lawyer's client would violate the letter and spirit of [the New York] Disciplinary Rules.

Agreeing with the position of the New York State Bar, the Alabama State Bar Disciplinary Commission in Opinion 2007-02 finds that, "[t]he mining of metadata constitutes a knowing and deliberate attempt by the recipient attorney to acquire confidential and privileged information in order to obtain an unfair advantage against an opposing party." Although the ABA Standing Committee on Ethics and Professional Responsibility, in Formal Opinion 06-442 (2006),[6] takes the position that the Model Rules of Professional Conduct do not prohibit a lawyer from reviewing and using metadata, this position was subsequently rejected by the State Bar of Arizona among others. Arizona Opinion 07-03 observes that under the ABA opinion, which puts "the sending lawyer…at the mercy of the recipient lawyer…, the sending lawyer might conclude that the only ethically safe course of action is to forego the use of electronic document transmission entirely…[this is not] realistic or necessary."

The North Carolina State Bar Ethics Committee agrees that a lawyer may not ethically search for confidential information embedded within an electronic communication from another party or the lawyer for another party. To do so would undermine the protection afforded to confidential information by Rule 1.6 and would interfere with the client-lawyer relationship of another lawyer in violation of Rule 8.4(d), which prohibits conduct that is "prejudicial to the administration of justice."

The Ethics Committee recognizes that it is possible for a lawyer to unintentionally find confidential information upon viewing the contents of an electronic communication. If this occurs, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party.

Rule 4.4(b) requires a lawyer who receives a writing relating to the representation of a client that the lawyer knows, or reasonably should know, was inadvertently sent, to promptly notify the sender. Receiving confidential information embedded in the metadata of an electronic communication is analogous to receiving, for example, a faxed pleading that inadvertently includes a page of notes from opposing counsel. Although the receiving lawyer did not seek out the confidential information, the receiving lawyer in either situation has a duty to "promptly notify the sender" under Rule 4.4(b) if the receiving lawyer "knows or reasonably should know that the writing was inadvertently sent." Although the technology involved is different, the Ethics Committee believes that a lawyer who can recognize confidential information inadvertently included in a fax can also recognize confidential information inadvertently included in an electronic document.

Further, a lawyer who intentionally or unintentionally discovers confidential information embedded within the metadata of an electronic communication may not use the information revealed without the consent of the other lawyer or party.

Although the receipt of confidential information embedded in metadata is analogous to the receipt of a page of handwritten notes in a faxed pleading for purposes of notifying the sender under Rule 4.4(b), metadata differs from the readily apparent information contained in a paper communication. Confidential information may inadvertently be included in the metadata of an electronic document despite reasonable efforts by a sender to stay abreast of rapid technological changes and to prevent the transmission of confidential information. The exchange of electronic documents, however, is vital to the functioning of the legal profession in the twenty-first century. Although Rule 4.4(b) does not require a lawyer to return an inadvertently sent paper document or specifically prohibit the use of information contained in such a document, Rule 8.4(d) prohibits conduct that is "prejudicial to the administration of justice." As comment [4] to Rule 8.4 observes, "[t]he 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." Allowing the use of confidential information that is found embedded within metadata would inhibit the efficient functioning of the modern justice system and also undermine the protections for

client confidences in the Rules of Professional Conduct and the attorney-client privilege. Therefore, the use of found metadata is "prejudicial to the administration of justice" in violation of Rule 8.4(d) and is prohibited.

In summary, a lawyer may not search for and use confidential information embedded in the metadata of an electronic communication sent to him or her by another lawyer or party unless the lawyer is authorized to do so by law, rule, court order or procedure, or the consent of the other lawyer or party. If a lawyer unintentionally views metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party.

Endnotes

1. Metadata is explained in Pennsylvania Bar Ass'n. Comm. on Legal Ethics and Professional Responsibility, Formal Op. 2007-500 (2007), *reconsidered* Pennsylvania Formal Op. 2009-100 (2009), as follows: "Metadata, which means 'information about data,' is data contained within electronic materials that is not ordinarily visible to those viewing the information. Although most commonly found in documents created in Microsoft Word, metadata is also present in a variety of other formats, including spreadsheets, PowerPoint presentations, and Corel WordPerfect documents."
2. Arizona State Bar Comm. on the Rules of Professional Conduct, Op. 07-03 (2007).
3. Pennsylvania Formal Op. 2007-500 (2007), *reconsidered* Pennsylvania Formal Op. 2009-100 (2009).
4. This is consensus position among the jurisdictions that have considered the issue as well as the ABA Standing Committee on Ethics and Professional Responsibility. Alabama State Bar Disciplinary Comm'n, Op. 2007-02 (2007); Arizona State Bar Comm. on the Rules of Professional Conduct, Op. 07-03 (2007); Colorado Bar Ass'n. Ethics Comm., Op. 119 (2008); District of Columbia Legal Ethics Comm., Op. 341 (2007); Florida Professional Ethics Comm., Ethics Op. 06-2 (2006); Maine Bd. of Bar Overseers Professional Ethics Comm'n., Op. 196 (2008); Maryland State Bar Ass'n. Comm. on Ethics, Op. 2007-09 (2006); New York State Ethics Op. 782 (2004); Pennsylvania Formal Op. 2009-100 (2009); ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 06-442 (Aug. 5, 2006).
5. Alabama Ethics Op. 2007-02 (2007); Arizona Op. 07-03 (2007); Florida Ethics Op. 06-2 (2006); Maine Op. 196 (Oct. 21, 2008); and New York Ethics Op. 749 (2001). District of Columbia Legal Ethics Comm. Op. 341 (2007) holds that a lawyer may not view metadata if the lawyer has actual knowledge that it was provided inadvertently.
6. ABA Formal Op. 06-442 (2006) concludes that the Model Rules of Professional Conduct permit a lawyer to review and use metadata contained in email and other electronic documents. The Colorado Bar Association, Maryland State Bar Association, and Pennsylvania Bar Association agree with the position expressed in the ABA opinion. Colorado Op. 119 (2008); Maryland Op. 2007-09 (2006); Pennsylvania Op. 2009-100 (2009).

2009 Formal Ethics Opinion 2

April 24, 2009

Responding to Unauthorized Practice of Law in Preparation of a Deed

Opinion rules a closing lawyer who reasonably believes that a title company engaged in the unauthorized practice of law when preparing a deed must report the lawyer who assisted the title company but may close the transaction if client consents and doing so is in the client's interest.

Inquiry #1:

Buyer/borrower's counsel is preparing for closing. The day prior to closing a draft of a deed is forwarded to buyer/borrower's counsel by ABC Title Company. At or near the top of the draft deed it states in writing, "This deed was prepared by ABC Title Company under the supervision of John Doe, attorney at law." ABC Title Company is not a bank or a law firm. John Doe is not employed by ABC Title Company. Buyer/borrower's counsel believes that the deed is actually being prepared by a nonlawyer employee or independent contractor of the ABC Title Company who then forwards the deed to John Doe for his review and approval. John Doe does not directly employ the nonlegal staff person who prepares the deed, nor is that person an independent contractor hired by John Doe for the purpose of assisting John Doe with the legal work he performs on behalf of his clients.

What are the ethical obligations of buyer/borrower's counsel as to John Doe and ABC Title Company?

Opinion #1:

No opinion is expressed on the legal question of whether ABC Title Company is engaged in the unauthorized practice of law. For the purpose of responding to this inquiry, however, it is assumed that buyer/borrower's counsel reasonably believes that ABC is engaged in the unauthorized practice of law.

Rule 8.3(a) requires a lawyer who knows 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 inform the North Carolina State Bar or a court having jurisdiction over the matter. Rule 8.3 only requires a lawyer to report rule violations of "another lawyer." There is no requirement under Rule 8.3 to report the unauthorized practice of law by a nonlawyer or company. Nevertheless, Rule 5.5(d) of the Rules of Professional Conduct prohibits a lawyer from assisting another person in the unauthorized practice of law.

If buyer/borrower's counsel suspects that John Doe is assisting ABC Title Company in the unauthorized practice of law, he should communicate his concerns to John Doe and advise John Doe that he may wish to contact the State Bar for an ethics opinion as to his future transactions with ABC Title Company. If, after communicating with John Doe, buyer/borrower's counsel reasonably believes that John Doe is knowingly assisting the title company in the unauthorized practice of law, and plans to continue participating in such conduct, buyer/borrower's counsel must report John Doe to the State Bar. Rule 8.3(a).

Inquiry #2:

May buyer/borrower's counsel proceed with the closing?

Opinion #2:

Buyer/borrower's counsel has an obligation to do what is in the best interest of his client while not assisting in the unauthorized practice of law. The lawyer should advise the client of his concerns about ABC's unauthorized practice of law and any harm that such conduct may pose to the client. However, if buyer/borrower's counsel determines that the deed appears to convey marketable title and the client decides to proceed with the closing after receiving his lawyer's advice, buyer/borrower's counsel may close the transaction. *See* 2007 FEO 3 (lawyer may proceed with representation of city council in quasi-judicial proceeding after advising the council of the legal implications of a nonlawyer appearing before the council in representative capacity). Buyer/borrower's participation in the closing does not further the unauthorized practice of law by ABC Title Company.

2009 Formal Ethics Opinion 3

January 15, 2010

Nonlawyer Employee Contacting Clients of Former Employer

Opinion rules that a lawyer has a professional obligation not to encourage or allow a nonlawyer employee to disclose confidences of a previous employer's clients for purposes of solicitation.

Inquiry:

May a nonlawyer employee of a law firm, who recently changed law firms, write to clients of his/her former employer with whom the nonlawyer had established relationships to inform the clients that the nonlawyer is employed with a new law firm and that the new law firm handles the same type of legal matters?

Opinion:

The Rules of Professional Conduct govern the actions of lawyers, rather than nonlawyers. However, a lawyer having direct supervisory authority over a nonlawyer employee has a duty to make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer. Furthermore, the lawyer may be held responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer. *See* Rule 5.3(c).

The protection of client confidences is one of the most significant responsibilities imposed on a lawyer. *See* Rule 1.6, 1.9. Comment [1] to Rule 5.3 provides that a lawyer must give nonlawyer employees appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of a client. A client's identity, and the fact that the client had previously retained a lawyer for a particular purpose, is confidential information. Rule 1.6 and Rule 1.9 refer to the duty of confidentiality that a lawyer owes to his own

current and former clients. However, the deference that the legal profession gives to a lawyer's duty of confidentiality would mandate that a lawyer has a professional obligation not to encourage or allow a nonlawyer employee to disclose confidences of a previous employer's clients for purposes of solicitation.

No opinion is expressed on the legal question of whether a communication with a client of the nonlawyer's former employer constitutes interference with a contract.

2009 Formal Ethics Opinion 4

April 24, 2009

Credit Card Account that Avoids Commingling

Opinion rules that a law firm may establish a credit card account that avoids commingling by depositing unearned fees into the law firm's trust account and earned fees into the law firm's operating account provided the problem of chargebacks is addressed.

Inquiry:

To avoid the commingling of client funds with a lawyer's own funds, Rule 1.15-2 of the Rules of Professional Conduct requires payments of mixed funds, unearned fees, and money advanced for costs to be deposited into a lawyer's trust account, and payments for earned fees and reimbursements for expenses advanced by a lawyer to be deposited into a lawyer's operating account. Although a lawyer may accept payment of legal fees by credit card, if there is no way to distinguish a credit card payment for earned fees or costs advanced from a payment for unearned fees or anticipated expenses, all credit card payments must be initially deposited into the lawyer's trust account. Earned fees and expense reimbursements are then withdrawn promptly from the trust account for deposit into the operating account or payment to the lawyer. CPR 129 and RPC 247.

A bank[1] has developed a credit card account specifically for law firms that separates and deposits payments of unearned and earned client funds into trust and operating accounts as appropriate. Payments for unearned fees (and for anticipated expenses) are deposited directly into the participating law firm's trust account and payments for earned fees (and costs advanced) are deposited directly into the firm's operating account. May a lawyer establish such an account?

Opinion:

Yes, the account satisfies a lawyer's professional responsibility to avoid the commingling of funds. Utilization of such an account does not violate Rule 1.15-2(g) which requires mixed funds (funds belonging to the lawyer received in combination with funds belonging to a client) to be deposited into the lawyer's trust account intact and, after deposit, the funds belonging to the lawyer to be withdrawn. The law firm credit card account described in the inquiry separates the funds prior to their deposit and, therefore, the funds are not mixed when received by the lawyer.

A lawyer may set up such an account only if the lawyer is also able to comply with 97 FEO 9 which addresses credit card agreements that give the processing bank the authority to debit or "charge back" an account in the event a credit charge is disputed. The opinion sets forth the following alternative ways to safeguard client funds in a trust account when the credit card agreement gives the bank the authority to debit the lawyer's trust account for a chargeback by a client without prior notice to the lawyer:

> 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; maintain a separate demand deposit account in an amount sufficient to cover any chargeback; request that the bank arrange an inter-account transfer such that the lawyer's operating account will be immediately debited in the event of a chargeback against the trust account; or establish a trust account for the sole purpose of receiving advance payments by credit card which will be transferred immediately to the lawyer's primary trust account.

As noted in 97 FEO 9, "[u]nder 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." Therefore, provided the lawyer can comply with the requirements set forth in 97 FEO 9, the lawyer may establish a credit card account that deposits funds into separate accounts.

Endnote

1. One such account is the Law Firm Merchant Account99 which is offered by Affiniscape Merchant Solutions in association with Bank of America, NA.

2009 Formal Ethics Opinion 5

January 22, 2009

Reporting Opposing Party's Citizenship Status to ICE

Opinion rules that a lawyer may serve the opposing party with discovery requests that require the party to reveal her citizenship status, but the lawyer may not report the status to ICE unless required to do so by federal or state law.

Inquiry #1:

Lawyer is defending a medical malpractice lawsuit in which a mother and her child are plaintiffs. The child is a natural born US citizen. Lawyer believes the mother is a Mexican citizen and suspects she is an undocumented alien.

The basis of the suit is injury to the child during birth. Plaintiff's counsel has forecast damages of over $30,000,000. The amount of damages is based in part on the cost of medical care in the United States. The cost of the same medical care in Mexico would be substantially less.

May Lawyer serve plaintiffs with discovery requests that require Mother to reveal her manner of entry into the United States and the status of her citizenship or legal residence?

Opinion #1:

Yes. If the discovery requests are intended to uncover information that is relevant to the defense of the case and which is admissible evidence (or may lead to admissible evidence) and is not for the improper purpose of creating a file to use to threaten the plaintiff with deportation, to harass the plaintiff, or for some other improper purpose, lawyer is not prohibited from engaging in such discovery. *See* Rule 3.1, Rule 4.4, 2005 FEO 3.

Inquiry #2:

If Lawyer engages in the discovery and determines that Mother is in the country illegally, may Lawyer call the US Immigration and Customs Enforcement (ICE) and report the mother's status?

Opinion #2:

No, unless federal or state law requires Lawyer to report Mother's illegal status to ICE.

Rule 4.4(a) provides that, 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." Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. Comment [4] to Rule 8.4 provides that "paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings."

It is unlikely that Lawyer's impetus to report Mother to ICE is motivated by any purpose other than those prohibited under these principles. The Ethics Committee has already determined that a lawyer may not threaten to report an opposing party or a witness to immigration officials to gain an advantage in civil settlement negotiations. 2005 FEO 3. Similarly, Lawyer may not report Mother's illegal status to ICE in order to gain an advantage in the underlying medical malpractice action.

Inquiry #3:

Would the answer to either Inquiry #1 or Inquiry #2 change if Mother was not a party to the litigation?

Opinion #3:

No. *See* Rule 4.4(a).

2009 Formal Ethics Opinion 6

July 24, 2009

Note: This opinion was withdrawn and is superseded by 2009 FEO 16.

2009 Formal Ethics Opinion 7

January 27, 2012

Interviewing an Unrepresented Child Prosecuting Witness in a Criminal Case Alleging Physical or Sexual Abuse of the Child

Opinion rules that a criminal defense lawyer or a prosecutor may not interview an unrepresented child who is the alleged victim in a criminal case alleging physical or sexual abuse if the child is younger than the age of maturity as determined by the General Assembly for the purpose of an in-custody interrogation (currently age 14) unless the lawyer has the consent of a non-accused parent or guardian or a court order allows the lawyer to seek an interview with the child without such consent; a lawyer may interview a child who is this age or older without such consent or authorization provided the lawyer complies with Rule 4.3, reasonably determines that the child is sufficiently mature to understand the lawyer's role and purpose, and avoids any conduct designed to coerce or intimidate the child.

Introduction:[1]

This ethics opinion examines when a criminal defense lawyer or a prosecutor may interview a child who is the prosecuting witness in a criminal case alleging physical or sexual abuse of the child. The opinion is purposefully limited to this factual situation and does not address whether a lawyer may, for example, interview a child who is a witness to a crime but is not the victim of the crime. The absence of an opinion on the latter subject does not, however, mean that the Ethics Committee has concluded that such interviews are permissible without consent or authorization of a parent, guardian or the court. A lawyer should take into consideration the principles articulated in this opinion when considering whether to interview any child who was a witness to a violent crime especially one involving the child's family members.

The opinion addresses a difficult dilemma for a lawyer who has a duty to prepare competently by investigating each case and interviewing key witnesses but who does not wish to cause further harm to a child who may have been traumatized by physical or sexual abuse.In preparing this opinion, the Ethics Committee received input from mental health professionals and child advocates. That input led to the committee's determination that the emotional and intellectual sophistication of a child cannot be determined by a lawyer or established by an opinion of the Ethics Committee. However, the General Assembly has determined that a child at a certain age is legally mature for the analogous purpose of responding to an in-custody interrogation.N.C. Gen. Stat. §7B-2101(b). In the absence of a better benchmark, the committee accepts the General Assembly's policy decision on this issue.

When a lawyer is considering whether to seek the consent or authorization of a parent or guardian or a court order[2] allowing the lawyer to interview a child who is alleged to be the victim of physical or sexual abuse, the lawyer should keep in mind the following information provided to the committee by the experts it consulted.Excessive interviews of child victims lead to additional trauma for the child.A person who is not trained in techniques for forensic interviewing of children often makes grave errors that can taint the interview or add to the child's trauma.It is preferable for the interview to be performed by a professional.To avoid intimidating the child, a support person for the child (family member or other appropriate person) should be present at the interview.In light of the foregoing, a lawyer should investigate whether forensic interviews with the child have already taken place and are available on tape; if a tape of an interview with the child is available, the lawyer should consider forgoing further interviews.

Inquiry #1:

Attorney A represents a criminal defendant on a charge of taking indecent liberties with a child.To prepare for trial, Attorney A would like to interview the child who is the victim of the alleged crime.The child is not a party to the criminal action.She does not have a lawyer and a guardian ad litem has not been appointed to represent her interests.May Attorney A interview the child without the consent of the child's parent or legal guardian?

Opinion #1:

Yes, if the child is older than the age of maturity for the purpose of an in-custody interrogation as determined by the General Assembly in N.C. Gen. Stat. §7B-2101(b) which provides that an in-custody admission of a child under the age of 14 is inadmissible if the interrogation was made outside the presence of the child's parent, guardian, custodian or attorney. Below the age designated in the statute, it is presumed that a child cannot understand the purpose of an interview with a lawyer, the lawyer's role, or the child's right to decline the interview or terminate the interview at any time.If the child is this age or older, Attorney A may seek an interview with the child without the consent of the child's parent or legal guardian, provided Attorney A respects the rights of the child and there is no legal requirement that the consent of the parent or legal guardian be obtained.If the General Assembly changes the designated age in N.C. Gen. Stat. §7B-2101(b), or a successor statute, this opinion shall be similarly changed.

It is Attorney A's professional duty to prepare competently and diligently to defend the client; *a priori*, in most cases this includes interviewing the victim of the alleged crime if the victim will consent to the interview.Nevertheless, a child frequently does not have the emotional or intellectual maturity to make an informed decision about whether to consent to the interview or the emotional or intellectual maturity to understand the role of the lawyer or the purpose of the interview.

Rule 4.3(b) states that, when 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.

As noted in comment [1] to Rule 4.3, "[a]n 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."

Many children are inexperienced in legal matters and will not understand the role of a lawyer who seeks an interview. Many children will naively defer to the lawyer because he or she is an adult.Many children will be easily misled or subject to the undue influence of an authority figure such as a lawyer.Because of their psychological and emotional immaturity, it is, therefore, presumed that a lawyer may not interview a child who is younger than age 14 without violating Rule 4.3(b) unless the lawyer obtains the prior consent or authorization of the child's (non-accused) parent or legal guardian or obtains an order from a court with jurisdiction.

A child who is age 14 or older may be interviewed without prior consent or authorization of a parent, guardian or the court provided the lawyer who seeks to interview the child reasonably determines that the child is sufficiently mature to understand, when disclosed by the lawyer, (1) the role of the lawyer, (2) who the lawyer represents, (3) that the purpose of the interview is to prepare the case for trial, (4)the right to have an adult present during the interview, and (5) that the child is at liberty to refuse or to terminate the interview.If the lawyer cannot reasonably conclude that the child is sufficiently mature, both emotionally and intellectually, to understand the five disclosures, the lawyer may not interview the child unless a legal guardian or parent consents or a court orders the interview. If the conduct of the legal guardian or the parent toward the child is at issue in the criminal case, consent must be obtained from a guardian ad litem, a court or other appropriate person or entity with authority to give consent. *See* Opinion #3; *see also* Rule 7.1 of the General Rules of Practice for the Superior and District Courts (providing procedure for appointment of lawyer to serve as guardian ad litem for minor who is victim or potential witness in a criminal proceeding).

Rule 3.4(b) prohibits a lawyer from counseling or assisting a witness to testify falsely.

This includes making improper suggestions or offering inducements that might lead a naïve and vulnerable child to change or alter his or her testimony. Although a lawyer may reasonably conclude that a child who is age 14 or older is sufficiently mature to consent to the interview, the lawyer may not engage in emotional manipulation or other forms of undue influence, coercion or intimidation that may inhibit or alter the witness's testimony.

Rule 4.2(a) prohibits a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the other lawyer consents or the communication is authorized by law or court order.Before interviewing a child, if allowed to do so under this opinion, the lawyer must determine whether the child is repre-

sented and, if applicable, follow the requirements of Rule 4.2(a).

Inquiry #2:

May the prosecutor interview the child who is the alleged victim of physical or sexual abuse?

Opinion #2:

Yes, subject to the same constraints set forth in Opinion #1.

This opinion does not impede a prosecutor's fulfillment of the duty under the Crime Victims Rights Act, N.C. Gen. Stat. Chap. 15A, Article 46, to offer a victim the opportunity to consult with the prosecutor to obtain the views of the victim about the disposition of the case.*See* N.C. Gen. Stat. §15A-832(f).N.C. Gen. Stat. §15A-841 states that, if the victim is mentally or physically incompetent, the victim's rights under the Act may be exercised by the victim's next of kin or legal guardian.A prosecutor may, therefore, fulfill his or her duty under the Act by speaking with the parent or guardian of an alleged victim who is under age of 14.

Inquiry #3:

The defendant is the child's parent or legal guardian and is accused of conduct that, if proven, would constitute abuse or neglect of the child.May the defendant's criminal defense lawyer interview the child subject to the constraints set forth in Opinion #1?

Opinion #3:

In most instances of alleged child abuse or neglect by a parent or guardian, a guardian ad litem (GAL) and, on occasion, an attorney advocate are appointed to represent the child.

RPC 249 prohibits a lawyer from communicating with a child who has been appointed a GAL unless the lawyer obtains the consent of the attorney advocate or, if only a GAL is appointed, the GAL. If a GAL has not been appointed for the child, the lawyer may interview the child subject to the constraints set forth in Opinion #1.

Endnotes

1. This opinion does not address legal issues relating to due process or the confrontation clause.
2. It is contemplated that a lawyer could seek the court's permission to interview the child without obtaining the consent of a parent or guardian.The child would not, of course, be compelled to submit to the interview.

2009 Formal Ethics Opinion 8

January 21, 2011

Service as Commissioner after Representing Party to Partition Proceeding

Opinion provides guidelines for a lawyer for a party to a partition proceeding and rules that the lawyer may subsequently serve as a commissioner for the sale but not as one of the commissioners for the partitioning of the property.

Inquiry #1:

Attorney is retained by a person with an interest in property to represent him in a proceeding to partition the property pursuant to Chapter 46 of the North Carolina General Statutes. N.C. Gen. Stat. §46-6 authorizes the court to appoint a disinterested person to represent any person interested in the property whose name is unknown and who fails to appear in the proceeding. May Attorney represent the existing client and also agree to be appointed to represent any unknown person with interest in the property?

Opinion #1:

No. There is a potential conflict between the interests of the existing client and the interests of the unknown person(s). One of the critical issues in a partition proceeding is whether the property should be sold or partitioned. *See, e.g.*, N.C. Gen. Stat. §46-22(c)(party seeking sale has burden of proving, by a preponderance of the evidence, that actual partition cannot be made without substantial injury to the interested parties). If Attorney has an existing client with a specific interest in the proceeding, Attorney cannot be disinterested as required by N.C. Gen. Stat. §46-6 or exercise independent professional judgment as required by the Rules of Professional Conduct when evaluating and representing the interests of the unknown person(s). The potential conflict cannot be resolved by consent because the unknown person(s) is unavailable to consent. Rule 1.7.

Inquiry #2:

At the conclusion of the proceeding, the clerk of court orders the public sale of the property and, pursuant to N.C. Gen. Stat. §§1-399.4 and 46-28, appoints Attorney as the commissioner for the sale.[1]

May Attorney serve as the commissioner and collect a commission from the public sale?

Opinion #2:

Yes, provided Attorney concludes that he can serve fairly and impartially and, further provided, Attorney terminates his representation of any person with an interest in the property.

The role of the commissioner is a neutral one with fiduciary responsibilities to all of the owners of the property. However, a commissioner conducting a public sale has limited discretion because he must follow the specific procedural requirements for judicial sales set forth in Chapter 1, Article 29A of the General Statutes. Attorney may, therefore, serve as commissioner for the sale upon determining that he can fulfill the role impartially, without bias for or against any of the parties to the partition proceeding, and upon terminating his representation of any person with an interest in the property. In the similar situation of a lawyer serving as a trustee on a deed of trust in foreclosure, the ethics opinions also allow the lawyer to relinquish the representation of the lender or the debtor to serve in the impartial fiduciary role of trustee for the foreclosure. *See* RPC 46, RPC 82, RPC 90.

N.C. Gen. Stat. §46-28.1 permits any party to a partition proceeding to file a petition for revocation of the order confirming the sale provided the petition is filed within 15 days and is based upon grounds that are specified in the statute. Therefore, the client's legal needs may not end with the entry of the order of sale and the appointment of a commissioner. Anticipating that a client might desire additional legal representation after the sale, at the beginning of the representation the lawyer must notify the client of the lawyer's intention to seek to withdraw from the representation upon the entry of an order of sale in order to be appointed by the clerk as commissioner. *See* Rule 1.4. After the entry of the order of sale and before seeking the permission of the clerk to withdraw from the representation to serve as the commissioner for the sale, the lawyer must obtain the client's informed consent, confirmed in writing, to withdraw from the representation to serve as commissioner. *See* Rule 1.16.

At the beginning of the representation, if Attorney does not intend to serve as a commissioner for the sale, he does not have to communicate with the client about potential service as a commissioner. If the circumstances change and Attorney subsequently decides to seek the appointment, failure to notify the client at the beginning of the representation will not prohibit Attorney from subsequently asking for the client's informed consent to withdraw to serve as a commissioner.

Inquiry #3:

At the conclusion of the proceeding, the clerk of court orders a private sale of the property pursuant to N.C. Gen. Stat. §§46-28 and 1-339.33. May Attorney be designated as the person authorized to make the private sale pursuant to N.C. Gen. Stat. §1-339.33(1)?

Opinion #3:

Yes, subject to the conditions set forth in Opinion #2.

Inquiry #4:

If Attorney is appointed the commissioner for a public sale or the person authorized to make the private sale, may Attorney purchase the property at the sale?

Opinion #4:

No. As the appointed commissioner or the person appointed to conduct the private sale, Attorney has a duty to oversee the sale of the property in a fair and impartial manner. Advancing a personal interest by bidding on or making an offer on the property violates this duty. *See* 2006 FEO 5 (county tax lawyer who is appointed commissioner may not bid at tax foreclosure sale).

Inquiry #5:

At the conclusion of the proceeding, the clerk of court orders the public sale of the property but appoints another person as commissioner for the sale. May

Attorney bid at the sale on his own behalf?

Opinion #5:

No. This would be a conflict of interest between the lawyer's self-interest in purchasing the property at the lowest price and the client's interest in selling the property for the highest price. Rule 1.7(a)(2). However, Attorney may bid on the property if he is doing so on behalf of the client.

Inquiry #6:

At the conclusion of the proceeding, the clerk of court orders the partition of the property. May Attorney agree to be appointed as one of the three commissioners responsible for dividing the property?

Opinion #6:

No. A commissioner for a partitioning must exercise discretion in determining how to divide the property, thus directly affecting the interests of the various parties to the proceeding. Moreover, there remain opportunities for Attorney to advocate for his client's interests in the event the commissioners seek input from the parties or in the event of an appeal. Attorney cannot, therefore, serve as an impartial commissioner. Rule 1.7(a).

Inquiry #7:

Assume that Attorney formerly represented one or more of the parties in a separate but related partition proceeding (i.e., a prior proceeding involving the same property that did not result in partition or sale), but does not represent any of the parties to the current proceeding.

May Attorney serve as one of the commissioners to conduct the sale or to partition the property?

Opinion #7:

Yes, provided Attorney determines that he can act impartially. *See* Opinion #1 and Rule 1.7.

Inquiry #8:

Assume that Attorney formerly represented one or more of the parties in a separate but related partition proceeding (i.e., a prior proceeding involving the same property that did not result in partition or sale), but does not represent any of the parties to the current proceeding.

May Attorney serve as the court-appointed lawyer for any "unknown owner" pursuant to N.C. Gen. Stat. §46-6?

Opinion #8:

Yes, with the informed consent, confirmed in writing, of Attorney's former client(s). Rule 1.9(a) prohibits a lawyer who has formerly represented a client in a matter from representing a new client in the same or a substantially related matter if the interests of the new client are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Inquiry #9:

Assume that Attorney formerly represented one or more of the parties in a separate but related partition proceeding (i.e., a prior proceeding involving the same property that did not result in partition or sale), but does not represent any of the parties to the current proceeding.

May Attorney purchase the property at the sale?

Opinion #9:

Yes, unless Attorney received confidential information from a former client relative to the property that Attorney could use to the former client's disadvantage when bidding on the property. Rule 1.9(c)(1).

If a lawyer no longer represents a former client, the lawyer's only duties to the former client are to avoid adverse representations of others in the same or a substantially related matter and to avoid using confidential client information to the disadvantage of the former client. Although the partition sale may be substantially related to the prior partition proceeding, a lawyer who is purchasing for his own interest is not engaged in the representation of an adverse party and, therefore, the prohibition on representations adverse to a former client in Rule 1.9(a) is inapplicable. However, the prohibition on using the confidential information of a former client to the disadvantage of the former client would apply unless, as Rule 1.9(c)(1) permits, the information has become generally known.

Endnote

1. Although the procedure for judicial sales of property set forth in Chapter 1, Article 29A, of the General Statutes provides for the appointment of only one commissioner, it is still the custom in some judicial districts for the clerk of court to appoint three commissioners. The conditions on service as a commissioner for the public sale of property set forth in this opinion apply equally to a lawyer who is appointed by the clerk to serve on a panel of commissioners.

2009 Formal Ethics Opinion 9

October 23, 2009

Computer-Based Conflict Systems

Opinion describes reasonable procedures for a computer-based conflicts checking system.

Inquiry:

For the past several years Law Firm has maintained information with regard to current and former representations in electronic form on its computer network and used software tools in order to query such data to determine whether prospective engagements would involve a conflict of interest. Law Firm has learned that its current software provider will no longer provide support for the conflict checking system. A new software provider will convert the data to a new, fully supported program for a certain dollar amount per year of data converted. With each additional year that the software provider is required to retrieve the data, the expense of the conversion goes up exponentially. For what period of time is Law Firm required to convert the data necessary for conflict checking purposes?

Opinion:

After termination of a client-lawyer relationship, a lawyer has continuing duties with respect to confidentiality and conflicts of interest. *See* Rule 1.6; Rule 1.9, cmt. [1]. These duties continue indefinitely, even after a client's death. *See* RPC 209. For example, in RPC 209, the Ethics Committee determined that, although six years is a reasonable amount of time for maintaining a closed client file, a law firm must indefinitely maintain a record of all destroyed client files. Similarly, the American Bar Association has opined that a lawyer should preserve, "perhaps for an extended time," an index or identification of destroyed client files. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1384 (1977).

Despite the indefinite duration of the duties with respect to confidentiality and conflicts, the requirements for complying with these duties must be reasonable. *See* Rule 0.2, Preamble: Scope. The Ethics Committee has previously adopted the standard of "reasonable care" in addressing a lawyer's duty to maintain client confidences. *See* RPC 133, RPC 215. Likewise, comment [3] to Rule 1.7 specifically provides that a law firm should adopt "reasonable procedures" in order to determine whether a conflict of interest exists.

Every law firm must make its own determination as to what conflict checking procedures are reasonable, taking into account such variables as the size of the law firm, the type of practice, the cost of maintaining conflict checking records over a period of time, and the risk of failing to discover an existing conflict of interest. Regardless of the amount of time that conflict checking information is maintained, lawyers have a duty to avoid any known conflicts and to address conflicts made known to them by opposing or third parties.

As a minimum standard for what constitutes reasonable care, the law firm must convert conflict checking data for at least the last six years to the new program. RPC 209. The law firm does not need to convert conflict checking data that is maintained in some other format by the law firm, i.e., index card filing system, so long as the firm has some means of searching the data for conflicts. The law firm should check with its malpractice carrier to determine whether the carrier has different requirements.

2009 Formal Ethics Opinion 10

October 23, 2009

Supervising a Nonlawyer Appearing in an Unemployment Hearing

Opinion rules that a lawyer must provide appropriate supervision to a nonlawyer appearing pursuant to N.C. Gen. Stat. A796-17(b) on behalf of a claimant or an employer in an unemployment hearing.

Inquiry #1:

N.C. Gen. Stat. A796-17(b) allows a nonlawyer to represent employers in unemployment hearings provided the nonlawyer is supervised by a North Carolina licensed lawyer. The statute does not require the lawyer to be present at the unemployment hearing:

> (b) Representation - Any claimant or employer who is a party to any proceeding before the [Employment Security] Commission may be represented by (i) an attorney; or (ii) any person who is supervised by an attorney; however, the attorney need not be present at any proceeding before the commission.

Attorney A is contacted by Corporation B, a business entity that would like to have its employees represent employers in unemployment hearings. As stated in a letter to Attorney A, Corporation B is looking for a lawyer to supervise the "corporation, its employees, and agents" in the representation of employers in unemployment hearings in North Carolina. May Attorney A accept and provide Corporation B with a letter of supervision that would indicate that Attorney A is supervising the corporation and its employees in the representation of employers in unemployment hearings?

Opinion #1:

No. N.C. Gen. Stat. A784-5 prohibits the practice of law by a business corporation. Rule 5.5(d) prohibits a lawyer from assisting in the unauthorized practice of law. Attorney A may not agree to supervise Corporation B or its employees and may not provide a letter of supervision to Corporation B.

Inquiry #2:

If Corporation B were not a corporation but another form of business entity, would the answer to Inquiry #1 change?

Opinion #2:

No.

Inquiry #3:

Attorney A is contacted by C, a nonlawyer who would like to act as a claimant's or an employer's representative pursuant to N.C. Gen. Stat. A796-17(b). C asks Attorney A to give her a letter of supervision "for any and all unemployment hearings." The requested letter would not be limited to a specific pending unemployment claim, but would be used for any claim upon which C might represent a claimant or an employer in the future. On a periodic basis, C would provide Attorney A with a list of claims upon which she provided representation.

May Attorney A provide the letter of supervision to C?

Opinion #3:

Unless Attorney A will provide appropriate supervision to C in every unemployment hearing in which she appears, Attorney A may not provide the letter of supervision.

Although N.C. Gen. Stat. A796-17(b) does not require the lawyer to be physically present at a hearing, it contemplates that a lawyer will supervise a nonlawyer representative. Moreover, Rule 5.3 requires a lawyer to supervise the conduct of any nonlawyer who is retained or associated with the lawyer. Therefore, the lawyer must provide appropriate supervision under the circumstances. *See* RPC 216 (lawyer may supervise nonlawyer who is not employee, but lawyer is responsible for work product). Appropriate supervision would include determining the ability and knowledge of the nonlawyer before agreeing that the nonlawyer may appear at a hearing without the lawyer. Tt would also require the lawyer to have specific knowledge of and provide oversight for each claim to be handled by the nonlawyer.

A "letter of supervision" that represents that a lawyer is supervising a nonlawyer must be a truthful communication as required by Rule 7.1. If Attorney A is not going to supervise C with regard to each individual unemployment hearing, then the letter is a sham and Attorney A is assisting C in the unauthorized practice of law.

Inquiry #4:

C asks Attorney A to prepare and sign a letter of representation for C with blank spaces so that C may fill in the blanks with the identifying information for each hearing in which she represents an employer. May Attorney A provide such a letter?

Opinion #4:

See Opinion #3.

2009 Formal Ethics Opinion 11

July 23, 2010

Representing Debtor in Bankruptcy When Lender is Current Client

Opinion rules that a lawyer may undertake the representation of a debtor in a Chapter 13 bankruptcy, although the lender is lawyer's current client, if the lawyer reasonably believes that he will be able to provide competent and diligent representation to both clients and both clients give informed consent.

Inquiry #1:

Lawyer regularly represents Lender in various matters. Lawyer is approached by Client to represent Client in an individual Chapter 13 bankruptcy. Lender has made a loan to Client. To secure the repayment of the loan, Lender holds a first priority deed of trust on Client's residence, a first priority deed of trust on Client's commercial building, and a first priority lien on Client's vehicle. Lawyer currently represents Lender in other matters, but not with regard to the indebtedness of Client to Lender.

As the lawyer for Client in the Chapter 13 bankruptcy, Lawyer will be responsible for reviewing documentation to determine whether Lender and other secured creditors have valid and enforceable security interests in or liens on Client's property. May Lawyer undertake the representation of Client in the Chapter 13 bankruptcy if Lender and Client consent?

Opinion #1:

Lawyer may undertake the representation of Client if Lawyer reasonably believes that he will be able to provide competent and diligent representation to Client in the bankruptcy action, while adequately protecting Lender's interests in those actions or matters where Lawyer represents Lender. Both Client and Lender must give their informed consent to the representation, confirmed in writing.

Because Lawyer currently represents Lender, Lawyer has a concurrent conflict of interest in representing Client in a bankruptcy action in which Lender is a creditor. *See* Rule 1.7(a). Comment [6] to Rule 1.7 provides that "absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated." Consent is necessary because the client as to whom the representation is adverse may feel betrayed, and the resulting damage to the client-lawyer relationship could impair the lawyer's ability to represent the client effectively. On the other hand, the client on whose behalf the adverse representation is undertaken may fear that the lawyer will pursue that client's case less effectively out of deference to the other client.

For client consent to cure the conflict, the lawyer must have a reasonable basis for believing that he will be able to provide competent and diligent representation to both clients. It is improper to represent one client asserting a claim against another in the same litigation, even with informed consent. *See* Rule 1.7, cmt. [17]. Also, if a specific rule, statute, or decision forbids dual representation in the particular context, client consent is irrelevant. *See* Rule 1.7, cmt. [16]. Outside these situations, the lawyer must evaluate objectively whether he will be able to provide competent representation to both clients. The lawyer should consider whether a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances.

In the instant scenario, the interests of the lender and the debtor are adverse. Lender would benefit if Lawyer determines that Lender's deeds of trust and liens are valid and enforceable. Conversely, Debtor would benefit from an opposite finding. However, Lawyer would only be representing the debtor in this particular action. If Lawyer concludes that he would be able to provide competent and diligent representation to Client in the bankruptcy action, while adequately protecting Lender's interests in those actions or matters where Lawyer represents Lender, Lawyer may seek the clients' informed consent to the bankruptcy representation. If Lawyer cannot reasonably conclude that the interests of both clients would be adequately protected if he represents Client in the bankruptcy action, Lawyer must decline the representation. *See* Rule 1.7(b).

Pursuant to Rule 1.0(f), "informed consent" denotes the "agreement by a person to a proposed course of conduct after the lawyer has communicated

adequate information and explanation appropriate to the circumstances." A lawyer must provide enough information for his client to make an informed decision, such as why the interests are adverse, how the representation may be affected, what risks are involved, and what other options are available. The information should be conveyed to each client in a manner consistent with the clients' level of sophistication. When a lawyer is seeking consent from an unsophisticated individual client, more disclosure and explanation will be required. The client's mere knowledge of the existence of the lawyer's other representation will not constitute sufficient disclosure.

Inquiry #2:

Lawyer regularly represents Lender in various matters. Lender has made a loan to Client. To secure the repayment of the loan, Lender holds a first priority deed of trust on Client's residence, a first priority deed of trust on Client's commercial building, and a first priority lien on Client's vehicle. Lawyer currently represents Lender in other matters, but not with regard to the indebtedness of Client to Lender.

Lawyer is approached by Client to represent Client in an individual Chapter 13 bankruptcy. The loan from Lender to Client has matured and Client wants to extend the maturity date of the loan. May Lawyer represent Client in negotiations with Lender?

Opinion #2:

Yes. *See* Opinion #1.

Inquiry #3:

May Lawyer represent Client as to the extension of the maturity date of the loan if Client and Lender reach an agreement for an extension without Lawyer's involvement? If so, may Lawyer file a motion seeking bankruptcy court approval of a refinancing agreement between Client and Lender in order to extend the maturity date of the loan, and then represent Client at the hearing on the motion?

Opinion #3:

Yes. *See* Opinion #1.

2009 Formal Ethics Opinion 12

January 15, 2010

Preparation of Documents for Unrepresented Adverse Party

Opinion rules that a lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party provided the lawyer explains who he represents and does not give the unrepresented party legal advice; however, the lawyer may not prepare a waiver of exemptions for the adverse party.

Background:

Supply Company is owed money by Contractor. Contractor is not represented by counsel. Contractor agrees to enter into an affidavit and confession of judgment in favor of Supply Company. The affidavit and confession of judgment is prepared by Supply Company's lawyer. The affidavit and confession of judgment contains a provision that states that Contractor "waives with prejudice any right it may have to appeal, modify, stay, or vacate the judgment, and it expressly waives the 30-day deadline to appeal the entry of the judgment."

Supply Company's lawyer also prepares a document for Contractor to sign entitled "Waiver of Exemptions." The document provides that Contractor has consulted with counsel, has previously executed a confession of judgment in favor of Supply Company, has been advised by counsel of the right to designate property, and has freely, knowingly, and voluntarily waived any and all exemptions provided by Article 16 of Chapter 1C of the North Carolina General Statutes (Exempt Property) and any and all exemptions afforded by Article X (Homesteads and Exemptions) of the North Carolina Constitution.

Inquiry #1:

May the lawyer for Supply Company include language in the affidavit and confession of judgment waiving Contractor's right to appeal, stay, or vacate the judgment and waiving the 30-day deadline to appeal the entry of the judgment?

Opinion #1:

Yes. However, the language in the affidavit and confession of judgment must be clear enough to put Contractor on notice that it is waiving important rights and must be sufficient to make Contractor's waiver knowing, intelligent, and voluntary.

Rule 4.3(a) provides that, in dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment [2] to Rule 4.3 clarifies that Rule 4.3 does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter and may prepare documents that require the unrepresented person's signature.

Whether a lawyer may submit documents to an unrepresented person for signature depends upon whether the lawyer's actions are categorized as the rendition of legal advice or mere communication. The Ethics Committee has previously ruled that a lawyer may provide an unrepresented party with a confession of judgment for execution provided the lawyer does not undertake to advise the unrepresented party concerning the meaning or significance of the document or to state or imply that the lawyer is disinterested. *See* RPC 165. However, it is unethical for a lawyer to provide an unrepresented party with a document that appears solely to represent the position of the adverse party, such as an answer. *See* CPR 121, CPR 296, RPC 165.

The prohibitions set out in the prior ethics opinions are consistent with Rule 1.7(b)(3), which prohibits a lawyer from representing opposing parties in the same litigation. Providing an opposing party with a response to a complaint, or other responsive pleading, is tantamount to representing that party. Pursuant to RPC 114, when a lawyer gives drafting assistance to a litigant who wishes to proceed *pro se*, an attorney-client relationship is formed and the Rules of Professional Conduct, particularly those concerning confidentiality and conflict of interest, apply.

The affidavit and confession of judgment is not a responsive pleading and does not solely represent the position of Contractor. Rather, the document represents the terms upon which Supply Company is willing to resolve its claim against Contractor. So long as Supply Company's lawyer has explained that he represents an adverse party and is not representing Contractor, Lawyer for Supply Company may negotiate the terms of the settlement and may prepare the document for Contractor's signature.

Inquiry #2:

The waiver of exemptions provides that Contractor has consulted with counsel, has previously executed a confession of judgment in favor of Supply Company, has been advised by counsel of the right to designate property, and has freely, knowingly, and voluntarily waived any and all statutory and constitutional exemptions. May Lawyer for Supply Company prepare the waiver of exemptions to be signed by Contractor and thereafter filed with the court?

Opinion #2:

No. First, the waiver of exemptions may not state that Contractor has consulted with counsel and has been advised by counsel of the right to designate property unless Contractor has actually received such counsel and advice. If Contractor is unrepresented in the matter, the statement cannot be included in the waiver of exemptions.

Second, Lawyer must determine whether a waiver of either the constitutional or statutory exemptions is legally permissible. Statutory and constitutional exemptions may be waived only under specific circumstances as set forth in the statutes and case law. To the extent that any such waiver is not recognized under the law, Lawyer may not insert such a waiver provision in the documents presented to the unrepresented party.

Finally, if Contractor is unrepresented, it is difficult to imagine how Contractor made a "knowing" waiver of all statutory and constitutional exemptions.

2009 Formal Ethics Opinion 14

October 29, 2010

Placing Client's Title Insurance in Agency in Which Lawyer's Spouse Has an Ownership Interest

Opinion rules that a lawyer participating in a real estate transaction may not in such transaction place his client's title insurance in a title insurance agency in which the lawyer's spouse has any ownership interest.

Inquiry:

May Lawyer participating in a real estate transaction place his client's title insurance with a title insurance agency in which Lawyer's spouse has an ownership interest?

Opinion:

No. Rule 1.7 provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if the representation of one or more clients may be materially limited by a personal interest of the lawyer. Rule 1.7(a)(2).

The Ethics Committee has previously examined personal conflicts of interest between title insurance agencies and real estate closing lawyers. In CPR 101 (1977), the Ethics Committee concluded that it is unethical for a lawyer who owns a substantial interest, directly or indirectly, in a title insurance agency, and who acts as a lawyer in a real estate transaction insured by the title insurance agency, to receive any compensation or benefit from the title insurance agency regardless of whether the ownership interest is disclosed to the client.

In RPC 185 (1994), the Ethics Committee determined that even an insubstantial interest in a title insurance agency could materially impair the judgment of the closing lawyer. The opinion provides that if a title agency, and, therefore, indirectly a 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. The opinion held that the conflict of interest is too great to be allowed even if the client wishes to consent.

In an unpublished ethics decision, ED 97-6 (1998), the Ethics Committee examined a fact scenario substantially similar to the one currently presented and determined that it is a conflict of interest for a lawyer to perform title work and place the title insurance with a title insurance agency operated by the lawyer's spouse.

The instant scenario presents a personal conflict of interest. The lawyer's personal interest in having his spouse's title insurance agency receive its compensation may conflict with the lawyer's duty to close the transaction only if it is in the client's best interest. In addition, the lawyer's personal relationship with the owner of the title insurance company will influence the lawyer's choice of the spouse's company as the insurer, as well as the vigorousness of the lawyer's negotiations with the title company on his client's behalf. Issues of title insurance coverage may have to be negotiated between the closing lawyer and the insurer. The lawyer's client and the insurer will necessarily have competing interests as to the extent of the coverage and the amount of the premium.

The conflict of interest is too great to be allowed, even with the client's informed consent. A closing lawyer must be able to make an independent recommendation of a title insurance company to his client, unbiased by any personal interest. In addition, a lawyer opining on title to property should be independent from the title insurance agency issuing the title insurance in reliance upon that opinion. This is consistent with the emphasis that the North Carolina legislature has placed on the professional and financial independence of the closing lawyer from the title insurance agency. *See, e.g.* N.C.G.S. § 58-26-1(a)(title insurance company may not issue insurance as to North Carolina real property unless the company has obtained the opinion of a North Carolina licensed attorney who is *not an employee or agent of the company*) and N.C.G.S. § 58-27-5(a) (lawyer who performs legal services incident to a real estate sale may not receive any payment, directly or indirectly, in connection with the issuance of title insurance for any real property which is a part of such sale).

This scenario differs from RPC 188, in which the Ethics Committee concluded that a lawyer may represent the buyer and/or lender in a real estate transaction brokered by the lawyer's spouse. RPC 188 provides that, although there is a conflict, clients may consent to the representation. RPC 188 can be distinguished because the lawyer did not choose the real estate broker for his client and was not involved in negotiations with the real estate broker as to the terms of the real estate sales contract.

2009 Formal Ethics Opinion 15

January 15, 2010

Dismissal of DWI Charge by Prosecutor When Insufficient Evidence Due to Suppression Order

Opinion rules that a prosecutor must dismiss a DWI charge when the prosecutor fails to appeal a court order suppressing evidence from the traffic stop thereby eliminating the evidence necessary to prove the charge.

Inquiry:

In a Driving While Impaired (DWI) case in district court, a defendant makes a pretrial motion to suppress all evidence obtained from the stop of his vehicle pursuant to N.C. Gen. Stat. A720-38.6(a). After considering the evidence offered at the pretrial hearing, the district court judge enters an order pursuant to N.C. Gen. Stat. A720-38.6(f) indicating his/her preliminary inclination to grant the defendant's pretrial motion because the stop was unconstitutional in violation of the Fourth Amendment. The prosecutor does not appeal this preliminary ruling to superior court and the district court judge's decision becomes a final judgment pursuant to the statute. The district court judge enters a final order suppressing the evidence from the vehicle stop. The evidence from the vehicle stop was the only evidence of the alleged crime. The case is re-calendared.

May the prosecutor call the case for trial, arraign the defendant (who pleads not guilty), call no witnesses or otherwise offer evidence, and rest the case, thus requiring the judge to dismiss the case; or does the prosecutor have an ethical duty to dismiss the case after all evidence of guilt is suppressed pursuant to the pretrial motion?

Opinion:

A lawyer has an ethical duty, under Rule 3.1, not to bring a proceeding unless there is a basis in law and in fact for doing so that is not frivolous. In light of this duty, a prosecutor who knows that she has no admissible evidence supporting a DWI charge to present at trial must dismiss the charge prior to calling the case for trial.

2009 Formal Ethics Opinion 16

July 23, 2010

Including Information on Verdicts, Settlements, and Memberships on a Website

Opinion rules that a website may include a case summary section showcasing successful verdicts and settlements if the section contains factually accurate information accompanied by an appropriate disclaimer and that any reference on the website to membership in an organization with a self-laudatory name must comply with the requirements of 2003 FEO 3.

Editor's Note: Upon adoption of this proposed opinion by the State Bar Council, 2000 FEO 1 will be overruled to the extent it is inconsistent and the Ethics Committee will recommend that the council withdrawal 2009 FEO 6.

Inquiry #1:

Is it possible for a law firm to include on its firm website a section showcasing successful verdicts and settlements without violating Rule 7.1(a)(2)?

Opinion #1:

Yes. Rule 7.1 provides that a lawyer "shall not make a false or misleading communication about the lawyer or the lawyer's services." The rule further provides that a communication is false or misleading if it "is likely to create an unjustified expectation about results the lawyer can achieve." Rule 7.1(a)(2). At issue is whether a law firm can provide information on its past successes without creating unjustified expectations.

Lawyer advertising is commercial speech that is protected by the First Amendment. Bates v. State Bar of Arizona, 433 U.S. 350 (1977). However, lawyer advertisements may not be deceptive or misleading. Id. The United States Supreme Court has noted that advertising by professionals poses special risks of deception because the public lacks sophistication concerning legal serv-

ices. *In re R.M.J.*, 455 U.S.191 (1982). Accordingly, warnings or disclaimers might be appropriately required in lawyer advertisements to dissipate the possibility of consumer confusion or deception. *Zauderer v. Ohio Disciplinary Counsel*, 471 U.S. 626 (1985).

Consumers of legal services benefit from the dissemination of accurate information in choosing legal representation. *See* DC Legal Ethics Comm., Op. 335 (2006). Lawyers also benefit from the dissemination of accurate information when seeking to enlist the aid of co-counsel in a particular matter. A consumer researching law firms on the internet expects a law firm's website to include information about the firm's past successes, and many firm websites currently include a "verdict and settlements" section. The law firm's duty is to provide that information to the consumer without creating an unjustified expectation about the results the lawyer can achieve. Comment [3] to Rule 7.1 provides that an advertisement that truthfully reports a lawyer's achievements may be misleading "if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case."

Previously, the Ethics Committee determined that statements about a lawyer's or a law firm's record in obtaining favorable verdicts was permissible on a firm's website if the information was provided in a certain context. *See* 2000 FEO 1. According to the opinion, the context would have to include the following:

> disclosure of 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.

2000 FEO 1. The requirements set out in 2000 FEO 1 may not be applicable in every scenario and may be so burdensome that they discourage lawyers from providing any information about verdicts and settlements and thereby effectively prevent consumers from getting helpful information.

In considering lawyer advertising, the Oklahoma Bar Association has concluded that a lawyer may advertise specific jury verdicts and settlement amounts if certain requirements are met. The advertisement must be factually accurate; must include an appropriate disclaimer displayed in the same manner and with the same emphasis as the results; must not suggest that the lawyer is promising the same results; must state that settlements are the result of private negotiations between the parties involved that may be affected by factors other than the legal merits of a particular case; and must not violate the lawyer's duty of confidentiality. Oklahoma Ethics Opinion 320 (10/15/04).

By way of example, the Oklahoma Bar opines that a statement in a printed advertisement about the results in a particular case would not violate Rule 7.1 if the statement is accompanied by an equally prominent statement to the effect that each case is different and that prior results should not create an expectation about future results in an individual case. According to the Oklahoma Ethics Committee, such a disclaimer would be "equally prominent" if the disclaimer is presented in the same manner and with the same emphasis as the statements themselves, and if its import is not obscured or minimized by other language or materials in the advertisement. For example, such a disclaimer in a printed advertisement should use the same font and at least the same size print as the statements themselves.

New York has also considered the use of disclaimers in lawyer advertising. The New York State Bar Association Committee on Professional Ethics opined that if client testimonials and reports of past results are misleading, a disclaimer may cure the otherwise misleading information if the disclaimer is sufficiently tailored to address the information that is misleading, and if the disclaimer's placement on the website is such that it is reasonable to expect that anyone who reads the testimonials and reports of past results will read the disclaimer. NY State Bar Assoc. Comm. on Prof'l Ethics, Op. 771 (2003). The committee further opined that the lawyer should "consider the size of the text and the proximity of the disclaimer to the client testimonials or report of past results. If the disclaimer is in a link, the lawyer should also consider the size and placement of the text signaling the reader to access the link and whether this signal sufficiently informs the reader that reviewing the linked disclaimer is material to any assessment of the information conveyed in the advertisement."

We agree with the reasoning of the New York and Oklahoma bars and conclude that a website may include a case summary section showcasing successful verdicts and settlements if the section contains factually accurate information accompanied by an appropriate disclaimer. The disclaimer must be sufficiently tailored to address the information presented in the case summary section. The disclaimer must be displayed on the website in such a manner that it is reasonable to expect that anyone who reads the case summary section will also read the disclaimer. Depending on the information contained in the case summary section, an appropriate disclaimer should point out that the cases mentioned on the site are illustrative of the matters handled by the firm; that case results depend upon a variety of factors unique to each case; that not all results are provided; and that prior results do not guarantee a similar outcome.

Providing a prominently displayed disclaimer that is specifically tailored to the information presented on a webpage regarding a lawyer or law firm's achievements precludes a finding that the webpage is likely to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters.

Inquiry #2:

Would the following types of information be permitted on a firm website:

A lawyer's biography referencing a single trial victory in a well-known case or the successful handling of a specific matter;

A lawyer's biography providing a list of his reported cases, but not including unfavorable reported cases; or

A lawyer's biography listing "representative matters handled," "recent cases," "recent experience," or the like but only including matters that were favorably resolved for the lawyer's clients?

Opinion #2:

Yes. *See* Opinion #1.

Inquiry #3:

Would the following types of information be permitted on a firm website:

A lawyer's biography stating that the lawyer has successfully represented numerous corporations or individuals;

A lawyer's biography stating that the lawyer has argued and won numerous cases before the North Carolina appellate courts without stating that he has also lost cases before the appellate courts; or

A lawyer's biography stating that the lawyer has successfully handled cases in a specific area of the law without stating that he has also been unsuccessful on cases in that area of the law?

Opinion #3:

Yes. *See* Opinion #1.

Inquiry #4:

2003 FEO 3 states that a lawyer may only advertise his membership or participation in an organization with a self-laudatory name or designation if certain conditions are satisfied. Does 2003 FEO 3 apply to a lawyer's individual biography on his firm's website?

Opinion #4:

Yes. 2003 FEO 3 states that a lawyer may only advertise his membership or participation in an organization with a self-laudatory name or designation if the following conditions are satisfied: (1) the organization has strict, objective standards for admission that are verifiable and would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience, or expertise indicated by the designated membership; (2) the standards for membership are explained in the advertisement or information on how to obtain the membership standards is provided in the advertisement; (3) the organization has no financial interest in promoting the particular lawyer; and (4) the organization charges the lawyer only reasonable membership fees. The opinion also provides that when the membership information may create unjustified expectations, such as the expectation that a lawyer obtains a million dollar verdict in every case, a disclaimer must be included in the advertisement.

Any reference to membership in such an organization must comply with

the requirements of 2003 FEO 3. *See also* 2007 FEO 14 (allowing lawyer to advertise his inclusion in the North Carolina Super Lawyers list but not to claim that he is a "super lawyer").

Inquiry #5:

Does 2003 FEO 3 apply to a firm's general reference to such membership on its website, such as "ten of our lawyers were included in the Legal Elite"?

Opinion #5:

Yes. *See* Opinion #4.

2000 FEO 1 is hereby overruled to the extent it is inconsistent with this opinion.

2009 Formal Ethics Opinion 17

October 29, 2010

Tacking as Question of Standard of Care

Opinion rules that whether a lawyer rendering a title opinion to a title insurer should tack to an owner's policy of title insurance or a mortgagee's (lender's) policy is a question of standard of care and outside the purview of the Ethics Committee

Inquiry:

RPC 99 holds that the Rules of Professional Conduct do not require personal inspection of all documents in the chain of title so long as a lawyer rendering an opinion on title for real property fully discloses to the client the precise nature and extent of the service being rendered. The opinion further states, "Since title insurers frequently omit exceptions in mortgagees' policies that would appear in owners' policies, tacking should be limited to tacking onto owners' policies."

May a lawyer render a title opinion to a title insurance company by tacking to a mortgagee's (lender's) title insurance policy?

Opinion:

This issue of the appropriate standard of care for rendering a title opinion is outside the purview of the Ethics Committee. To the extent that RPC 99 appeared to opine on the standard of care relative to tacking to an owner's policy versus a mortgagee's (lender's) policy for the purpose of rendering a title opinion, that part of the opinion is withdrawn.

Whether tacking to an owner's policy or a mortgagee's policy, a lawyer's duty is to provide competent representation to his client, consistent with Rule 1.1, and to reasonably consult with the client about the means used to accomplish the client's objectives. Rule 1.4(a)(2). The lawyer must consult with the client before using a method of rendering a title opinion that might present additional risk for the client.

2010 Formal Ethics Opinion 1

April 16, 2010

Representation of Insurance Carrier after Insured Disappears

Opinion rules that a lawyer retained by an insurance carrier to represent an insured whose whereabouts are unknown and with whom the lawyer has no contact may not appear as the lawyer for the insured absent authorization by law or court order.

Inquiry #1:

Attorney was retained by Insurance Carrier to defend Insured in a negligence lawsuit based upon an automobile accident. Insured cannot be located and his whereabouts are unknown. Service by publication was required. May Attorney proceed with the representation, file pleadings on behalf of Insured, and appear in court to defend the case on behalf of Insured?

Opinion #1:

No. To respond to this inquiry, the question of whether a client-lawyer relationship is created between Attorney and Insured must be addressed. Comment [4] of Rule 0.2, *Scope*, provides that "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." In most instances, the Ethics Committee declines to offer an opinion that hinges upon a question of law. Nevertheless, the determination of whether a client-lawyer relationship exists is often essential to the committee's interpretation and application of the Rules of Professional Conduct. Moreover, the relevant North Carolina case law is clear. In *Dunkley v. Shoemate*, 350 N.C. 573, 515 S.E. 2d 442 (1999), the Supreme Court held that where a law firm had no contact with the defendant and was not authorized by the defendant to undertake his representation, no lawyer-client relationship existed between the defendant and the lawyers seeking to represent him pursuant to the insurance trust fund for the defendant's employer. The *Dunkley* opinion cites favorably the following statement from *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 463 S.E. 2d 397 (1995): "[n]o person has the right to appear as another's attorney without the authority to do so, granted by the party for which he [or she] is appearing." *Id.* at 577, 515 S.E. 2d at 444 [quoting *Amethyst Corp.* 120 N.C. App. at 532, 463 S.E. 2d at 400]. The Court also concurred with the statement in *Amethyst Corp.* that, "North Carolina law has long recognized that an attorney-client relationship is based upon principles of agency," and "[t]wo factors are essential in establishing an agency relationship: (1) The agent must be authorized to act for the principal; and (2) The principal must exercise control over the agent.'" *Id.* [quoting *Amethyst Corp.*, 120 N.C. App. at 533-534, 463 S.E. 2d at 400].

Therefore, unless allowed by statute, court order, or subsequent case law, a lawyer may not appear in court for a party who has not authorized the representation and with whom the lawyer has not established a client-lawyer relationship.

Inquiry #2:

Would the response to Inquiry #1 be different if the insurance contract with Insured specifies that Insurance Carrier has the authority to choose legal counsel for Insured and to decide whether to settle the case?

Opinion #2:

No.

Inquiry #3:

Would the response to Inquiry #1 be different if Insured received actual notice of the lawsuit and contacted Insurance Carrier before disappearing?

Opinion #3:

Whether such contact with Insurance Carrier is sufficient to create a client-lawyer relationship with a lawyer selected by Insurance Carrier is a question of fact and law not resolved by the existing case law. However, the Ethics Committee doubts that the two factors required to establish an agency relationship exist in this situation. *See also Dunkley*, 350 N.C. at 578, 515 S.E. 2d at 445 ("RPC 223, Rule 1.2(a), and *Amethyst Corp.* correctly emphasize the principle that a lawyer cannot properly represent a client with whom he has no contact.").

Inquiry #4:

Would the response to Inquiry #1 be different if Insured received notice of the lawsuit and specifically authorized the representation before disappearing?

Opinion #4:

Yes, Attorney may appear in the lawsuit on behalf of Insured if Insured has authorized the representation. However, if Insured cannot thereafter be located, Attorney may not mislead the court about Insured's absence. Rule 3.3(a)(1). Moreover, in the event Insured is not present to participate in the representation, Attorney may have to file a motion to withdraw. Rule 1.2, cmt. [1] (Client has "the ultimate authority to determine the purposes to be served by legal representation85."); Rule 1.16; RPC 223; 03 FEO 16; *see also Dunkley*, 350 N.C. at 578, 515 S.E. 2d at 445 ("a lawyer cannot properly represent a client with whom he has no contact.").

Inquiry #5:

Would the response to Inquiry #1 be different if the insurance contract contained a provision granting Insurance Carrier the express authority to proceed with the representation on behalf of and in the name of the Insured in the event contact with Insured is lost?

Opinion #5:

This is a question of law that is not resolved by the existing case law and is outside the purview of the Ethics Committee.

Inquiry #6:

Attorney is retained by Insurance Carrier to defend a "John Doe" defendant in an automobile accident case. May Attorney represent "John Doe" in the court proceedings?

Opinion #6:

If the designation of a certain person as "John Doe" is necessary to effect

service of process and Attorney concludes that he is able to identify the intended person (e.g., an employee of an insured defendant company), Attorney may work with Insurance Carrier and the defendant company to identify the individual and, once identified, may appear in the lawsuit on behalf of the individual if authorized to do so by the individual. If the identity of "John Doe" cannot be ascertained by Attorney, Insurance Carrier, or another client, whether Attorney may represent "John Doe" in the court proceedings is a question of law outside the purview of the Ethics Committee.

2010 Formal Ethics Opinion 2

April 16, 2010

Obtaining Medical Records From Out of State Health Care Providers

Opinion rules that a lawyer may not serve an out of state health care provider with an unenforceable North Carolina subpoena and may not use documents produced pursuant to such a subpoena.

Inquiry #1:

Lawyer represents the Department of Social Services in a county that borders another state. In a particular case, the relevant hospital records are located out of state. Is it ethical for Lawyer to subpoena the medical records under the authority of N.C. R. Civ. P. 45 knowing that the North Carolina subpoena is unenforceable?

Opinion #1:

No. If the North Carolina subpoena is not enforceable out of state, the lawyer may not misrepresent to the out of state health care provider that it must comply with the subpoena. RPC 236 provides that it is unethical for a lawyer to use the subpoena process to mislead the custodian of documentary evidence as to the lawyer's authority to require the production of such documents. *See also* Rule 8.4(c) (professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

Inquiry #2:

If the records are subpoenaed and the health care provider complies with the subpoena, may Lawyer utilize the medical records?

Opinion #2:

No. Lawyer may not use documents that were produced in reliance on Lawyer's misrepresentation as to Lawyer's authority to require the production of such documents.

2010 Formal Ethics Opinion 3

January 21, 2011

Cross-examining Current and Former Clients

Opinion provides guidance on the cross-examination of current and former clients.

Inquiry #1:

Lawyer is a criminal defense lawyer who represents persons charged with various criminal and traffic offenses. Lawyer also represents police officers responding to investigations by internal affairs departments. In these matters, the officers are threatened with professional discipline, including possible termination, for alleged conduct involving moral turpitude, dishonesty, or police department policy violations. In such matters, Lawyer represents the police officer individually and does not represent the police department.

Lawyer currently represents Officer in an internal affairs investigation in which Officer may be disciplined or lose his job.

Defendant would like to retain Lawyer to represent him in a criminal matter. Officer is one of the prosecuting witnesses in Defendant's criminal matter. May Lawyer represent Defendant in the criminal matter if Officer is a prosecuting witness?

Opinion #1:

Rule 1.7(a) states that, except as provided in Rule 1.7(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. Pursuant to Rule 1.7(a)(1), a concurrent conflict of interest exists if the representation of one client will be *directly adverse* to another client. The prohibition against simultaneous representation of adverse interests is based primarily on the duty of loyalty that lawyers owe their clients. *See* Rule 1.7, cmt. [1]. If a lawyer opposes a client, even in an unrelated matter, the client may feel betrayed and the lawyer-client relationship may be damaged. Another consideration under Rule 1.7 is a lawyer's obligation to use independent professional judgment in providing competent and diligent representation to all clients. Rule 1.7(a)(2) provides that a concurrent conflict of interest exists if the representation of one client may be materially limited by the lawyer's duties to another client.

If Lawyer must cross-examine Officer in Defendant's criminal matter, Lawyer has a concurrent conflict of interest. Comment [6] to Rule 1.7 specifically provides that a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. Any attempt to discredit Officer's credibility through cross-examination would violate Lawyer's duty of loyalty to Officer. Conversely, the failure to challenge Officer's damaging testimony through rigorous cross-examination would violate Lawyer's duty to competently and diligently represent Defendant. Lawyer cannot cross-examine Officer without the risk of either jeopardizing Defendant's case by foregoing a line of aggressive questioning or breaching a duty of loyalty and/or confidentiality owed to Officer.

An additional function of the prohibition set out in Rule 1.7 is to protect client confidences. If Lawyer has confidential information of Officer that is relevant and material to the cross-examination, the representation of one or both of Lawyer's clients could be materially limited by Lawyer's duties to the other client and Lawyer has a concurrent conflict of interest. A vigorous cross-examination of Officer may compromise Lawyer's duty of confidentiality to Officer. Alternatively, Lawyer could fail to cross-examine Officer fully, for fear of misusing the confidential information, which would breach Lawyer's duty to competently and diligently represent Defendant.

If Lawyer must cross-examine Officer in Defendant's criminal matter, the resultant conflict of interest is nonconsentable. Generally, if a lawyer with a conflict reasonably believes that he will be able to provide competent and diligent representation to both clients, he may take on the representation so long as he obtains both clients' informed written consent. *See* Rule 1.7(b). However, certain conflicts are nonconsentable, "meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." Rule 1.7, cmt. [14].

Consentability is determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to the representation, given the conflict of interest. Consent cannot be sought if the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation to each client. *See* Rule 1.7, cmt. [15].

In the given fact scenario, Lawyer cannot reasonably conclude that he can protect the interests of each client, or competently and diligently represent each client, if Lawyer must cross-examine Officer in Defendant's criminal matter.

Inquiry #2:

Would it matter if Defendant was charged only with a minor traffic violation?

Opinion #2:

If Officer's testimony relates only to an uncontested issue and Lawyer reasonably concludes that he can forgo cross examination of Officer without affecting the competent defense of the case, Lawyer may represent Defendant, provided he obtains the informed written consent of Defendant. *See* Rule 1.7(b).

Inquiry #3:

Does it matter if Officer's personnel files are generally not subject to subpoena and may not be used for cross examination?

Opinion #3:

No. The fact that Officer's personnel files may not be used for cross-examination may appear to alleviate the concern as to Lawyer's duty of confidentiality to Officer. However, Lawyer remains aware of confidential information relative to Officer that could inspire questions for cross examination. In addition, Lawyer owes Officer the duty of loyalty, which prevents Lawyer from cross-examining Officer.

Inquiry #4:

Would it make any difference if the Fraternal Order of Police or a similar organization arranged for or retained Lawyer to represent Officer?

Opinion #4:

No. Regardless of who retains Lawyer to represent Officer, Lawyer still owes Officer the same duties of confidentiality and loyalty. *See* Rule 1.8(f). Also, Lawyer's pecuniary interest in obtaining further business from the hiring organization may create an additional personal conflict of interest for Lawyer, in that he would want to avoid a rigorous cross examination of a police officer to remain in the good graces of the organization. *See* Rule 1.7(a)(2).

Inquiry #5:

What if Officer is a former client at the time of the representation of Defendant? Is Lawyer required to disclose the former lawyer-client relationship with Officer to Defendant at the outset so that Defendant can make an informed decision about representation?

Opinion #5:

If Lawyer obtained confidential information from Officer that is relevant to Officer's cross-examination and Lawyer needs to use that confidential information to effectively cross-examine Officer, then Lawyer may not represent Defendant. *See* Rule 1.9(c); 2003 FEO 14.

An exception to Rule 1.9(c) provides that a lawyer may use confidential information of a former client to the disadvantage of the former client when the information has become "generally known." Rule 1.9(c)(1). If certain information as to the internal affairs investigation is generally known, that information may be used to cross-examine Officer without obtaining the consent of Officer. *See* Rule 1.9, cmt. [8].

If Lawyer determines that he does not need to use any confidential information that is not generally known to effectively cross-examine Officer, Lawyer must still disclose the former lawyer-client relationship with Officer to Defendant so that Defendant can make an informed decision about Lawyer's representation.

2010 Formal Ethics Opinion 4

October 29, 2010

Lawyer Participating in Barter Exchange

Opinion provides guidelines for participation in a barter exchange.

Inquiry:

Lawyer would like to participate in a trade or "barter" exchange that is an association of businesses that exchange goods or services. Members of the barter exchange are paid in barter dollars that can be used to pay other members for their services. For example, a lawyer who is a member prepares a will for a member who is a landscaper and receives barter dollars that can then be used by the lawyer to purchase a variety of services from other members, not solely landscaping services. The barter exchange manager publishes a directory of members and may advertise to members the goods or services available from other members. In addition to an entrance fee and a monthly administrative fee, the exchange manager requires members to pay a cash transaction fee of 10% on the gross value of each purchase from a member through the exchange. For example, if a lawyer provides $500 in services to another member, in addition to the fee paid to the lawyer, the recipient pays a $50 fee to the manager of the exchange for a total payment of $550 (barter dollars and cash) for the legal services.

The barter exchange lists all participating businesses in the "trading network." From this list, a member who would like to buy services or goods selects a business. A "buyer" who needs legal services would select a lawyer from the list of lawyers available in the trading network. Members are encouraged to call the exchange manager to get linked with other members when in need of particular goods or services. Trades between participating businesses are voluntary and the provision of goods or services is between the two participating businesses without interference from the barter exchange or its manager. Members are not under any obligation to use the barter exchange for goods or services and, if a member cannot find a suitable business in the trading network with which to do business, the member may pay cash for goods or services to a business that is not a member of the exchange. Similarly, a member of the exchange is not required to do business with an exchange member who requests goods or services.

The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324 (1982), recognized the barter exchange manager as the third-party record keeper and clearinghouse for barter transactions among the members of an exchange and also recognized "trade" or "barter" dollars as legal, taxable dollars that may be used as an alternative payment method. Under TEFRA, all trade revenue is treated as taxable income and must be reported using Form 1099-B.

May Lawyer participate in the barter exchange?

Opinion:

Yes, as long as the lawyer's professional judgment is not compromised by participation in the exchange, the lawyer ensures that listings and advertisements of the exchange comply with the requirements for legal advertising, there is full disclosure of the states in which the lawyer is licensed, and clients do not use barter dollars to pay in advance for litigation or other expenses of representation.

This inquiry raises the following questions: (1) whether a lawyer may accept payment for services in a form other than money; (2) whether a barter exchange is a lawyer referral service and, therefore, subject to the restrictions on lawyer referral services; (3) whether a participating lawyer can comply with the advertising and solicitation limitations in the Rules of Professional Conduct; (4) whether payments to the barter exchange violate the prohibition on sharing legal fees with a nonlawyer; and (5) whether clients may pay litigation expenses in barter dollars. Each of these questions is addressed below.

A lawyer may accept payment for legal services in a form other than money. *See* Rule 1.5, cmt. [4]. Therefore, there is no prohibition on accepting barter dollars as payment for legal services.

With regard to lawyer referral services, Rule 7.2(b) provides as follows:

> 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 costs of advertisements or communications permitted by this Rule; [and]
>
> (2) pay the usual charges of a not-for-profit lawyer referral service that complies with Rule 7.2....

A lawyer referral service is a service that purports to screen the lawyers who participate and to match prospective clients with suitable participating lawyers. *See* 04 FEO 1 (online matching service not subject to nonprofit limitation on lawyer referral services). Comment [6] to Rule 7.2 adds that a lawyer referral service:

> is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements.

A barter exchange that provides a complete, impartial list of all participating lawyers, does not purport to recommend or select a lawyer for an exchange member seeking legal services, and does not restrict the number of participating lawyers is not a lawyer referral service.

The next question is whether a participating lawyer can comply with the limitations on lawyer advertising and solicitation in the Rules of Professional Conduct. A lawyer participating in a barter exchange will be responsible for the content of all advertising about the lawyer's services to other members. Rule 7.1(a) allows advertising that is not false or misleading. As long as the trading network list or directory of members and any other advertisement to members of the barter exchange does not include information about a participating lawyer that is false or misleading, a lawyer may be included in the list, directory, or advertisement. In addition, to avoid unauthorized practice of law, the participating lawyer must ensure that all exchange listings, directories, or advertisements identify the states in which the lawyer is licensed.

Rule 7.3(a) prohibits in-person solicitation of prospective clients either by a lawyer or by an agent of a lawyer. If the manager of the exchange, or a third party such as a broker, engages in in-person solicitation of exchange members on behalf of other exchange members, a lawyer who is an exchange member may not allow such solicitation to occur on the lawyer's behalf. If participation in the in-person solicitation or brokerage of services is a condition of member-

ship in the exchange, a lawyer may not be a member of the exchange.

The next question is whether the fee structure for the barter exchange violates the prohibition on sharing legal fees with a nonlawyer in Rule 5.4(a). The manager of the barter exchange charges a cash transaction fee of 10% on the gross value of each purchase from a member through the exchange. The transaction fee is paid by the recipient of the services; the lawyer is not required to give 10% of his fee to the exchange manager. Although prohibited in the context of compensating nonlawyer employees (*see* RPC 147), paying for services of a nonlawyer based upon a percentage of a legal fee is not per se fee sharing. The use of credit cards to pay for legal services has long been allowed, although credit card banks routinely charge a "discount fee" that is a percentage of the legal fee charged to the credit card. *See* CPR 129 (lawyers may accept payment of legal fees by credit card). Paying a percentage fee to a barter exchange manager is no different than paying a discount fee to a credit card bank. The fee is a surcharge on the transaction and is not fee sharing with a nonlawyer. *See* ABA Formal Opinion 88-356 (1988)(lawyer placement agency's fee based on the amount of the legal fee is not fee splitting).

We agree with the following conclusion of the New York State Bar Association Committee on Professional Ethics in N. Y. State Bar Ass'n. Comm. on Prof'l. Ethics Op. 665 (1994), which allows a lawyer to participate in a barter exchange:

> There are a number of rationales for the prohibition against sharing legal fees with nonlawyers: (1) to avoid the possibility of a nonlawyer interfering with the exercise of the lawyer's professional judgment in representing a client, (2) to ensure that the total fee paid by the client is not unreasonably high, and (3) to ensure that the nonlawyer is not motivated to engage in improper solicitation of business for the lawyer. [Citations omitted.] We do not believe that the proposed barter exchange implicates these concerns so long as the barter exchange exercises no influence over the professional judgment of the lawyer, the lawyer's legal fee complies with [the reasonableness requirement of] DR 2-106(A) of the [New York] Code [of Professional Responsibility], and the exchange sponsor does not engage in in-person solicitation of customers or use written advertising materials that the lawyer/participant could not use.

The last question is whether a member of the barter exchange who contracts with a lawyer may pay in advance for litigation expenses or other expenses of representation by advancing barter dollars to the lawyer. Rule 1.15 requires a lawyer to account for funds entrusted to the lawyer for payment of third parties by depositing those funds into a trust account. Because barter dollars cannot be deposited into a trust account, all advance payments of litigation expenses by a barter exchange client must be paid in cash or by check or credit card.

In summary, a lawyer may participate in a barter exchange as long as the exchange exercises no influence over the professional judgment of the lawyer; the listing and advertisements of the exchange are truthful, not misleading, and identify the states in which the lawyer is licensed; there is no in-person solicitation of members by the barter exchange manager or a broker on behalf of the lawyer; and advance payments of litigation expenses or other expenses of representation are not in barter dollars.

2010 Formal Ethics Opinion 5

April 16, 2010

Client-Lawyer Relationship in Child Support Enforcement Actions

Opinion rules that the lawyer for a child support enforcement program that brings an action for child support on behalf of the government does not have a client-lawyer relationship with the custodian of the children.

Inquiry #1:

Title IV-D of the Social Security Act, 42 U.S.C.S. 651 et seq., requires each state to establish a child support enforcement (CSE) agency to provide services for the establishment and collection of child support for dependent children who are recipients of public assistance. The act also requires the CSE agency to provide assistance in the collection of child support to a custodian of a dependent child not receiving public assistance if the custodian applies to the agency for such assistance. The Child Welfare Act, Chap. 110, Art. 9, of the N.C. General Statutes, enacts the requirements of Title IV-D. The CSE program established by the North Carolina act is administered by the Child Support Enforcement Agency, a branch of the North Carolina Department of Health and Human Services. The programis usually administered at the county level; the local CSE program administrator hires a lawyer to institute the child support proceeding against the non-custodial, responsible parent. The proceeding is instituted in the name and on behalf of the government at the instigation of the custodian of the child who is named ex relatione (e.g., *County of Durham DSS ex rel. Stevons v. Charles*, 182 N.C. App. 505, 642 S.E. 2d 482 (2007)).

Lawyer A is defending a non-custodial parent in a child support action brought by the lawyer for the child support enforcement (CSE) program for the county. Does the CSE lawyer represent the custodian of the children?

Opinion #1:

The lawyer representing the CSE program does not represent the custodian of the children; the lawyer represents the government agency bringing the action. As previously observed in Ethics Decisions 279 and 2007-3, the purpose of the CSE program is to provide financial support to dependent children regardless of who currently has custody of a dependent child and regardless of who may currently owe support payments. "It would defeat the purpose of [CSE] legislation if a client-lawyer relationship were automatically created between the [CSE] lawyer and the custodian of the children because the lawyer would be unable to pursue any future child support action against such custodian should support and custody obligations switch." ED 279.

Nevertheless, if the CSE lawyer makes statements to the parent that would lead a reasonable person to believe that the lawyer is representing him or her personally, a client-lawyer relationship may be inferred. To avoid misleading the custodian as to the relationship, in any private conference with a custodian (outside of court proceedings), "the [CSE] lawyer should explain that he or she is not the custodian's lawyer; that their conversations are not protected by the duty of confidentiality; and that if the interests of the government and the custodian of the children diverge, the lawyer will represent the interests of the government." ED 279.

Inquiry #2:

Lawyer A wants to serve discovery on the custodian of the children. Should the discovery be served on the lawyer for the CSE program or on the custodian of the children?

Opinion #2:

This is a question of civil procedure and trial strategy that is outside of the purview of the Ethics Committee. However, if Lawyer A decides to seek information directly from the custodian, it would not violate Rule 4.2 unless the custodian is represented by his or her own lawyer in the matter.

During the representation of a client, Rule 4.2 prohibits a lawyer from communicating with a person that the lawyer knows is represented in the matter unless the lawyer has the consent of the other lawyer or is authorized by law or court order to communicate with the person. Lawyer A's direct communications with the custodian will not violate Rule 4.2 because the CSE lawyer does not represent the parent. ED 2007-3 (lawyer appointed to represent defendant/non-custodial parent in child support case may communicate directly with custodial parent).

Inquiry #3:

Lawyer A wants to depose the custodian. The CSE lawyer informed Lawyer A that he would not attend the deposition. May Lawyer A proceed with the deposition?

Opinion #3:

Yes. If the custodian was properly served with notice of the deposition, there is no prohibition on proceeding with the deposition although the CSE lawyer fails to appear. Even when a deponent is represented by a lawyer in a matter, if the deposition is properly noticed and the lawyer for the deponent fails or refuses to appear, the lawyer noticing the deposition may proceed. Such communications are "authorized by law" and, therefore, not prohibited by Rule 4.2.

Inquiry #4:

In a case involving international child support enforcement issues, the CSE lawyer, who works in the North Carolina Attorney General's Office, would like to call another lawyer from the attorney general's staff to testify as an expert.

Does this violate the Rules of Professional Conduct?

Opinion #4:

No. Rule 3.7(a) prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness. However, this disqualification is not imputed to the other lawyers in same firm or organization unless the lawyer's testimony would be adverse to the interests of the firm or organization's client. Rule 3.7(b).

2010 Formal Ethics Opinion 6

January 21, 2011

Advertising for Legal Employment in Non-practicing Areas

Opinion rules that a lawyer may place an advertisement for employment in practice areas in which the lawyer does not have experience only if the lawyer intends to provide competent representation either by promptly obtaining competence through study and investigation or by associating a lawyer who is competent in those particular areas of law. If, at the time the advertisement is placed, it is likely the lawyer will associate more experienced lawyers to handle the resulting cases, that fact should be disclosed to the public in the advertisement.

Inquiry #1:

Lawyer would like to advertise for legal employment in several areas of negligence law including products liability, pharmaceutical, and medical malpractice. Lawyer does not, however, have practice experience in these legal areas. For cases involving these areas of practice, Lawyer plans to associate another lawyer who is qualified in the particular area of law.

May Lawyer advertise for legal employment in an area of practice in which Lawyer lacks experience?

Opinion #1:

Yes, but only if Lawyer intends to promptly become competent in such representation by study and investigation in the advertised area of law or intends to associate an experienced lawyer to competently handle the resulting cases.

Lawyer advertising represents commercial speech protected as a constitutional right. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Such commercial expression serves not only the interests of lawyers, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. *Id.* at 561-62. The rights of lawyers to advertise, however, are not unlimited. Legal advertisements may not be false or misleading. *See* Rule 7.1.

Pursuant to Rule 7.1(a)(1), a communication 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. For example, in RPC 217, the Ethics Committee determined that it was misleading for a law firm to include in its advertisements remote call forwarding telephone numbers under the names of towns in which the law firm did not have an office. The opinion provides that listing what appears to be a local telephone number in an advertisement circulated in communities where the law firm does not have an actual presence, 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.

To avoid misleading the public, lawyers should be competent, or intend to promptly obtain competence, in the areas of law in which they advertise. Rule 1.1 addresses the subject of lawyer competence:

A lawyer shall not handle a legal matter that 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.

In advertising, lawyers should not claim to have experience in areas of law in which they lack experience. Such claims are false and misleading. Competence in particular areas of law primarily arises from experience. In addition to experience, lawyer competence may be gained from study and investigation. Rule 1.1 acknowledges that lawyers can obtain competence in a particular area of law by associating a lawyer experienced in that area of law to work with them in representing a client. When a member of the public sees a lawyer's advertisement, however, that person could reasonably expect that the advertising lawyer has or will have, at the time of the representation, personally obtained the competence necessary to handle the legal matter that is the subject of the advertisement. If this is not the case, and the lawyer instead intends to associate another lawyer to provide the competent representation, members of the public could be misled by the advertisement. Thus, if at the time the advertisement is placed it is likely that the lawyer will later associate more experienced lawyers to handle the resulting cases, that fact should be disclosed to the public in the form of a disclaimer in the advertisement. *See* Co. Bar Assoc. Ethics Comm. Op. 76 (1987).

Previous ethics opinions have determined that an appropriate disclaimer may cure an otherwise misleading advertisement. *See, e.g.*, 2003 FEO 3 (lawyer may advertise membership in organization with self-laudatory title, but when the membership information may create unjustified expectations, a disclaimer must be included in the advertisement); *see also* Rule 7.1(b) (communication by lawyer that contains dramatization depicting fictional situation is misleading unless it contains statement explaining that communication contains a dramatization and does not depict actual events or real persons). Likewise, an appropriate disclaimer will preclude a finding that Lawyer's proposed advertisements are likely to mislead prospective clients. If, at the time an advertisement is placed, it is likely that Lawyer will associate a more experienced lawyer to handle the resulting cases, that fact must be disclosed to the public in a disclaimer in the advertisement.

Inquiry #2:

If Lawyer associates another law firm in connection with a legal matter, may Lawyer accept a portion of the legal fees?

Opinion #2:

Yes. Rule 1.5(e) allows for the division of a legal fee between lawyers who are not in the same firm. Lawyer may receive a portion of the legal fees associated with the referred matter so long as the client agrees to the arrangement in writing, the total fee is reasonable, and the fee division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation. Rule 1.5(e).

The assumption of joint responsibility is an alternative to a division of fees in proportion to the services performed. Comment [8] to Rule 1.5 explains that "[j]oint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership." Therefore, a lawyer who agrees to share legal fees must make reasonable efforts to ensure that the other lawyers who are parties to the arrangement comply with the ethics rules. *See* Rule 5.1. As stated in RPC 205, "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."

The ABA Committee on Ethics and Professional Responsibility has opined that joint responsibility does not require substantial services to be performed by the lawyer. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 85-1514 (1985). However, joint responsibility does include the same financial and ethical responsibility and the same responsibility to ensure adequate representation and communication as one partner would have for another partner's client in similar circumstances. *Id.*

Lawyer may receive a fee in proportion to the services he performs in the matter or he may receive a fee based on his assumption of joint responsibility for the representation. *See* Rule 1.5(e).

Inquiry #3:

If Lawyer is entitled to receive a portion of the legal fees, what amount/proportion of the legal fee is reasonable?

Opinion #3:

Apart from the requirements that the total fee be reasonable, that the client consent to the fee division, and that each law firm assume joint responsibility for the representation, the Ethics Committee declines to opine on the division of fees between lawyers or law firms.

2010 Formal Ethics Opinion 7

Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property

Opinion was adopted as 2011 Formal Ethics Opinion 6. No opinion will be issued as 2010 Formal Ethics Opinion 7.

2010 Formal Ethics Opinion 8

July 23, 2010

Consultation with Lawyer as Prospective Mediator

Opinion rules that a lawyer who consults with both parties to a dispute relative to the lawyer's prospective service as a mediator may not subsequently represent one of the parties to the dispute.

Inquiry:

Lawyer consulted with Husband on two occasions about separating from Wife. During both meetings, only questions about mediating the marital dissolution were discussed.

Wife attended the third consultation with Lawyer. At the meeting, Lawyer disclosed the prior two meetings with Husband. He also advised Wife that he would remain "neutral" during the meeting with her; would not give either party legal advice; and would only discuss the mediation process. Wife informed Lawyer that she was represented by her own lawyer. Lawyer told Wife that he was willing to serve as the mediator for the marital dispute/dissolution if her lawyer advised her to agree. Lawyer also told Wife that he had discussed his potential roles as either advocate or mediator with Husband in the prior meetings and that, for the present, Husband chose to keep Lawyer "neutral."

At their request, Lawyer subsequently sent a separation checklist to both Husband and Wife. The checklist gives information about the issues a separation agreement should address. It does not provide substantive advice.

Wife consulted with her lawyer and decided not to pursue mediation. Husband would now like to employ Lawyer as his advocate in the equitable distribution action filed by Wife. May Lawyer represent Husband in the equitable distribution action?

Opinion:

No. If Lawyer was acting in the role of a mediator when he consulted with Wife, Rule 1.12(a), *Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral*, prohibits him from representing anyone in connection with a matter in which he participated personally and substantially as a mediator unless all of the parties to the proceeding give informed consent confirmed in writing. Although the mediation never occurred, Lawyer still held himself out to be a neutral and had substantive discussions with Wife about the mediation process. Therefore, he participated substantially in the mediation process and, to protect the integrity of the neutral role of mediators, he is disqualified from representing Husband without the consent of Wife.

2010 Formal Ethics Opinion 9

July 23, 2010

Using Stock Photographs in Advertising

Opinion rules that a dramatization disclaimer is not required when using a stock photograph in an advertisement so long as, in the context of the advertisement, the stock photograph is not materially misleading.

Inquiry:

Are dramatization disclaimers required when using stock photographs in a print or video advertisement for legal services?

Opinion:

No. Rule 7.1, *Communications Concerning a Lawyer's Services,* sets forth the essential requirements for all advertising by lawyers. Rule 7.1(a) states that a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. Rule 7.1(b) provides that a communication by a lawyer that contains a dramatization depicting a fictional situation is misleading unless it contains a conspicuous statement at the beginning and end of the communication "explaining that the communication contains a dramatization and does not depict actual events or real persons."

Dramatizations of fictional cases in video advertisements ("commercial dramatizations") are potentially misleading. *See* RPC 164. Therefore, such advertisements require the dramatization disclaimer. *See* Rule 7.1(b). "Stock photographs" are professional photographs of common places, events, or people that can be used and reused for advertising. Like commercial dramatizations, stock photographs do not depict actual events or actual clients. However, unlike commercial dramatizations, stock photographs, because they are static, do not have the same tendency to mislead a consumer of legal services. Unless in the context of the advertisement or marketing document, the stock photograph creates a material misrepresentation of fact, a stock photograph may be included in legal advertisement without a dramatization disclaimer. *See* Rule 7.1(a)(1).

2010 Formal Ethics Opinion 10

January 21, 2011

Charging Client for Out-of-Office Consultations

Opinion rules that a law firm may charge a client for the expenses associated with an out-of-office consultation so long as advertisements referencing the service indicate that the client will be charged for the service and the client consents to the charge prior to the visit.

Inquiry #1:

A personal injury law firm (Firm) advertises that it will provide home/hospital visits to potential clients. Firm also advertises that it works on a contingency fee basis and that consultations are free. The fee agreement recites a contingency fee, and further states that costs will be billed separately and in addition to the contingency fee.

May Firm charge a client for the actual cost of the out-of-office consultation (mileage) in addition to the contingency fee?

Opinion #1:

Yes. A lawyer may enter into a fee agreement with a client that requires the client to pay court costs and expenses of litigation in addition to a contingent fee on any amount recovered for the client. *See* Rule 1.5(c); RPC 235; 2004 FEO 8. However, the fee and expenses that are ultimately charged and collected from the client must not be clearly excessive in violation of Rule 1.5(a).

Inquiry #2:

May Firm charge a flat fee for the out-of-office consultation irrespective of the actual costs of meeting with the client? For example, may Firm charge a $200 flat fee for any client that requests an out-of-office visit?

Opinion #2:

A distinction must be made between charges for expenses versus fees for legal services. Firm may not charge a set amount for an expense irrespective of the actual cost to Firm. Rule 1.5(a) provides that a lawyer shall not "charge or collect a clearly excessive amount for expenses." If a lawyer travels only a short distance to visit a prospective client, it would be clearly excessive for Firm to charge the client $200 as a mileage expense.

However, lawyers may charge flat fees for providing legal services provided the requirements set out in 2008 FEO 10 are met. Lawyer at Firm may charge a flat fee for an initial consultation so long as the client understands and agrees that the flat fee is the entire payment for the specified legal work to be performed by the lawyer, regardless of the amount of time that it takes the lawyer to perform the legal work; the flat fee will be earned by the lawyer immediately upon payment; and when the lawyer's representation ends, the client will not be entitled to a refund of any portion of the flat fee unless the legal work is not completed or it can be demonstrated that the flat fee is clearly excessive under the circumstances. *Id.*

If Firm advertises that consultations are free, the $200 charge necessarily must be a charge for expenses rather than legal fees. Firm may not charge $200 for every out-of-office consultation, irrespective of the actual expense Firm incurred.

Inquiry #3:

If the answer to Inquires #1 or #2 is "yes," must Firm disclose the charge for the out-of-office consultation prior to meeting with a client?

Opinion #3:

Yes. Firm must specifically disclose the charge for the out-of-office visit, and get the client's consent to the deduction of the expense from any recovery, prior to making such a visit.

In addition, Firm must clearly disclose any charges associated with out-of-office consultations in advertisements stating that Firm will provide out-of-office consultations and that consultations are free. Rule 7.1 provides that a lawyer shall not make a false or misleading communication about the lawyer

or the lawyer's services. It is misleading for Firm to advertise that it will provide out-of-office consultations, and that consultations are free if Firm intends to charge clients for expenses related to the out-of-office visit. *See* 2004 FEO 8 (unless lawyer invariably makes the repayment of costs advanced contingent upon the outcome of each matter, advertisement for legal services that states that there is no fee unless there is a recovery must also state that costs advanced must be repaid at the conclusion of the matter).

Inquiry #4:

If the answer to Inquiries #1 or #2 is "yes," must Firm disclose the charge for the offsite visit in its contingent fee agreement?

Opinion #4:

Yes. Rule 1.5(c) provides that a contingent fee agreement must be in writing and must state the method by which the fee is to be determined, including litigation and other expenses to be deducted from the recovery. Firm must disclose in the contingent fee agreement the charge for the offsite visit as an expense to be deducted from the recovery.

2010 Formal Ethics Opinion 11

January 21, 2011

Letterhead Listing Membership in Organization with Self-Laudatory Name

Opinion rules that a lawyer may list membership in Million Dollar Advocates Forum, or another organization with a self-laudatory name, on his letterhead only if a disclaimer of similar results and information about the criteria for membership also appears on the letterhead.

Inquiry #1:

2003 FEO 3 considered whether a lawyer may advertise membership in the Million Dollar Advocates Forum. The opinion explained that this membership information may create unjustified expectations about the results the lawyer can achieve, such as the expectation that the lawyer obtains a million-dollar verdict in every case. Along with requirements relative to the legitimacy of the membership credential, the opinion stated that the communication must include both a disclaimer providing notice that similar results are not guaranteed, that each case is different and must be evaluated separately, and an explanation of the standards for membership or information on how to obtain the membership standards in order for the communication to avoid violating Rule 7.1(a)(2). Attorney A wants to list membership in the Million Dollar Advocates Forum on his letterhead.

Is letterhead a communication about the lawyer's services?

Opinion #1:

Yes, letterhead is a communication about the lawyer's services. Letterhead contains a myriad of information. The name of the lawyer or law firm on the letterhead communicates by whom or through what entity services are being offered and identifies the nature of those services as legal services. Inclusion of the name of a founding lawyer who has passed away communicates history about and affiliations of the law firm. Listing memberships or certifications of a lawyer on letterhead communicates information about the lawyer's focus, activities, and accomplishments. The address communicates information about the community in which the lawyer or law firm offers services. Similarly, information about the states in which the firm lawyers are licensed helps a consumer to determine whether a lawyer may provide legal services in a particular jurisdiction. Accordingly, Rule 7.5(a) requires letterhead to comply with Rule 7.1, the rule on communications concerning a lawyer's services. This is consistent with the approach taken by the United States Supreme Court in cases in which the Supreme Court analyzed letterhead as commercial speech. *See, e.g., Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*, 512 U.S. 136 (1994); *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990).

Inquiry #2:

May Attorney A list membership in the Million Dollar Advocates Forum on letterhead sent to prospective clients? Is a disclaimer required?

Opinion #2:

Yes, Attorney A may list membership in an organization with a self-laudatory name or designation, such as Million Dollar Advocates Forum, on letterhead sent to prospective clients if the following conditions are satisfied: (1) the organization must satisfy the requirements set forth in 2003 FEO 3 and 2007 FEO 14; (2) the letter must contain information on how to obtain the membership standards for the Million Dollar Advocates Forum; and (3) the letter must include a disclaimer to avoid creating unjustified expectations about the results the lawyer can achieve. The disclaimer must at a minimum explain that each case is different, each case must be evaluated separately, and that no representation is made that similar results will be achieved in the recipient's case.

Inquiry 3:

May Attorney A list membership in the Million Dollar Advocates Forum on letterhead used generally in the course of Attorney A's legal practice—letterhead not sent to prospective clients but instead sent to existing clients, unrepresented opposing parties, other laypersons, lawyers, and/or judges? Is a disclaimer required?

Opinion 3:

Yes, Attorney A may list membership in the Million Dollar Advocates Forum on such letterhead, provided the conditions and disclaimer requirement set out in Opinion #2 are satisfied. A letter communicates to all who see it, not just the intended recipient. Accordingly, letterhead must be accurate and not misleading, regardless of the intended recipient.[1] Prospective clients are not the only individuals at risk for being misled by information that creates unjustified expectations, such as a claim of membership in the Million Dollar Advocates Forum or other self-laudatory organization. Current clients are at risk, particularly those who retain the lawyer without having seen a prospective client letter that includes the disclaimer. Unrepresented opposing parties are at risk of being unduly influenced by the membership information, absent explanation. Furthermore, the lawyer sending a letter cannot guarantee that only the intended recipient will see the letter. Even if an intended recipient might have sufficient legal education and training to evaluate the claimed credential and therefore might not be susceptible to unjustified expectations, others seeing the letter—for example, nonlawyer assistants—may not. Providing the additional information set out in Opinion #2 and as previously required in 2003 FEO 3 and 2007 FEO 14 will ameliorate any risk of creation of unjustified expectations from inclusion of membership information in a self-laudatory organization on letterhead.

Endnote

1. This opinion is consistent with the manner in which the United States Supreme Court addressed letterhead with certification information in the case of *Peel, infra*. The letter at the genesis of that case was a letter sent to the Attorney Registration and Disciplinary Commission of Illinois (the body that investigates and prosecutes cases of lawyer misconduct in Illinois). The Supreme Court's discussion of whether the letterhead was misleading did not limit its consideration to whether the letterhead was misleading to the intended recipient—the commission—but analyzed generally whether the letterhead was misleading.

2010 Formal Ethics Opinion 12

January 21, 2011

Providing Conflicts Information to Hiring Law Firm

Opinion rules that a hiring law firm may ask an incoming law school graduate to provide sufficient information as to his prior legal experience so that the hiring law firm can identify potential conflicts of interest.

After his second year of law school, a law student worked as a summer clerk for Law Firm A in Raleigh. One of the many projects Law Firm A assigned to the law student was legal research that was part of Law Firm A's preparation of Lawsuit X.

After the law student graduated from law school, Law Firm B hired the now law graduate as an associate in its Chicago office. After the law graduate left Law Firm A, but before he joined Law Firm B, Law Firm A filed Lawsuit X. After Lawsuit X was filed, lawyers in the Charlotte office of Law Firm B were retained to defend the case.

The law graduate was unaware that Lawsuit X had been filed, or that Law Firm B had been retained to defend it. Before the law graduate joined Law Firm B, the firm asked him to provide information about the identity of the client matters he worked on at Law Firm A so that potential conflicts could be addressed. The law graduate contacted Law Firm A, which directed him not to disclose any information about matters he had worked on or clients for whom

he had worked.

Law Firm A learned that law graduate was associated with Law Firm B in Chicago and moved to disqualify Law Firm B from Lawsuit X. Law Firm B established a screen immediately upon learning that law graduate had worked on Lawsuit X.

Inquiry #1:

Does law graduate have a conflict of interest that is imputed to the other lawyers in Law Firm B, disqualifying those lawyers from the representation of the defendant in Lawsuit X?

Opinion #1:

No. A law firm may hire a law graduate although the law firm is representing a client in a matter on which the law graduate previously worked for the opposing party while clerking at another law firm. Conflicts of interest created by work performed as a law clerk are not imputed to other members of a law firm under Rule 1.10. *See* Rule 1.10, cmt. [4]. Nevertheless, the law graduate should be screened from any participation in the matter. *Id.* (Note that Rule 1.10(c) allows a law firm to hire a lawyer who previously worked for the opposing party while employed at another law firm so long as the lawyer is timely screened from any participation in the matter and written notice is given to any affected former client.)

Inquiry #2:

Will a Rule 1.0(1) screen of the law graduate from Lawsuit X implemented when Law Firm B learned of law graduate's involvement in Lawsuit X be deemed "timely" and protect the lawyers of Law Firm B from disqualification?

Opinion #2:

In order to be effective, screening measures must be implemented as soon as practical after a law firm knows or reasonably should know that there is a need for screening. Rule 1.0, cmt. [10]. The purpose of screening is to assure the affected parties that confidential information known by the disqualified individual remains protected. Rule 1.0, cmt. [9]. If the screen is implemented prior to any participation by the law graduate in the matter and prior to the communication of any confidential information, the purpose for the screening procedure will have been effectuated.

Inquiry #3:

Is it improper for a law firm to ask law graduates or graduates not yet admitted to the practice of law, who have worked as law clerks, to identify client matters on which they worked as law clerks so that the hiring law firm can identify potential conflicts of interest?

Opinion #3:

No. When a new law school graduate, or any new lawyer, joins a firm, the hiring firm has an obligation to protect their clients against harm from conflicts of interest. *See* Rule 1.7. Comment [3] to Rule 1.7 provides that, to determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures to determine in both litigation and non-litigation matters the persons and issues involved. However, the identity of the persons and issues involved in a matter are protected client information under Rule 1.6(a).

Rule 1.6(a) of the Rules of Professional Conduct provides that a lawyer shall not reveal information acquired during the professional relationship with a client unless (1) the client gives informed consent; (2) the disclosure is impliedly authorized; or (3) one of the exceptions set out in Rule 1.6(b) applies. One of the exceptions set out in Rule 1.6(b) provides that a lawyer may reveal confidential information to comply with the Rules of Professional Conduct. Rule 1.6(b)(1).

The ABA Standing Committee on Ethics and Professional Responsibility recently opined that lawyers moving between firms should be permitted to disclose the persons and issues involved in a matter because the prohibition of such disclosure would preclude lawyers from conforming with the conflicts rules. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-455 (2009). Similarly, it is appropriate for a law firm to ask an incoming law school graduate to provide sufficient information so that the hiring law firm can identify potential conflicts of interest.

However, as noted in the ABA opinion, "any disclosure of conflict information should be no greater than reasonably necessary to accomplish the purpose of detecting and resolving conflicts and must not compromise the attorney-client privilege or otherwise prejudice a client or former client." Id. In addition, a lawyer or law firm receiving conflict information may not reveal such information or use it for purposes other than detecting and resolving conflicts of interest.

Inquiry #4:

Is a law firm that a law graduate worked for permitted to disclose to a different law firm the identity of clients and matters that the law graduate worked on at the law firm so that the hiring firm can identify potential conflicts of interest?

Opinion #4:

Yes. *See* Opinion #3.

2010 Formal Ethics Opinion 13

January 21, 2011

Receiving Fee or Commission for Financial Services and Products Provided to Legal Clients

Opinion rules that a lawyer may receive a fee or commission in exchange for providing financial services and products to a legal client so long as the lawyer complies with the ethical rules pertaining to the provision of law-related services, business transactions with clients, and conflicts of interest.

Inquiry:

Lawyer would like to establish an ancillary business that provides financial services to clients and non-clients. Services would include assistance in the selection, purchase, and disposition of securities, life insurance, and annuities. Lawyer would be compensated through consulting fees, investment advisory fees, and commissions. The ancillary services would be provided by an entity separate and distinct from the lawyer's legal practice.

May Lawyer offer financial services to his legal clients and receive a fee or commission based on the provision of the financial services and the sale of financial products?

Opinion:

Yes. The ethical responsibilities for a lawyer who provides law-related services are set out in Rule 5.7. When law-related services are provided under circumstances that are not distinct from the provision of legal services, the law firm will be subject to all of the Rules of Professional Conduct with respect to the provision of the law-related services. If the law-related services are provided by a separate entity, the law firm will still be subject to the Rules of Professional Conduct unless the law firms takes "reasonable measures" to ensure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the lawyer-client relationship do not exist. *See* Rule 5.7(a)(2).

Even when a lawyer provides law-related services through a separate entity, and takes the necessary measures to ensure that the consumer of the law-related services knows that the services are not legal services, the lawyer is still bound by the Rules of Professional Conduct as to the referral of his legal clients to the ancillary business. Comment [6] to Rule 5.7 provides that when a client-lawyer relationship exists with a person who is referred by a lawyer to an ancillary business controlled by the lawyer, the lawyer must comply with Rule 1.8(a) pertaining to business transactions with clients. *See also* Rule 1.8, cmt. [1]. Pursuant to Rule 1.8(a) a lawyer may only enter into a business transaction with a client if: (1) the transaction and terms are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction. Accordingly, a lawyer must make these disclosures and secure the requisite consent before providing financial services and products to a client.

Prior to the 2003 amendments to the Rules of Professional Conduct, Rule 1.8(b) provided that "during or subsequent to legal representation of a client, a lawyer shall not enter 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 finan-

cial proceeds from the representation, or any information, confidential or otherwise, acquired by the lawyer during the course of the representation." The current version of Rule 1.8(b) states only that a lawyer "shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules."

Although the previous prohibition on receiving fees or commissions for ancillary business transactions related to legal representation has been eliminated, when dealing with his legal clients, Lawyer has an ethical duty to avoid conflicts created by his own personal interests. *See* Rule 1.7(a)(2). Rule 1.7(b) provides that a lawyer shall not represent a client with respect to a matter if the lawyer's professional judgment on behalf of the client may be materially limited by the lawyer's own personal interest. Comment [10] to Rule 1.7 specifically states that 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 financial interest." The lawyer's self-interest in promoting his financial services company must not distort his independent professional judgment in the provision of legal services to the client, including referring a client to the lawyer's own ancillary business. Rule 1.7; Rule 2.1.

Although a conflict of interest exists in providing financial products to legal clients, the potential problems and risks can be avoided in most transactions if the lawyer makes the disclosures required by Rules 1.8(a) and 1.7(b), and obtains the client's informed written consent. Rule 1.7(b) allows a lawyer to represent a client despite a conflicting personal interest if the lawyer reasonably believes his representation of the client will not be affected and the client gives written consent after disclosure of the existence and nature of the possible conflict and the possible adverse consequences of the representation. Prior to entering into a business transaction with a client, Rule 1.8(a) requires the lawyer to fully disclose the terms of the transaction to the client, including the lawyer's role in the transaction, in a manner that can be reasonably understood by the client. In such circumstances, a client should have sufficient information from which to decide whether to enter into an ancillary business transaction with the client's lawyer. Each transaction should be evaluated in accordance with its individual circumstances.

In recommending financial products to an estate-planning client, the Oklahoma Bar Association recommends that the lawyer include elements such as the following in a written disclosure to the client: (a) that the lawyer has a business and financial relationship with the financial services company; (b) whether the lawyer will receive a commission, fee, or other compensation from the sale of the financial product; (c) that the interests of the client and the interests of the financial services company and the lawyer, as an agent for the company, may be different and may conflict; (d) whether the lawyer or the financial services company is licensed to sell only certain types of financial products and, if so, why the lawyer is recommending the proposed product instead of other products in which he or she does not have a financial interest; (e) that if the client authorizes the lawyer to disclose confidential information in the course of obtaining the financial product, such disclosure may constitute a waiver of the client's right to confidentiality based upon the lawyer-client relationship; (f) whether the financial services company is also the lawyer's client; (g) that in the event a claim or controversy arises, the lawyer could be disqualified in representation of both the client and the company; and (h) that the client should consider seeking the opinion of independent counsel concerning the proposed transaction. *See* OK Bar Ass'n Ethics Op. 316 (2001).

Assuming that the financial services are provided under circumstances that are distinct from the provision of legal services, and Lawyer ensures that the consumer of the financial services knows that the services are not legal services, Lawyer may offer his financial services to his legal clients and receive payment for the services so long as he complies with the requirements set out in 1.8 and 1.7.

Lawyer must first determine that his professional judgment on behalf of the client will not be adversely affected by his personal interest in making a profit. If Lawyer cannot reasonably make such a determination, then the lawyer should not refer the client to his financial services company. *See* Rule 1.7(b)(1). Lawyer then must make an independent professional determination that the financial products and services offered by his company would best serve his client's interests. Prior to recommending his financial services and products to the client, Lawyer must make full disclosure of his personal interest in the financial services company, as required by Rule 1.7(b) and Rule 1.8(a) so that the client can make a fully informed choice.

To the extent this opinion differs from RPC 238, 2000 FEO 9, 2001 FEO 9, those opinions are overruled.

2010 Formal Ethics Opinion 14

April 27, 2012

Use of Search Engine Company's Keyword Advertisements

Opinion rules that it is a violation of the Rules of Professional Conduct for a lawyer to select another lawyer's name as a keyword for use in an Internet search engine company's search-based advertising program.

Inquiry:

Attorney A participates in an Internet search engine company's search-based advertising program. The program allows advertisers to select specific words or phrases that should trigger their advertisements. An advertiser does not purchase the exclusive rights to specific words or phrases. Specific words or phrases can be selected by any number of advertisers.

One of the keywords selected by Attorney A for use in the search-based advertising program was the name of Attorney B, a competing lawyer in Attorney A's town with a similar practice. Attorney A's keyword advertisement caused a link to his website to be displayed on the search engine's search results page any time an Internet user searched for the term "Attorney B" using the search engine. Attorney A's advertisement may appear to the side of or above the unpaid search results, in an area designated for "ads" or "sponsored links."

Attorney B never authorized Attorney A's use of his name in connection with Attorney A's keyword advertisement, and the two lawyers have never formed any type of partnership or engaged in joint representation in any case.

Does Attorney A's selection of a competitor's name as a keyword for use in a search engine company's search-based advertising program violate the Rules of Professional Conduct?

Opinion:

Yes. It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 8.4(c). Dishonest conduct includes conduct that shows a lack of fairness or straightforwardness. *See In the Matter of Shorter*, 570 A.2d 760, 767-68 (DC App. 1990). The intentional purchase of the recognition associated with one lawyer's name to direct consumers to a competing lawyer's website is neither fair nor straightforward. Therefore, it is a violation of Rule 8.4(c) for a lawyer to select another lawyer's name to be used in his own keyword advertising.

2011 Formal Ethics Opinion 1

April 22, 2011

Lawyer as Advocate and Witness

Opinion provides guidelines for the application of the prohibition in Rule 3.7 on a lawyer serving as both advocate and witness when the lawyer is the litigant.

Inquiry #1:

Rule 3.7(a) prohibits a lawyer from acting as an advocate at a trial in which the lawyer is "likely to be a necessary witness" unless the testimony will concern uncontested issues, the nature or value of legal services, or disqualification will work a substantial hardship on the client. Therefore, a lawyer who is identified as a witness has a professional responsibility, pursuant to Rule 3.7, to determine whether he or she is "likely to be a necessary witness" and, as such, is disqualified from acting as an advocate at the trial. When is a lawyer a "necessary witness" and at what point prior to trial must this determination be made?

Opinion #1:

Rule 3.7 prohibits a lawyer from serving as both an advocate and a witness in a trial to eliminate the confusion that may result for the trier of fact when a lawyer serves in both roles. The comment to the rule describes this as "the ambiguities of the dual role" and observes, "[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." Rule 3.7, cmts. [2] and [3]. However, to protect the client's choice of counsel and prevent abuse of the rule by an opponent as a litigation tactic, disqualifi-

cation is limited to situations where the lawyer's testimony is "necessary." It is generally agreed that when the anticipated testimony is relevant, material, and unobtainable by other means, the lawyer's testimony is "necessary." *See* Ann. Model Rules of Prof'l. Conduct (6th ed. 2007), p. 361 (citing cases).

A lawyer who is named as a witness by an opposing party must evaluate his knowledge of the facts in controversy and make a good faith determination as to whether his testimony will be relevant, material, and unobtainable elsewhere. This evaluation must be ongoing as the case moves toward trial, contested issues are identified, and discovery discloses additional witnesses and information about the case. However, to avoid prejudicing a client due to a last-minute change of trial counsel, a lawyer should withdraw from representation in the trial if the lawyer knows or reasonably should know that he is a necessary witness. Failure to withdraw in a timely manner is a violation of Rule 3.7.

Inquiry #2:

Does the prohibition on serving as an advocate and a witness apply to pretrial work, settlement negotiations, or assisting with the trial strategy?

Opinion #2:

No. The underlying reason for the prohibition—confusion of the trier of fact relative to the lawyer's role—does not apply when the lawyer's advocacy is limited to activities outside the courtroom. *See* Ann. Model Rules of Prof'l. Conduct (6th ed. 2007), p. 364 (citing cases including *Cunningham v. Sams,* 161 N.C. App. 295, 588 S.E. 2d 484 (2003)(reversing portion of disqualification order prohibiting representation in pretrial activities)).

Although a lawyer may continue to provide representation outside the courtroom, the lawyer should not use this as an excuse to delay withdrawal from representation in the litigation if the lawyer knows or reasonably should know that he is a necessary witness. *See* Opinion #1 above.

Inquiry #3:

Is a lawyer who is a litigant and who is likely to be a necessary witness prohibited by Rule 3.7 from representing himself at the trial?

Opinion #3:

No. The underlying reason for the prohibition—confusion regarding the lawyer's role—does not apply when the lawyer is also a litigant. *See* Ann. Model Rules of Prof'l Conduct (6th ed. 2007), p. 366 (citing cases). The Ethics Committee observes, however, that it is the sole prerogative of a court to determine advocate/witness issues when raised in a motion to disqualify. This ethics opinion merely holds that a lawyer/litigant is not required to find alternative counsel prior to a court's ruling on a motion to disqualify.

2011 Formal Ethics Opinion 2

April 22, 2011

Former Client's Failure to Object to Conflict

Opinion sets forth the factors to be taken into consideration when determining whether a former client's delay in objecting to a conflict constitutes a waiver.

Inquiry:

In April 2002, Wife and Husband separate. Wife meets with Attorney A for a consultation and pays Attorney A $100. Attorney A is not hired by Wife, does not open a file, and has no further contact with Wife.[1] Wife hires Attorney B. Husband and Wife sign a separation contract in July 2003. Husband is not represented.

In May 2007, Husband signs a quitclaim deed relinquishing his rights in the marital residence. Husband is not represented; Wife is represented by Attorney B.

In July 2009, Husband hires Attorney A to file for an uncontested divorce. Attorney A has no record or memory of a prior consultation with Wife. The following month, Husband, represented by Attorney A, files for divorce. Wife, represented by Attorney B, files an answer and counterclaim seeking divorce and equitable distribution.

In October 2009, the divorce action is heard and a judgment of absolute divorce is entered. Both parties are present at the hearing and are represented by their respective lawyers. In the succeeding months, the parties, through their lawyers, consent to and designate a mediator; file equitable distribution affidavits; and participate in mediation with both parties and both lawyers present. The mediation results in an impasse.

Subsequent to the mediation, and for the first time in the proceedings, Attorney B notifies Attorney A that Wife objects to Attorney A's representation of Husband because Attorney A previously represented Wife in the same matter.

A lawyer must obtain the informed consent of a former client, pursuant to Rule 1.9(a), prior to representing a party who is adverse to the former client in the same or a substantially related matter. On occasion, however, a lawyer will fail to identify a former client conflict and will unintentionally represent an adverse party without obtaining the consent of the former client. If a former client delays lodging her objection to the representation of the adverse party by her former lawyer, does the former client's subsequent objection to the representation require the lawyer's withdrawal pursuant to Rule 1.9(a)?

Opinion:

Rule 1.9, the former client conflict rule, does not address this question and the comment to the rule, unfortunately, provides no guidance. In this situation, the Ethics Committee must interpret the Rules of Professional Conduct in a manner that is consistent with principles and values promoted by the rules. Rule 1.9(a) enforces the duties of loyalty and confidentiality that continue after the termination of the client-lawyer relationship. A lawyer has a continuing duty to maintain a reliable, comprehensive system for identifying conflicts arising from both present and former representations.[2] Rule 1.7, cmt. [3]. A lawyer should never accept a representation knowing that it presents a prohibited conflict under Rule 1.9, and even a good faith and unintentional failure to identify a conflict of interest does not excuse it. Moreover, because of the importance of protecting confidentiality and promoting loyalty, mere delay on the part of a former client to object to a new representation does not constitute tacit consent. Nevertheless, the right to legal counsel of one's choice and the prevention of substantial hardship on a client due to a lawyer's disqualification are other policies recognized and promoted by the Rules. *See* Rule 1.10(c)(allowing screening of disqualified lawyer); Rule 1.18(c)(limiting disqualification of lawyer who consulted with prospective client); and Rule 3.7 (lawyer who is necessary witness is not disqualified if works substantial hardship on the client).

Although delay will not be sufficient to constitute waiver in most cases, the following factors should be taken into consideration when evaluating whether a former client's failure timely to object to a new, adverse representation should constitute a *de facto* waiver of the right to object: (1) whether the lawyer's failure to identify the conflict of interest and bring it to the attention of the former client was unintentional; (2) whether the former client knew of the new representation and the adverse interest entailed; (3) the length of the delay in lodging an objection; (4) whether there was an opportunity to lodge an objection; (5) whether the former client was represented by counsel during the delay; (6) the reason the delay occurred; and (7) whether disqualification will result in substantial hardship for the new client. *See* Laws. Man. on Prof. Conduct (ABA/BNA) 51:234 (2002) (setting forth factors considered by courts when deciding whether to grant a delayed motion to disqualify).

In the present situation, Attorney A's failure to identify the conflict was unintentional. Wife, the former client, however, was fully aware of the new, adverse representation by Attorney A; had numerous opportunities to object to the new representation at earlier stages in the proceedings; and had legal counsel to advise her during the delay. Moreover, there does not appear to be a justification for Wife's delay in lodging her objection other than to gain a tactical advantage by waiting until disqualification would work a substantial hardship on Husband. Under these circumstances, Attorney A is not required to withdraw from the representation of Husband when Wife raised her objection. Nevertheless, the courts have concurrent jurisdiction over the conduct of the lawyers appearing before them. The Ethics Committee recognizes the discretion of a court to decide any motion to disqualify.

Endnotes

1. Pursuant to 2006 FEO 14, the acceptance of a fee by Attorney A rendered Wife a client (as opposed to a prospective client under Rule 1.18) to whom the duties of loyalty and confidentiality are owed.
2. This opinion does not condone or justify sloppy systems for recording and checking conflicts of interest. Even a prospective client consultation, where no fee is paid and no further representation provided, should be entered into a law firm's conflicts checking system.

2011 Formal Ethics Opinion 3

April 22, 2011

Advising a Criminal Defendant Who is an Undocumented Alien

Opinion rules that a criminal defense lawyer may advise an undocumented alien that deportation may result in avoidance of a criminal conviction and may file a notice of appeal to superior court although there is a possibility that the client will be deported.

Inquiry #1:

Client A is arrested for driving while impaired. The magistrate sets a secured bond of $2000, schedules the trial for district court and notifies U.S. Immigration and Customs Enforcement (ICE) that Client A may be in the country illegally. Client A is taken to the county jail to wait for trial. At Client A's first appearance, the judge appoints Attorney A to defend him.

ICE determines that Client A is an undocumented alien and gives the jail notice that it should be advised when Client A is released. Once Client A's bond is paid, Client A will be held in the jail for an additional 48 hours to give ICE the opportunity to begin proceedings. If ICE does not serve Client A with a notice to appear within this time period, the jail will release him.

Client A tells Attorney A that he wants to be deported as soon as possible and does not want a conviction on his record. Attorney A discusses Client A's options with him. If Client A pays the bond, ICE will probably come to the jail, transport him to a federal holding facility and begin removal proceedings within 48 hours of paying the bond. Once Client A is deported, the State might dismiss Client A's DWI charge. Attorney A knows that, should Client A someday choose to re-enter the United States legally, a DWI conviction would be detrimental to an immigration application or an application for a work permit.

Attorney A is aware that the existence of an ICE detainer is only an indication that Client A might be removed before the resolution of the case. ICE may choose not to pick Client A up; it may serve him and then release him pending a removal hearing; it may offer him an immigration bond which can be posted so that he can secure his release during immigration proceedings; or he may be eligible for a remedy, such as cancellation of removal, which would allow him to receive permanent residency in the United States.

Did Attorney A violate the Rules of Professional Conduct by advising Client A of his legal option to pay the bond?

Opinion #1:

No. Although a lawyer may not assist a client in conduct that the lawyer knows is criminal or fraudulent, a lawyer "may discuss the legal consequences of any proposed course of conduct with a client". Rule 1.2(d).. Advising Client A of his legal option to pay the bond and face possible deportation is appropriate advice for a competent lawyer to give to a client under these circumstances.

Inquiry #2:

May Attorney A move for a continuance of the trial to give Client A more time to pay the bond?

Opinion #2:

Yes. *See* Opinion #1.

Inquiry #3:

Client A and Attorney A decide that Client A will plead guilty to DWI in district court because Client A has been unable to raise the money necessary to pay the bond. Client A is sentenced to time served. The jail immediately notifies ICE that it has 48 hours to pick up Client A before he is released. ICE takes custody of Client A and transports him to a federal holding facility. Attorney A knows that Client A has the right to appeal for a trial *de novo* in superior court. Attorney A also knows that the superior court may dismiss the case if Client A is deported.

May Attorney A enter a notice of appeal knowing that Client A's pending deportation may result in the dismissal of the superior court case?

Opinion #3:

Rule 3.1 prohibits a lawyer from advancing frivolous or meritless proceedings or arguments but permits a lawyer in a criminal proceeding that may result in incarceration the leeway to "so defend the proceeding as to require that every element of the case be established." Comment [1] to the rule observes that "[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure." Rule 3.2 requires a lawyer to make reasonable efforts to expedite litigation "consistent with the interests of the client". However, comment [1] to this rule adds, "[t]he question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay."

Filing a notice of appeal for Client A is not, in itself, frivolous or meritless because Client A has a constitutional right to a trial *de novo* in superior court before a jury. The question is whether the pleading is interposed for an improper purpose which would violate not only Rule 3.1 but also the prohibition on conduct prejudicial to the administration of justice set forth in Rule 8.4(d).

Rule 3.3(a)(1) prohibits a lawyer from knowingly making a false statement of material fact to a court. This prohibition applies to statements in pleadings as well as to statements in open court. Rule 3.3, cmt. [3]. Comment [3] to the rule adds that "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."

Although Attorney A believes that Client A may not be available for trial in superior court, a client's presence is not always necessary to resolve a case in superior court. If a trial is necessary, it can be done by written waiver if the court permits. Moreover, by the time the case is reached for trial, the client may, in fact, be available. Lastly, it is unlikely that the State will actually dismiss the charges simply because the defendant has been removed. Therefore, filing a notice of appeal for Client A does not violate the rules.

2011 Formal Ethics Opinion 4

April 27, 2012

Participation in Referral Arrangement

Opinion rules that a lawyer may not agree to procure title insurance exclusively from a particular title insurance agency on every transaction referred to the lawyer by a person associated with the agency.

Inquiry #1:

Attorney has developed a good working relationship with Referring Party who, over time, has referred real estate closings to Attorney's office. Referring Party has some affiliation with Title Insurance Agency. Attorney desires to maintain this working relationship with Referring Party. As a condition of receiving further referrals, Referring Party asks that Attorney agree to procure title insurance exclusively from Title Insurance Agency on every transaction referred to Attorney by Referring Party. May Attorney agree to such a referral arrangement with Title Insurance Agency?

Opinion #1:

No. The ethical duties set forth in the Rules of Professional Conduct prohibit a lawyer from entering into an exclusive reciprocal referral agreement with any service provider. Such an arrangement impairs the lawyer's ability to provide independent professional judgment in violation of Rules 2.1 and 5.4(c). In addition, the arrangement amounts to improper compensation for referrals in violation of Rule 7.2(b). Finally, such an arrangement creates a nonconsentable conflict of interest between the lawyer and the client. *See* Rule 1.7.

In most real estate transactions, the client delegates the choice of title insurer to the lawyer, who is charged with acting in the best interest of the client. In determining what is in the best interests of the client, it is appropriate for the lawyer to consider among other things the fees charged for title insurance, the financial stability of the insurer and/or title insurance underwriter, the willingness of the title insurer to provide coverage regarding title matters, and the ability of the insurer to meet the needs of the client with regard to the transaction.

The lawyer may also consider the lawyer's working relationship with a specific title insurer, particularly where the relationship may prove beneficial to the client. This is true even where the client has been referred to the lawyer by someone affiliated with the specific title insurer. The lawyer may, and should, strive to cultivate the types of business relationships and provide the quality of legal services that will encourage clients and other professionals to recommend the lawyer's services. What a lawyer cannot do, however, is permit a person who recommends the lawyer's services to direct or regulate the lawyer's professional judgment in rendering the legal services. *See* Rule 5.4(c).

If the client indicates a preference as to a particular title insurance company that the lawyer does not believe is the best selection for the client, the lawyer's role is to counsel the client so that the client may make an informed decision.

Ultimately, the choice of the title insurer in a real estate transaction is in the province of the client acting in consultation with the lawyer.

Inquiry #2:

Upon becoming aware that another lawyer has agreed to procure title insurance exclusively from a title insurance agency on every transaction referred to the lawyer by someone associated with the title insurance company, is Attorney under an ethical obligation to report and refer the other lawyer's conduct to the State Bar?

Opinion #2:

Rule 8.3(a) requires a lawyer to inform the State Bar if the lawyer knows 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. Attorney should communicate his concerns to the other lawyer and recommend that the lawyer contact the State Bar for an ethics opinion as to his continuing participation in what appears to be an improper referral arrangement. After this communication, if Attorney has knowledge that the lawyer has continued his participation in an improper referral arrangement, Attorney must report the lawyer to the State Bar.

2011 Formal Ethics Opinion 5

July 15, 2011

Representation of Lender in Contested Foreclosure When Corporate Trustee Is Owned by Spouse and Paralegal

Opinion rules that a lawyer may not represent the beneficiary of the deed of trust in a contested foreclosure if the lawyer's spouse and paralegal own an interest in the closely-held corporate trustee.

Inquiry:

Attorney A forms Corporation X in order that the corporation might be appointed substitute trustee on a deed of trust when a lender asks Attorney A to handle the foreclosure. Attorney A's wife and paralegal each own stock in Corporation X.

If Attorney A's wife and paralegal own any interest in Corporation X, may Attorney A represent the beneficiary/lender in a contested foreclosure proceeding if Corporation X is appointed substitute trustee?

Opinion:

No. As noted in N.C. Gen. Stat. §45-21.16(c), a trustee on a deed of trust is "a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding." Because of the conflict between the neutral, fiduciary role of trustee and the role of advocate, a number of ethics opinions also hold that a lawyer serving as a trustee in a contested foreclosure proceeding may not represent the beneficiary or the grantor in the proceeding. 2008 FEO 11 (listing opinions). Attorney A's indirect financial interest in Corporation X creates the appearance, if not the reality, that the corporation is the alter ego of Attorney A. Therefore, if Corporation X is appointed substitute trustee in a contested foreclosure, the neutrality of the trustee will be improperly impaired unless Attorney A is prohibited from representing the beneficiary or the lender in the proceeding. *Id.* (Lawyer may represent corporation partially owned by firm in its capacity as trustee but may not advocate for lender in contested foreclosure.) For an explanation of a contested foreclosure proceeding, see 2008 FEO 11.

If the corporate trustee is a publicly traded corporation in which Attorney A's wife and paralegal own non-controlling interests, the perceived neutrality of the corporate trustee is not impaired and Attorney A may represent the lender in a contested foreclosure proceeding. *See, e.g.,* RPC 83 and RPC 185.

2011 Formal Ethics Opinion 6

January 27, 2012

Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property

Opinion rules that a lawyer may contract with a vendor of software as a service provided the lawyer uses reasonable care to safeguard confidential client information.

Inquiry #1:

Much of software development, including the specialized software used by lawyers for case or practice management, document management, and billing/financial management, is moving to the "software as a service" (SaaS) model. The American Bar Association's Legal Technology Resource Center explains SaaS as follows:

> SaaS is distinguished from traditional software in several ways. Rather than installing the software to your computer or the firm's server, SaaS is accessed via a web browser (like Internet Explorer or FireFox) over the internet. Data is stored in the vendor's data center rather than on the firm's computers. Upgrades and updates, both major and minor, are rolled out continuously…SaaS is usually sold on a subscription model, meaning that users pay a monthly fee rather than purchasing a license up front.[1]

Instances of SaaS software extend beyond the practice management sphere addressed above, and can include technologies as far-ranging as web-based email programs, online legal research software, online backup and storage, text messaging/SMS (short message service), voicemail on mobile or VoIP phones, online communication over social media, and beyond.

SaaS for law firms may involve the storage of a law firm's data, including client files, billing information, and work product, on remote servers rather than on the law firm's own computer and, therefore, outside the direct control of the firm's lawyers. Lawyers have duties to safeguard confidential client information, including protecting that information from unauthorized disclosure, and to protect client property from destruction, degradation, or loss (whether from system failure, natural disaster, or dissolution of a vendor's business). Lawyers also have a continuing need to retrieve client data in a form that is usable outside of a vendor's product.[2]

Given these duties and needs, may a law firm use SaaS?

Opinion #1:

Yes, provided steps are taken to minimize the risk of inadvertent or unauthorized disclosure of confidential client information and to protect client property, including the information in a client's file, from risk of loss.

The use of the internet to transmit and store client information presents significant challenges. In this complex and technical environment, a lawyer must be able to fulfill the fiduciary obligations to protect confidential client information and property from risk of disclosure and loss. The lawyer must protect against security weaknesses unique to the internet, particularly "end-user" vulnerabilities found in the lawyer's own law office. The lawyer must also engage in periodic education about ever-changing security risks presented by the internet.

Rule 1.6 of the Rules of Professional Conduct states that a lawyer may not reveal information acquired during the professional relationship with a client unless the client gives informed consent or the disclosure is impliedly authorized to carry out the representation. Comment [17] explains, "A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." Comment [18] adds that, when transmitting confidential client information, a lawyer must take "reasonable precautions to prevent the information from coming into the hands of unintended recipients."

Rule 1.15 requires a lawyer to preserve client property, including information in a client's file such as client documents and lawyer work product, from risk of loss due to destruction, degradation, or loss. *See also* RPC 209 (noting the "general fiduciary duty to safeguard the property of a client"), RPC 234 (requiring the storage of a client's original documents with legal significance in a safe place or their return to the client), and 98 FEO 15 (requiring exercise of lawyer's "due care" when selecting depository bank for trust account).

Although a lawyer has a professional obligation to protect confidential information from unauthorized disclosure, the Ethics Committee has long held that this duty does not compel any particular mode of handling confidential information nor does it prohibit the employment of vendors whose services may involve the handling of documents or data containing client information. *See* RPC 133 (stating there is no requirement that firm's waste paper be shredded if lawyer ascertains that persons or entities responsible for the disposal employ procedures that effectively minimize the risk of inadvertent or unau-

thorized disclosure of confidential information). Moreover, while the duty of confidentiality applies to lawyers who choose to use technology to communicate, "this obligation does not require that a lawyer use only infallibly secure methods of communication." RPC 215. Rather, the lawyer must use reasonable care to select a mode of communication that, in light of the circumstances, will best protect confidential client information and the lawyer must advise effected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality. *Id.*

Furthermore, in 2008 FEO 5, the committee held that the use of a web-based document management system that allows both the law firm and the client access to the client's file is permissible:

> provided the lawyer can fulfill his obligation to protect the confidential information of all clients. A lawyer must take steps to minimize the risk that confidential client information will be disclosed to other clients or to third parties. *See* RPC 133 and RPC 215…. A security code access procedure that only allows a client to access its own confidential information would be an appropriate measure to protect confidential client information…. If the law firm will be contracting with a third party to maintain the web-based management system, the law firm must ensure that the third party also employs measures which effectively minimize the risk that confidential information might be lost or disclosed. *See* RPC 133.

In a recent ethics opinion, the Arizona State Bar's Committee on the Rules of Professional Conduct concurred with the interpretation set forth in North Carolina's 2008 FEO 5 by holding that an Arizona law firm may use an online file storage and retrieval system that allows clients to access their files over the internet provided the firm takes reasonable precautions to protect the security and confidentiality of client documents and information.[3]

In light of the above, the Ethics Committee concludes that a law firm may use SaaS if reasonable care is taken to minimize the risks of inadvertent disclosure of confidential information and to protect the security of client information and client files. A lawyer must fulfill the duties to protect confidential client information and to safeguard client files by applying the same diligence and competency to manage the risks of SaaS that the lawyer is required to apply when representing clients.

No opinion is expressed on the business question of whether SaaS is suitable for a particular law firm.

Inquiry #2:

Are there measures that a lawyer or law firm should consider when assessing a SaaS vendor or seeking to minimize the security risks of SaaS?

Opinion #2:

This opinion does not set forth specific security requirements because mandatory security measures would create a false sense of security in an environment where the risks are continually changing. Instead, due diligence and frequent and regular education are required.

Although a lawyer may use nonlawyers outside of the firm to assist in rendering legal services to clients, Rule 5.3(a) requires the lawyer to make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer. The extent of this obligation when using a SaaS vendor to store and manipulate confidential client information will depend upon the experience, stability, and reputation of the vendor. Given the rapidity with which computer technology changes, law firms are encouraged to consult periodically with professionals competent in the area of online security. Some recommended security measures are listed below.

- Inclusion in the SaaS vendor's Terms of Service or Service Level Agreement, or in a separate agreement between the SaaS vendor and the lawyer or law firm, of an agreement on how the vendor will handle confidential client information in keeping with the lawyer's professional responsibilities.
- If the lawyer terminates use of the SaaS product, the SaaS vendor goes out of business, or the service otherwise has a break in continuity, the law firm will have a method for retrieving the data, the data will be available in a non-proprietary format that the law firm can access, or the firm will have access to the vendor's software or source code. The SaaS vendor is contractually required to return or destroy the hosted data promptly at the request of the law firm.
- Careful review of the terms of the law firm's user or license agreement with the SaaS vendor including the security policy.
- Evaluation of the SaaS vendor's (or any third party data hosting company's) measures for safeguarding the security and confidentiality of stored data including, but not limited to, firewalls, encryption techniques, socket security features, and intrusion-detection systems.[4]
- Evaluation of the extent to which the SaaS vendor backs up hosted data.

Endnotes

1. FYI: Software as a Service (SaaS) for Lawyers, ABA Legal Technology Resource Center at abanet.org/tech/ ltrc/fyidocs/saas.html.
2. *Id.*
3. Paraphrasing the description of a lawyer's duties in Arizona State Bar Committee on Rules of Professional Conduct, Opinion 09-04 (Dec. 9, 2009).
4. A firewall is a system (which may consist of hardware, software, or both) that protects the resources of a private network from users of other networks. Encryption techniques are methods for ciphering messages into a foreign format that can only be deciphered using keys and reverse encryption algorithms. A socket security feature is a commonly-used protocol for managing the security of message transmission on the internet. An intrusion detection system is a system (which may consist of hardware, software, or both) that monitors network and/or system activities for malicious activities and produces reports for management.

2011 Formal Ethics Opinion 7

January 27, 2012

Using Online Banking to Manage a Trust Account

Opinion rules that a law firm may use online banking to manage its trust accounts provided the firm's managing lawyers are regularly educated on the security risks and actively maintain end-user security.

Inquiry:

Most banks and savings and loans provide "online banking" which allows customers to access accounts and conduct financial transactions over the internet on a secure website operated by the bank or savings and loan. Transactions that may be conducted via on-line banking include account-to-account transfers, payments to third parties, wire transfers, and applications for loans and new accounts. Online banking permits users to view recent transactions and view and/or download cleared check images and bank statements. Additional services may include account management software.

Financial transactions conducted over the internet are subject to the risk of theft by hackers and other computer criminals. Given the duty to safeguard client property, particularly the funds that a client deposits in a lawyer's trust account, may a law firm use online banking to manage a trust account?

Opinion:

Yes, provided the lawyers use reasonable care to minimize the risk of loss or theft of client property specifically including the regular education of the firm's managing lawyers on the *ever-changing* security risks of online banking and the active maintenance of end-user security.

As noted in 2011 FEO 6, *Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property*, the use of the internet to transmit and store client data (or, in this instance, data about client property) presents significant challenges. In this complex and technical environment, a lawyer must be able to fulfill the fiduciary obligations to protect confidential client information and property from risk of disclosure and loss. The lawyer must protect against security weaknesses unique to the internet, particularly "end-user" vulnerabilities found in the lawyer's own law office. The lawyer must also engage in frequent and regular education about the security risks presented by the internet.

Rule 1.15 requires a lawyer to preserve client property, to deposit client funds entrusted to the lawyer in a separate trust account, and to manage that trust account according to strict recordkeeping and procedural requirements. *See also* RPC 209 (noting the "general fiduciary duty to safeguard the property of a client") and 98 FEO 15 (requiring a lawyer to exercise "due care" when selecting depository bank for trust account). The rule is silent, however, about online banking.

Nevertheless, online banking may be used to manage a client trust account if the recordkeeping and fiduciary obligations in Rule 1.15 can be fulfilled. The recordkeeping requirements for trust accounts are set forth in Rule 1.15-3. Rule 1.15-3(b)(3) specifically requires a lawyer to maintain the following

records relative to the transfer of funds from the trust account:

> all instructions or authorizations to transfer, disburse, or withdraw funds from the trust account (including electronic transfers or debits), or a written or electronic record of any such transfer, disbursement, or withdrawal showing the amount, date, and recipient of the transfer or disbursement, and, in the case of a general trust account, also showing the name of the client or other person to whom the funds belong;

If the online banking software does not provide a method for making an official bank record of the required information when money is transferred from the trust account to another account, such transfers must be handled by a method that provides the required records.

To fulfill the fiduciary obligations in Rule 1.15, a lawyer managing a trust account must use reasonable care to minimize the risks to client funds on deposit in the trust account by remaining educated as to the dynamic risks involved in online banking and insuring that the law firm invests in proper protection and multiple layers of security to address those risks. *See* [Proposed] 2011 FEO 6.

A lawyer who is managing a trust account has affirmative duties to regularly educate himself as to the security risks of online banking; to actively maintain end-user security at the law firm through safety practices such as strong password policies and procedures, the use of encryption, and security software, and the hiring of an information technology consultant to advise the lawyer or firm employees; and to insure that all staff members who assist with the management of the trust account receive training on and abide by the security measures adopted by the firm. Understanding the contract with the depository bank and the use of the resources and expertise available from the bank are good first steps toward fulfilling the lawyer's fiduciary obligations.

This opinion does not set forth specific security requirements because mandatory security measures would create a false sense of security in an environment where the risks are continually changing. Instead, due diligence and frequent and regular education are required. A lawyer must fulfill his fiduciary obligation to safeguard client funds by applying the same diligence and competency to manage the risks of on-line banking that a lawyer is required to apply when representing clients.

2011 Formal Ethics Opinion 8

July 15, 2011

Utilizing Live Chat Support Service on Law Firm Website

Opinion provides guidelines for the use of live chat support services on law firm websites.

Inquiry:

A law firm would like to utilize a live chat support service on its website. Typically, such a service requires the law firm to download a software program to the firm website. After the software is downloaded, a "button" is displayed on the website which reads something like "Click Here to Chat Live." The button is often accompanied by a picture of a person with a headset. Once a visitor clicks on the button to request a live chat, the visitor will be able to have a typed out conversation in real-time with an agent identified as perhaps a "law firm staff member" or an "operator." The agent will guide the visitor through a series of screening questions through the use of a script. Typically, the agent will learn about the facts of the potential case. The agent will also obtain contact information for the visitor. The agent then emails a transcript of the "chat" to the law firm. In some instances, the law firm pays only for the transcripts of "chats" in which the visitor provides a way for the law firm to contact him or her.

Depending on the software program purchased, in addition to the live chat "button" being displayed on the website, a pop-up window may also appear on the screen specifically asking visitors if they would like "live help." The window may contain a picture of a person with a headset and reads something like, "Hi, you may just be browsing but we are here to answer your questions. Please click 'yes' for live help." The pop-up window is software-generated. It is only after the visitor clicks on the button that the live agent is engaged.

In another form of the live chat support service, the "button" and pop-up window showing a picture of a person with a headset is displayed on the website and a voice says something like, "Hi, we are here to answer your questions. Please click 'yes' for live help." These statements are presumably software-generated. It is only after the visitor clicks on the "yes" button that the live agent is engaged.

Is the utilization of these types of live chat support services a violation of the Rules of Professional Conduct?

Opinion:

No. Rule 7.3(a) provides that a lawyer shall not by "in-person, live telephone, or real-time electronic contact" solicit professional employment from a potential client unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication. The interactive typed conversation with a live agent provided by the live chat support service described above constitutes a real-time electronic contact.

It is important to note that the prohibition in Rule 7.3(a) applies only to lawyer-initiated contact. Rule 7.3 does not prohibit real-time electronic contact that is initiated by a potential client. In each of the instances described above, the website visitor has made the initial contact with the firm. The visitor has chosen to visit the law firm's website, indicating that they have some interest in the website's content. It is appropriate at this juncture for the law firm to offer the website visitor live assistance.

In addition to the fact that the potential client has initiated the contact with the law firm, the circumstances surrounding this type of real-time electronic contact do not trigger the concerns necessitating the prohibition set out in Rule 7.3. Comment [1] to Rule 7.3 explains the policy considerations behind the prohibition:

> There is a potential for abuse inherent in direct in-person, live telephone, or real-time electronic 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 fully to 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.

The use of a live chat support service does not subject the website visitor to undue influence or intimidation. The visitor has the ability to ignore the live chat button or to indicate with a click that he or she does not wish to participate in a live chat session.

The Philadelphia Bar Association recently issued an opinion that allows certain real-time electronic communications, including communications through blogs, chat rooms, and other social media. Philadelphia Bar Ass'n Prof'l. Guidance Comm., Op. 2010-6 (2010). The opinion states that Rule 7.3 does not bar the use of social media for solicitation where a prospective client to whom the lawyer's communication is directed has the ability "to 'turn off' the soliciting lawyer and respond or not as he or she sees fit." The Philadelphia Bar Association opined that "with the increasing sophistication and ubiquity of social media, it has become readily apparent to everyone that they need not respond instantaneously to electronic overtures, and that everyone realizes that—like targeted mail—emails, blogs, and chat room comments can be readily ignored, or not, as the recipient wishes."

Although the use of this type of technology is permissible, the practice is not without its risks, and a law firm utilizing this service must exercise certain precautions. The law firm must ensure that visitors who elect to participate in a live chat session are not misled to believe that they are conversing with a lawyer if such is not the case. While the use of the term "operator" seems appropriate for a nonlawyer, a designation such as "staff member," or something similar, would require an affirmative disclaimer that a nonlawyer staff member is not an attorney. The law firm must ensure that the nonlawyer agent does not give any legal advice.

The law firm should be wary of creating an "inadvertent" lawyer-client relationship. In addition, the law firm should exercise care in obtaining information from potential clients and be mindful of the potential consequences/duties resulting from the electronic communications. Rule 1.18 provides that a person who discusses with a lawyer the possibility of forming a client-lawyer rela-

tionship with respect to a matter is a prospective client and that, even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client may generally not use or reveal information learned in the consultation. Furthermore, Rule 1.18(c) prohibits a lawyer from representing a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter. Therefore, acquiring information from a prospective client via the live chat service could create a conflict of interest with a current client that would require withdrawal.

2011 Formal Ethics Opinion 9

July 15, 2011

Use of Letterhead by Person Who is Not Employed or Affiliated with Firm

Opinion rules that a lawyer may not allow a person who is not employed by or affiliated with the lawyer's firm to use firm letterhead.

Inquiry #1:

May a lawyer allow a person who is not employed by the lawyer's firm and who is not subject to the supervision or control of any lawyer with the firm to use the firm's letterhead?

Opinion #1:

No. It is professional misconduct for a lawyer to violate the Rules of Professional Conduct through the acts of another. Rule 8.4(a). The Rules prohibit false or misleading communications by a lawyer about the lawyer or the lawyer's services. Rule 7.1(a). They also prohibit conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 8.4(c). A recipient of a letter on a law firm's letterhead assumes that the letter was written by a firm lawyer or by an employee or affiliate[1] of the firm who is acting under the authority, supervision, and control of a firm lawyer. If a person who is not employed or formally affiliated with the firm sends a letter on firm letterhead, it creates the false impression that the person has the authority to act on behalf of the law firm and is being supervised by a firm lawyer. In the worst case, the recipient may falsely assume that the sender is a lawyer with the firm. A lawyer may not participate actively or passively in this deception. If a lawyer learns that someone who is not employed or affiliated with the firm is using firm letterhead to write to third parties, the lawyer must take steps to stop the misuse of the letterhead.

A lawyer may, however, allow a client to draft a letter to be printed on letterhead if the lawyer reviews and assumes responsibility for the content of the letter by signing it.

Inquiry #2:

A client would like to use the letterhead of his lawyer's firm for activities that do not constitute the practice of law. For example, when negotiating the terms of a loan with a third party, the client wants to write the terms on the firm letterhead and have the third party sign the document. The client and the lawyer anticipate that the loan will subsequently be closed by the lawyer. May a lawyer allow a client to use his firm's letterhead in this manner? May a lawyer agree to such use if the lawyer supervises or controls the content of the document?

Opinion #2:

No, because the third party may falsely believe that the client is acting with the authority of the law firm. *See* Opinion #1. In addition, it may create the false impression that the law firm is verifying or endorsing the transaction.

Endnote

1. A person who is not an employee but who is formally affiliated with a firm, such as a contract lawyer or paralegal, may use firm letterhead if the person is authorized to act on the firm's behalf and the affiliation is set forth on the letterhead or otherwise in the letter. *See, e.g.,* RPC 126.

2011 Formal Ethics Opinion 10

October 21, 2011

Lawyer Advertising on Deal of the Day or Group Coupon Website

Opinion rules that a lawyer may advertise on a website that offers daily discounts to consumers where the website company's compensation is a percentage of the amount paid to the lawyer if certain disclosures are made and certain conditions are satisfied.

Inquiry:

Lawyer would like to advertise on a "deal of the day" or "group coupon" website. To utilize such a website, a consumer registers his email address and city of residence on the website. The website company then emails local "daily deals" or coupons for discounts on services to registered consumers. The daily deals are usually for services such as spa treatments, tourist attractions, restaurants, photography, house cleaning, etc. The daily deals can represent a significant reduction off the regular price of the offered service. Consumers who wish to participate in the "deal of the day" purchase the deal online using a credit card that is billed.

The website company negotiates the discounts with businesses on a case-by-case basis; however, the company's fee is always a percentage of each "daily deal" or coupon sold. Therefore, the revenue received by the business offering the daily deal is reduced by the percentage of the revenue paid to the website company.

May a lawyer advertise on a group coupon website and offer a "daily deal" to users of the website subject to the website company's fees without violating the Rules of Professional Conduct?

Opinion:

Yes. Although the website company's fee is deducted from the amount paid by a purchaser for the anticipated legal service, it is paid regardless of whether the purchaser actually claims the discounted service and the lawyer earns the fee by providing the legal services to the purchaser. Therefore, the fee retained by the website company is the cost of advertising on the website and does not violate Rule 5.4(a) which prohibits, with a few exceptions, the sharing of legal fees with nonlawyers. The purpose for the fee-splitting prohibition is not confounded by this arrangement. As noted in Comment [1] to the rule, the traditional limitations on sharing fees prevent interference in the independent professional judgment of a lawyer by a nonlawyer. There is no interaction between the website company and the lawyer relative to the legal representation of purchasers at any time after the fee is paid on-line other than the transfer of the proceeds of the "daily deal" to the lawyer. Rule 7.2(b)(1) allows a lawyer to pay the reasonable cost of advertisements. As long as the percentage charged against the revenues generated is reasonable compensation for the advertising service, a lawyer may participate. *Cf.* 2010 FEO 4 (permitting participation in a barter exchange program in which members pay a cash transaction fee of ten percent on the gross value of each purchase of goods or services). There are, however, professional responsibilities that are impacted by this type of advertising.

First, a lawyer may not engage in misleading advertising. Rule 7.1. Therefore, the advertised discount may not be illusory: the lawyer must have an established, standard fee for the service that is being offered at a discount. Moreover, the lawyer's advertisement on the website must include certain disclosures. Clients should not make decisions about legal representation in a hasty manner. The advertisement must explain that the decision to hire a lawyer is an important one that should be considered carefully and made only after investigation into the lawyer's credentials. In addition, the advertisement must state that a conflict of interest or a determination by the lawyer that the legal service being offered is not appropriate for a particular purchaser may prevent the lawyer from providing the service and, if so, the purchaser's money will be refunded (see below for explanation of the duty to refund).

Second, a lawyer must deposit entrusted funds in a trust account. Rule 1.15-2(b). The payments received by the lawyer from the website company are advance payments[1] of legal fees that must be deposited in the lawyer's trust account and may not be paid to the lawyer or transferred to the law firm operating account until earned by the provision of legal services.

Third, a professional relationship with a purchaser of the discounted legal service is established once the payment is made and this relationship must be honored. The lawyer has offered his services on condition that there is no conflict of interest and the service is appropriate for the purchaser, and the purchaser has accepted the offer. At a minimum, the purchaser must be considered a prospective client entitled to the protections afforded to prospective clients under Rule 1.18.

Fourth, a lawyer may not retain a clearly excessive fee. Rule 1.5(a). If a prospective client fails to claim the discounted legal service within the designat-

ed time (before the "expiration date"), one might consider the advance payment forfeited. Even if it is assumed that this is a risk that is generally known to consumers, however, it does not justify the receipt of a windfall by the lawyer. As a fiduciary, a lawyer places the interests of his clients above his own and may not accept a legal fee for doing nothing. Such a fee is inherently excessive. Therefore, if a prospective client does not claim the discounted service within the designated time, the lawyer must refund the advance payment on deposit in the trust account for the prospective client or, if the prospective client still desires the legal service, the lawyer may charge his actual rate at the time the service is provided but must give the prospective client credit for the advance payment on deposit in the trust account.

Last, a lawyer has a duty of competent representation pursuant to Rule 1.1. The lawyer must consult with each prospective client to determine what service the prospective client actually requires. If competent representation requires the lawyer to expend more time than anticipated to satisfy the advertised service, the lawyer must do so without additional charge. Similarly, if upon consulting with a prospective client the lawyer determines that the prospective client does not need the legal service or that a conflict of interest prohibits the representation, the lawyer must refund the prospective client's entire advance payment, including the amount retained by the website company, to make the prospective client whole.

Endnote

1. In light of the many uncertainties of a legal representation arranged in the manner proposed, a lawyer may not condition the offer of discounted services upon the purchaser's agreement that the money paid will be a flat fee or a minimum fee that is earned by the lawyer upon payment. *See* 2008 FEO 10.

2011 Formal Ethics Opinion 12

October 21, 2011

Disclosing Clerk's Error to Court

Opinion rules that a lawyer must notify the court when a clerk of court mistakenly dismisses a client's charges.

Inquiry:

Lawyer has a client in custody who has numerous cases pending in district court. Lawyer negotiates a plea agreement with the assistant district attorney (ADA) whereby all but two of the charges will be dismissed. Lawyer asks for the client to be brought into the courtroom to enter his plea. At that time, Lawyer is informed that the client has already been taken back to the jail. Lawyer and the ADA agree to continue the case to the next business day. When Lawyer subsequently goes to visit his client in jail, he is told that the client was released because all of his charges were dismissed.

Upon investigation, Lawyer confirms that all of the client's charges had been voluntarily dismissed. The dismissals are clearly the result of an error by the clerk of court and do not reflect the plea agreement entered into by Lawyer and the ADA.

Must lawyer inform the clerk of court of the error?

Opinion:

Yes. The preamble to the Rules of Professional Conduct provides that as a member of the legal profession, a lawyer is an "officer of the legal system." Rule 0.1. Rule 8.4(d) states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." Similarly, Comment [2] to Rule 3.3 (Candor Toward the Tribunal) refers to the special duties of lawyers as officers of the court to "avoid conduct that undermines the integrity of the adjudicative process."

Under Rule 3.3, for example, a lawyer has a duty to disclose a client's false testimony even though it may have grave consequences for the client, where the alternative is that the lawyer cooperate in deceiving the court thereby subverting the truth-finding process which the adversary system is designed to implement. Rule 3.3, Cmt. [11]. Thus, if a conflict arises between a lawyer's duty to his client and his duties as an officer of the court, the lawyer's duty to the court must prevail.

This inquiry differs from that addressed in 98 FEO 5, which provides that a defense lawyer does not have a duty to inform the court of an inaccurate driving record presented by the prosecutor. In the situation addressed in 98 FEO 5, both advocates are present in court and each is expected to present evidence and carry his burden of proof. The opinion states that the burden of proof is on the state to show that the defendant's driving record justifies a more restrictive sentencing level and that the defense lawyer is not required to volunteer adverse facts when the prosecutor fails to bring them forward.

In the instant inquiry, Lawyer knows that his client's charges were dismissed in error and that "justice" (in the form of a negotiated plea to which Lawyer and the client agreed) was not carried out. Therefore, Lawyer has an obligation to inform the court or the clerk of court of the apparent error. *Accord* Wis. Formal Ethics Op. E-84-7 (1984)(defense attorney has obligation to inform the court or the court's staff of clerk of court's error).

2011 Formal Ethics Opinion 13

October 21, 2011

Editor's note: This opinion is not intended to imply that a lawyer for an estate is required to petition the clerk for approval of the lawyer's fee; however, a personal representative's commission may be reduced if the clerk of court does not approve the lawyer's fee in advance.

Retaining Funds in Trust Account to Pay Disputed Legal Fee

Opinion rules that client funds or the funds of a third party that are placed in the lawyer's control for the purpose of being safeguarded, managed, or disbursed in connection with a transaction, but which were not designated or identified as funds for the payment of legal fees, may not be retained in the trust account, pursuant to Rule 1.15-2(g), as disputed funds to which the lawyer may be entitled.

Inquiry:

Attorney agreed to represent the Estate of E. E was a North Carolina lawyer who conducted his practice through a professional limited liability company (PLLC), in which he was the sole member. Attorney's representation included collecting the assets and paying the claims of the PLLC with the intention that the PLLC would eventually be dissolved and any remaining assets of the PLLC would be distributed to the estate.

The funds of the estate, approximately $3,000, were deposited in the general trust account for Attorney's law firm and a ledger card for the estate was established. The funds of the PLLC, in excess of $100,000, were also deposited in the trust account and a separate ledger for the PLLC was established. Attorney billed his work for the PLLC separately from his work for the estate in order that the legal fees for the resolution of the PLLC issues would be paid from funds of the PLLC.

Administrator recently terminated the representation and demanded return of the remaining funds of the estate (approximately $2,500) and of the PLLC (approximately $100,000) held in the general trust account of Attorney's law firm.

Attorney contends that his firm is owed $29,000 in legal fees for the representation of the PLLC. Administrator contests these legal fees and did not authorize Attorney to pay the fees from any of the money held in trust.

Rule 1.15-2(g) states:

> [w]hen 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.

May Attorney retain $29,000 in his firm's trust account and transfer only the difference to Administrator until the dispute over the legal fees is resolved?

Opinion:

No, the funds must be returned to Administrator and Attorney may file a claim with the Estate for payment for his legal services.

Rule 1.15-2(g) permits a lawyer to withhold only funds to which the lawyer has a claim to entitlement such as funds deposited as a client's advance payment of a legal fee or funds from a settlement negotiated by the lawyer that, by prior agreement, include a contingent fee. However, client funds or the funds of a third party that are placed in the lawyer's control for the purpose of being safeguarded, managed, or disbursed in connection with a transaction, but which were not otherwise designated or identified as funds for the payment of legal

fees, may not be retained in the trust account as disputed funds pursuant to Rule 1.15-2(g). As explained in Comment [14] to Rule 1.15, "[a] lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention."

Regardless of whether the funds are identified as funds of the Estate of E or funds of the PLLC, the funds in this inquiry are the property of the Estate of E[1] and were delivered to Attorney for the purpose of being managed by Attorney as a part of his legal services to the estate. The funds are subject to legal requirements to pay the claims of the creditors of the PLLC and of the estate.[2] Moreover, payment of administrative expenses of an estate from estate assets, including attorney's fees, is only permitted on the issuance of an order of the clerk of superior court and requires the clerk to exercise judicial discretion in such matters.[3] A personal representative must file a petition seeking an order from the clerk enabling the payment of attorney's fees by an estate.[4] These legal restrictions on the assets of an estate demonstrate that Attorney had no claim of entitlement to the funds. Therefore, when the representation ended, Attorney was obliged to deliver all of the funds as directed by Administrator. Rule 1.15-2(m)(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).

Rather than deposit the funds of an estate in a general trust account, estate funds should, in most instances, be deposited in a fiduciary account maintained solely for the deposit of fiduciary funds or other entrusted property of a particular person or entity. Rule 1.15-1(e)(defining "fiduciary account"). In a fiduciary account, the funds can be invested as usually required for prudent management of fiduciary funds. The comment to Rule 1.15 explains that:

> [c]lient funds must be deposited in a general trust account if there is no duty to invest on behalf of the client. Generally speaking, if a reasonably prudent person would conclude that the funds in question, either because they are nominal in amount or are to be held for a short time, could probably not earn sufficient interest to justify the cost of investing, the funds should be deposited in the general trust account. In determining whether there is a duty to invest, a lawyer shall exercise his or her professional judgment in good faith and shall consider the following:
>
> a) The amount of the funds to be deposited;
>
> b) The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;
>
> c) The rates of interest or yield at financial institutions where the funds are to be deposited;
>
> d) The cost of establishing and administering dedicated accounts for the client's benefit, including the service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the client's benefit;
>
> e) The capability of financial institutions, lawyers, or law firms to calculate and pay income to individual clients;
>
> f) Any other circumstances that affect the ability of the client's funds to earn a net return for the client.

Generally, the funds of an estate are of sufficient quantity or will be held for a sufficiently long period of time that deposit in a fiduciary account is required.

Endnotes

1. N.C. Gen. Stat. §57C-6-01(4) provides that E's PLLC dissolved by statute on the 90th day following E's death. E's PLLC and all of its assets are assets of the estate.
2. *See* N.C. Gen. Stat. §57C-6-05(1) and N.C. Gen. Stat. §28A-19-6.
3. *See Wachovia Bank & Trust Co. v. Waddell*, 237 N.C. 342, 75 S.E. 2d 151 (1953).
4. *See In re Estate of Longest*, 74 N.C. App. 386, 328 S.E. 2d 804, *cert. denied and appeal dismissed*, 314 N.C. 330, 333 S.E. 2d 488 (1985).

2011 Formal Ethics Opinion 14

April 27, 2012

Outsourcing Clerical or Administrative Tasks

Opinion rules that a lawyer must obtain client consent, confirmed in writing, before outsourcing its transcription and typing needs to a company located in a foreign jurisdiction.

Inquiry:

Law Firm would like to outsource its transcription and typing needs to a company located in a foreign jurisdiction. Specifically, voice files would be sent via email and some documents would be scanned to the company via email. The communications would, in turn, be transcribed to paper. The files would include information about client matters and work product regarding client matters. Law Firm investigated the security measures the company utilizes and found them to be extensive.

Is Law Firm required to disclose the outsourcing of these clerical tasks to its clients and obtain their informed written consent as contemplated by 2007 FEO 12?

Opinion:

Yes. 2007 FEO 12 provides that a lawyer must disclose the outsourcing of support services to an assistant in another country and obtain the client's informed written consent to the outsourcing. 2007 FEO 12 does not differentiate between the outsourcing of administrative as opposed to legal support services. Similarly, ABA Formal Opinion 08-451 (2008) provides that "where the relationship between the firm and the individuals performing the services is attenuated, as in a typical outsourcing relationship, *no information protected by Rule 1.6* may be revealed without the client's informed consent." (Emphasis added). The bar associations of New York and Ohio have reached similar conclusions. N.Y. State Bar Ass'n. Comm. on Prof'l Ethics, Op. 2006-3 (2006); Ohio Ethics Op. 2009-6 (2009).

The ABA opinion notes the existence of unique risk factors that must be evaluated when client information is outsourced to a foreign vendor. As noted in the ABA opinion:

> [c]onsideration . . . should be given to the legal landscape of the nation to which the services are being outsourced, particularly the extent that personal property, including documents, may be susceptible to seizure in judicial or administrative proceedings notwithstanding claims of client confidentiality . Similarly, the judicial system of the country in question should be evaluated to assess the risk of loss of client information or disruption of the project in the event that a dispute arises between the service provider and the lawyer and the courts do not provide prompt and effective remedies to avert prejudice to the client.

The protection of client confidences is one of the most significant responsibilities imposed on a lawyer. Given the risk that a foreign jurisdiction may provide less protection for confidential client information than that provided domestically, the outsourcing of any task to another country that involves the disclosure of confidential client information requires disclosure and client consent confirmed in writing.[1] Consent "confirmed in writing" denotes consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. *See* Rule 1.0(c). The client's consent to the outsourcing may be incorporated into the employment agreement.

Endnote

1. Client consent is not required in 2011 FEO 6 although the opinion allows confidential client information to be transmitted over the internet and stored using servers that may be located in another country. The instant opinion can be distinguished because outsourcing requires disclosure of client information to third parties.

2011 Formal Ethics Opinion 15

October 21, 2011

Communication with Adverse Party to Request Public Records

Opinion rules that, pursuant to the North Carolina Public Records Act, a lawyer may communicate with a government official for the purpose of identifying a custodian of public records and with the custodian of public records to make a request to examine public records related to the representation although the custodian is an adverse party, or an employee of an adverse party, whose lawyer does not consent to the communication.

Inquiry #1:

Adopted in 1995, RPC 219 rules that a lawyer may communicate with a custodian of public records, pursuant to the North Carolina Public Records Act, N.C. Gen. Stat. Chap. 132, for the purpose of making a request to examine public records related to a representation although the custodian and the

government entity employing the custodian are adverse parties and the lawyer for the custodian and the government entity does not consent to the communication.

Has the ruling in this opinion changed in light of the comprehensive revisions to the Rules of Professional Conduct in 1997 and 2003?

Opinion #1:

No. RPC 219 relies upon Rule 7.4(a), the "anti-contact rule"[1] at that time, and specifically applies the provision in the rule that allows a lawyer to communicate with a represented opposing party without the consent of opposing counsel if the communication is authorized by law. Rule 7.4(1) provided at that time:

> [d]uring the course of his or her representation of a client, a lawyer shall not (1) 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.

The essential provisions of the anti-contact rule were not changed when the Rules were revised and renumbered in 1997 and again revised in 2003. The current version of the rule, Rule 4.2(a), 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 to do so by law or a court order. 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.

ABA Formal Ethics Opinion 95-396 (1995) observes that Model Rule 4.2's exception permitting a communication "authorized by law" is satisfied by "a constitutional provision, statute, or court rule, having the force and effect of law, that expressly allows a particular communication to occur in the absence of counsel."

N.C. Gen. Stat. §132-6(a) requires that:

> [e]very custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law.

The statute authorizes direct communication with a custodian of public records for the purpose of inspecting and furnishing copies of public records and remains an exception to the communications prohibited in current Rule 4.2(a).

Inquiry #2:

RPC 219 does not examine whether there are limitations on the content of the communications with the public records custodian. Apart from communications for the purposes of submitting a request for public records, arranging a convenient time to inspect the records, and inspecting the records, may the lawyer communicate with the custodian for the purpose of identifying the documents sought or for any other purpose related to the representation?

Opinion #2:

A lawyer may communicate with a custodian of public records for the purposes set forth in N.C. Gen. Stat. §132-6(a), to inspect, examine, or obtain copies of public records. To the extent that the lawyer must communicate with the custodian to identify the records to be inspected, examined, or copied, the communication is in furtherance of the purpose of the Public Records Act[2] to facilitate access to public records and is allowed without obtaining the consent of opposing counsel. Such communications should be limited to the identification of records and should not be used by the lawyer as an opportunity to engage in communications about the substance of the disputed matter.

Inquiry #3:

The identity of the custodian of public records may vary depending upon the nature of the records sought and the organization of the government entity. RPC 219 does not examine any limitations on the lawyer's inquiries of government employees or officials for the purpose of determining the identity of the custodian. May the lawyer speak to government employees for this purpose without the consent of the lawyer for the government?

Opinion #3:

N.C. Gen. Stat. §132-2 provides that:

> [t]he public official in charge of an office having public records shall be the custodian thereof.

A lawyer may communicate with government employees, without obtaining the consent of the government's lawyer, for the purpose of identifying the public official in charge of an office and therefore the custodian of the records of that office.

Endnote

1. This term is used frequently by the ABA and others to refer to the rule that restricts lawyers from communicating directly with represented persons. *See e.g.,* ABA Formal Ethics Opinion 95-396 (1995).
2. The public policy for the Public Records Act is set forth in N.C. Gen. Stat. §132-1(b):
   > The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this state that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As used herein, "minimal cost" shall mean the actual cost of reproducing the public record or public information.

2011 Formal Ethics Opinion 16

January 27, 2012

Responding to Ineffective Assistance of Counsel Claim Questioning Representation

Opinion rules that a criminal defense lawyer accused of ineffective assistance of counsel by a former client may share confidential client information with prosecutors to help establish a defense to the claim so long as the lawyer reasonably believes a response is necessary and the response is narrowly tailored to respond to the allegations.

Inquiry #1:

The ABA recently issued Formal Opinion 10-456, which holds that a criminal defense lawyer accused of ineffective assistance of counsel by a former client cannot share confidential information with prosecutors to help establish a defense to the former client's claim of ineffective assistance of counsel unless the disclosure is made in a court-supervised setting.

Our Rule 1.6(b)(6) provides that a lawyer may reveal information protected from disclosure by Rule 1.6(a) 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.

This exception, also found in ABA Model Rule 1.6, allows a lawyer to reveal confidential information to respond to claims of ineffective assistance of counsel, provided the lawyer narrowly tailors the disclosure to that which is reasonably necessary to respond to the facts of the specific claim.

Under the ABA opinion, however, a lawyer would not be permitted to make such limited disclosure outside of a "court-supervised setting." The opinion provides that disclosure may not occur until a court directs the lawyer to disclose, presumably after considering any objections or claims of privilege raised by the former client. The opinion states:

> Although an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by [Model] Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under [Model] Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer "reasonably believes [it is] necessary" to do so in the lawyer's self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

Outside of the court-supervised setting contemplated by the ABA opinion, may a North Carolina lawyer accused of ineffective assistance of counsel disclose information about the former representation to the extent that lawyer

believes it is reasonably necessary to establish a defense to the accusation? For example, in response to prosecutors' inquiries, but before a court has ordered the lawyer to do so, may the lawyer disclose information about the representation of a former client that the lawyer believes is reasonably necessary to respond to a claim of ineffective assistance of counsel in the former client's post-conviction motion for appropriate relief?

Opinion #1:

Yes. We decline to adopt ABA Formal Op. 10-456 (2010).

Rule 1.6(b)(6), which applies to state and federal criminal representations, specifically provides that a lawyer may reveal confidential information protected from disclosure by Rule 1.6(a) to the extent the lawyer reasonably believes necessary to respond to allegations concerning the lawyer's representation of the client. Rule 1.6(b)(6) also affords the lawyer discretion to determine what information is reasonably necessary to disclose, and there is no requirement that the lawyer exercise that discretion only in a "court-supervised setting."

We take additional guidance from the North Carolina General Assembly in reaching this conclusion. Regarding state court post-conviction actions, N.C. Gen. Stat. § 15A-1415(e) provides that where a defendant alleges ineffective assistance of prior trial or appellate counsel as a ground for the illegality of his conviction or sentence, the client "shall be deemed to waive the attorney-client privilege with respect to both oral and written communications between such counsel and the defendant to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness." The statute further provides that the waiver of the attorney-client privilege "shall be automatic upon the filing of the motion for appropriate relief alleging ineffective assistance of prior counsel, and the superior court need not enter an order waiving the privilege."

Adoption of the ABA opinion would contradict the legislature's determination that lawyers should have the discretion, *without* court direction or supervision, to disclose privileged information in response to such claims in the narrowly-tailored fashion contemplated by Rule 1.6(b)(6). Adoption of the opinion would also contradict the language of Rule 1.6(b)(6) itself, which does not require a court-supervised setting to make a narrowly-tailored disclosure of confidential information in response to such claims. We decline to adopt an opinion that contradicts existing state law and rules governing disclosure of otherwise confidential and privileged information under these limited circumstances.

In reaching this conclusion, however, we are also relying on the fact that both N.C. Gen. Stat. § 15A-1415(e) and Rule 1.6(b)(6) clearly admonish lawyers who choose to respond to claims of ineffective assistance of counsel, regardless of the setting, to respond in a manner that is narrowly tailored to address the specific facts underlying the specific claim. Simply put, the pursuit of an ineffective assistance of counsel claim by a former client does not give the lawyer *carte blanche* to disclose all information contained in a former client's file. Comment [15] to Rule 1.6 emphasizes that Rule 1.6(b) permits disclosure only to the extent the lawyer reasonably believes necessary to accomplish one of the purposes specified in the exceptions set out in paragraph (b). Disclosure should be no greater than what is reasonably necessary to accomplish the purpose. Therefore, once a lawyer has determined that disclosure of confidential or privileged information is necessary to respond to a claim of ineffective assistance of counsel, and once the lawyer has decided to make that disclosure, the lawyer still has a duty to avoid the disclosure of information that is not responsive to the specific claim. In the same vein, a prosecutor requesting information from defense counsel in relation to an ineffective assistance of counsel claim must limit his request to information relevant to the defendant's specific allegations of ineffective assistance. *See* Rule 3.8; Rule 4.4.

2012 Formal Ethics Opinion 1

July 20, 2012

Use of Client Testimonials in Advertising

Opinion rules that testimonials that discuss characteristics of a lawyer's client service may be used in lawyer advertising without the use of a disclaimer. Testimonials that refer generally to results may be used so long as the testimonial is accompanied by an appropriate disclaimer. The reference to specific dollar amounts in client testimonials is prohibited.

Inquiry #1:

Are testimonials that merely imply positive results but do not state specific results considered "soft" endorsements under 2007 FEO 4? Some examples are, "the attorney did a great job for me," "I was pleased with the outcome of my case," or "I can get my life back on track now."

Are testimonials that do not include any specific monetary amounts but do indicate a favorable result considered soft endorsements? Some examples of these types of testimonials are, "He was able to get my case settled to my satisfaction," "the charges against me were dropped/dismissed," "my medical bills were covered/paid," or "I was able to get Social Security/workers' compensation benefits."

If these kinds of testimonials are not considered soft endorsements, are they still permissible in legal advertising? Do they require disclaimer language similar to language required by 2009 FEO 16?

Opinion #1:

Testimonials that discuss characteristics of a lawyer's client service may be used in lawyer advertising without the use of a disclaimer. Testimonials that refer generally to results may be used so long as the testimonial is accompanied by an appropriate disclaimer. The reference to specific dollar amounts in client testimonials is prohibited.

Rule 7.1 provides that a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication that is likely to create an unjustified expectation about results the lawyer can achieve is misleading. Rule 7.1(a)(2). Depending upon their content, client testimonials have the potential to create unjustified expectations.

A distinction can be drawn between "hard" and "soft" testimonials. A "hard" testimonial goes to the outcome of a case or matter. A "soft" testimonial does not go to the outcome of the case or matter, but rather focuses on shared values or characteristics of the lawyer's client service.

The Ethics Committee has concluded that a lawyer may incorporate "soft" client endorsements in their advertising materials without violating Rule 7.1. *See* 2007 FEO 4. A lawyer may use client testimonials stating that a lawyer handled a case efficiently, always acted in a professional manner, was considerate of the client's particular needs, etc. Examples of other soft endorsements include:

- "The lawyer was very knowledgeable."
- "The service provided by the law firm was excellent."
- "The attorney was very patient."
- "We were very impressed and pleased with the commitment to service."
- "My experience was one of courtesy and I found myself at ease at all times."

See Conn. Informal Op. 01-07 (2001). These statements are permissible under Rule 7.1 because they do not refer to the outcome of a particular matter and do not create unjustified expectations about the results the lawyer can achieve in any case.

"Hard" testimonials, or testimonials that indicate a particular favorable result in a case, have the potential to mislead a potential client to form an unjustified expectation that the same results can be obtained on his or her behalf. Examples of such statements include:

- "The charges against me were dropped/dismissed."
- "My medical bills were covered/paid."
- "I was able to get Social Security/workers' compensation benefits."
- "My lawyer settled my case for "$500,000."

Comment [3] to Rule 7.1 states that the creation of unjustified expectations may be prevented by the use of an appropriate disclaimer. In that regard, the Ethics Committee previously approved the use of disclaimers to cure the potentially misleading nature of case summary sections on a law firm's website. *See* 2009 FEO 16. The New York State Bar has applied the same rationale to client testimonials. *See* NY State Bar Assoc. Comm. on Prof'l Ethics, Op. 771 (2003).

We similarly conclude that a lawyer may include in marketing materials client testimonials that refer generally to the outcome of a specific matter, so long as the testimonials are accompanied by an appropriate and effective disclaimer. The reference to specific dollar amounts in client testimonials is prohibited.

The disclaimer must comply with the requirements set out in Rule 7.1(b)

pertaining to communications containing dramatizations. Pursuant to Rule 7.1(b), the disclaimer may be oral or written. The disclaimer must appear or be spoken at the beginning and the end of the communication and must be conspicuous. For example, any written disclaimer accompanying a written testimonial must be printed in the same font size and color as the font size and color used for the testimonial. Any oral disclaimer accompanying an oral testimonial must be spoken at the same volume as the testimonial and must be spoken at a conversational speed that is easily understood.

A written disclaimer accompanying an oral testimonial on a television advertisement must appear on the screen in a conspicuous font size and color and must appear for a sufficient amount of time that a lawyer can reasonably conclude that a reasonably competent individual viewing the advertisement has the time to read the disclaimer.

For video testimonials embedded in a law firm website, the video may contain the written or oral disclaimer as described above. Alternatively, the webpage containing the link to the testimonial video may display a conspicuous written disclaimer directly above or below the link to the video containing the testimonial.

Inquiry #2:

Are the requirements under the Rules of Professional Conduct for client testimonials in television, radio advertisements, billboards, or video clips on websites different than the requirements for testimonials in written or printed materials?

Opinion #2:

No. However, certain mediums would not allow for a disclaimer that would meet the requirements set out above. For example, it is not reasonable to expect a driver to have time to read a disclaimer on a roadside billboard.

2012 Formal Ethics Opinion 2

January 25, 2013

Lawyer-Mediator's Preparation of Contract for Pro Se Parties to Mediation

Opinion rules that a lawyer-mediator may not draft a business contract for pro se parties to mediation.

Inquiry:

May a mediator, who is also a lawyer, draft a business contract for two business proprietors at the conclusion of a successful mediation concerning a matter that is not currently the subject of litigation when neither party is represented by individual counsel?

Opinion:

No. It is a non-consentable conflict of interest.

Rule 1.12(a) allows a lawyer to represent a party in connection with a matter in which the lawyer participated personally and substantially as a mediator if all parties to the proceeding give informed consent, confirmed in writing. However, under Rule 1.7(a), joint representation of two parties to an agreement presents a concurrent conflict of interest even if the lawyer-mediator has their consent.

Although Rule 1.7(b) provides for circumstances under which a lawyer may represent joint clients, an analysis of the risks associated with the proposed joint representation leads to the conclusion that such representation is not appropriate. Therefore, the lawyer-mediator should not draft the business contract.

When contemplating joint representation, a lawyer must consider whether the interests of the parties will be adequately protected if they are permitted to give their informed consent to the representation, and whether an independent lawyer would advise the parties to consent to the conflict of interest. Representation is prohibited if the lawyer cannot reasonably conclude that he will be able to provide competent and diligent representation to all clients. *See* Rule 1.7, cmt. [15]. As stated in comment [29] to Rule 1.7, the representation of multiple clients "is improper when it is unlikely that impartiality can be maintained."

The complex issues that must be addressed when crafting a comprehensive business contract may result in adverse interests. Even if the parties agree on the broad outlines of a business contract at the conclusion of the mediation, a disinterested lawyer will not be able to conclude that the interests of each party can be completely represented. With respect to the terms on which there appear to be agreement, one or both parties may benefit from a disinterested lawyer's advice as to whether the agreement meets with the party's legitimate objectives, and what other procedural alternatives may be available to achieve more favorable terms. In the instant inquiry, neither party is represented by individual counsel.

Joint representation could lead to questions about the integrity of the mediation process. The lawyer's duty to provide each client with necessary and appropriate advice might require informing one party that they made a "bad deal" during the mediation process. It is untenable for a lawyer to counsel a client that an agreement the lawyer-mediator has assisted him to reach in mediation may not be in that client's best interests. If the ultimate agreement turns out to be one-sided and unfavorable to one party, the lawyer-mediator's role could be closely scrutinized.

Finally there is the risk that the proposed joint representation will fail or that the business contract will be the subject of future litigation between the two parties. In either event, the parties will have to retain new lawyers for the subsequent litigation.

For the reasons cited above, the lawyer-mediator in the facts presented may not jointly represent both parties by drafting their new business contract.

Regardless of the above analysis, the lawyer-mediator will be governed by the Supreme Court's Standards of Professional Conduct for Mediators, which may also prohibit the lawyer's representation of one or more of the parties following the mediation.

This opinion does not prohibit a lawyer-mediator from assisting the parties in preparing a written summary reflecting the parties' mutually acceptable understanding of the issues resolved in the mediation, as long as the lawyer-mediator does not represent to the pro se parties that the summary is being prepared as a legally enforceable document.

2012 Formal Ethics Opinion 3

July 20, 2012

Imposition of Finance Charges on Delinquent Client Account in Absence of Advance Agreement

Opinion rules that a lawyer may charge interest on a delinquent client account, without an advance agreement with the client, to the extent and in the manner permitted by law.

Inquiry:

A law firm would like to impose finance charges on delinquent client accounts pursuant to N.C. Gen. Stat. § 24-11. N.C. Gen. Stat. § 24-11(a) provides in part:

On the extension of credit under an open-end credit or similar plan...under which no service charge shall be imposed upon the consumer or debtor if the account is paid within 25 days from the billing date, there may be charged and collected interest, finance charges, or other fees at a rate in the aggregate not to exceed one and one-half percent (1 1/2%) per month on the unpaid balance of the previous month...

May the law firm impose finance charges pursuant to N.C. Gen. Stat. § 24-11 although a client has not agreed to such finance charges in advance?

Opinion:

Yes. 98 FEO 3 provides that if a lawyer wants to charge up to one and one-half percent per month interest on the unpaid portion of a client's balance from the previous month, the lawyer must comply with N.C. Gen. Stat. §24-11, conform his conduct as a creditor to the requirements of any other applicable consumer credit laws, and have an agreement to this effect with the client.

In contrast to 98 FEO 3, case law has interpreted N.C. Gen. Stat. § 24-11 to allow a service provider to impose a monthly finance charge upon an overdue open-credit account without an advance agreement so long as the service provider gives advance notice of the intention to impose the finance charges. *See, e.g., Hydes Ins. Agency Inc. v. Nolan*, 30 N.C. App. 503 (1976), 227 S.E.2d 169; *Inco v. Planters Oil Mill*, 63 N.C. App. 374, 304 S.E.2d 782 (1983); *Hedgecock Builders Supply Co. v. White*, 92 N.C. App. 535, 375 S.E.2d 164 (1989). The finance charges may only be collected on amounts that become due after initial notice by the creditor that it is going to collect the charges.

Case law further provides that such notification is sufficient if it occurs at the time the credit is initially extended, or if it occurs at any point prior to the

time when the amounts on which the finance charges are applied become due. *Hedgecock Builders Supply Co. v. White*, 92 N.C. App. 535, 375 S.E.2d 164 (1989); *Harrell Oil Co. v. Case*, 543 S.E.2d 522 (2001). N.C. Gen. Stat. §24-11 requires that a bill for the balance due on an account must be mailed to the customer at least 14 days prior to the date specified in the statement as being the date by which payment of the new balance must be made to avoid the imposition of any finance charge. N.C. Gen. Stat. §24-11(d).

The Ethics Committee has concluded that the notice required by law is sufficient to protect the interests of clients with delinquent accounts. Therefore, a lawyer may charge interest on unpaid balances for legal services to the extent and in the manner permitted by law. To the extent that the case law on the issue of notice is unclear, the Ethics Committee requires that any such notice must be in writing. *See* Rule 1.5 (recommending written fee agreements).

98 FEO 3 is overruled to the extent that it conflicts with this opinion.

2012 Formal Ethics Opinion 4

January 25, 2013

Screening Lateral Hire Who Formerly Represented Adverse Organization

Opinion rules that a lawyer who represented an organization while employed with another firm must be screened from participation in any matter, or any matter substantially related thereto, in which she previously represented the organization, and from any matter against the organization if she acquired confidential information of the organization that is relevant to the matter and which has not become generally known.

Inquiry #1:

Attorney J was employed with Law Firm H where she did workers' compensation defense work. During this time, Attorney J handled many such cases for Large Manufacturer and its insurer. In addition, Attorney J was privy to Large Manufacturer's workers' compensation policies and procedures, litigation strategies, and system for case preparation. Attorney J participated in workers' compensation strategy meetings with representatives of Large Manufacturer as well as with defense counsel from Law Firm Y, another firm providing workers' compensation defense representation to Large Manufacturer.

Attorney J resigned from Law Firm H to work for Law Firm S, a plaintiffs' personal injury firm that routinely handles workers' compensation cases against Large Manufacturer.

May Attorney J work at Law Firm S?

Opinion #1:

Yes, if Attorney J is properly screened from participation in (1) any matter in which Attorney J represented Large Manufacturer or any other adverse party; (2) any matter that is substantially related to a matter in which Attorney J represented Large Manufacturer; and (3) any matter in which a lawyer with Law Firm H represents or represented Large Manufacturer or any other adverse party and about which Attorney J acquired material confidential information while she was employed with Law Firm H. Written notice of the screen must be given to Large Manufacturer and any other affected former client.

Rule 1.9(a) prohibits a lawyer who has formerly represented a client in a matter from thereafter representing an adverse party in the same or a substantially related matter unless the former client gives informed consent. This provision of the rule prohibits Attorney J from representing any workers' compensation claimant on a claim for which she formerly defended Large Manufacturer and from representing any claimant on a claim that is substantially related to a matter upon which Attorney J formerly represented Large Manufacturer.

Comment [3] to Rule 1. 9 provides the following explanation of disqualification because of substantial relationship:

> [m]atters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter... Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

The substantial relationship test serves as a proxy for requiring a former client to disclose confidential information to demonstrate that the lawyer has a conflict of interest:

> A former client is not required to reveal the information learned by the lawyer to establish a substantial risk that the lawyer has information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Rule 1.9, cmt. [3].

Rule 1.9(b) prohibits a lawyer from representing anyone in the same or a substantially related matter in which a firm with which the lawyer was formerly associated had previously represented the adverse party and about whom the lawyer acquired confidential, material information, unless the former client gives informed consent. This provision of the rule prohibits Attorney J from representing a workers' compensation claimant in a matter in which one of the other lawyers at Law Firm H defended Large Manufacturer and about which Attorney J acquired confidential information that is material to the matter.

If Attorney J is disqualified under any provision of Rule 1.9, Rule 1.10(c) permits screening of Attorney J to avoid imputing her disqualification to the other lawyers in her new firm. The rule provides:

> [w]hen a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
>
> (1) the personally disqualified lawyer is timely screened from any participation in the matter; and
>
> (2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

Comment [4] to Rule 1.9, which relates to lawyers moving between firms, elucidates the policy considerations justifying the use of screens in this situation:

> [w]hen 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.

As long as a screen is implemented to isolate Attorney J from participation in these matters, the consent of Large Manufacturer to the representation of the claimants by a lawyer with Law Firm S is not required. *See* Rule 1.0(l) and 2003 FEO 8 (setting forth screening procedures).

Inquiry #2:

Large Manufacturer contends that any new workers' compensation claims against Large Manufacturer that Attorney J handles at Law Firm S will be substantially related to her prior representation of Large Manufacturer because Attorney J was privy to information about Large Manufacturer's defense of workers' compensation cases and this information will materially advance the interests of any client with a workers' compensation claim against Large Manufacturer.

May Attorney J represent claimants on new workers' compensation cases

against Large Manufacturer if the claimant did not seek representation from Law Firm S until after Attorney J's employment?

Opinion #2:

It depends. If a new matter is not the same or substantially related to Attorney J's prior representations of Large Manufacturer, she is not disqualified from the representation unless, during her prior employment with Law Firm H, she acquired confidential information of Large Manufacturer that is material or relevant to the representation of the new client, may be used to the disadvantage of Large Manufacturer, and is not generally known. Attorney J has a continuing duty under paragraphs (a) and (b) of Rule 1.9 to monitor any new matter involving Large Manufacturer to determine whether it is substantially related to her prior representation of her former client or she acquired confidential information from Large Manufacturer that is material to the matter. If so, she is personally disqualified and must be screened. *See* Opinion #1.

Even if the matters are not substantially related, however, Attorney J has a continuing duty under paragraph (c) of Rule 1.9 to ensure that the representation will not result in the misuse of confidential information of Large Manufacturer. Rule 1.9(c) prohibits a lawyer who has formerly represented a client in a matter or whose former firm has formerly represented a client in a matter from thereafter using confidential information relating to the representation to the disadvantage of the former client except as allowed by the Rules or when the information has become "generally known." A screen must be promptly implemented to isolate Attorney J from participation in any such case. *See* Opinion #1.

Comment [8] to Rule 1.9 explains the exception for information that is "generally known" as follows:

> ...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."

Similarly, the *Restatement (Third) of the Law Governing Lawyers* adopts an access approach to the determination of what information is "generally known":

> Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired if those facts are not themselves generally known.

Restatement (Third) of the Law Governing Lawyer, §59, cmt. d.

Attorney J's general knowledge of Large Manufacturer's workers' compensation case management, settlement, and litigation policies and practices may be sufficient in some matters to disqualify her. As observed in the discussion of "substantial relationship" in comment [3] to Rule 1.9, "[i]n the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation."

When evaluating whether a representation is substantially related to a prior representation of an organizational client or whether a lawyer acquired confidential information of a former organizational client that is substantially relevant to the representation of a client and may be used to the disadvantage of the former client, the following factors, among others, should be considered: the length of time that the lawyer represented the former client; the lawyer's role in representing the former client, including the lawyer's presence at strategy and decision-making sessions for the former client; the relative authority of the lawyer to make decisions about the representation of the former client; the passage of time since the lawyer represented the former client;[1] the extent to which there are material factual and legal similarities between former and present representations; and the substantial relevance of the former client's litigation policies, strategies, and practices to the new matter.

Inquiry #3:

May the other lawyers in Law Firm S represent claimants on new workers' compensation cases against Large Manufacturer?

Opinion #3:

Yes, if Attorney J is screened from those matters for which she acquired confidential information of Large Manufacturer that is disqualifying. *See* Opinion #2.

Inquiry #4:

Should Attorney J be screened from participation in workers' compensation cases against Large Manufacturer that were defended by lawyers from Law Firm Y while Attorney J was employed by Law Firm H?

Opinion #4:

Yes, if she acquired confidential information of Large Manufacturer that is disqualifying. *See* Opinion #2.

Inquiry #5:

Large Manufacturer has many long-term employees who over time may file multiple workers' compensation claims against Large Manufacturer. If Lawyer J or another lawyer with Law Firm H defended Large Manufacturer against a particular employee while Attorney J was employed by the firm, it is contended that there is a substantial risk that Attorney J will have specific confidential information of Large Manufacturer that would be relevant and useful to the representation of the particular claimant. For example, a manager's thoughts and opinions regarding the claimant could be information that would not be generally known and which might be used to the disadvantage of Large Manufacturer.

May Attorney J represent a claimant on a new workers' compensation case against Large Manufacturer if the claimant had previously filed a workers' compensation case against Large Manufacturer that was defended by a lawyer from Law Firm H while Attorney J was employed by the firm?

Opinion #5:

As stated in Opinion #2, Attorney J has a continuing duty to monitor any matter involving Large Manufacturer to be sure that the representation will not result in the use of confidential information of Large Manufacturer that has not become generally known to the disadvantage of Large Manufacturer in violation of Rule 1.9(c). A screen must be promptly implemented to isolate Attorney J from participation in any such matter.

Endnote

1. For an example of a timeframe deemed to be sufficient to manage post-employment conflicts of interest for federal government employees, see the Ethics in Government Act of 1978, 18 U.S.C.§207(c).

2012 Formal Ethics Opinion 5

October 26, 2012

Reviewing Employee's Email Communications with Counsel Using Employer's Business Email System

Opinion rules that a lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee's lawyer using the employer's business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages unless a court determines that the messages are not privileged.

Inquiry #1:

Attorney A represents Employer on various matters including legal disputes with its employees. Employer has a business email system that is available to all employees and that is used for transacting Employer's business. Employer's personnel policy states that Employer may monitor emails sent or received using Employer's email system, specifically including email sent or received on any employee's business email account.

Employee is in a legal dispute with Employer. Employee has used his business email account on Employer's email system to send emails to his lawyer and he has received emails from his lawyer on his business email account on Employer's email system.

Does a lawyer have a duty to avoid communicating with a client over the email system of the client's employer?

Opinion #1:

A lawyer must avoid communications with a client over an employer's email system if there is a risk that the employer will find and read the emails. The duty of confidentiality, set forth in Rule 1.6 of the Rules of Professional Conduct, requires a lawyer "to act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer…." Rule 1.6, cmt. [17]. Comment [18] to the rule adds that, when transmitting confidential client information, a lawyer must take "reasonable precautions to prevent the information from coming into the hands of unintended recipients."

Where a lawyer knows or reasonably should know that a client is using an employer's email system to communicate with the lawyer, the lawyer should seek to avoid the use of the employer's system regardless of whether the legal matter is unrelated to the client's employment and regardless of whether there is a legal argument that use of the system does not waive the attorney-client privilege. The duty of confidentiality is more expansive than the attorney-client privilege. It requires a lawyer to protect confidential information from disclosure to "any unintended recipient." The lawyer should explore with the client alternative methods of communicating including use of the employee's personal email system, telephone, and texting.

Inquiry #2:

May Attorney A tell Employer to review the records for its email system to retrieve any personal email messages sent or received by Employee on Employee's business email account?

Opinion #2:

Attorney A should research the law relating to the recovery, identification and production of employee email, including the law on attorney-client privilege, and advise Employer as to its rights and responsibilities under the law. *See* Rule 4.4(a)("In representing a client, a lawyer shall not...use methods of obtaining evidence that violate the legal rights of…a person.")

Inquiry #3:

Employer reviews the records of its email system and discovers email messages between Employee and his lawyer. The emails from the lawyer contain the statement "Attorney-Client Confidential Communication." Employer informs Attorney A that it has copies of these messages.

May Attorney A review the email messages?

Opinion #3:

In the absence of a Rule of Professional Conduct or prior ethics opinion on point, the Ethics Committee was guided by the case law on the application of the attorney-client privilege to communications between a client and his lawyer over an employer's email system. The attorney-client privilege is fundamental to the client-lawyer relationship and the trust that underpins that relationship. As such, the bar must protect the privilege and seek to limit incursions upon the privilege that are not warranted by law.

Case law from many jurisdictions,[1] including North Carolina,[2] indicates that whether the privilege applies to email exchanges between an employee and his lawyer that occurred over an employer's email system depends upon whether the employee had a reasonable expectation of privacy in the email communications. This in turn requires an investigation into a myriad of factors, including whether the employer has a clear, unambiguous policy regarding email usage and monitoring; whether that policy is effectively communicated to employees; whether the policy is adhered to by the employer; whether third parties have access to the employee's email account on the employer's system; when/where the communication occurred (at home or the office; during work or leisure hours); and whether the employee took affirmative steps to preserve the privacy of the communication. *See, e.g., In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 258 (S.D.N.Y. 2005)(in considering whether employee has objectively reasonable expectation of privacy in emails sent to the employee's attorney over the employer's computer systems, court should consider (1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or email, (3) do third parties have a right of access to the computer or emails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies).

Therefore, whether Attorney A may read the email messages recovered by Employer will depend upon an analysis of the case law and the factors set forth therein to determine whether Employee had a reasonable expectation of privacy or, lacking that, waived the privilege when communicating with his lawyer using Employer's email system. If Attorney A is able to conclude, confidently and in good faith, that the privilege was waived, he may read the emails and use them to represent his client. However, in deference to the bar's interest in protecting the attorney-client privilege, Attorney A should err on the side of recognizing the privilege whenever an analysis of the facts and case law is inconclusive. If a matter is in litigation, Attorney A may seek the court's determination of the waiver issue.

Inquiry #4:

Does Attorney A have to notify Employee's lawyer that Employer has copies of the email messages?

Opinion #4:

No. Rule 4.4(b) is not applicable in this situation. The rule states that "[a] lawyer who receives a writing relating to the representation of the lawyer's client and knows or reasonably should know that the writing was inadvertently sent shall promptly notify the sender." Employee and his lawyer sent the email messages knowingly using Employer's email system. Therefore, the email was not "inadvertently sent" and no duty to notify arises under this rule. *See* ABA Formal Opinion 11-460 (2011).

2009 FEO 1 (2010) can be distinguished. The opinion rules that a lawyer must notify the sender upon finding confidential information embedded in metadata transmitted in an electronic communication. The transmission of metadata, which is not disclosed on the face of an electronic document, is held to be inadvertent on the part of the sending lawyer, thus triggering a duty to notify for the receiving lawyer under Rule 4.4(b). However, in the instant situation, the substance of the communications between the employee and his lawyer are disclosed on the face of the emails and use of the employer's system was intentional. Therefore, the emails were not "inadvertently sent."

In the absence of a duty to notify, the fact that Employer has copies of the email messages is confidential client information that Attorney A may not disclose unless one of the exceptions to the duty of confidentiality applies or the client gives informed consent to disclosure. Rule 1.6(a). In the current situation, Rule 1.6(b)(1) only allows the lawyer to disclose confidential client information to comply with the law, a court order, or the discovery requirements under the Rules of Civil Procedure.

The ABA Standing Committee on Ethics and Professional Responsibility (the Standing Committee) addressed a similar inquiry in ABA Formal Opinion 11-460 (2011), and found that notification is only allowed with client consent in the absence of a law authorizing disclosure. As observed by the Standing Committee,

> [I]f no law can reasonably be read as establishing a reporting obligation, then the decision whether to give notice must be made by the employer-client. Even when there is no clear notification obligation, it often will be in the employer-client's best interest to give notice and obtain a judicial ruling as to the admissibility of the employee's attorney-client communications before attempting to use them and, if possible, before the employer's lawyer reviews them. This course minimizes the risk of disqualification or other sanction if the court ultimately concludes that the opposing party's communications with counsel are privileged and inadmissible. The employer's lawyer must explain these and other implications of disclosure, and the available alternatives, as necessary to enable the employer to make an informed decision.

Inquiry #5:

Employee has a personal email account with a commercial email service (such as Gmail, Hotmail, or Road Runner) that is not a part of Employer's business email system. However, the personal email account can be accessed via

Employee's office computer. The personal email account is password protected. Employer can access the email messages on this personal email account by changing the password to the account.

May Attorney A advise Employer to change the password to access Employee's email messages on his personal email account?

Opinion #5:

No. To advise a client to change the password to a personal email account violates Rule 1.2(d), which prohibits a lawyer from counseling a client to engage in criminal or fraudulent conduct, and Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Again, obtaining a judicial ruling allowing Employer to access the email messages would authorize the Employer to proceed and avoid any professional misconduct by Attorney A.

Inquiry #6:

On its own initiative, Employer changes the password on Employee's personal email account and gains access to emails on the account including email messages between Employee and his lawyer.

May Attorney A review the email messages? Should Attorney A notify Employee's lawyer that Employer has copies of the email messages?

Opinion #6:

No. Attorney A may not review the email messages unless allowed to do so by court order. To hold otherwise would be to permit a lawyer to assist a client in fraudulent conduct in violation of Rule 1.2(d) and Rule 8.4(c).

Attorney A may not notify Employee's lawyer that Employer has copies of the email messages unless he has the informed consent of Employer or if Attorney A believes that notification is reasonably necessary to comply with law or a court order. Rule 1.6(a) and (b)(1). As noted above, it may be in Employer's best interest to obtain a judicial ruling on the admissibility of the email messages and this should be explained to Employer to obtain consent to disclose.

Inquiry #7:

Lawyers who are employed by government agencies that are subject to public records laws frequently are required to review emails of government employees to ascertain whether the emails are public records and must be produced pursuant to a public records request. Because all emails are subject to review to comply with the public records law, emails between a government employee and his lawyer would be subject to the same review. May a government lawyer participate in such a review?

Opinion #7:

Yes. The review is required by law and it is in the best interests of the government and the public that the review be performed by lawyers. However, if emails between a government employee and his lawyer are evaluated and held not to be public records, the government lawyer must further determine whether the attorney-client privilege for the communications was waived by the employee by the use of the government's email system. *See* Opinion #2 above. If the lawyer determines that the privilege was not waived or the lawyer cannot confidently and in good faith make that determination, the lawyer should recognize the privilege and take steps to protect the communications from further disclosure or distribution unless authorized by court order.

Endnotes

1. The Ethics Committee is grateful to the North Carolina Bar Association Labor and Employment Law Section Council for the following list of relevant cases: *Convertino v. US DOJ*, 674 F. Supp. 2d 97 (D.D.C. 2009); *Curto v. Medical World Comms. Inc.,* 2006 US Dist. LEXIS 29387 (EDNY 2006); *Curto v. Medical World Comms. Inc.,* 2006 US Dist. LEXIS 29387 (EDNY 2006); *Garrity v. John Hancock Mut. Life Ins. Co.*, No. 00-12143-RWZ, 2002 US Dist. LEXIS 8343 (D. Mass. May 7, 2002); *Haynes v. Office of the Attorney General*, 298 F.Supp.2d 1154 (D. Kan. 2003); *Holmes v. Petrovich Dev. Co., LLC*, 191 Cal. App.4th 1047, 119 Cal.Rptr.3d 878 (2011); *Kaufman v. Sungard Inv. Sys.*, No. 05-CV-1236, 2006 US Dist. LEXIS 28149 (DNJ 2006) (unpub.); *Leor Exploration & Prod'n LLC v. Aguiar*, No. 09-60136-CIV, 2009 US Dist. LEXIS 87323 (SD Fla. Sept. 23, 2009); *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001); *Muick v. Glenayre Elecs.*, 280 F.3d 741 (7th Cir. 2002); *Restuccia v. Burk Tech.*, 5 Mass.L.Rep. 712, 1996 Mass. Super. LEXIS 367 (Mass. Super. Ct. 1996); *Scott v. Beth Israel Medical Center, Inc.*, 17 Misc.3d 934, 847 N.Y.S.2d 436 (NY Sup. Ct. 2007; *Sims v. Lakeside School*, No. CO6-1412RSM, 2007 US Dist. LEXIS 69568 (Sept. 20, 2007); *Hygeson v. US Bancorp Equip. Fin'g, Inc.*, No. CV-03-467-ST, 2004 US Dist. LEXIS 18863 (D.Or. Sept. 15, 2004); *United States v. Simons*, 205 F.3d 392 (4th Cir. 2000).
2. *Mason v. ILS Techs., LLC*, No. 3:04-CV-139, 2008 US Dist. LEXIS 28905 (W.D.N.C. 2008) (attorney-client privilege was not waived where the employee testified that he did not know of the employer's policy on monitoring of personal emails transmitted on the employer's email system and employer failed to prove otherwise).

2012 Formal Ethics Opinion 6

October 26, 2012

Use of Leased Time-Shared Office Address or Post Office Address on Letterhead and Advertising

Opinion rules that a law firm may use a leased time-shared office address or a post office address to satisfy the address disclosure requirement for advertising communications in Rule 7.2(c) so long as certain requirements are met.

Inquiry #1:

ABC Company offers to lease office space to law firms. The office lease is a time-sharing arrangement in which lawyers use meeting rooms by appointment. Depending upon the lease, ABC Company may also provide mail forwarding and personalized call answering. ABC Company advertises that it provides businesses with "prestigious addresses" that can be utilized on business cards and stationary.

May a law firm enter into a lease with ABC Company and use the leased office address as the law firm's address on letterhead and advertising?

Opinion #1:

Yes, subject to certain requirements.

Rule 7.2(c) provides that a lawyer's advertisements must include the name and office address of at least one lawyer or law firm responsible for its content. Rule 7.1(a) provides that a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. "It is a 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." RPC 217. In RPC 217, the Ethics Committee concluded that listing what appears to be a local telephone number in an advertisement in a particular community, without including an explanation that the number is not a local telephone number and that there is no law office in that community, is misleading as to the actual location of the law firm.

Similarly, it would be misleading for a law firm to use a leased time-shared office address on letterhead or in advertising to infer that the law firm has an office or a lawyer located in a community when the law firm's only connection with the community is the lease arrangement that allows a lawyer to use meeting rooms in that community on an "as needed" basis.

However, the use of a leased time-shared office address in communications may not be misleading depending upon the law firm's connection to the community or the disclosures included in the communication. Whether such a communication is misleading must be determined on a case-by-case basis.

A lawyer who does not wish to meet clients at his home, or to list his home address on letterhead and advertisements, does not mislead the public by using a time-shared leased office address on letterhead and advertisements when the lawyer actually lives in the community associated with the leased address and uses the leased office to meet with clients on a regular basis.

In addition, it is not misleading for a law firm to list a time-shared leased office address on letterhead or in advertising so long as the communication contains an explanation that accurately reflects the law firm's presence at the address (i.e.,"by appointment only").

Inquiry #2:

Lawyer operates a "virtual law firm" from an office located in her home. She communicates with her clients online and by the telephone. She does not meet with clients in person except on rare occasions at locations outside of her home. Rule 7.2(c) of the Rules of Professional Conduct requires a lawyer to include "the name and office address of at least one lawyer or law firm" on every advertisement. Lawyer would like to advertise her virtual law firm, but she does not want to include her home address in the advertisements because she is concerned about her safety and privacy. She is considering using a leased office address in her community, as described in Inquiry #1, to circumvent this problem, but would prefer not to incur this expense.

May Lawyer list her post office address, which is the address listed for her on the membership records of the North Carolina State Bar, on advertising to

comply with Rule 7.2(c)?

Opinion #2:

Previously, the Ethics Committee interpreted the "office address" requirement in Rule 7.2(c) to mean a street address. However, requiring a street address in all legal advertising has proved problematic, particularly as the number of lawyers working from home offices or operating virtual law practices has increased. The requirement is no longer practical or necessary to avoid misleading the public or to insure that a lawyer responsible for the advertisement can be located by the State Bar. Moreover, the membership department of the North Carolina State Bar accepts post office addresses as a lawyer's address.

Therefore, a post office address qualifies as an "office address" for purposes of Rule 7.2(c) provided the post office address is on file as the lawyer's current mailing address in the lawyer's membership record with the North Carolina State Bar.

2012 Formal Ethics Opinion 7

October 25, 2013

Copying Represented Persons on Electronic Communications

Opinion provides that consent from the lawyer for a represented person must be obtained before copying that person on electronic communications; however, the consent required by Rule 4.2 may be implied by the facts and circumstances surrounding the communication.

Inquiry #1:

When Lawyer A sends an electronic communication, such as an email, to opposing counsel, Lawyer B, may Lawyer A "copy" Lawyer B's client on the electronic communication?

Opinion #1:

No, unless Lawyer B has consented to the communication. Rule 4.2(a), often called the "no contact rule," provides that, 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 to do so by law or a court order." Copying the opposing party on a communication—whether electronic communication or conventional mail—to opposing counsel is a communication under Rule 4.2(a) and prohibited unless there is consent or other legal authorization.

Inquiry #2:

Would the answer change if Lawyer A is replying to an electronic communication from Lawyer B in which Lawyer B copied her own client? Does the fact that Lawyer B copied her own client on the electronic communication constitute implied consent to a "reply to all" responsive electronic communication from Lawyer A?

Opinion #2:

The fact that Lawyer B copies her own client on the electronic communication to which Lawyer A is replying, standing alone, does not permit Lawyer A to "reply all." While Rule 4.2(a) does not specifically provide that the consent of the other lawyer must be "expressly" given, the prudent practice is to obtain express consent. Whether consent may be "implied" by the circumstances requires an evaluation of all of the facts and circumstances surrounding the representation, the legal issues involved, and the prior communications between the lawyers and their clients.

The *Restatement of the Law Governing Lawyers* provides that an opposing lawyer's consent to communication with his client "may be implied rather than express." *Rest. (Third) of the Law Governing Lawyers* § 99 cmt. J. The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics ("New York Committee") and the California Standing Committee on Professional Responsibility & Conduct ("California Committee") have examined this issue. Both committees concluded that, while consent to "reply to all" communications may sometimes be inferred from the facts and circumstances presented, the prudent practice is to secure express consent from opposing counsel. Ass'n of the Bar of the City of NY Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-1; CA Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2011-181.

There are scenarios where the necessary consent may be implied by the totality of the facts and circumstances. However, the fact that a lawyer copies his own client on an electronic communication does not, in and of itself, constitute implied consent to a "reply to all" responsive electronic communication. Other factors need to be considered before a lawyer can reasonably rely on implied consent. These factors include, but are not limited to: (1) how the communication is initiated; (2) the nature of the matter (transactional or adversarial); (3) the prior course of conduct of the lawyers and their clients; and (4) the extent to which the communication might interfere with the client-lawyer relationship. These factors need to be considered in conjunction with the purposes behind Rule 4.2. Comment [1] to Rule 4.2 provides:

> [Rule 4.2] contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation.

After considering each of these factors, and the intent of Rule 4.2, Lawyer A must make a good faith determination whether Lawyer B has manifested implied consent to a "reply to all" responsive electronic communication from Lawyer A.

Caution should especially be taken if Lawyer B's *client* responds to a "group" electronic communication by using the "reply to all" function. Lawyer A may need to reevaluate the above factors before responding further. Under no circumstances may Lawyer A respond solely to Lawyer B's client.

Because of the ease with which "reply to all" electronic communications may be sent, the potential for interference with the attorney-client relationship, and the potential for inadvertent waiver by the client of the client-lawyer privilege, it is advisable that a lawyer sending an electronic communication, who wants to ensure that his client does not receive any electronic communication responses from the receiving lawyer or parties, should forward the electronic communication separately to his client, blind copy the client on the original electronic communication, or expressly state to the recipients of the electronic communication, including opposing counsel, that consent is not granted to copy the client on a responsive electronic communication.

To avoid a possible incorrect assumption of implied consent, the prudent practice is for all counsel involved in a matter to establish at the outset a procedure for determining whether it is acceptable to "reply to all" when a represented party is copied on an electronic communication.

2012 Formal Ethics Opinion 8

October 26, 2012

Lawyer's Acceptance of Recommendations on Professional Networking Website

Opinion rules that a lawyer may ask a former client for a recommendation to be posted on the lawyer's profile on a professional networking website and may accept a recommendation if certain conditions are met.

Inquiry #1:

Lawyer has a profile listing on a professional social networking website, such as LinkedIn. The networking website has a feature that allows members to write recommendations for each other. A member of the networking website may request a recommendation from another member, or a member may send a recommendation to another member without being asked. In either event, the member receiving the recommendation has the opportunity to review the recommendation and decide whether to "accept" the recommendation. For a recommendation to be published on the member's online profile, it has to "accepted."

May a lawyer with a professional profile on the networking website accept a recommendation from a current or former client?

Opinion #1:

Yes. When a lawyer has control over the content of postings on his or her profile on the networking website, the lawyer may accept a recommendation from a current or former client subject to certain conditions. The lawyer may only "accept" recommendations that comply with the Rules of Professional Conduct that pertain to advertising. Rule 7.1 provides that a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication that is likely to create an unjustified expectation

about results the lawyer can achieve is misleading. Rule 7.1(a)(2).

A recommendation posted on the networking website is essentially a client testimonial. Depending upon content, a client testimonial has the potential to create unjustified expectations. The Ethics Committee recently established guidelines under which a lawyer may use certain client testimonials in advertising. *See* 2012 FEO 1. A lawyer may only accept a recommendation from a current or former client if the recommendation complies with 2012 FEO 1.

Pursuant to 2012 FEO 1, a lawyer may accept a client recommendation that is limited to a discussion of the characteristics of a lawyer's client service. If the recommendation includes general references to the results the lawyer obtained for the client, the lawyer may accept the recommendation if it can be accompanied by an appropriate disclaimer. The lawyer may not accept a recommendation that refers to a settlement or verdict of a specific dollar amount. In addition, the lawyer must review the recommendation for any confidential information that the lawyer believes should not be published online. Therefore, it may be necessary for the lawyer to ask the client to add disclaiming language or to delete certain content.

Inquiry #2:

May a lawyer with a professional profile on the networking website send a recommendation request to a current or former client?

Opinion #2:

Yes, subject to certain conditions. A lawyer may ask a current or former client for a recommendation that consists of comments indicating the client's level of satisfaction with certain aspects of the lawyer-client relationship. *See* 2007 FEO 4.

The lawyer's duty of confidentiality to the client requires that the lawyer advise the client, at the time of the request, that the recommendation may be published on the member's online profile, and the lawyer must obtain the client's consent to publication.

The lawyer's duties as to a recommendation received pursuant to the request are set out in Opinion #1 above.

2012 Formal Ethics Opinion 9

January 25, 2013

Identifying the Roles and Responsibilities of a Lawyer Appointed to Represent a Child or the Child's Best Interests in a Contested Custody or Visitation Case

Opinion holds that a lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

Introduction:

This opinion is limited to an examination of the role of a lawyer appointed to represent a child in a contested custody or visitation proceeding. It does not examine other contexts in which a lawyer may be appointed to represent a child[1] such as when a child is alleged to be abused or neglected or is a party in civil litigation. To avoid confusion, the label "guardian ad litem" will not be used in this opinion when referring to a lawyer appointed to represent a child in a contested custody or visitation proceeding although a court may choose to apply this label. This opinion does not address or seek to question the authority of a court to appoint a lawyer to represent a child in a contested custody proceeding. It seeks only to assist the lawyer and the court to clarify the responsibilities of a lawyer serving in such a role.

In a contested custody or visitation proceeding—especially a "high conflict" proceeding—the court will, on occasion, appoint a lawyer to represent the child or children whose custody is at stake. Although the authority for such appointments is not clear[2] and may reside with the court's inherent authority to administer justice, such appointments are becoming more common as seen in recent inquiries to the Ethics Committee.[3] The appointment presents a number of difficult issues of professional responsibility for the appointed lawyer. These issues cannot be resolved unless the lawyer's role is clearly designated and understood by all of the parties to the proceeding, especially the appointed lawyer and the court.

This opinion identifies the possible roles that a lawyer appointed in a contested custody case may play and recommends that the order of appointment specify the role and responsibilities of the appointed lawyer. The opinion also addresses some specific issues of professional responsibility that arise from those roles. Although there are limited references to the Rules of Professional Conduct in this opinion, identification of the client and of the lawyer's role relative to that client is fundamental to the application of the Rules.

Inquiry #1:

What are the roles for a lawyer who is appointed to represent a child in a contested custody or visitation proceeding?

Opinion #1:

Two distinct roles for a lawyer for a child are recognized: (1) "Child's Attorney" and (2) "Best Interests Attorney."[4] As described in the *American Bar Association, Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases* (2003)("ABA Standards"), the Child's Attorney "provides independent legal representation in a traditional attorney-client relationship, giving the child a strong voice in the proceedings"; the Best Interests Attorney, on the other hand, "independently investigates, assesses, and advocates the child's best interests as a lawyer."[5] The former role is "client directed" in which the lawyer serves as the traditional advocate for the objectives articulated by the child and owes the child "the same duties of undivided loyalty, confidentiality, and competent representation as are due to an adult client."[6] The latter role is "advocate directed,"[7] where the advocate's judgment is substituted for that of the child with "the purpose of protecting a child's best interests without being bound by the child's directives or objectives."[8]

Because the differences in the two roles are fundamental—particularly with regard to the lawyer's relationship to the child and responsibilities to the court—a lawyer who is appointed to represent a child in a contested custody proceeding must be sure that she knows which role she has been appointed to perform.

There is another possible role for a lawyer to play. The court may appoint a nonlawyer or a lawyer to be an advisor ("court-appointed advisor") to assist the court by investigating and reporting information to the court or by providing the court with an opinion on some matter.[9] The lawyer in such a role is not acting as an advocate or serving as counsel for either the child or the child's interests. As an advisor to the court, the lawyer may become a witness who is subject to examination by the parties. The lawyer appointed to serve in this function should also take steps to insure that the order of appointment specifies this role and its duties.

Inquiry #2:

What are the professional responsibilities of a Child's Attorney?

Opinion #2:

A Child's Attorney serves in the traditional role of counsel for the child and must fulfill that role in accordance with the Rules of Professional Conduct. The lawyer must ascertain the child's objectives for the representation and then seek to obtain those objectives within the bounds of the Rules of Professional Conduct. Rule 1.2. The lawyer owes the duty of confidentiality to the child and her communications with the child are protected by the attorney-client privilege. *See* Rule 1.6. If the lawyer is appointed to represent more than one child of the dissolving marriage, the lawyer must monitor the representation for potential conflicts of interest between the children's differing objectives for the representation. *See* Rule 1.7. If a conflict evolves that cannot be managed, the lawyer may have to decline the representation or withdraw.[10]

A lawyer who is appointed a Child's Attorney must determine whether the child is sufficiently mature and articulate to participate meaningfully in the client-lawyer relationship. As permitted by Rule 1.14(a), when a client's capacity to make adequately considered decisions is diminished "because of minority," the lawyer "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." However, if a child is too young to articulate his or her objectives for the representation or to make decisions about the representation, the lawyer should recommend to the court that the lawyer be appointed to serve as a Best Interests Attorney rather than a Child's Attorney.

Inquiry #3:

What are the professional responsibilities of a Best Interests Attorney?

Opinion #3:

A Best Interests Attorney is bound by the Rules of Professional Conduct "except as dictated by the absence of a traditional attorney-client relationship with the child and the particular requirements of [her] appointed tasks."[11] The

lawyer must determine the child's best interests based upon objective criteria "as set forth in the law related to the purposes of the proceedings."[12] Any objectives or preferences expressed by the child are but one factor to be taken into consideration when determining the best interests of the child.

The child's communications with the Best Interests Attorney are subject to Rule 1.6, the confidentiality rule, except that "the lawyer may use the child's confidences for the purposes of the representation without disclosing them."[13] This means that the lawyer may use confidential information received from a child to develop other evidence. The example provided in the *ABA Standards* is of the child who discloses a parent's drug use to the Best Interests Attorney. The lawyer may not disclose the source of the information but she may investigate and present evidence of the drug use.[14]

Representation of multiple children does not create a conflict of interest for a Best Interests Attorney because the lawyer is not bound, as in a traditional client-lawyer relationship, to advocate for a client's objectives. As explained in the *ABA Standards*, "[a] Best Interests Attorney in such a case should report the relevant views of all the children...and advocate the children's best interests..."[15]

Inquiry #4:

What are the professional responsibilities of a court-appointed advisor?

Opinion #4:

The court-appointed advisor is not acting as a lawyer; he is not an advocate and does not represent a client or a particular interest. Rather, the advisor serves as an investigator for the court and owes the court the duty to investigate thoroughly and impartially and to report back to the court.

As an investigator who is responsible only to the court, the lawyer has no duty of confidentiality or loyalty to any of the parties or witnesses. Moreover, it is unlikely that the attorney-client privilege will attach to the lawyer/advisor's communications with parties or witnesses. When a lawyer is serving in this role, he must disclose the capacity in which he is acting to anyone who may misunderstand his role. *See, e.g.*, Rule 4.3(b). It is not a conflict of interest for a lawyer to serve as a court-appointed advisor if he does not represent any person appearing in the matter and he does not mislead others about his role. In particular, the lawyer must explain that communications will not be held in confidence and may be reported to the court. Since the lawyer is not representing a client in the matter, the prohibition on contact with a represented person in Rule 4.2 does not apply to his communications with represented persons. However, it is recommended that the lawyer/advisor inform the other lawyer prior to speaking to his client.

Non-lawyers, such as social workers and psychologists, who are more appropriately trained to investigate and offer opinions on issues of child welfare, may be better suited to serve in the role of court-appointed advisor. At the time of appointment, a lawyer should consider whether a nonlawyer would fulfill the role better than the lawyer and, if so, the lawyer should express this opinion to the court.

Inquiry #5:

How does an appointed lawyer know which role he is being appointed to perform?

Opinion #5:

Ideally, the order of appointment will specify which role the lawyer is to perform.[16] However, because confusion about the roles is not uncommon, a lawyer who is asked to serve must help the court to articulate the lawyer's role. Standard 1.3 of the *Standards for Attorneys for Children in Custody or Visitation Proceedings of the American Academy of Matrimonial Lawyers* ("*AAML Standards*") is instructive:

> Whenever a court assigns counsel for a child, the court should specify in writing the scope of the assignment and the tasks expected, preferably in the form of an order. In the event that the court does not specify these tasks at the time of appointment, the counsel's first action should be to seek clarification from the court of the tasks expected of him or her.[17]

Similarly, the ABA Standards state:

> The lawyer should accept an appointment only with full understanding of the issues and the functions to be performed. If the appointed lawyer considers parts of the appointment order confusing or incompatible with his or her ethical duties, the lawyer should (1) decline the appointment, (2) inform the court of the conflict and ask the court to clarify or change the terms of the order, or (3) both.[18]

If the order fails to identify the role and the lawyer's accompanying responsibilities, the lawyer should first request clarification. In particular, the lawyer should ask that the order articulate whether the lawyer is to be a Child's Attorney, a Best Interests Attorney (as those roles are defined above), or a court-appointed advisor. If the court indicates that the lawyer is to be a Best Interests Attorney, the lawyer should request that the order specify the duties that accompany this role. If the court indicates that the lawyer is a Child's Attorney, the lawyer should confirm that the child is capable of making decisions about important matters sufficient to establish the goals of the representation.[19] If the court indicates that the lawyer is a court-appointed advisor, the lawyer should consider whether a nonlawyer would better fulfill this role and, if so, make this recommendation to the court.

To assist with the clarification of the scope of the assignment and the tasks expected, the following questions should be answered at the time of appointment (the list is not exhaustive):

Identifying the Role

• Am I being appointed to provide independent legal representation to the child in a traditional client-lawyer relationship (the Child's Attorney role)?

- or to investigate, assess, and advocate for the child's best interests (the Best Interests Attorney role)?

- or to assist the court by investigating and reporting information to the court, or by providing the court with an opinion on some matter (the court-appointed advisor)?

Child's Attorney's Assignment and Tasks

• If appointed to be the Child's Attorney, has the child's capacity to direct the representation been established?

• If appointed to be the Child's Attorney, does the court agree

- the child will be my client;

- I will owe the child the professional responsibilities owed to any client including the protection of confidences from unauthorized disclosure and the preservation of the attorney-client privilege; and

- in accordance with Rule 3.7, it would be inappropriate in most instances for me to serve as both advocate and witness?

• If appointed to be the Child's Attorney, will I be permitted/expected to do any of the following: make an opening or closing statement, introduce evidence including witnesses, examine witnesses for any party, subpoena records or witnesses, or participate on behalf of the child/client in consent agreements between the parties?

Best Interests Attorney's Assignment and Tasks

• If appointed to be the Best Interests Attorney, what duty do I have to investigate and report to the court?

• If appointed to be the Best Interests Attorney, will my communications with the child be confidential but I may use the confidential information to develop other evidence?

• If appointed to be the Best Interests Attorney, does the court agree that, in accordance with Rule 3.7, it would be inappropriate in most instances for me to serve as both advocate (for the child's best interests) and witness?

- If the court expects me to testify, does the court understand that this may subject the child's confidences to disclosure and may jeopardize my ability to gain the trust of the child and of witnesses necessary to my investigation?

• If appointed to be the Best Interests Attorney, will I be permitted/expected to do any of the following: make an opening or closing statement, introduce evidence including witnesses, examine witnesses for any party, subpoena records or witnesses, or participate in consent agreements between the parties?

Court Appointed Advisor's Assignment and Tasks

• If appointed to assist the court by investigating and reporting information to the court or by providing the court with an opinion on some matter, does the court agree that I will not be serving as a lawyer and I will owe no duties of representation to any party or other person involved in the proceeding?

• If appointed to be an advisor to the court, does the court agree that I may communicate with represented persons without the consent of their lawyers as would be otherwise required by Rule 4.2?

• If appointed to be an advisor to the court, what tasks will I perform?

- Will I submit an oral or a written report to the court?

- Will I limit my role to investigator and report only my factual findings,

or will I provide the court with an opinion on some matter?
- Will I be a witness in the proceeding subject to testimonial examination?

Because of the potential for the roles to be confused, regardless of the specificity of the order, the judge should be reminded at the beginning of each hearing of the role of the appointed lawyer.[20]

Inquiry #6:

Should a lawyer appointed as the Child's Attorney or a Best Interests Attorney agree to investigate and present evidence? To testify or present a written or oral report or recommendation to the court?

Opinion #6:

Regardless of the role, the appointed lawyer, like any lawyer advocating a position, should conduct independent discovery and investigation of the facts.[21] At hearings, it is preferable that the lawyer have the authority to present and cross-examine witnesses and offer exhibits.[22] However, the standards of numerous organizations agree that "[n]either kind of lawyer is a witness."[23] As noted in the *ABA Standards*, "[a] court seeking expert or lay opinion testimony, written reports, or other non-traditional services should appoint an individual for that purpose, and make clear that the person is not serving as a lawyer, and is not a party."[24] The *AAML Standards* are even more adamant on this issue:

> Courts may choose to appoint someone to investigate and report information to the court. When they do so, these professionals should be called "court-appointed advisors." Courts may choose to appoint someone in an expert capacity to provide the court with an opinion about some contested matter. When they do so, these professionals should be called "experts." Courts may choose to appoint someone to protect children from the harms associated with the contested litigation. When they do so, these professionals should be called "protectors." There may be other reasons courts may choose to add a professional to the case.
>
> Language matters, however. We believe that assigning any of these tasks to someone who is called counsel is unnecessary, needlessly confusing, and misleading. Whatever these professionals are called, and whether or not they happen to be members of the bar, these professionals should never be mistaken for being counsel for the child or serving in any kind of attorney role.[25]

The potential harm from testifying as a witness is evident. If the Child's Attorney cannot assure her client that their communications are confidential and the Best Interests Attorney cannot assure the child or other witnesses of the same, the ability of a lawyer to perform in either role will be undermined.

At the time of the appointment, unless the lawyer is specifically appointed as an advisor to the court with no other role, the lawyer should recommend to the court that she not make a written or oral report to the court or testify as to her findings, particularly if the lawyer is appointed as the Child's Attorney. If the court insists that the lawyer perform these functions, the lawyer may decline the appointment.

Conclusion:

Serving as a Child's Attorney or a Best Interests Attorney in a contested custody or visitation case requires special skills, training, and experience. So much so that the AAML Standard 1.2 requires, "[t]o be eligible for appointment as counsel for a child in a custody or visitation proceeding, a person should be specially trained and designated by the local jurisdiction as competent to perform the assignment" and the comment adds, "[a]t a minimum, counsel for children must know how to communicate effectively with children and understand children's mental and emotional states at different ages and stages of their lives."[26]

This opinion does not attempt to address all of the professional responsibilities or obligations of a lawyer appointed as a Child's Attorney, a Best Interests Attorney, or a court-appointed advisor. A lawyer who is asked to serve in any of these roles should understand the requirements of each role. Familiarity with the *ABA Standards* and the *AAML Standards* is recommended.

Endnotes

1. For example, a lawyer may be appointed, pursuant to N.C. Gen. Stat. §7B-601(a), to be an attorney-guardian ad litem for a child who is alleged to be abused, neglected, or dependent; a lawyer may be appointed guardian ad litem for a minor who is a party in civil litigation pursuant to Rule 17 of the NC Rules of Civil Procedure (*see infra* note 2); or a lawyer may be appointed for a minor child in a domestic violence action pursuant to N.C. Gen. Stat. §50B-3(a1)(3)h.
2. The NC Rules of Civil Procedure authorize the appointment of a guardian ad litem (GAL) to appear on behalf of a minor plaintiff or defendant in civil litigation. N.C. R. Civ. P. 17(b)(1) and (2). The General Rules of Practice for the Superior and District Courts provide for the appointment of a lawyer to serve as GAL for a minor who is the victim or potential witness in a criminal proceeding. N.C. Gen. R. Prac. Super. & Dist. Ct. 7.1. Neither rule authorizes the appointment of a lawyer or a GAL for a child who is a non-party to a civil proceeding.
3. The increasing call for the appointment of lawyers to represent the children in custody cases is also noted in *Representing Children: Standards for Attorneys for Children in Custody or Visitation Proceedings of the American Academy of Matrimonial Lawyer*, p. 2, (2011) [hereinafter "AAML Standards"].
4. The terms are found in *American Bar Association, Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases* (2003)[hereinafter "*ABA Standards*"]. However, the distinction is recognized in other writings. *See AAML Standards*; *National Association of Counsel for Children Recommendations for Representation of Children in Abuse and Neglect Cases* (2001)[hereinafter "*NACC Recommendations*"]; *New York State Bar Assn. Committee on Children and the Law: Standards for Attorneys Representing Children in Custody, Visitation and Guardianship Proceedings* (2008)[hereinafter "*NYSBA Standards*"].
5. *ABA Standards, supra* note 3, at 1.
6. *ABA Standards, supra* note 3, at 2.
7. *NACC Recommendations, supra* note 3, at 4.
8. *ABA Standards, supra* note 3, at 2.
9. *AAML Standards, supra* note 2, at 26-27.
10. *See ABA Standards, supra* note 3, at 9.
11. *ABA Standards, supra* note 3, at 15.
12. *ABA Standards, supra* note 3, at 17.
13. *Id.*
14. *Id.*
15. *Id.*
16. The lawyer should urge the court to avoid the use of the designation "guardian ad litem" which adds to the confusion about the lawyer's role because of its affiliation with Rule 17 and abuse/neglect appointments. *See ABA Standards, supra* note 3, at 2 ("The role of 'guardian ad litem' has become too muddled through different usages in different states, with varying connotations.")
17. *AAML Standards, supra* note 2, at 14.
18. *ABA Standards, supra* note 3, at 3.
19. Standard 2.1 of the *AAML Standards* states: "Court-appointed counsel must decide, on a case-by-case basis, whether their child clients possess the capacity to direct their representation. In the event that the court seeks to appoint counsel for children who lack capacity to direct their representation, the lawyer should strive to refuse the appointment." *AAML Standards, supra* note 2 at15.
20. *ABA Standards, supra* note 3, at 7.
21. *ABA Standards, supra* note 3, at 5.
22. *Id.* at 6.
23. *Id.* at 2; *see generally*, Standard 3 of the *AAML Standards, supra* note 2 at 25; *NACC Recommendations, supra* note 3 at 10.
24. *ABA Standards, supra* note 3, at 2-3.
25. *AAML Standards, supra* note 2, at 26-27.
26. *AAML Standards, supra* note 2 at 13.

2012 Formal Ethics Opinion 10

January 25, 2013

Participation as a "Network" Lawyer for Company Providing Litigation or Administrative Support Services

Opinion rules a lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

Introduction:

This opinion explores whether a lawyer may participate as a "network" lawyer for a company, usually offering its services via the Internet, that provides litigation or administrative support services to clients with a particular type of legal/business problem.

For example, ABC Services offers to assist mortgage holders and mortgage loan servicers (ABC clients) with the nationwide management of "mortgage

defaults." ABC maintains a national network of lawyers who have entered into a "network agreement" with ABC to use administrative and litigation support services provided by ABC, including default management application software, and to accept referrals from ABC. The agreement establishes the legal fees that a network lawyer may charge to an ABC client as well as the "administrative fees" the lawyer must pay to ABC for the support services provided by ABC. An ABC client is considered the mutual client of both ABC and the network lawyer with ABC functioning as the agent of the ABC client while providing litigation and administrative support services to the network lawyer. When a mortgage holder or servicer becomes an ABC client, it is provided with a list of network lawyers. The ABC client may choose to retain one of the network lawyers to provide legal services in connection with a default, or it may ask ABC to invite a lawyer or firm of the client's choosing to become a network lawyer and subsequently to provide legal services to the client. The network lawyer invoices the client for the legal services provided by the lawyer. ABC separately invoices the network lawyer for the administrative services it provided in support of the representation of the ABC client.

Another example of this business model is an Internet-based company, XYZ Company, which offers "an online eviction processing system that connects landlords and property managers with real estate attorneys." The eviction services are provided using software accessed via XYZ's website and a network of lawyers who are licensed by XYZ to use the software. A lawyer who wishes to participate in XYZ's network signs a licensing agreement for the use of the eviction software. The licensing fee is determined by the size of the market in which the lawyer will be providing eviction services. The website states that its system provides lawyers "with the technology necessary to: [e]lectronically receive information necessary to file eviction requests from clients; [c]ommunicate with clients through a message center; [p]rint county-specific forms necessary for eviction filing with the court, completed with pre-populated information from the client; [p]rovide automated updates to client on the status of the case." A landlord who signs up for the service is given the names of network lawyers who have contracted with XYZ to handle eviction cases within the relevant jurisdiction. The selected or assigned lawyer (in the case of single-lawyer jurisdictions) prosecutes the eviction through the court system. The lawyer logs actions taken into XYZ's software, which creates periodic case status reports that are automatically emailed to the landlord. The website claims that these status reports virtually eliminate the need for direct communications between the landlord and the lawyer. The legal fee for each eviction is determined by the lawyer providing the service. The fee is billed and collected by XYZ and then forwarded to the lawyer.

Inquiry #1:

May a North Carolina lawyer or law firm enter into an agreement to participate in a "network" of lawyers for a company using this business model?

Opinion #1:

No, unless the following conditions are satisfied.

Unauthorized Practice of Law

N.C. Gen. Stat. §84-5 makes it unlawful for any corporation to practice law or "hold itself out in any manner as being entitled to do [so]...." Moreover, a lawyer is prohibited by Rule 5.5(d) from assisting another person in the unauthorized practice of law. Neither a lawyer nor a law firm may become a member of a "network" for a company using this business model if the company is providing legal services or holding itself out as a provider of legal services as opposed to a provider of support services to lawyers and clients and a method for identifying lawyers who will use those services to represent the client.

Lawyer Referral Service

A lawyer may not participate in the network if payments are made to the company for referrals or if the company is a for-profit lawyer referral service. Rule 7.2(b) prohibits a lawyer from giving anything of value to a person for recommending a lawyer's services except a lawyer may pay the reasonable cost of advertising. Rule 7.2(d) prohibits participation in a lawyer referral service unless the service is not operated for profit and the service satisfies other conditions not relevant here. Comment [6] to Rule 7.2 defines a lawyer referral service as "any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation...."

Despite the prohibition on participation in a for-profit referral service, 2004 FEO 1 holds that a lawyer may participate in an on-line service that is similar to both a lawyer referral service and a legal directory, provided there is no fee sharing with the service and all communications about the lawyer and the service are truthful. In 2004 FEO 1, the online service solicited lawyers to participate and then charged participating lawyers a registration fee and an annual fee for administrative, system, and advertising expenses. The amount of the annual fee varied by lawyer based upon a number of factors including the lawyer's current rates, areas of practice, geographic location, and number of years in practice. The opinion noted that the online service had aspects of both a lawyer referral service and a legal directory:

> [o]n the one hand, the online service is like a lawyer referral service because the company purports to screen lawyers before allowing them to participate and to match a prospective client with suitable lawyers. On the other hand, it is like a legal directory because it provides a prospective client with the names of lawyers who are interested in handling his matter together with information about the lawyers' qualifications. The prospective client may do further research on the lawyers who send him offer messages. Using this information, the prospective client decides which lawyer to contact about representation.

If a litigation support company provides a prospective client with the names and qualifications of the lawyers in its network who will provide representation in the jurisdiction where the client's case is located but does not specify the employment of one particular lawyer, it is not a prohibited lawyer referral service. Similarly, if at the client's request, a lawyer or law firm is invited to participate in the network, the company is not operating a for-profit lawyer referral service. As stated in 2004 FEO 1, "the potential harm to the consumer [of a for-profit referral service] is avoided because the company does not decide which lawyer is right for the client."

Independent Professional Judgment and Communication with the Client

While a client is entitled to hire an agent to manage its legal affairs, Rule 5.4(c) specifically prohibits a lawyer from permitting 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. *See also* Rule 1.8(f)(compensation from a third party is prohibited unless there is no interference in the client-lawyer relationship). A lawyer has a duty to communicate with the client about the objectives of the representation and to explain the law to the client to permit the client to make an informed decision about those objectives. Rules 1.2 and 1.4. There can be no interference with the lawyer's communications with the client or with the lawyer's independent professional judgment as to which legal services are required to achieve the client's objectives. *See* Rule 1.2(a)("a lawyer shall abide by a client's decisions concerning the objectives of representation and...consult with the client as to the means by which they are to be pursued"). The interference in a network lawyer's professional judgment is improper if the company dictates what legal services the lawyer is to provide to a client, the company is the sole source of information about the client and its legal needs, or access to the client is restricted by the company. A law firm or lawyer participating in a network must establish the professional relationship with the client and maintain control of the relationship through direct communications as needed to establish the objectives for the representation and to determine the means to achieve them. *See* Rule 1.2.

Competent Representation

Although a lawyer may use the company's services or software, including the forms generated by that software, the lawyer remains professionally responsible for the competent representation of the client including the appropriate determination of the legal services needed to achieve the client's objectives and the quality of any work product that is used in the representation of the client. Rule 1.1 and Rule 1.2. If the lawyer determines that a form or pleading generated by the company's software is not appropriate for a particular client, the lawyer must competently prepare the appropriate form or pleading and, if additional information from the client is required, the lawyer must communicate with the client to obtain the information.

Confidential Information

The confidentiality of the communications between the client and the lawyer, including email communications using the company's website or soft-

ware, must be assured or, in the alternative, informed consent of the client to the sharing of its communications with the company must be obtained, in advance, after disclosure of the risks of such disclosure. Rule 1.6. The risk that the attorney-client privilege for those communications may be forfeited must be specifically disclosed to the client to obtain informed consent.

Fee Sharing with Nonlawyer

Independent, professional judgment is maintained, in part, by the prohibition on sharing legal fees with a nonlawyer found in Rule 5.4(a). The prohibition helps to avoid nonlawyer interference with the exercise of a lawyer's professional judgment, ensures that the total fee paid by the client is not unreasonably high, and discourages the nonlawyer from engaging in improper solicitation of business for the lawyer. *See* 2010 FEO 4. If a network lawyer must pay the company an "administrative fee" for every legal service the lawyer provides to the client regardless of the administrative or litigation support services provided by the company, the arrangement violates the rule. Any payment to the company for administrative and litigation support services, including payment for access to the company's litigation support software, must be reasonable in light of the services provided. *See* Rule 1.5(a).

Advertising and Solicitation

The information that a participating lawyer provides to the company for distribution to prospective clients must be accurate. Rule 7.1(a) (prohibiting false or misleading communications about the lawyer or the lawyer's services). If false or misleading statements about the lawyer or his services are subsequently made by the company on its website or in other advertising for the company's services, the lawyer must demand that the statements be corrected or deleted. *See* RPC 241 (lawyer who participates in a joint advertising venture or a legal directory is professionally responsible for content of the advertisement even if written or prepared by another). If this does not occur, the lawyer must withdraw from the network.

Rule 7.2(b) prohibits a lawyer from giving anything of value to a person for recommending a lawyer's services except a lawyer may pay the reasonable cost of advertising. Therefore, participation as a network lawyer is prohibited if payments are made to the company for referrals. However, if the payments are for litigation support or administrative services provided to the client or to the lawyer to assist in the rendering of the legal services to the client, and the charge for those services is reasonable in light of the service received, the payments do not violate the rule.

Rule 7.3(a) prohibits a lawyer from engaging in in-person, telephone, or real-time electronic solicitation (collectively, in-person solicitation) for professional employment when a significant motive for such conduct is the lawyer's pecuniary gain unless the lawyer has a prior professional relationship with the potential client (there are other exceptions not relevant to this inquiry). A lawyer may not do through an agent that which he is prohibited from doing by the Rules of Professional Conduct. Rule 8.4(a). Therefore, if the company engages in in-person solicitation of potential clients that do not have a prior professional relationship with a network lawyer or law firm, and the company's motive for doing so is to solicit clients for legal services to be provided by a network lawyer or law firm, participation in the network arrangement is prohibited.

Written Agreement

Although this opinion does not require a lawyer to have a written agreement with the company, a written agreement addressing the conditions set forth above is strongly recommended. The lawyer may not rely upon a written agreement alone, however, but must monitor the practices of the company on a continuing basis and discontinue the relationship if the lawyer cannot insure compliance with the conditions set forth above.

Inquiry #2:

A participating network lawyer enters into an exclusive arrangement with the company whereby no other network lawyer will provide legal services to participating clients in a designated territory or jurisdiction. This means that a prospective client with a legal matter in this territory or jurisdiction will be automatically referred to the lawyer with the exclusive arrangement.

May a lawyer enter into such an agreement?

Opinion #2:

No, this is essentially a for-profit lawyer referral service, which is prohibited by Rule 7.2(d). *See also* Opinion #1.

Inquiry #3:

After the company enters into a network agreement with a lawyer for a particular territory or jurisdiction, all lawyers who subsequently apply to become network lawyers for the same territory or jurisdiction are charged substantially higher fees. This has the effect of discouraging other lawyers from seeking to become network lawyers for the same territory or jurisdiction and will potentially create *de facto* exclusive territories or jurisdictions.

May a lawyer enter an agreement with the company under these circumstances?

Opinion #3:

No. *See* Opinion #2.

Inquiry #4:

The network agreement specifies that any information submitted by a client using the company's website shall become the exclusive property of the company.

May a lawyer enter into an agreement with such a provision?

Opinion #4:

No. A lawyer cannot agree that his or her confidential communications with a client will become the property of a third party. Such an agreement will interfere not only with the lawyer's duty to protect confidential client communications from unauthorized disclosure, but also with other duties including, but not limited to, the duty of competent representation, the recordkeeping duty for trust account funds, and the duty to avoid future conflicts of interest. *See* Rules 1.1, 1.6, 1.9, and 1.15-3.

Inquiry #5:

The network agreement contains a provision that restricts the lawyer from soliciting any "customer" of the company for the purpose of providing services that compete with the services of the company.

May a lawyer enter into a network agreement with such a provision?

Opinion #5:

No, unless the agreement specifies that the lawyer is not agreeing to restrict his or her right to practice law in violation of Rule 5.6. Presumably, the company does not provide legal services because it is prohibited by law from doing so. *See* Opinion #1 above. The provision in the licensing agreement must specify the non-legal services provided by the company to which the non-compete would apply.

Inquiry #6:

The network agreement requires the lawyer to provide the company with his or her client list.

May a lawyer enter into a network agreement with such a provision?

Opinion #6:

No. This would only be permissible if the lawyer obtained the informed consent of every client whose name will be disclosed to the company. Rule 1.6(a). To obtain informed consent, the lawyer must inform each client of the likelihood that the disclosure would result in a business solicitation from the company.

Inquiry #7:

In the past, lack of sufficient oversight of the ABC employees responsible for preparing affidavits for use by network firms in foreclosure proceedings lead to instances of "robo-signing" in which an ABC employee signed a foreclosure affidavit without conducting a review of the client's file on the matter or possessing the knowledge to which the employee attested in the affidavit. Such affidavits were executed in a manner contrary to the notary's acknowledgement and verification of the documents.[1] The affidavits were then forwarded to the lawyer for use in the foreclosure proceedings.

What is a network lawyer's duty relative to the documents and pleadings provided by ABC?

Opinion #7:

This inquiry demonstrates the potential problems that can result from interference in the autonomy and independent professional judgment of a lawyer by a third party. A lawyer should not participate in the network or a similar service that includes support from a third party if the lawyer's ability to communicate with the client is so restricted that the lawyer cannot determine whether the documents and information he receives via the third party are reliable.

If a network lawyer obtains a document, such as an affidavit, from ABC for use in the representation of a client and the lawyer knows or reasonably should know that ABC has engaged in preparation of erroneous, false, or seemingly false documents or affidavits in similar matters in the past, the lawyer may not use the documents until he has assured himself, through review of the client's own files or direct communication with the client, that the documents are reliable. *See* Rule 5.4(c). Particularly with regard to sworn statements, a lawyer's duty of candor requires the lawyer to avoid offering false evidence. *See* Rule 3.3(a)(3). Nevertheless, if a client or an agent of the client is not otherwise known to be unreliable or to provide erroneous or false information, a lawyer may rely upon information provided to her to represent the client.

Endnote

1. Such conduct is the subject of the National Mortgage Settlement. nationalmortgagesettlement.com.

2012 Formal Ethics Opinion 11

July 19, 2013

Use of Nonlawyer Field Representatives to Obtain Representation Contracts

Opinion rules that a law firm may send a nonlawyer field representative to meet with a prospective client and obtain a representation contract if a lawyer at the firm has reviewed sufficient information from the prospective client to determine that an offer of representation is appropriate.

Inquiry #1:

ABC law firm employs a large staff of nonlawyers, including paralegals, assistants, and others. Among the nonlawyer staff are employees called "field representatives." When a prospective client contacts ABC, the firm sends a field representative to the prospective client's home or other location chosen by the prospective client. The field representative provides information about the firm in an effort to convince the prospective client to choose firm ABC for representation. If the prospective client agrees, the field representative provides a representation contract and obtains the client's signature on the contract. The field representation also obtains information from the prospective client concerning the representation.

No lawyer with the firm consults with the prospective client before the field representative meets with the person. No lawyer with the firm reviews the information obtained by the field representative before the field representative obtains the client's signature on the representation contract. Is ABC's use of field representatives in this manner permissible under the Rules of Professional Conduct?

Opinion #1:

No. A law firm may not send a nonlawyer field representative to meet with a prospective client and obtain a representation contract when no lawyer with the firm has reviewed the prospective client's relevant facts and circumstances to make an initial determination that an offer of legal services is appropriate.

Inquiry #2:

If a lawyer at the firm has reviewed sufficient information from the prospective client to determine that an offer of representation is appropriate, may a firm employ a field representative to meet with the prospective client and obtain a representation contract?

Opinion #2:

The Ethics Committee has previously determined that a lawyer may delegate certain tasks to nonlawyer assistants. *See, e.g.*, RPC 70, RPC 216, 99 FEO 6, 2002 FEO 9. Pursuant to RPC 216, when a lawyer delegates a task to a nonlawyer, the lawyer has a duty under the Rules of Professional Conduct to take reasonable steps to ascertain that the nonlawyer assistant is competent; to provide the nonlawyer assistant with appropriate supervision and instruction; and to continue to use the lawyer's own independent professional judgment, competence, and personal knowledge in the representation of the client. *See also* Rule 1.1, Rule 5.3, Rule 5.5.

In 2002 FEO 9 the Ethics Committee specifically determined that a nonlawyer may oversee the execution of real estate closing documents and the disbursement of the proceeds even though the lawyer is not physically present at the closing. 2002 FEO 9 states that, in any situation where a lawyer delegates a task to a nonlawyer assistant, the lawyer must determine that delegation is appropriate after having evaluated the complexity of the transaction, the degree of difficulty of the task, the training and ability of the nonlawyer, the client's sophistication and expectations, and the course of dealing with the client. The opinion holds that the lawyer is still responsible for providing competent representation and adequate supervision of the nonlawyer.

Similarly, under certain circumstances, a nonlawyer field representative may oversee the execution of a representation contract. The firm lawyer must consider the factors set out in 2002 FEO 9 and determine whether such delegation is appropriate.

The lawyer must also take precautions to avoid assisting the unauthorized practice of law. *See* Rule 5.5(d). The lawyer must instruct the field representative to disclose to the prospective client that he is not a lawyer and that he cannot answer any legal question. The lawyer must also admonish the field representative not to provide legal advice and to contact the lawyer should a legal question arise. Likewise, the lawyer must be available by some means to consult with and answer any legal questions the prospective client may have.

2012 Formal Ethics Opinion 12

January 25, 2013

Agreement for Division of Fees Entered Upon Lawyer's Departure from Firm

Opinion rules that an agreement for a departing lawyer to pay his former firm a percentage of any legal fee subsequently recovered from the continued representation of a contingent fee client by the departing lawyer does not violate Rule 5.6 if the agreement was negotiated by the departing lawyer and the firm after the departing lawyer announced his departure from the firm and the specific percentage is a reasonable resolution of the dispute over the division of future fees.

Inquiry:

Attorney B, an associate in Attorney A's firm, resigned from the firm effective February 28, 2005. At the time of his resignation, Attorney B signed an agreement with the firm. The agreement provided that Attorney B would take all of the active client files for which the clients had indicated a desire for Attorney B to continue to represent them. The agreement also contained the following provision:

> With respect to those files in which the client chooses Attorney B to conclude his or her active claim, upon recovery made by Attorney B on each such file, Attorney B shall forward to Attorney A, at the time of disbursement, 50% of the attorney's fee collected on each settlement. This will include medical payments fees as well. Attorney B will also pay to Attorney A upon recovery the total amount of expenses due to Attorney A in accordance with [a computer expense printout provided by Attorney A]. Finally, Attorney B will forward to Attorney A a copy of the settlement sheet signed by the client reflecting the disbursements on each such file. All settlements negotiated by Attorney B through February 28, 2005, will be handled through Attorney A's trust account.

Client entered into an agreement for representation on a personal injury claim with Attorney A's firm on December 16, 2004, while Attorney B was still with the firm. When Attorney B left the firm in February 2005, Client chose to continue to be represented by Attorney B. The case was concluded in May 2010, with a deputy commissioner's award to Client.

There is currently an "attorney-attorney" fee arbitration between Attorney A's firm and Attorney B pending before the fee dispute committee of the local judicial district bar. The distribution of the legal fee from the resolution of Client's worker's compensation case is in dispute. The judicial district bar's bylaws relating to the arbitration of such disputes provides: "The committee shall neither have nor exercise jurisdiction regarding disputes…which involve services that may constitute a violation of The North Carolina State Bar Rules of Professional Conduct, as now in effect or may be hereafter amended." The presiding arbitrator has requested an opinion from the North Carolina State Bar on the following issue: Does the provision of the agreement quoted above comply with the Rules of Professional Conduct?

Opinion:

Rule 5.6(a) prohibits a lawyer from participating in offering or making a partnership, shareholders, operating, employment, or similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship except an agreement concerning benefits upon retirement. This prohibition on restrictive covenants protects the freedom of clients to choose a

lawyer and promotes lawyer mobility and professional autonomy. Rule 5.6, cmt. [1].

2008 FEO 8 examined provisions in three employment agreements to determine whether the agreements complied with Rule 5.6. Although the opinion ruled that all three agreements violated Rule 5.6, the opinion, nevertheless, encouraged lawyers to enter into agreements that will help to resolve potential disputes about the division of fees. While cautioning that "such agreements may not be so financially onerous or punitive as to deter a withdrawing lawyer from continuing to represent a client if the client chooses to be represented by the lawyer after the lawyer's departure from the firm," the opinion held that a lawyer may participate in the offering or making of an agreement that includes a provision for dividing legal fees received after a lawyer's departure from a firm.

> ...provided the formula or procedure for dividing fees is, at the time the agreement is made, reasonably calculated to compensate the firm for the resources expended by the firm on the representation as of the date of the lawyer's departure and will not discourage a departing lawyer from taking a case and thereby deny the client access to the lawyer of his choice.

Thus, the circumstances and timing of the execution of an agreement are important to the analysis of whether the agreement runs afoul of Rule 5.6.

In the current inquiry, the agreement was negotiated and entered into after Attorney B announced that he was leaving Attorney A's firm. The agreement was, apparently, part of a global settlement of all issues relative to Attorney B's departure. It was not entered into as a condition of continued employment, as were the agreements analyzed in 2008 FEO 8. It did not deter Attorney B from leaving the firm or from continuing to represent clients who chose to follow him to his new firm. In fact, the agreement specifically contemplated that Attorney B would continue to represent those clients. In light of the various stages of his cases at the time of his departure, a 50% split of the contingent fees to be earned on the cases cannot be viewed as "onerous" or "punitive." Such a division of fees would favor Attorney B in some cases and disfavor him in others.

A division of fees based upon a fixed percentage that fairly allocates, over the range of cases, the value of the time and work expended before and after a lawyer leaves a firm is a reasonable means of achieving an efficient, equitable resolution of the fee division issues between a departing lawyer and the firm. Provided the lawyers deal fairly and honestly with each other without intimidation, threats, or misrepresentation, this type of agreement should be encouraged.

The provision of the agreement addressing costs advanced is consistent with 2008 FEO 8, which provides that the agreement "may require the departing lawyer to protect the firm's interest in receiving reimbursement for costs advanced from any final settlement or judgment received by the client."

Rule 1.5(e) requires a client's written consent to the division of a fee between lawyers who are not in the same firm. This rule, however, does not apply to the current situation because the fee agreement with the client preceded Attorney B's departure from the firm. Rule 1.5, cmt. [9].

2012 Formal Ethics Opinion 13

July 19, 2013

Duty to Safekeep Client Files upon Suspension, Disbarment, Disappearance, or Death of Firm Lawyer

Opinion rules that the partners and managerial lawyers remaining in a firm are responsible for the safekeeping and proper disposition of both the active and closed files of a suspended, disbarred, missing, or deceased member of the firm.

Inquiry #1:

The law firm A & B, PA, was formed as a professional corporation in 1992. Lawyer A and Lawyer B were the initial shareholders in the firm. In 1993, Lawyer C joined the firm and became a shareholder. The professional corporation's articles of incorporation were amended to change the professional corporation's name to A, B & C, PA.

In 1998 Lawyer C closed a real estate transaction for a client of the firm. The file was placed among the firm's inventory of client files.

In 2008 Lawyer A and Lawyer B learned that Lawyer C had committed numerous embezzlements from the firm's trust account in a cumulative amount exceeding $1,000,000. Lawyer C (hereinafter, "C") was ousted from the firm and was subsequently disbarred. The firm's articles of incorporation were amended to change the professional corporation's name back to A & B, PA. When C was ousted from the firm, Lawyer A and Lawyer B reviewed the files for the clients of the firm whose legal services had been provided by C. When their review was completed, Lawyer A and Lawyer B instructed or allowed C to take possession of those client files. Since 2008, paper client files have been in a storage facility to which C's lawyer has the key, and electronic client files, to the extent that there were any, have been stored in a password-protected manner by C's lawyer.

The client whose transaction was closed by C in 1998 is now seeking her file, which is believed to be in the storage facility. C is in prison. C's lawyer cannot access the storage facility due to physical infirmity. However, C's lawyer is willing to give Lawyer A and Lawyer B the key to the storage facility, and to authorize them to access and retrieve the client files. Lawyer A and Lawyer B assert that they are not obligated to help the client obtain her file.

When a lawyer leaves a firm and is subsequently disbarred, what is the professional responsibility of the lawyers remaining with the firm relative to the safekeeping and proper disposition of the files of the clients of the disbarred lawyer?

Opinion #1:

The remaining lawyers in the firm are responsible for the safekeeping and proper disposition of both the active and closed files of the disbarred lawyer in their custody. As used in this opinion, "files" applies to both electronic and paper files unless otherwise indicated. Because of the risk of loss, closed files may not be relinquished to a disbarred lawyer who is no longer subject to the regulation of the North Carolina State Bar and no longer required to comply with the Rules of Professional Conduct.

Rule 1.15 requires a lawyer to preserve client property, including information in a client's file such as client documents and lawyer work product, from risk of loss due to destruction, degradation, or disappearance. *See also* RPC 209 (noting the "general fiduciary duty to safeguard the property of a client"); RPC 234 (requiring the storage of a client's original documents with legal significance in a safe place or their return to the client); 98 FEO 15 (requiring exercise of lawyer's "due care" when selecting depository bank for trust account); and 2011 FEO 6 (allowing law firm to use "cloud computing" if reasonable care is taken to protect the security of electronic client files).

If a lawyer practices in a law firm with other lawyers, the responsibility to preserve a client's property, including the client's file, is not solely the responsibility of the lawyer providing the legal services to the client. Rule 5.1(a) of the Rules of Professional Conduct requires the partners in a law firm and all lawyers with comparable managerial authority to 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."

The professional responsibilities of the partners and the lawyers with managerial authority relative to the files of the firm are the same, regardless of whether the lawyer has departed the firm because of suspension, disbarment, disappearance, or death.[1] The lawyers are responsible for (1) ensuring that any open client matter is promptly and properly transitioned to the lawyer of the client's choice, and (2) retaining possession of and safekeeping closed client files of the departed lawyer until the requirements for disposition of closed files set forth in RPC 209 can be fulfilled. *See, e.g.*, RPC 48 (explaining duties upon firm dissolution including continuity of service to clients and right of clients to counsel of their choice).

All firms should recognize the possibility of suspension, disbarment, disappearance, or death of a firm lawyer. Law firms should plan for and include in their operating procedures a means or method to access and secure all client files for which the firm would be responsible if such an event were to occur.

Inquiry #2:

Do Lawyer A and Lawyer B have a duty to help a former client of the firm obtain the file relating to the legal services provided to her by C when C was a member of the firm?

Opinion #2:

Yes, when the location of a file is known, the lawyers have a duty to take reasonable measures to assist a client to obtain the file. *See* Opinion #1 and RPC 209.

Endnote

1. This opinion does not address the professional responsibilities of the firm lawyers when a lawyer leaves the firm to practice elsewhere.

2012 Formal Ethics Opinion 14

January 25, 2013

Advertising Content on Gift or Promotional Items

Opinion rules that the advertising content displayed on certain gift or promotional items does not have to include an office address.

Inquiry:

Lawyer would like to put her firm name on a non-state issued license plate to be placed on the front of her automobile. The graphics on the license plate would consist only of the firm name. No other content would appear on the plate. Is Lawyer required to include an office address on the license plate?

Opinion:

No. Rule 7.2(c) provides that any advertisement for legal services must include the "name and office address of at least one lawyer or law firm responsible for [the advertisement's] content." The purpose of the rule is to facilitate the identification and location of a responsible lawyer or firm in order to hold that lawyer or firm accountable for the content of the advertisement. However, we conclude that where a gift/promotional item displays only the name or logo of the lawyer or law firm, and the items are used/disseminated by the lawyer or law firm in a manner otherwise permissible under the Rules of Professional Conduct, the gift/promotion item does not have to display an office address.

Examples of such items would include pens, pencils, hats, or coffee mugs bearing the name or logo of a law firm or lawyer. A non-state issued license plate displaying a law firm's name is also exempt from the address requirement.

2012 Formal Ethics Opinion 15

January 25, 2013

Editor's Note: See 2011 FEO 1 for additional guidance.

Lawyer as Witness

Opinion rules that whether a lawyer is a "necessary witness" and thereby disqualified from acting as a client's advocate at a trial is an issue left up to the discretion of the tribunal.

Inquiry:

Based on allegations by A, Defendant B was arrested and charged with cruelty to animals. B's lawyer wrote to A and asked him to withdraw the charges. B's lawyer advised A that B had not harmed the animals and advised A that he could be sued civilly for maliciously instituting charges against B without probable cause. Eventually, B's motion for a directed verdict was granted in the matter.

Lawyer, on behalf of B, filed a malicious prosecution suit against A. The pleadings contained an allegation that Lawyer had contacted A, assured A that B had not harmed his animals, asked A to withdraw the charges, and advised A that "persons who maliciously institute charges without probable cause could be held liable for damages." The pleading then alleges that A "maliciously refused to contact the relevant law enforcement authorities to inform them of the true facts."

The trial court questions whether Lawyer had made himself a witness by virtue of his inclusion of the above-referenced factual allegations.

Opinion:

Rule 3.7(a) provides that a lawyer shall not act as advocate at a trial in which "the lawyer is likely to be a necessary witness" unless: (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.

A lawyer should be disqualified under Rule 3.7 only upon a showing of "compelling circumstances." *State v. Schmitt*, 102 P.3d 856, 859 (Wash. Ct. App. 2004). Disqualification is limited to situations where the lawyer's testimony is "necessary." It is generally agreed that when the anticipated testimony is relevant, material, and unobtainable by other means, the lawyer's testimony is "necessary." *See* Ann. Model Rules of Prof'l. Conduct (6th ed. 2007), p. 361 (citing cases).

The issue of whether a lawyer is a "necessary witness" and thereby disqualified from acting as a client's advocate at a trial is an issue best left to the discretion of the tribunal. Determining whether a lawyer is likely to be a necessary witness "involves a consideration of the nature of the case, with emphasis on the subject of the lawyer's testimony, the weight the testimony might have in resolving disputed issues, and the availability of other witnesses or documentary evidence which might independently establish the relevant issues." *Fognani v. Young*, 115 P.3d 1268 (Colo. 2005).

2013 Formal Ethics Opinion 1

October 15, 2013

Release/Dismissal Agreement Offered by Prosecutor to Convicted Person

Opinion rules that, subject to conditions, a prosecutor may enter into an agreement to consent to vacating a conviction upon the convicted person's release of civil claims against the prosecutor, law enforcement authorities, or other public officials or entities.

Inquiry:

Defendant was convicted of a crime in a North Carolina state court and sentenced to the North Carolina prison system. Ten years later, the parties learned of exculpatory evidence. Defendant, with the advice of two defense counsel, signed a release that provided, in pertinent part, as follows:

> [Defendant] for and in consideration of release from the North Carolina Department of Corrections, do[es] hereby voluntarily agree without any threat, coercion, or prosecutorial misconduct, that he will never...bring legal action of any kind against the State of North Carolina, the County of..., the...County Sheriff's Department, Detective...of the...County Sheriff's Department, any and all members and employees of the...County District Attorney's Office.... This Release is given and executed with due knowledge [and] cognizance of the Supreme Court's recognition of the validity and enforceability of Releases of this nature in the case of *Town of Newton v. Rumery*, 480 US 386 (1987).

May a state or federal prosecutor prepare, offer, negotiate, or execute an agreement (a "release/dismissal agreement") that conditions the prosecutor's agreement not to object to or contest a motion for appropriate relief initiated by the convicted person upon the convicted person's agreement to release civil claims against public officials or entities arising from the convicted person's arrest, prosecution, or imprisonment?

Opinion:

Yes, but the prosecutor must take great care not to transgress existing ethical rules.

A *per se* ethical rule against prosecutors negotiating post-conviction release/dismissal agreements[1] would effectively prohibit a defense lawyer from offering on behalf of his or her client a waiver of potential civil claims to persuade a prosecutor to support the prisoner's motion to vacate the conviction. Some defense lawyers wish to have this option available when the extent to which new exculpatory evidence casts doubt on the defendant's guilt is debatable.

In negotiating such an agreement, however, a prosecutor must be mindful of his or her ethical obligations. For instance, if recently discovered exculpatory evidence shows that the prisoner was innocent of the charge(s) for which he is currently incarcerated and he files a legally meritorious motion with the appropriate court to vacate his conviction, the prosecutor may not make his or her consent to the motion contingent on the prisoner waiving potential civil claims arising from his wrongful conviction. Rule 3.1 ("A lawyer shall not... defend a proceeding...or...controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous..."). *See also* Rule 3.8, *Special Responsibilities of a Prosecutor*, cmt. [1] (responsibility as minister of justice carries with it specific obligations to see that defendant is accorded procedural justice and that guilt is decided upon sufficient evidence).

In the fact pattern giving rise to this inquiry, the prisoner was represented by counsel in the negotiation of the release-dismissal agreement. A prosecutor should not negotiate such an agreement with an unrepresented prisoner unless the prisoner insists upon proceeding *pro se*. *Cf.* Rule 3.8(c) (prosecutor shall not seek to obtain from an unrepresented accused a waiver of important pretrial rights). Before negotiating such an agreement with a pro se prisoner, judicial approval of the pro se representation should be

obtained. *Cf.* Rule 3.8, cmt. [3].

Even if the ethical concerns identified above have been addressed, a prosecutor may only negotiate an agreement that includes a waiver of the prisoner's potential civil claims against the sovereign or public officials if the prosecutor has the legal authority to represent the interests of the sovereign or those officials with respect to such civil claims. It would be unethical for the prosecutor explicitly or implicitly to misrepresent the scope of the prosecutor's authority to negotiate with respect to such civil claims. Rule 4.1; Rule 8.4(c).

In communicating with the court regarding the prosecution's position on whether the conviction should be vacated, the prosecutor should disclose the existence of any agreement conditioning the prosecutor's position on the prisoner's agreement to waive potential civil claims. *Cf.* RPC 152 (prosecutor must ensure that all material terms of negotiated plea are disclosed in response to direct questions).

Endnote

1. There is no general legal prohibition against a prosecutor negotiating or entering into a "release-dismissal agreement" in the pre-conviction context. *See Town of Newton v. Rumery*, 480 US 386, 395-97 (1987) (rejecting the assumption "that all–or even a significant number–of release-dismissal agreements stem from prosecutors abandoning 'the independence of judgment required by [their] public trust'" and concluding that a per se rule of invalidity of such agreements would fail to credit other relevant public interests and improperly assume prosecutorial misconduct). *See also Rodriguez v. Smithfield Packing Co.*, 338 F.3d 348, 353-54 & n.3 (4th Cir. 2003) (applying *Rumery* to enforce a release-dismissal agreement and noting that such agreements serve the legitimate public interest of avoiding future litigation); and *Senator v. Baltimore County*, 917 F.2d 1302, 1990 WL 173827 (4th Cir. 1990) (unpub.) ("the release agreement serves the public interest").

2013 Formal Ethics Opinion 2

October 24, 2014

Providing Incarcerated Defendant with Opportunity to Review Discovery Materials

Opinion rules that if, after providing an incarcerated criminal client with a summary/explanation of the discovery materials in the client's file, the client requests access to any of the discovery materials, the lawyer must afford the client the opportunity to meaningfully review relevant discovery materials unless certain conditions exist.

Inquiry #1:

Lawyer represents Defendant in a criminal case. The state has provided Lawyer with discovery as PDF files. The state has also given Lawyer DVDs containing copies of the video recordings of interrogations of Defendant and a codefendant; surveillance videotapes; and audio recordings of calls made by Defendant and the codefendant from the jail.

Lawyer reviewed the discovery and provided Defendant with a summary of the evidence. Defendant demands that he be provided a copy of the entire 1,200 pages of discovery and be allowed to view/listen to the 17 hours of video and audio recordings.

Does Lawyer have an ethical duty to comply with the client's demand?

Opinion #1:

As a matter of professional responsibility, Rule 1.4 requires a lawyer to "keep a client reasonably informed about the status of a matter" and "promptly comply with reasonable requests for information." As stated in comment [5] to Rule 1.4:

> 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...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.

The duties set out in Rule 1.4 are similar to those found in ABA Standards for Criminal Justice, Defense Functions, Standard 4-3.8 (3d ed. 1993) which provides:

> (a) Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information.
>
> (b) Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Under Rule 1.2(a)(1), the client in a criminal case has the authority to decide, "after consultation with the lawyer, as to a plea to be entered, whether to waive a jury trial, and whether the client will testify." During the course of the representation, a criminal defense lawyer complies with the requirements of Rule 1.4 to keep a client "reasonably informed" by providing the client with sufficient information to make informed decisions about these important issues. This obligation is fulfilled by providing the client with a summary of the discovery materials and consulting with the client as to the relevance of the materials to the client's case. If the lawyer has provided the client with a summary/explanation of the discovery materials and the client, nonetheless, requests copies of or asks to review any of the file materials, the duty to comply with reasonable requests for information requires the lawyer to afford the client the opportunity to meaningfully review relevant discovery material unless one or more of the following conditions exist: (1) the lawyer believes it is in the best interest of the client's legal defense to deny the request; (2) a protective order or court rule limiting the discovery materials that may be shown to the defendant or taken to a jail or prison is in effect; (3) such review is prohibited by the specific terms of a discovery agreement[1] between the prosecution and the defense lawyer; (4) because of circumstances beyond the defense counsel's control, such review is not feasible in light of the volume of discovery materials and the time remaining before trial or before a decision must be made by the client on a plea offer; or (5) disclosure of the discovery materials will endanger the safety or welfare of the client or others.

In determining what discovery materials are relevant, and what disclosure is in the best interest of the client's legal defense, the lawyer must exercise his or her independent professional judgment in the context of the decisions that the defendant must make about what plea to enter, whether to waive jury trial, and whether to testify. *See* Rule 1.2(a)(1). As noted above: "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." Rule 1.4, cmt. [5]. However, as stated in comment [7] to Rule 1.4, a lawyer "may not withhold information to serve the lawyer's own interest or convenience or the interest or convenience of another person." Therefore, the lawyer may not deny the request due to issues of expense or inconvenience.

Regardless of whether the lawyer determines that the client should have an opportunity to review some or all of the discovery materials, the lawyer is not required to provide the client with a physical copy of the discovery materials during the course of the representation.

Inquiry #2:

If Lawyer provides Defendant with a copy of, or access to, discovery materials, may Lawyer redact or otherwise remove private information of a third person, such as the address of a witness or pictures of an alleged rape victim?

Opinion #2:

The lawyer may redact or otherwise remove information that the lawyer determines, in his professional judgment, should not be disclosed to the client, including information that would endanger the safety and welfare of the client or is subject to a protective order, court rule, or agreement prohibiting disclosure. *See* Rule 1.4, cmt. [7].

Endnote

1. Discovery agreements between the prosecution and the defense may present other ethical concerns not addressed in this opinion.

2013 Formal Ethics Opinion 3

April 19, 2013

Safekeeping Funds Collected from Client to Pay Expenses

Opinion examines a lawyer's responsibilities when charging and collecting from a client for the expenses of representation.

Inquiry #1:

Attorney hires a court reporter to take a deposition in Client's case. The court reporter transcribes the deposition and delivers the transcript and an invoice to Attorney. Attorney bills Client for the court reporter's services in the

amount shown on the invoice. Client gives Attorney the funds to pay the court reporter's invoice. Attorney has not previously paid the court reporter.

May Attorney deposit the funds from Client into Attorney's operating account and write a check on the operating account to pay the court reporter?

Opinion #1:

No. The funds collected from Client were collected for the purpose of paying a third party in connection with the performance of legal services and are, therefore, "entrusted funds." Entrusted funds are funds belonging to someone other than the lawyer which are in the lawyer's possession or control in connection with the performance of legal services or professional fiduciary services. Rule 1.15-1(d). Entrusted funds must be maintained separately from the property of Attorney and deposited in Attorney's trust account in accordance with Rule 1.15-2(b).

Attorney may direct Client to write a check for the court reporter's fee payable directly to the court reporter. Attorney would then forward the check to the court reporter without depositing the check in Attorney's trust account. Rule 1.15 does not prohibit a lawyer who receives a check belonging wholly to a third party from delivering the check to the appropriate recipient without first depositing the check in the lawyer's trust account. Rule 1.15, cmt. [5].

Inquiry #2:

Would the answer to Inquiry #1 change if Attorney considers payment of a court reporter to be the lawyer's obligation?

Opinion #2:

No. It does not matter who has the obligation to pay the court reporter. If a lawyer receives funds from a client for the purpose of paying a third party, the funds are entrusted funds and must be maintained separately from the property of the lawyer in a trust account.

Inquiry #3:

Would the answer to Inquiry #1 change if Attorney is contractually obligated to pay the court reporter's fee regardless of whether Client pays Attorney for this expense?

Opinion #3:

No. Attorney's contractual obligations do not change the fact that Attorney is receiving entrusted funds from a client for the specific purpose of paying a third party.

Inquiry #4:

Would the answer to Inquiry #1 change if Attorney has already paid the court reporter from either his operating account or personal funds prior to receipt of Client's funds?

Opinion #4:

Yes. Attorney has advanced the funds to pay the expenses of representation and Attorney is entitled to reimbursement from the client. Rule 1.8, cmt. [10]. The money paid by Client is not entrusted to Attorney but is owed to him. To avoid commingling client funds with the lawyer's funds as required by Rule 1.15-2(f), Attorney must deposit Client's payment into his operating or personal account.

Inquiry #5:

In the field of patent law, the services of patent lawyers or agents in foreign countries ("foreign agents") are sometimes required in the course of applying for international patents for US clients. On behalf of Client, Patent Attorney arranges for foreign agent services. The foreign agent performs the required services and sends an invoice to Patent Attorney. Patent Attorney bills Client for the foreign agent's services in the amount shown on the invoice. Client sends Patent Attorney the funds to pay the foreign agent's invoice. Patent Attorney has not previously paid the foreign agent.

Do the answers to Inquiries #1-4 change if the funds at issue are funds received from the client to pay for the services of a foreign agent?

Opinion #5:

No.

Inquiry #6

Patent Attorney and a foreign agent routinely provide services to clients of the other lawyer upon request. The foreign agent and Patent Attorney invoice each other per client matter. The foreign agent and Patent Attorney also have a practice of arranging offsets, such that the total amount due to the foreign agent is reduced by the amount due to Patent Attorney.

When Patent Attorney receives an invoice from the foreign agent for services performed by the foreign agent for one of Patent Attorney's clients, Patent Attorney invoices the client for the amount due for the foreign agent's fee and collects the funds from the client.

Do these additional facts change the answer to Inquiry #5?

Opinion #6:

No.

Inquiry #7:

Under the facts in Inquiry #6, Patent Attorney collects the funds from the client for the foreign agent's fee but does not use that money to pay the foreign agent's fee. Instead Attorney settles the obligation to the foreign agent through offsets or, if no offset agreement can be reached, by payment from Patent Attorney.

Is this permissible?

Opinion #7:

No. If a lawyer collects money from a client for a specific purpose, the lawyer must either (1) use the money received from the client to make the payment for which the money was collected, (2) return the funds to the client, or (3) obtain the client's consent to hold the funds in trust until earned by provision of legal services or used to pay other expenses. Rule 1.15-2.

Inquiry #8:

Under the facts in Inquiry #6, is it permissible for Patent Attorney to offset a client expense with a fee due to Patent Attorney in an unrelated matter?

Opinion #8:

Yes, provided Attorney provides Client with a full accounting and explanation of the cost of the foreign agent's services, the offsets applied to the foreign agent's invoice, and the amount still owed to the foreign agent or owed to Attorney by Client. If a lawyer invoices a client for a specific amount to pay a designated expense, the lawyer must use the money received from the client to pay that expense, return the funds to the client, or obtain the client's consent to deposit the funds in the trust account. *See* Opinion #7. If an expense was already paid by the lawyer through offsets or the advancing of the lawyer's funds, the lawyer may use the money received from the client to reimburse the lawyer. *See* Opinion #4. However, offset agreements may never be used by a lawyer to earn a profit on the expenses of representation. *See* Rule 1.5(a)(prohibiting the charging or collecting of an excess amount for expenses).

Inquiry #9

Would the answers to Inquiries #6-8 change if Patent Attorney considers the obligation to pay a foreign agent to be the lawyer's obligation?

Opinion #9:

No.

Inquiry #10:

Would the answers to Inquiries #6-8 change if Patent Attorney is contractually obligated to pay for the services of the foreign agent regardless of whether Client pays Patent Attorney for those services?

Opinion #10:

No.

Inquiry #11:

Client pays Patent Attorney for the foreign agent's fee after the foreign agent has performed services and invoiced Patent Attorney. Client terminates Patent Attorney's representation and retains Patent Attorney #2. At the time of termination, Patent Attorney has not paid the foreign agent or used offsets to satisfy the obligation to the foreign agent. The foreign agent invoices Patent Attorney #2 for the services provided in Client's matter. Do these additional facts or the potential for this to occur change the answers to Inquiries #5-10?

Opinion #11:

No. Patent Attorney must maintain Client's entrusted funds in Patent Attorney's trust account until returned to Client or until receipt of instructions for disposition from Client or Client's new lawyer. If Client or Patent Attorney

#2 instructs Patent Attorney to pay the foreign agent, Patent Attorney must do so promptly. *See* Rule 1.5-2(m). Similarly, if instructed to do so, Patent Attorney must transfer Client's funds to Patent Attorney #2 for deposit in Patent Attorney #2's trust account where they will be available to pay the foreign agent.

2013 Formal Ethics Opinion 4

July 19, 2013

Editor's note: This opinion supplements and clarifies 2006 FEO 3.

Representation in Purchase of Foreclosed Property

Opinion examines the ethical duties of a lawyer representing both the buyer and the seller on the purchase of a foreclosure property and the lawyer's duties when the representation is limited to the seller.

Inquiry #1:

Bank A foreclosed its deed of trust on real property and was the highest bidder at the sale. Bank A listed the property for sale. Buyer entered into a contract to purchase the property.

An addendum to the Offer to Purchase and Contract ("Contract") signed by the parties states that the closing shall be held in Seller's lawyer's office by a date certain and that Seller, Bank A, "shall only pay those closing costs and fees associated with the transfer of the Property that local custom or practice clearly allocates to Seller ... and the Buyer shall pay all remaining fees and costs." Bank B is providing financing for the transaction.

Seller chose Law Firm X to close the residential real estate transaction. Law Firm X did not participate in the foreclosure of the property prior to the sale; however, Law Firm X regularly does closings for properties sold by Bank A.

Law Firm X proposes to send Buyer a letter advising Buyer that it has been chosen as settlement agent and advising Buyer that it will be representing both parties in the transaction. Law Firm X will charge Buyer $425 for the closing.

May Lawyer at Law Firm X participate in the joint representation of Buyer and Seller as contemplated by the Contract?

Opinion #1:

If a lawyer is named as the closing agent for a residential real estate transaction pursuant to an agreement such as the one set out above, the lawyer has a duty to ensure that he can comply with Rule 1.7 prior to accepting joint representation of the buyer and seller. When contemplating joint representation, a lawyer must consider whether the interests of the parties will be adequately protected if they are permitted to give their informed consent to the representation, and whether an independent lawyer would advise the parties to consent to the conflict of interest. Representation is prohibited if the lawyer cannot reasonably conclude that he will be able to provide competent and diligent representation to all clients. *See* Rule 1.7, cmt. [15]. As stated in comment [29] to Rule 1.7, the representation of multiple clients "is improper when it is unlikely that impartiality can be maintained."

The Ethics Committee has previously concluded that, under certain circumstances, it may be acceptable for a lawyer to represent the borrower, the lender, and the seller in the closing of a residential real estate transaction. *See, e.g.,* CPR 100, RPC 210. Joint representation may be permissible in a residential real estate closing because, in the usual transaction, the contract to purchase is entered into by the buyer and seller prior to the engagement of a lawyer. Therefore, the lawyer has no obligation to bargain for either party. Similarly, the buyer and the lender have agreed to the basic terms of the mortgage loan prior to the engagement of the closing lawyer. However, in CPR 100, the Ethics Committee specifically stated that:

> [a] lawyer having a continuing professional relationship with any party to the usual residential transaction, whether the seller, the lender, or the borrower, should be particularly alert to determine in his own mind whether or not there is any obstacle to his loyal representation of other parties to the transaction, and if he finds that there is, or if there is any doubt in his mind about it, he should promptly decline to represent any other party to the transaction.

In addition to the above determination, Rule 1.7 requires that the lawyer obtain any affected client's informed consent to the joint representation and to confirm that consent in writing. Rule 1.7.

Comment [6] to Rule 1.0 (Terminology) provides that, to obtain "informed consent," a lawyer must "make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision." Comment [6] clarifies that, ordinarily, this will require: (1) communication that includes a disclosure of the facts and circumstances giving rise to the situation; (2) any explanation reasonably necessary to inform the individual of the material advantages and disadvantages of the proposed course of conduct; and (3) a discussion of the individual's options and alternatives.

To obtain Buyer's "informed" consent in the instant scenario, Lawyer must: (1) explain the proposed scope of the lawyer's representation; (2) disclose Lawyer's prior relationship with Seller; (3) explain the advantages and risks of common representation; and (4) discuss the options/alternatives Buyer has under the Contract, such as hiring his own lawyer at his own expense. *See* Rule 1.0, 97 FEO 8, 2006 FEO 3.

If the above requirements are met, Lawyer may proceed with the common representation. If Lawyer subsequently determines that he can no longer exercise his independent professional judgment on behalf of both clients, he must withdraw from the representation of both clients.

If Lawyer determines at the outset that the common representation will be adverse to the interests of either Buyer or Seller, or that his judgment will be impaired by loyalty to Seller, Lawyer may not represent both parties. Similarly, if Buyer does not consent to the joint representation, Lawyer may not represent both parties.

Inquiry #2:

Buyer notifies Lawyer at Law Firm X that he wants to have his own lawyer represent him at the closing. Therefore, Law Firm X intends to limit its representation to Seller. To clarify its role in the transaction, Lawyer sends Buyer an Independently Represented Buyer Acknowledgement to sign agreeing that, although Law Firm X was providing services necessary and incidental to effectuating a settlement of the transaction, including providing an opinion of title for the Buyer's policy to the title insurance company chosen by and affiliated with Bank A, there will be no attorney-client relationship between Law Firm X and Buyer. Law Firm X informs Buyer that the charge for the closing will be reduced to $325.

May Law Firm X limit its representation to Seller and charge Buyer $325 for closing the real estate transaction?

Opinion #2:

Upon notice that Buyer wants to have his own lawyer represent him at the closing, Lawyer must first determine whether Buyer desires Law Firm X to continue to represent his interests in conjunction with his own lawyer. If Buyer desires Law Firm X to continue to represent his interests in the closing, then Law Firm X may continue to advise Buyer and the firm would not be required to adjust its fee.

If Buyer does not consent to the joint representation, Lawyer may limit his representation to Seller in the absence of a conflict of interest. Under the circumstances, it is incumbent upon Lawyer to clarify its role to Buyer. 2006 FEO 3 specifically holds that a lawyer may represent only the seller's interests in a transaction and provide services as a title and closing agent, as required by the contract of sale. There must, however, be certain robust and thorough disclosures to the buyer.

Pursuant to 2006 FEO 3, Lawyer must "fully disclose to Buyer that Seller is his sole client, he does not represent the interests of Buyer, the closing documents will be prepared consistent with the specifications in the contract to purchase and, in the absence of such specifications, he will prepare the documents in a manner that will protect the interests of his client, Seller, and, therefore, Buyer may wish to obtain his own lawyer." 2006 FEO 3.

If Lawyer limits his representation to Seller, Lawyer may not perform any legal services for Buyer. At the conclusion of the representation, Lawyer needs to consider the factors set out in Rule 1.5(a) and determine whether the fee of $325 is clearly excessive *for the services performed for Seller.*

Whether the contract to purchase the property requires Buyer to pay Lawyer's fee for *representation of Seller* is a legal question outside the purview of the Ethics Committee. However, a lawyer may be paid by a third party, including an opposing party, provided the lawyer complies with Rule 1.8(f) and the fee is not illegal or clearly excessive in violation of Rule 1.5(a). *See* RPC 196.

Similarly, Buyer's authority to renegotiate the terms of the Contract per-

taining to the selection of the closing lawyer, and/or the payment of the closing costs and fees associated with the closing, are outside the purview of the Ethics Committee.

Inquiry #3:

May Lawyer provide an opinion of title to the title insurance company for Buyer's title insurance policy under the circumstances described in Inquiry #2?

Opinion #3:

In representing Seller, Law Firm X may provide an opinion on title to the title insurer sufficient and necessary to satisfy the requirements of the Contract and facilitate completion of the transaction on behalf of Seller. *See* CPR 100, RPC 210, 2006 FEO 3.

CPR 100 and RPC 210 provide that a lawyer who is representing the buyer, the lender, and the seller (or any one or more of them) may provide the title insurer with an opinion on title sufficient to issue a mortgagee title insurance policy, when the premium is paid by the buyer. CPR 100 further recommends that, because a buyer-borrower is usually inexperienced in the purchase of real estate and the securing of loans thereon, "any lawyer involved in the transaction, even though not representing the borrower, should be alert to inform the borrower of the availability of an owner's title insurance policy which is usually available to the borrower up to the amount of the loan at little or no expense to the borrower, and assist the borrower in obtaining an owner's title insurance policy."

2013 Formal Ethics Opinion 5

July 19, 2013

Disclosure of Confidential Information to Lawyer Serving as Foreclosure Trustee

Opinion rules that a lawyer/trustee must explain his role in a foreclosure proceeding to any unrepresented party that is an unsophisticated consumer of legal services; if he fails to do so and that party discloses material confidential information, the lawyer may not represent the other party in a subsequent, related adversarial proceeding unless there is informed consent.

Inquiry:

Lender requests that Lawyer's Firm serve as the substitute trustee under a note and deed of trust to commence foreclosure proceedings based on an alleged event of default. Borrower under the note and deed of trust is a limited liability company. While Firm is acting as substitute trustee, Borrower's member-manager meets with Lawyer and explains to Lawyer why he believes Borrower is not in default. Borrower is a small business and its member-manager is inexperienced in matters requiring legal representation.

During the meeting with the member-manager, Lawyer did not explain the role of the trustee or the trustee's relationship to the borrower and lender in a foreclosure. The member-manager informed Lawyer that Borrower's theory is that the note required the subject property to be cleaned and cleared, and Borrower does not believe this condition was met. Borrower's member-manager shows Lawyer pictures and other documents supporting Borrower's theory of the case during this meeting.

The foreclosure proceeding is subsequently dismissed and superior court litigation between Borrower and Lender ensues. A new substitute trustee is appointed under the deed of trust. The primary issue in the lawsuit is the same issue Lawyer and the member-manager of Borrower discussed at their meeting while Firm was substitute trustee, i.e. whether Lender fulfilled its obligations under the note to clean and clear the property.

Now that Firm is no longer the substitute trustee, may Lawyer represent Lender in the lawsuit?

Opinion:

RPC 90 provides that a lawyer who as trustee initiated a foreclosure proceeding may resign as trustee after the foreclosure is contested and act as lender's counsel. The opinion notes that former service as a trustee does not disqualify a lawyer from subsequently assuming a partisan role in regard to foreclosure under a deed of trust or related litigation. *See also* RPC 64 (lawyer who served as trustee may after foreclosure sue the former debtor on behalf of the purchaser).

The facts of RPC 90 contemplate that the trustee resigns "when it becomes apparent that the foreclosure will be contested." In the instant matter, it appears that Lawyer continued to participate as trustee in the foreclosure after he knew that it was contested. Lawyer met with the member-manager of Borrower and discussed Borrower's theory as to the issue of default. Lawyer obtained information from the member-manager specifically related to the issue in controversy.

The responsibilities and limitations of a lawyer acting as trustee on a deed of trust arise primarily from the lawyer's fiduciary duties as trustee as opposed to any client-lawyer relationship. RPC 82. As a fiduciary, a lawyer/trustee has a duty to act impartially as between the parties and to ensure that the foreclosure is prosecuted in accordance with the law and the terms of the deed of trust. *See* RPC 82. However, the trustee's role may be unclear to an unsophisticated consumer of legal services who is unrepresented in the foreclosure. This may lead this party to make uncounseled disclosures to the lawyer/trustee on the erroneous assumption that the lawyer represents the party and has a duty of confidentiality to the party. Therefore, it is the lawyer/trustee's duty to explain the following to any party to a foreclosure that is unrepresented by counsel and inexperienced in the employment of lawyers or the mechanics of a foreclosure proceeding:

- the trustee's role is to ensure that the correct procedures are impartially followed in the prosecution of the foreclosure proceeding;
- the trustee does not represent either the lender or the borrower; and
- communications made by the lender or the borrower to the trustee will not be held in confidence and may be used or disclosed in subsequent actions between the lender and the borrower.

Lawyer failed to explain these limitations on the trustee's role to the member-manager of the LLC, which was unrepresented and apparently inexperienced in the mechanics of a foreclosure proceeding. The member-manager reasonably assumed that the disclosures he made to Lawyer would be held in confidence. Because Lawyer, in his fiduciary capacity, encouraged or allowed Borrower to confide in him without explaining the trustee's role or warning Borrower that the information could be disclosed or used, Lawyer may not subsequently represent Lender in a subsequent substantially related matter if the information Lawyer received from Borrower is material to the matter. Such a practice would constitute conduct that is prejudicial to the administration of justice. *See* Rule 8.4(d). However, Borrower's informed consent, confirmed in writing, would permit Lawyer to proceed with the representation. *See* Rule 1.7(b).

A lawyer/trustee may represent a lender against a borrower in a subsequent proceeding if the lawyer resigns as trustee upon recognizing that the foreclosure will be contested and the lawyer has not received information that may be used to the disadvantage of Borrower in the subsequent matter.

2013 Formal Ethics Opinion 6

July 19, 2013

State Prosecutor Seeking Order for Arrest for Failure to Appear When Defendant is Detained by ICE

Opinion rules that a state prosecutor does not violate the Rules of Professional Conduct by asking the court to enter an order for arrest when a defendant detained by ICE fails to appear in court on the defendant's scheduled court date.

Inquiry #1:

A defendant is an undocumented alien who is arrested for a crime. He is given a secured bond by the magistrate, placed in custody in the jail, and served with a US Immigration and Customs Enforcement (ICE) detainer. The defendant hires a bondsman to pay the secured bond and the bondsman does so. ICE comes to the jail and takes the defendant into custody, transporting him to a federal holding facility. The defendant's court-appointed lawyer brings verification of the defendant's detention by ICE to the prosecutor handling the case. Later, the defendant's lawyer appears in court on the defendant's court date and explains to the court that the defendant is in the custody of ICE. The defense lawyer asks the state to have the defendant brought to trial, enter a voluntary dismissal, or dismiss the case with leave pursuant to N.C. Gen. Stat.§15A-932.

The prosecutor asks the judge to call the defendant for failure to appear and to issue an order for his arrest pursuant to N.C. Gen. Stat.§15A-305(b)(2)

which provides that "[a]n order for arrest may be issued when:...[a] defendant who has been arrested and released from custody pursuant to Article 26 of this Chapter, Bail, fails to appear as required."

The court enters a forfeiture of the bond pursuant to N.C. Gen. Stat.§15A-544.3(a), which provides that when a defendant who was released upon execution of a bail bond fails to appear before the court as required, the court shall enter a forfeiture for the amount of the bail bond in favor of the state and against the defendant and the surety on the bail bond. Nevertheless, N.C. Gen. Stat.§15A-544.3(b)(9) provides that a forfeiture of a bail bond will be set aside if, on or before the final judgment date, "satisfactory evidence is presented to the court" that one of a number of listed "events" has occurred. That list includes the following "event" at subparagraph (vii):

> the defendant was incarcerated in a local, state, or federal detention center, jail, or prison located anywhere within the borders of the United States at the time of the failure to appear, and the district attorney for the county in which the charges are pending was notified of the defendant's incarceration while the defendant was still incarcerated and the defendant remains incarcerated for a period of 10 days following the district attorney's receipt of notice, as evidenced by a copy of the written notice served on the district attorney via hand delivery or certified mail and written documentation of date upon which the defendant was released from incarceration, if the defendant was released prior to the time the motion to set aside was filed.

N.C. Gen. Stat.§15A-544.3(b)(9); accord N.C. Gen. Stat.§15A-544.5(b)(7).

If ICE decides to release the defendant from custody and there is an outstanding order for his arrest from a North Carolina court, ICE will detain the defendant until he can be released to the custody of the State.[1] *See* N.C. Gen. Stat.§15A-761.

Is the prosecutor's conduct a violation of Rule 3.8 or any other Rule of Professional Conduct?

Opinion #1:

No. Rule 3.8, on the special responsibilities of a prosecutor, prohibits a prosecutor from prosecuting a charge that the prosecutor knows is not supported by probable cause. The comment to the rule, moreover, emphasizes the prosecutor's duty to seek justice. However, there is no legal requirement that a defendant's failure to appear in court be willful. In the instant inquiry, the legal requirements for requesting an order of arrest were satisfied and there was a procedural reason for seeking the order of arrest. Therefore, although the prosecutor knows that the defendant's failure to appear is not willful, the prosecutor's exercise of his professional discretion within the requirements of the law does not violate the Rules of Professional Conduct.

Inquiry #2:

Did the judge violate the Rules of Professional Conduct or the Code of Judicial Conduct by issuing the order for arrest and forfeiting the bond?

Opinion #2:

Opining on the professional conduct of judicial officers is outside the purview of the Ethics Committee. Therefore, no opinion will be offered in response to this question.

Endnote

1. As a practical matter, however, a person who is detained by ICE is rarely released. Deportation or federal incarceration is more likely.

2013 Formal Ethics Opinion 7

July 19, 2013

Sharing Fee from Tax Appeal with Nonlawyer

Opinion rules that a law firm may not share a fee from a tax appeal with a nonlawyer tax representative unless such nonlawyer representatives are legally permitted by the tax authorities to represent claimants and to be awarded fees for such representation.

Inquiry:

A is a nonlawyer independent tax representative who has worked with Company B in seeking to achieve a reduction in the county assessment of Company B's property for ad valorem taxes. Under A's contract with Company B, if A is successful in achieving a reduction in the assessment, he is entitled to receive a percentage of Company B's tax savings. It is assumed that A is limiting his representation to activities that do not constitute the practice of law.

Pursuant to the contract with Company B, A is authorized to obtain counsel provided it does not increase the amount Company B is required to pay for representation.

A and Company B want to appeal to the North Carolina Property Tax Commission seeking a reduction in the assessment. A licensed lawyer is required to pursue the appeal.

With Company B's consent, may A retain Lawyer to represent Company B on the appeal and pay Lawyer a percentage of A's share of any tax savings for Company B? May Lawyer be paid out of A's share on an hourly basis?

Opinion:

Rule 5.4(a) regulates the distribution of fees that, because of the prohibition on the unauthorized practice of law, may only be earned by a lawyer. *See* 2005 FEO 6. The purpose of the prohibition, as noted in comment [1] to the rule, is to protect the lawyer's professional independence of judgment from interference from a nonlawyer. The prohibition also prevents solicitation of cases by lawyers and discourages nonlawyers from engaging in the unauthorized practice of law. *See* 2003 FEO 10.

Unless nonlawyers are legally permitted to represent taxpayer/claimants before any taxing authority, and to be awarded fees for such representation, the proposed arrangement constitutes improper fee sharing in violation of Rule 5.4(a).

The instant scenario can be distinguished from those addressed previously by the Ethics Committee in 2003 FEO 10 and 2005 FEO 6. The two prior opinions apply to nonlawyer representatives of disability claimants before the Social Security Administration (SSA). 2003 FEO 10 holds that a Social Security lawyer may agree to compensate a nonlawyer representative for the prior representation of a disability claimant before the SSA. 2005 FEO 6 provides that the compensation of a nonlawyer law firm employee who represents Social Security disability claimants before the SSA may be based upon the income generated by such representation. However, nonlawyers are legally permitted to represent disability claimants before the SSA and to be awarded fees for such representation. *See* 42 U.S.C. § 406. When generated by a nonlawyer as authorized by law, such a fee cannot be designated a "legal fee" subject to the limitations of Rule 5.4(a). *See* 2005 FEO 6.

Lawyer should negotiate his fee directly with Company B.

2013 Formal Ethics Opinion 8

July 25, 2014

Responding to the Mental Impairment of Firm Lawyer

Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

Introduction:

As the lawyers from the "Baby Boomer" generation advance in years, there will be more instances of lawyers who suffer from mental impairment or diminished capacity due to age. In addition, lawyers suffer from depression and substance abuse at approximately twice the rate of the general population.[1] This opinion examines the obligations of lawyers in a firm who learn that another firm lawyer suffers from a mental condition that impairs the lawyer's ability to practice law or has resulted in a violation of a Rule of Professional Conduct. This opinion relies upon ABA Commission on Ethics and Professional Responsibility, Formal Opinion 03-429 (2003) [hereinafter ABA Formal Op. 03-429] for its approach to the issues raised by the mental impairment of a lawyer in a firm. For further guidance, readers are encouraged to refer to the ABA opinion.

Inquiry #1:

Attorney X has been practicing law successfully for over 40 years and is a prominent lawyer in his community. In recent years, his ability to remember has diminished and he has become confused on occasion. The other lawyers in his firm are concerned that he may be suffering from the early stages of Alzheimer's disease or dementia.

What are the professional responsibilities[2] of the other lawyers in the firm?[3]

Opinion #1:

The partners[4] in the firm must make reasonable efforts to ensure that

Attorney X does not violate the Rules of Professional Conduct.

Mental impairment may lead to inability to competently represent a client as required by Rule 1.1, inability to complete tasks in a diligent manner as required by Rule 1.3, and inability to communicate with clients about their representation as required by Rule 1.4. Although a consequence of the lawyer's impairment, these are violations of the Rules of Professional Conduct nonetheless. As noted in ABA Formal Op. 03-429, "[i]mpaired lawyers have the same obligations under the [Rules of Professional Conduct] as other lawyers. Simply stated, mental impairment does not lessen a lawyer's obligation to provide clients with competent representation." Under Rule 1.16(a)(2), a lawyer is prohibited from representing a client and, where representation has commenced, required to withdraw if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client." Unfortunately, an impaired lawyer may not be aware or may deny that his impairment is negatively impacting his ability to represent clients. ABA Formal Op. 03-429.

Rule 5.1(a) requires partners in a firm and all lawyers with comparable managerial authority in the firm to "make reasonable efforts to ensure that the firm or the organization has in effect measures giving reasonable assurance that all lawyers in the firm or the organization conform to the Rules of Professional Conduct." Similarly, Rule 5.1(b) requires a lawyer having direct supervisory authority over another lawyer to "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." Taken together, these provisions require a managerial or supervisory lawyer who suspects or knows that a lawyer is impaired to closely supervise[5] the conduct of the impaired lawyer because of the risk that the impairment will result in violations of the Rules.

When deciding what should be done in response to a lawyer's apparent mental impairment, it may be helpful to partners and supervising lawyers to consult a mental health professional for advice about identifying mental impairment and assistance for the impaired lawyer. *Id.* As observed in ABA Formal Op. 03-429,

> [t]he firm's paramount obligation is to take steps to protect the interest of its clients. The first step may be to confront the impaired lawyer with the facts of his impairment and insist upon steps to assure that clients are represented appropriately notwithstanding the lawyer's impairment. Other steps include forcefully urging the impaired lawyer to accept assistance to prevent future violations or limiting the ability of the impaired lawyer to handle legal matters or deal with clients.

Id. If the lawyer's mental impairment can be accommodated by changing the lawyer's work environment or the type of work that the lawyer performs, such steps also should be taken.[6] "Depending on the nature, severity, and permanence (or likelihood of periodic recurrence) of the lawyer's impairment, management of the firm has an obligation to supervise the legal services performed by the lawyer and, in an appropriate case, prevent the lawyer from rendering legal services to clients of the firm." *Id.* Making a confidential report to the State Bar's Lawyer Assistance Program (LAP) (or to another lawyers assistance program approved by the State Bar[7]) would also be an appropriate step. The LAP can provide the impaired lawyer with confidential advice, referrals, and other assistance.

Inquiry #2:

Attorney X's mental capacity continues to diminish. Apparently as a consequence of mental impairment, Attorney X failed to deliver client funds to the office manager for deposit in the trust account. It is believed that he converted the funds to his own use. In addition, Attorney X failed to complete discovery for a number of clients although he declined assistance from the other lawyers in the firm. Some clients may face court sanctions as a consequence. Although Attorney X is engaging and articulate when he meets with clients, he no longer seems able to prepare for litigation and, on more than one occasion, Attorney X's presentation in court was muddled, meandering, and confused.

What are the professional responsibilities of the other lawyers in the firm?

Opinion #2:

Attorney X has violated Rule 1.15 by failing to place entrusted funds in the firm trust account. He has also violated Rule 1.1 and Rule 1.3 by providing incompetent representation and by failing to act with reasonable promptness in completing discovery. These are violations of the Rules of Professional Conduct that may have to be reported to the State Bar or to the court. In addition, steps may have to be taken to provide additional ongoing supervision for Attorney X or to change the circumstances or type of work that he performs to avoid additional violations of his professional duties. The other lawyers in the firm must also take steps to mitigate the adverse consequences of Attorney X's past conduct including replacing client funds.

Rule 8.3(a) requires a lawyer "who knows 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] inform the North Carolina State Bar or the court having jurisdiction over the matter." Only misconduct that raises a "substantial question" as to the lawyer's honesty, trustworthiness, or fitness must be reported. As noted in the Comment,

> [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 possible offense and not the quantum of evidence of which the lawyer is aware.
>
> Rule 8.3, cmt. [4].

If an impaired lawyer's misconduct is isolated and unlikely to recur because the mental impairment has ended or is controlled by medication or treatment, no report of incompetent or delinquent representation may be required. *See* RPC 243 (an "isolated incident resulting from a momentary lapse of judgment" does not raise a substantial question about honesty, trustworthiness, or fitness). "Similarly, if the firm is able to eliminate the risk of future violations of the duties of competence and diligence under the [Rules] through close supervision of the lawyer's work, it would not be required to report the impaired lawyer's violation." ABA Formal Op. 03-429.

However, reporting is required if the misconduct is serious, such as the violation of the trust accounting rules described in this inquiry, or the lawyer insists upon continuing to practice although his mental impairment has rendered him unable to represent clients as required by the Rules of Professional Conduct.[8] In either situation, a report of misconduct may not be made if it would require the disclosure of confidential client information in violation of Rule 1.6, and the client does not consent to disclosure. *See* Rule 8.3(c).

Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." If the managing lawyers determine that the impaired lawyer cannot provide competent and diligent representation and should be removed from a client's case, the situation must be explained to the client so that the client can decide whether to agree to be represented by another lawyer in the firm or to seek other legal counsel.

Rule 5.1(c) requires a partner or a lawyer with comparable managerial authority or with supervisory authority over another lawyer to take reasonable remedial action to avoid the consequences of the lawyer's violation of the Rules. Even if the impaired lawyer is removed from a representation, the firm lawyers must make every effort to mitigate any adverse consequences of the impaired lawyer's prior representation of the client.

Inquiry #3:

If the firm partners determine that Attorney X has violated the Rules and there is a duty to report under Rule 8.3, may they fulfill the duty by reporting Attorney X to the State Bar's Lawyer Assistance Program (LAP)?

Opinion #3:

No. 2003 Formal Ethics Opinion 2 addressed this issue in the context of reporting opposing counsel as follows:

> The report of misconduct should be made to the Grievance Committee of the State Bar if a lawyer's impairment results in a violation of the Rules that is sufficient to trigger the reporting requirement. The lawyer must be held professionally accountable. *See, e.g.,* Rule .0130(e) of the Rules on Discipline and Disability of Attorneys, 27 N.C.A.C. 1B, Section .0100 (information regarding a member's alleged drug use will be referred to LAP; information regarding the member's alleged additional misconduct will be reported to the chair of the Grievance Committee).
>
> Making a report to the State Bar, as required under Rule 8.3(a), does not diminish the appropriateness of also making a confidential report to LAP.

The Bar's disciplinary program and LAP often deal with the same lawyer and are not mutually exclusive. The discipline program addresses conduct; LAP addresses the underlying illness that may have caused the conduct. Both programs, in the long run, protect the public interest.

Inquiry #4:

Attorney X announces his intent to leave the firm to set up his own solo practice and to take all of his client files with him. The other lawyers in the firm are concerned that, absent any supervision or assistance, Attorney X will be unable to competently represent clients because of his mental impairment.

What are the duties of the remaining lawyers in the firm if Attorney X leaves and sets up his own practice?

Opinion #4:

In addition to any duty to report, the remaining lawyers may have a duty to any current client of Attorney X to ensure that the client has sufficient information to make an informed decision about continuing to be represented by Attorney X.

As noted in Opinion #2, Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The clients of an impaired lawyer who leaves a firm must decide whether to follow the departed lawyer to his new law practice. To make an informed decision, the clients must be informed of "the facts surrounding the withdrawal to the extent disclosure is reasonably necessary for those clients to make an informed decision about the selection of counsel." ABA Formal Op. 03-429. There is no comparable duty to former clients of the impaired lawyer as long as the firm avoids any action that might be interpreted as an endorsement of the services of the departed, impaired lawyer, including sending a joint letter regarding the lawyer's departure from the firm.

The remaining lawyers in the firm may conclude that, while under their supervision and support, the impaired lawyer did not violate the Rules and, therefore, there is no duty to report to the State Bar under Rule 8.3. Nevertheless, subject to the duty of confidentiality to clients under Rule 1.6, voluntarily reporting the impaired lawyer to LAP (or another lawyer assistance program approved by the State Bar) would be appropriate. The impaired lawyer will receive assistance and support from LAP and this may help to prevent harm to the interests of the impaired lawyer's clients.

Inquiry #5:

Associate lawyers and staff members are often the first to observe behavior indicating that a lawyer has a mental impairment. If an associate lawyer or a staff member reports behavior by Attorney X that indicates that Attorney X is impaired and may be unable to represent clients competently and diligently, what is a partner's or supervising lawyer's duty upon receiving such a report?

Opinion #5:

If a partner or supervising lawyer receives a report of impairment from an associate lawyer or a staff member, regardless of whether the lawyer suspected of impairment is a senior partner or an associate, the partner or supervising lawyer must investigate and, if it appears that the report is meritorious, take appropriate measures to ensure that the impaired lawyer's conduct conforms to the Rules of Professional Conduct. *See* Opinion #1 and Rule 5.1(a). It is never appropriate to protect the impaired lawyer by refusing to act upon or ignoring a report of impairment or by attempting to cover up the lawyer's impairment.

Inquiry #6:

If an associate lawyer in the firm observes behavior by Attorney X that indicates that Attorney X is not competent to represent clients, what should the associate lawyer do?

Opinion #6:

The associate lawyer must report his or her observations to a supervising lawyer or the senior management of the firm as necessary to bring the situation to the attention of lawyers in the firm who can take action.

Inquiry #7:

An associate lawyer in the firm reports to his supervising lawyer that he suspects that Attorney X is mentally impaired. He also describes to the supervising lawyer conduct by Attorney X that violated Rules 1.1 and 1.3. The supervising lawyer tells the associate to ignore the situation and to not say anything to anyone about his observations including clients, other lawyers in the firm, or staff members. The associate concludes that no action will be taken to investigate or address Attorney X's behavior. Does the associate lawyer have any further obligation?

Opinion #7:

A subordinate lawyer is bound by the Rules of Professional Conduct notwithstanding that the subordinate lawyer acts at the direction of another lawyer in the firm. Rule 5.2(a). If the associate lawyer believes that the duty to report professional misconduct under Rule 8.3 may be triggered by the conduct of Attorney X, the associate lawyer should discuss this concern with his supervising lawyer. If the supervising lawyer declines to address the situation, the associate lawyer should seek guidance as to his professional responsibilities from the lawyers at the State Bar who provide informal ethics advice.

Inquiry #8:

Assume that Attorney X is the sole principal in the firm and there is one associate lawyer. Attorney X displays behavior that may indicate that he is in the early stages of Alzheimer's disease or dementia. There is no senior management to whom the associate lawyer can report. What should the associate lawyer do?

Opinion #8:

If the associate lawyer believes that the duty to report professional misconduct under Rule 8.3 may be triggered by the conduct of Attorney X, the associate lawyer should seek guidance as to his professional responsibilities from the lawyers at the State Bar who provide informal ethics advice. *See* Opinion #7. Regardless of whether Attorney X's conduct triggers the duty to report, the associate lawyer may seek advice and assistance from the LAP or from another approved lawyer assistance program, or may contact a trusted, more experienced lawyer in another firm to serve as a mentor or advisor on how to address the situation.

Inquiry #9:

Assume Attorney X is a sole practitioner and the lawyers in his community observe behavior that may indicate that he is in the early stages of Alzheimer's disease or dementia. What is the responsibility of the lawyers in the community?

Opinion #9:

The Rules of Professional Conduct impose no specific duty on other members of the bar to take action relative to a potentially impaired fellow lawyer except the duty to report to the State Bar if the other lawyer's conduct raises a substantial question about his honesty, trustworthiness, or fitness to practice law and the information about the lawyer is not confidential client information. *See* Opinion #7. Nevertheless, as a matter of professional responsibility, attendant to the duties to seek to improve the legal profession and to protect the interests of the public that are articulated in the Preamble to the Rules of Professional Conduct, the lawyers in the community are encouraged to assist the potentially impaired lawyer to find treatment or to transition from the practice of law. A mental health professional, the LAP, or another lawyer assistance program can be consulted for advice and assistance.

Inquiry #10:

Do the responses to any of the inquiries above change if the lawyer's impairment is due to some other reason such as substance abuse or mental illness?

Opinion #10:

No.

Endnotes

1. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-429 (2003) (citing George Edward Bailly, *Impairment, the Profession, and Your Law Partner*, 11 No.1 Prof. Law. 2 (1999)) [hereinafter ABA Formal Op. 03-429].
2. This opinion does not address the issues that may arise under the Americans with Disabilities Act of 1990, 42 US C. §§12101 et seq. (2003) (the ADA) relative to an employer's legal responsibilities to an impaired lawyer. Lawyers are advised to consult the ADA and the Equal Employment Opportunity Commission's website, eeoc.gov, for guidance.
3. "Firm" as used in the Rules of Professional Conduct and this opinion denotes "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a legal services organiza-

tion or the legal department of a corporation, government entity, or other organization." Rule 1.0(d).

4. "Partner" as used in the Rules of Professional Conduct and this opinion denotes "a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law." Rule 1.0(h).
5. It is improper for a firm to charge a client for additional supervision for an impaired lawyer if the supervision exceeds what is normally required to ensure competent representation unless the client is advised of the reason for the additional supervision and agrees to the charges. *See* Rule 1.5(a).
6. ABA Formal Op. 03-429 provides the following examples of accommodation:

   A lawyer who, because of his mental impairment, is unable to perform tasks under strict deadlines or other pressures, might be able to function in compliance with the [Rules] if he can work in an unpressured environment. In addition, the type of work involved, as opposed to the circumstances under which the work occurs, might need to be examined when considering the effect that an impairment might have on a lawyer's performance. For example, an impairment may make it impossible for a lawyer to handle a jury trial or hostile takeover competently, but not interfere at all with his performing legal research or drafting transaction documents.

7. One such program is the Transitioning Lawyers Commission (or "TLC") of the North Carolina Bar Association, which considers issues of aging and cognitive impairment and helps lawyers to wind down their law practices to "retire gracefully." *See more at:* tlc.ncbar.org.
8. ABA Formal Op. 03-429 cautions that when reporting an impaired lawyer pursuant to Rule 8.3, disclosure of the impairment may be necessary; however, the reporting lawyer should be careful to avoid violating the ADA.
9. ABA Formal Op. 03-429 counsels that, when providing a client with information about the departed lawyer, a firm lawyer "must be careful to limit any statement to ones for which there is a reasonable factual foundation." This will avoid violating the prohibition on false and misleading communications in Rule 7.1 and the prohibition on deceit and misrepresentation in Rule 8.4(c).

2013 Formal Ethics Opinion 9

October 25, 2013

Role of Lawyer for Public Interest Law Organization

Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

Facts:

Attorney A is a staff lawyer for Immigrant Aid Corporation (IAC), a public interest, nonprofit corporation that provides services to immigrants with limited income. Public interest law firms are subject to the requirements of NC Gen. Stat. §84-5.1.

IAC is tax exempt under 26 U.S.C. §501(c)(3). A nonlawyer is the executive director of IAC. IAC has satellite offices that are managed by nonlawyers. The services provided by the organization to immigrants include legal assistance with immigration matters. These services are provided by staff lawyers and by Board of Immigration Appeals (BIA) representatives. BIA representatives are nonlawyers who are authorized by the federal government to handle certain immigration matters.

IAC charges its clients nominal fees for the legal services it provides. There is a separate, predetermined fee for each separate aspect of a case or task to be performed by a lawyer or a BIA representative. The organization does not have income qualification guidelines and does not use a sliding income scale to determine what a client will pay for a service.

A new client of the corporation is asked to sign a document entitled "Retainer Agreement" for the services to be provided by staff lawyers. The agreement states that "if the process to obtain the benefit I seek requires more than one step, each step will be a separate case with a separate fee and separate service plan." A schedule of the separate fees is not provided with the agreement. Instead, the agreement specifies a total fee, which is the aggregate of the fees for the various legal services that it is anticipated the client will need.

The Retainer Agreement states that the executive director or the office manager will determine the outcome of a client's request for a waiver of a legal fee, a client's complaint regarding legal services, and any dispute regarding legal fees. In the case of a fee dispute, a disgruntled client speaks first to a supervising staff lawyer, then, if the dispute is not resolved, to an office manager who is not a lawyer, and finally to the executive director.

When a client pays a fee by cash or check, the cash or check is locked in a staff member's desk until the funds can be deposited in IAC's operating account.

Inquiry #1:

Are North Carolina lawyers who work for IAC subject to the North Carolina Rules of Professional Conduct although they are not employed by a law firm?

Opinion #1:

Yes. The North Carolina Rules of Professional Conduct apply not only to lawyers working at law firms, but also to lawyers working in-house at public and private companies and for non-profit organizations. *See* Rule 1.0(d) ("'Firm' or 'law firm' denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation, government entity, or other organization.") *See also* Preamble, Rule 0.1 ("Every lawyer is responsible for observance of the Rules of Professional Conduct").

Inquiry #2:

Is a North Carolina lawyer allowed to work for a 501(c)(3) corporation in which a nonlawyer serves as the executive director or as the manager of the satellite office where the lawyer works?

Opinion #2:

Yes. Pursuant to NC Gen. Stat. §84-5.1, a nonprofit corporation, tax exempt under 26 U.S.C. §501(c)(3), organized or authorized under Chapter 55A of the General Statutes of North Carolina, and operating as a public interest law firm as defined by the applicable Internal Revenue Service guidelines, may render legal services provided by lawyers licensed to practice law in North Carolina for the purposes for which the nonprofit corporation was organized. "The nonprofit corporation must have a governing structure that does not permit an individual or group of individuals other than an attorney duly licensed to practice law in North Carolina to control the manner or course of the legal services rendered and must continually satisfy the criteria established by the Internal Revenue Service for 26 U.S.C. §501(c)(3) status, whether or not any action has been taken to revoke that status." NC Gen. Stat. §84-5.1(a). *See also* Rule 5.4, cmt. [3] (nonlawyer may serve as a director or officer of a professional corporation organized to practice law if permitted by law).

Inquiry #3:

If the answer to Inquiry #2 is "yes," to what extent may the executive director or office manager supervise or instruct the staff lawyers in the performance of legal services?

Opinion #3:

The nonlawyers associated with the IAC may not "direct or regulate" the staff lawyer's professional judgment in rendering legal services. Rule 5.4(c). As required by NC Gen. Stat. §84-5.1, the IAC "must have a governing structure that does not permit an individual or group of individuals other than an attorney duly licensed to practice law in North Carolina to control the manner or course of the legal services rendered."

Inquiry #4:

The fees to be charged for a legal service performed by a staff lawyer or by a BIA representative are finally approved by the executive director. May a staff lawyer permit a nonlawyer to have final approval authority for fees to be charged for the lawyer's work?

Opinion #4:

A nonlawyer may have final approval authority for fees to be charged for the lawyer's work only if the approval process does not interfere with the staff lawyer's exercise of professional judgment and there is a method for the lawyer to object if the fee is clearly excessive in violation of Rule 1.5(a).

Inquiry #5:

By allowing IAC to collect and retain legal fees, is a staff lawyer participating in fee-sharing with a nonlawyer which is prohibited by Rule 5.4?

Opinion #5:

No. As noted in comment [1] to the Rule 5.4, the traditional limitations

on sharing fees prevent interference in the independent professional judgment of a lawyer by a nonlawyer. NC Gen. Stat. §84-5.1 prohibits a nonprofit public interest law corporation from having a governing structure that permits such interference. So long as IAC is complying with the statutory requirements, the fee-splitting prohibition is not triggered by this arrangement.

Inquiry #6:

If money is collected in advance from clients of IAC to pay for legal services to be provided by staff lawyers, does the staff lawyer have to insure that money is deposited into a trust account established and managed pursuant to Rule 1.15 of the Rules of Professional Conduct?

If money is collected for a consultation with an IAC client at the time of the consultation, does the staff lawyer have to insure that the money is deposited into a trust account or may it be deposited into the corporation's operating account?

Does the title "Retainer Agreement" allow the staff lawyer to consider the payment a true retainer, which is earned upon payment, and which may be deposited in IAC's operating account?

Opinion #6:

If money is collected for a staff lawyer's services, the lawyer must insure that IAC handles the money in a manner that is consistent with the lawyer's duty to safekeep client property. Rule 1.15. Comment [2] to Rule 1.15 provides that "[a]ny 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." Pursuant to Rule 1.15-2(b), "[a]ll 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." "Entrusted property" includes "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." Rule 1.15-1(e).

The title of the representation agreement, in this case "Retainer Agreement," does not determine the actual nature of the agreement. Whether money paid in advance by a client is "entrusted property" that must be placed in a trust account will depend on the nature of the advance payment (advance fee, general retainer, flat fee, or minimum fee) and whether the fee is earned upon payment. The IAC must follow the guidelines set out in 2008 FEO 10 as to fees paid in advance and place any fees that are not earned immediately into a trust account.

Inquiry #7:

If money is collected for costs that may be incurred in conjunction with the provision of legal services, should the staff lawyer insure that the money is deposited into a trust account?

Opinion #7:

Yes. Any portion of a payment that is intended to cover costs must be deposited in a trust account. If IAC receives a check from a client that represents costs and fees, the check must be deposited in a trust account before IAC may withdraw that portion of the funds that constitutes immediately earned legal fees. *See* RPC 158.

Inquiry #8:

Until the money is deposited in a bank account, may a client's cash or check be locked in a staff member's desk?

Opinion #8:

A lawyer has a duty to safekeep client funds and property. Rule 1.15-2. Rule 1.15-2(b) provides that"[a]ll 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." Any check representing any portion of legal fees that are not earned immediately must be *promptly* deposited in a trust account. In the event that trust funds cannot be immediately deposited in a trust account, the funds should be securely maintained until they can be deposited.

Inquiry #9:

Should a staff lawyer require that a schedule of the fees for services be included in the Retainer Agreement or discussed with the client at the time of execution of the agreement?

Opinion #9:

Yes. Rule 1.4(b) provides that a lawyer shall "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." In this scenario, the client cannot make an informed decision about entering into the representation agreement without sufficient knowledge of the legal fees being charged for each specific service.

Inquiry #10:

May the agreement include the following statement: "If I decide not to continue a case with the agency and the service I requested has been performed or completed, I will not be entitled to a refund, full or partial, of the fee"?

Opinion #10:

The use of the term "nonrefundable fee" in fee agreements is prohibited because a fee is always subject to refund, in whole or in part, if the fee is clearly excessive under the circumstances. 2008 FEO 10. Therefore, a fee agreement may state that a client "will not be entitled to a refund of any portion of a fee unless it can be demonstrated that the total fee was clearly excessive under the circumstances." *See* "Model Fee Provisions" in 2008 FEO 10.

Inquiry #11:

May a staff lawyer ask a client to sign the "Retainer Agreement" if it states that IAC "is not obligated to continue representing me in all steps of the legal process, and may withdraw its representation and close my case upon written notification to the client and to the administrative law agency"?

Opinion #11:

No. The statement in the Retainer Agreement misrepresents the ethical duties owed by the staff lawyer to the client and the administrative law agency or tribunal by the staff lawyer.

Pursuant to Rule 1.2(c), "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances." When the scope of representation is limited, it is appropriate to define the scope of representation in the representation agreement. The agreement should set forth the "steps of the legal process" for which IAC will provide a lawyer to represent the client. The representation may be limited to those "steps" if reasonable under the circumstances.

If the staff lawyer withdraws from the matter before completing the "steps," the lawyer must comply with Rule 1.16(c) requiring notice to or permission of the tribunal, consistent with applicable law, when terminating a representation. In addition, Rule 1.16(d) requires a lawyer to "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 or expense that has not been earned or incurred."

Inquiry #12:

May a staff lawyer agree to or participate in IAC's process for resolving fee disputes with clients? Should the agreement reference the fee dispute resolution program of the State Bar required by Rule 1.5(f) of the Rules of Professional Conduct?

Opinion #12:

The IAC may establish an internal mechanism for reviewing clients' complaints about legal fees. However, that mechanism will not replace the obligation of a North Carolina lawyer to participate in the North Carolina State Bar's fee dispute resolution program. Participation in the fee dispute resolution program of the North Carolina State Bar is mandatory for the lawyer when a client requests resolution of a disputed legal fee. Rule 1.5(f).

Inquiry #13:

If a client disputes a fee, should the amount of any fee previously paid by the client and converted to IAC's use be deposited in a trust account?

Opinion #13:

No. If fees have been deposited in IAC's operating account based on a contract providing that the fees were earned upon receipt, there is no requirement to deposit the funds into a trust account pending the resolution of a fee dispute.

Inquiry #14:

A lawyer who is not a director, officer, or manager of IAC is designated as the supervising lawyer for the other lawyers on the staff. Is the supervising lawyer responsible for IAC's compliance with the Rules of Professional Conduct?

Opinion #14:

Pursuant to Rule 5.1(a), "[a] lawyer who individually or together with other lawyers possesses comparable managerial authority, shall make reasonable efforts to ensure that the firm or the organization has in effect measures giving reasonable assurance that all lawyers in the firm or the organization conform to the Rules of Professional Conduct." Pursuant to Rule 5.1(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."

Inquiry #15:

What are the duties and responsibilities of the subordinate lawyers in the organization relative to compliance with the Rules of Professional Conduct?

Opinion #15:

Rule 5.2 sets out the responsibilities of subordinate lawyers regarding compliance with the Rules of Professional Conduct. Rule 5.2(a) states that a lawyer "is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person." However, Rule 5.2(b) states that 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."

Inquiry #16:

IAC maintains a referral list of private lawyers to use when it is necessary to refer a person elsewhere. At the request of management, may a staff lawyer refer an inquiring person to one or two specific lawyers on the list?

Opinion #16:

Yes, if the lawyers are qualified to handle the client's matter and nothing of value has been given by the lawyers for the referral. Rule 7.2(b).

Inquiry #17:

A BIA representative is designated by IAC as an "Immigration Specialist" on business cards, email, and other written communications to clients and prospective clients. Is a staff lawyer required to take any action to prevent or challenge such designation?

Opinion #17:

Rule 5.5(d) provides that a lawyer "shall not assist another person in the unauthorized practice of law." If, in the context of IAC's operations, the use of the term "Immigration Specialist" by a BIA representative is misleading as to the representative's authority to practice law in North Carolina, then a staff lawyer must take steps to remedy the misrepresentation.

Inquiry #18:

IAC advertises that its legal services are provided at "reasonable prices" without explanation or clarification. Does such a statement violate the advertising rules for lawyers?

Opinion #18:

The statement that legal services are provided at "reasonable prices" is permissible so long as it is truthful. Whether a fee is reasonable depends upon a number of factors, including the current rates in the particular community. *See also* Rule 1.5(a) (listing factors to be considered in determining whether a fee is clearly excessive).

Inquiry #19:

What duty does a staff lawyer or a supervising lawyer have to review notices that IAC places in newspapers and social media about its legal services for compliance with the advertising rules?

Opinion #19:

A lawyer employed by IAC has a duty to ensure that the content of any information IAC provides to prospective clients about the lawyer or the lawyer's services is truthful and not misleading. Rule 7.1; 2004 FEO 1.

Inquiry #20:

IAC posts the following announcement on Facebook: "IAC will be hosting a FREE citizenship workshop on [date] at [address]. We will help applicants fill out their applications for citizenship and a lawyer will review each application. If you or a friend are interested in getting help with your citizenship application at the workshop, please contact [lawyer]." Does this announcement violate the advertising rules for lawyers?

Opinion #20:

No. IAC may conduct educational workshops for non-clients and may offer to provide free legal services. *See* RPC 36. IAC may advertise the seminars so long as the advertisements comply with the Rules of Professional Conduct. 2007 FEO 4. To comply with the rules, it may be necessary for the announcement to include any limitations on the free services IAC will provide.

Inquiry #21:

If a staff lawyer concludes that IAC's current fee structure violates IRS and BIA regulations, what should the staff lawyer do?

Opinion #21:

Pursuant to Rule 1.13(b), if a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action that:

> is a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
>
> Rule 1.13(c) further states that:
>
> 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 reveal such information outside the organization to the extent permitted by Rule 1.6 and may resign in accordance with Rule 1.16.

2013 Formal Ethics Opinion 10

October 25, 2013

Participation in Online Group Legal Advertising Using Territorial Exclusivity

Opinion rules that, with certain disclosures, a lawyer may participate in an online group legal advertising service that gives a participating lawyer exclusive rights to contacts arising from a particular territory.

Facts:

Total Attorneys is a for-profit company that provides group advertising services to lawyers. In exchange for an advertising fee, Total Attorneys provides participating lawyers with a license to use a Total Attorneys website (TotalBankruptcy.com or TotalDivorce.com, for example) to advertise the participating lawyer's legal services. The license is geographically exclusive and only one lawyer within a particular zip code is licensed to use the advertising site. Participating lawyers pay a specified fee per contact per month to cover the costs of advertising and marketing services, including the design and operation of the website, telephone support services, and customer management software.

Total Attorneys establishes and maintains a website that provides consumers with information on certain legal subjects such as bankruptcy law. Consumers who wish to contact the participating lawyer within the consumer's zip code may either call a toll free number provided by the website call center, or fill out an online contact form. Total Attorneys forwards the contact to the participating lawyer. The interactions between the website call center and the consumer are limited to obtaining basic information and facilitating the first contact with the participating lawyer. The website call center does not engage in any screening or evaluation of the consumer, or the consumer's potential legal concern.

Each page on the website includes a disclaimer similar to the following: **PAID ATTORNEY ADVERTISEMENT: THIS WEB SITE IS A**

GROUP ADVERTISEMENT AND THE PARTICIPATING ATTORNEYS ARE INCLUDED BECAUSE THEY PAY AN ADVERTISING FEE. It is not a lawyer referral service or prepaid legal services plan. Total Bankruptcy is not a law firm. Your request for contact will be forwarded to the local lawyer who has paid to advertise in the ZIP code you provide. Total Bankruptcy does not endorse or recommend any lawyer or law firm who participates in the network, nor does it analyze a person's legal situation when determining which participating lawyers receive a person's inquiry. It does not make any representation and has not made any judgment as to the qualifications, expertise, or credentials of any participating lawyer. No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers. The information contained herein is not legal advice. Any information you submit to Total Bankruptcy does not create an attorney-client relationship and may not be protected by attorney-client privilege. Do not use the form to submit confidential, time-sensitive, or privileged information. All photos are of models and do not depict clients. All case evaluations are performed by participating attorneys. An attorney responsible for the content of this site is Kevin W. Chern, Esq., licensed in Illinois with offices at 25 East Washington, Suite 400, Chicago, Illinois 60602. To see the attorney in your area who is responsible for this advertisement, please click here, or call 866-200-8052.

Inquiry:

May a lawyer participate in the online legal service described above?

Opinion:

Yes, provided each Total Attorneys website fully, accurately, and prominently discloses the following: it provides paid group advertising services to lawyers; it is not a law firm and cannot provide legal advice; it is not a referral service; it does not recommend or endorse a particular lawyer; it does not vouch for the qualifications of participating lawyers; and each participating lawyer is licensed to use the advertising site and has paid to be the sole lawyer listed for a particular zip code.

The Arizona State Bar issued an ethics opinion that holds that a lawyer may ethically participate in an Internet-based group advertising program that limits participation to a single lawyer for each zip code from which prospective clients may come, provided the service fully and accurately discloses its advertising nature and, specifically, that each lawyer has paid to be the sole lawyer listed for a particular zip code. Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Op. 2011-02 (2011).

The New Jersey Advisory Committee on Advertising similarly concluded that territorial exclusivity is permissible when such exclusivity is disclosed, the methodology for the selection of the attorney based on zip code is made clear, and the website does not assess consumers' legal needs or vouch for the qualifications of the participating attorney. NJ Advisory Comm. on Prof'l Ethics, Op. 43 (2011).

2012 FEO 10 examined numerous issues relative to a web-based company that provides litigation and administrative support services to "network" lawyers who represent clients with a particular type of legal matter (e.g., landlord's eviction) while simultaneously providing non-legal services to the same clients. In response to the exclusive arrangement with each lawyer whereby no other network lawyer may provide legal services to a participating client in a designated territory, the opinion concludes that the service is a for-profit referral service prohibited by Rule 7.2(d).

Nevertheless, the reasoning of the Arizona State Bar and the New Jersey Committee on Advertising is persuasive. With sufficient disclosure that the purpose of the website is to provide advertising and not referrals, and with disclosure of the exclusive territorial arrangement with participating lawyers, any concerns about misleading members of the public are alleviated. Provided the disclosures are truthful and there is no sharing of legal fees with the service, Total Attorneys is merely group advertising and not a for-profit lawyer referral service. *See* 2004 FEO 1 (holding that a lawyer may participate in an online service that is similar to both a lawyer referral service and a legal directory provided there is no fee sharing with the service and all communications about the lawyer and the service are truthful).

To the extent 2012 FEO 10 is inconsistent with this opinion, it is overruled.

2013 Formal Ethics Opinion 12

July 25, 2014

Disclosure of Settlement Terms to Former Lawyer Asserting a Claim for Fee Division

Opinion rules that, in a worker's compensation case, when a client terminates representation, the subsequently hired lawyer may disclose the settlement terms to the former lawyer to resolve a pre-litigation claim for fee division pursuant to an applicable exception to the duty of confidentiality.

Facts:

Client hired Lawyer A to represent Client in a workers' compensation matter. A year later, Client discharged Lawyer A and subsequently hired Lawyer B. Lawyer A filed a motion to withdraw as counsel while reserving her right to a legal fee. Lawyer B settled Client's workers' compensation case and the Industrial Commission entered an order approving the settlement and the legal fee to be paid from the proceeds of the settlement. Lawyer A asked Lawyer B for a copy of the Industrial Commission's order. Client instructed Lawyer B to keep the settlement information confidential. Lawyer B therefore refused to provide Lawyer A with a copy of the Industrial Commission's order, and also refused to disclose the settlement amount. However, Lawyer B asked Lawyer A to submit an accounting of Lawyer A's hours in the case and Lawyer A's hourly rate. Lawyer A refused to provide an accounting of her time without more information about the settlement. Lawyer A insists that she needs to know the settlement amount to determine the amount of the fee that is to be divided between the two lawyers. Lawyer A further asserts that before she can determine the amount of her fee, she must know which injury claims are subject to the settlement.

Inquiry:

May Lawyer B share the settlement details with Lawyer A?

Opinion:

Keeping a client's information confidential is paramount among the duties a lawyer owes to the client. Unless Client consents to the disclosure of information about the settlement, or one of the exceptions set out in Rule 1.6(b) applies, Lawyer B may not reveal the details of the settlement to Lawyer A.

A client has the right to discharge his lawyer at any time. Where a lawyer with a contingency fee contract is terminated before the matter is concluded, the discharged lawyer has a claim for quantum meruit recovery from the proceeds of the matter. *Covington v. Rhodes*, 38 NC App. 61, 247 S.E.2d 305 (1978), *disc. rev. denied*, 296 NC 410, 251 S.E.2d 468 (1979). Furthermore, the discharged lawyer may file his claim for *quantum meruit* against the client or against the subsequent lawyer. *Guess v. Parrott*, 160 NC App. 325, 585 S.E.2d 464 (2003).

Rather than wait for Lawyer A to file suit, however, the better practice is to attempt to resolve a dispute before litigation. To this end, at the beginning of the representation, Lawyer B should counsel Client about the law pertaining to Lawyer A's claim for a legal fee based on *quantum meruit*. Lawyer B also should explain to Client that Rule 1.6(b)(6) permits a lawyer to disclose confidential client information, without the client's consent, "to respond to allegations in any proceeding concerning the lawyer's representation of the client," and that the exception to the rule, as noted in the comment, "does not require the lawyer to await the commencement of an action or proceeding…" Rule 1.6, cmt [11]. Therefore, Lawyer B may disclose the details of the settlement to resolve Lawyer A's claim for a share of the fee. Only that information relevant to the valuation of Lawyer A's legal services may be disclosed.

2013 Formal Ethics Opinion 13

January 24, 2014

Disbursement Against Funds Credited to Trust Account by ACH and EFT

Opinion rules that a lawyer may disburse immediately against funds that are credited to the lawyer's trust account by automated clearinghouse (ACH) transfer and electronic funds transfer (EFT) despite the risk that an originator may initiate a reversal.

Inquiry:

The originator of an automated clearinghouse (ACH) transfer[1] or an electronic funds transfer (EFT) can initiate a reversal of the transaction. However, the reversal must be requested by the originating bank and approved by the receiving bank. When a bank receives a reversal request, it typically will attempt to obtain authorization from the individual whose account was credited before making a reversal.

May a lawyer disburse immediately against funds that are credited to her trust account by ACH or EFT if there is some risk that the originator may initiate a reversal?

Opinion:

Yes. Electronic funds transfers, whether ACH or EFT, are designed to make funds available immediately, like wired funds. While there is some risk that the originator may initiate a reversal, the risk of reversal is slight. Moreover, the lawyer should get notice from the receiving bank in time to take action to prevent the reversal or otherwise to protect other client funds on deposit in the trust account. *See, e.g.,* 97 FEO 9 (lawyer may accept payments to a trust account by credit card although the bank is authorized to debit the trust account in the event a credit card charge is disputed).

A lawyer is not guilty of professional misconduct if that lawyer, upon learning that an ACH or EFT has been reversed, immediately acts to protect the funds of the lawyer's other clients on deposit in the trust account. This may be done by personally depositing the funds necessary to address the deficit created by the reversal or by securing or arranging payment from sources available to the lawyer other than trust account funds of other clients. *See* RPC 191.

Endnote

1. When a paper check is converted to an automated clearinghouse (ACH) debit, the check is taken either at the point-of-sale or through the mail for payment, the account information is captured from the check, and an electronic transaction is created for payment through the ACH system. The original physical check is typically destroyed by the converting entity (although an image of the check may be stored for a certain period of time). A law firm may convert the paper checks that it receives on behalf of a client or a client matter for payment to the trust account through the ACH system.

   Authorized ACH debits from the trust account that are electronic transfers of funds (in which no checks are involved) are allowed provided the lawyer maintains a record of the transaction as required by Rule 1.15-3(b)(3) and (c)(3). The record, whether consisting of the instructions or authorization to debit the account, a record or receipt from the register of deeds or a financial institution, or the lawyer's independent record of the transaction, must show the amount, date, and recipient of the transfer or disbursement, and, in the case of a general trust account, also show the name of the client or other person to whom the funds belong.

   Nevertheless, checks *drawn* on a trust account should not be converted to ACH because the lawyer will not receive a physical check or a check image that can be retained in satisfaction of the record-keeping requirements in Rule 1.15-3. The transaction will appear on the lawyer's trust account statement as an ACH debit with limited information about the payment (e.g., dollar amount, date processed, originator of the ACH debit). For this reason, lawyers are required to use business-size checks that contain an Auxiliary-On-Us field in the MICR line of the check because these checks cannot be converted to ACH. *See* Rule 1.15-3(a).

   See generally Rule 1.15, comments [17] and [18] .

2013 Formal Ethics Opinion 14

January 23, 2015

Representation of Parties to a Commercial Real Estate Loan Closing

Opinion rules that common representation in a commercial real estate loan closing is, in most instances, a "nonconsentable" conflict meaning that a lawyer may not ask the borrower and the lender to consent to common representation.

Background:

In the standard closing of a commercial loan secured by real property (a "commercial loan closing"), the borrower and the lender have separate legal counsel. The borrower's lawyer traditionally handles most aspects of the closing including the preparation of the settlement statement as well as the collection of funds, the payoffs, and the disbursements. The borrower understands that its lawyer represents its interests alone. Unlike a residential real estate closing in which the lender's documents can rarely be modified once entered into by the borrower/buyer, it is common in a commercial loan closing for the borrower's lawyer to be actively involved in negotiating provisions of the commitment letter that establishes the basic terms of the mortgage, and to also negotiate specific revisions to the loan documents to address material matters such as default, disbursement of insurance proceeds, permitted transfers, and indemnification.

A large regional bank recently changed its commercial loan closing policies to require all lawyers who close commercial loans with the bank to be employed by law firms that are "authorized" by the bank to close its loans. These lawyers are designated as "Bank's Counsel." Bank's Counsel is asked by the bank to handle the entire closing including the title search, title certification, and the holding and disbursing of the closing funds.

Lawyers who traditionally represent the borrower in a commercial loan closing are concerned about this policy for a number of reasons including the following:

- Having closing funds delivered to the lender's lawyer instead of the borrower's lawyer subjects the borrower to responsibility for the funds without the benefit of its own legal counsel's guidance, protection, and assistance;
- Once the loan funds are committed to the borrower by the lender, they become the responsibility of the borrower. When there is separate, independent representation of the borrower, the protections of malpractice insurance and the closing protection letter are available to the borrower.
- The borrower's recourses may be limited if closing funds are mishandled and the borrower suffers a loss in connection with Bank's Counsel's preparation of the closing statement and disbursement of the loan proceeds. However, when the borrower's lawyer performs the escrow and closing functions, the lender gets an insured closing letter and a legal opinion relative to authority and enforceability from the borrower's lawyer and has protection.
- Having the lender's lawyer perform the property and business due diligence functions may result in the disclosure of confidential information relative to the borrower's property or its business interests that would not be disclosed if the borrower's lawyer performed these functions.
- Unless the borrower is sophisticated and instructs its lawyer to be actively involved, the borrower's lawyer may be placed in the role of "outsider" or passive observer, which may limit the quality and scope of the representation that the borrower receives. It will also invite, notwithstanding disclosure, the perception that the lender's lawyer is looking out for the interests of all of the parties.

Inquiry #1:

May a lawyer represent both the borrower and the lender for the closing of a commercial loan secured by real property? If so, is informed consent of both the borrower and the lender required, and what information must be disclosed to obtain informed consent?

Opinion #1:

In most instances, a lawyer may not represent both the borrower and the lender for the closing of a commercial loan even with consent.

Rule 1.7 prohibits the representation of a client if the representation involves a concurrent conflict of interest unless certain conditions are met. A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client or the representation of one client may be materially limited by the lawyer's responsibilities to another client. Rule 1.7(a). The closing of a commercial loan secured by real estate is an "arm's length" business transaction in which large sums of money are at stake, the documentation is complex, and the opportunities to negotiate on behalf of each party are numerous. As observed in the comment to Rule 1.7:

> Even where there is no direct adverseness, a conflict of interest exists if a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client may be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent a seller of commercial real estate, a real estate developer, and a commercial lender is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself preclude the representation or require disclosure and consent. The critical questions are the likelihood that a dif-

ference in interests 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.

Rule 1.7, cmt. [8].

Rule 1.7(b) allows a lawyer to proceed with a representation burdened with a concurrent conflict of interest, but only if the lawyer determines that the representation of all of the affected clients will be competent and diligent and each affected client gives informed consent. In other words, the lawyer must decide whether the conflict is "consentable." Rule 1.7, cmt. [2]. If the lawyer's exercise of independent professional judgment on behalf of any client will be compromised, the conflict is not consentable. As noted in the comment to Rule 1.7:

> [S]ome conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent...Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest...[R]epresentation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.

Rule 1.7, cmt.[14]-[15]. Although deleted from the comment to Rule 1.7 when the Rules of Professional Conduct were comprehensively revised in 2003, the following is an excellent test for determining whether a conflict is "consentable": "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." Rule 1.7, cmt. [5] (2002).

In RPC 210, the Ethics Committee held that a lawyer may represent the seller, borrower/buyer, and lender in a residential real estate closing with the informed consent of all of the parties. Even so, the opinion includes the following cautionary language:

> 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.

A commercial loan closing is substantially different from a residential closing in which there is little opportunity to negotiate on behalf of the borrower/buyer once the purchase contract and loan commitment letter are signed. In a commercial loan closing, there are numerous opportunities for a lawyer to negotiate on behalf of the parties, so impartiality is rarely possible. There are also numerous opportunities for an actual conflict to arise between the borrower and the lender and, if a conflict does arise, the prejudice to the parties would be substantial. Therefore, common representation in a commercial loan closing is, in most instances, a "nonconsentable" conflict, meaning that a lawyer may not ask the borrower and the lender to consent to common representation. *Restatement (Third) of The Law Governing Lawyers*, §122, Comment g(iv), cites decisions in which the court denied the possibility of client consent as a matter of law in certain categories of cases. These decisions include *Baldasarre v. Butler*, 625 A. 2d 458 (N.J. 1993), in which the Supreme Court of New Jersey observed:

> This case graphically demonstrates the conflicts that arise when an attorney, even with both clients' consent, undertakes the representation of the buyer and the seller in a complex commercial real estate transaction. The disastrous consequences of [the lawyer's] dual representation convinces us that a new bright-line rule prohibiting dual representation is necessary in commercial real estate transactions where large sums of money are at stake, where contracts contain complex contingencies, or where options are numerous. The potential for conflict in that type of complex real estate transaction is too great to permit even consensual dual representation of buyer and seller. Therefore, we hold that an attorney may not represent both the buyer and seller in a complex commercial real estate transaction even if both give their informed consent.

635 A. 2d at 467. *See also* Fla. Bar. Prof'l Ethics Comm., Op. 97-2 (1997)(lawyer may not represent both buyer and seller in closing of sale of business where material terms of contract have not been agreed to or discussed by parties).

In summary, dual representation of the borrower and the lender for the closing of a commercial real estate loan is a nonconsentable conflict of interest unless the following conditions can be satisfied: (1) the contractual terms have been finally negotiated prior to the commencement of the representation; (2) there are no material contingencies to be resolved; (3) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (4) it is unlikely that a difference in interests will eventuate and, if it does, it will not materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that should be pursued on behalf of a client; (5) the lawyer reasonably concludes that he will be able to act impartially in the representation of both parties; (6) the lawyer explains to both parties that his role is limited to executing the tasks necessary to close the loan and that this limitation prohibits him from advocating for the specific interests of either party; (7) the lawyer discloses that he must withdraw from the representation of both parties if a conflict arises; and (8) after the foregoing full disclosure, both parties give informed consent confirmed in writing.

Regardless of the above conditions allowing common representation of the borrower and lender, consent may never be sought to represent the lender, the borrower, and the seller of real property if the seller will provide secondary financing for the transaction and accept a secondary deed of trust. In this situation, the risks to the interests of the seller are too great to permit a lawyer to seek consent to common representation.

Inquiry #2:

The bank intends for Bank's Counsel to represent only the bank (lender) but to handle all aspects of the closing.

May a lawyer represent only the lender but handle all aspects of a commercial loan closing including the title search, title certification, marshalling the necessary documents, and holding and disbursing of the closing funds? If so, what information must be disclosed by Bank's Counsel to the borrower relative to the role of Bank's Counsel?

Opinion #2:

Yes, a lawyer may be the lead lawyer for the closing ("the closing lawyer") provided the lawyer represents only one party—either the lender or the borrower. Because the title work and other due diligence are for the benefit of the lender, there is no prohibition on the lender's lawyer performing these tasks. *See* 2004 FEO 10 (because buyer is the intended beneficiary of the deed although not a signatory, buyer's lawyer may prepare deed without creating a lawyer-client relationship with seller). However, if the closing lawyer represents the lender, certain conditions must be satisfied.

In 2006 FEO 3, the Ethics Committee considered whether a lawyer may represent a lender on the closing of the sale to a third party of property acquired by the lender as result of foreclosure by execution of the power of sale in the deed of trust on the property. The opinion holds (among other things) that a lawyer may serve as the closing lawyer and limit his representation to the lender/seller if there is disclosure to the buyer:

> Attorney A must fully disclose to Buyer that [the lender/seller] is his sole client, he does not represent the interests of Buyer, the closing documents will be prepared consistent with the specifications in the contract to purchase, and, in the absence of such specifications, he will prepare the documents in a manner that will protect the interests of his client, [the lender/seller], and, therefore, Buyer may wish to obtain his own lawyer. *See, e.g.*, RPC 40 (disclosure must be far enough in advance of the closing that the buyer can procure his own counsel), RPC 210, 04 FEO 10, and Rule 4.3(a). Because of the strong potential for Buyer to be misled, the disclosure must be thorough and robust.
>
> Consistent with the holding in 2006 FEO 3, in a commercial loan closing,

the lender's lawyer may serve as the closing lawyer provided the borrower is informed that the closing lawyer will not represent its interests and will interpret loan documents in the light that is most favorable to the lender; the borrower is given a reasonable opportunity to retain its own counsel and is not mislead as to its right to do so; the lawyers for both parties advise their clients about the risks and benefits of a having the lender's lawyer serve as the closing lawyer; and the borrower's lawyer is allowed to observe and participate in the transaction to the extent necessary to protect the borrower's interests.

This opinion cannot address all of the concerns expressed in the Background section above relative to the additional risks to the borrower if the lawyer for the closing is the lender's lawyer. However, if the closing funds are deposited to and disbursed from the trust account of the lender's lawyer in accordance with the requirements of the trust accounting rule, Rule 1.15, the funds should not be at risk. To the extent that there are other risks to the interests of the borrower, the borrower's lawyer must analyze those risks and advise the borrower about steps that may be taken to minimize the risks including negotiating with the lender's lawyer for aspects of the closing to be handled by the borrower's lawyer.

2013 Formal Ethics Opinion 15

January 24, 2014

Return of Records to Client upon Termination of Representation

Opinion rules that records relative to a client's matter that would be helpful to subsequent legal counsel must be provided to the client upon the termination of the representation, and may be provided in an electronic format if readily accessible to the client without undue expense.

Inquiry #1:

In the age of electronic records, what information must be given to a departing client when the client requests the file?

Opinion #1:

Rule 1.16(d) of the Rules of Professional Conduct requires a lawyer, upon termination of representation, to "take steps to the extent reasonably practicable to protect a client's interests, such as...surrendering papers and property to which the client is entitled..."

Comment 10 to Rule 1.16 specifically provides that copies of "all correspondence received and generated by the withdrawing or discharged lawyer should be released; and anything in the file that would be helpful to successor counsel should be turned over."

Competent representation includes organized record-keeping practices that safeguard the documentation and information necessary to enable the lawyer to (1) readily retrieve information required for the representation; (2) remain abreast of the status of the case; and (3) be adequately prepared to handle the client's matter. 2002 FEO 5; Rule 1.1, cmt. [6]. The standards for record-keeping, including record retention, for electronic communications, documents, records, and other information ("records") are the same as the standards for paper records. As stated in 2002 FEO 5 on the retention of email in a client's file, "[a] lawyer must exercise his or her legal judgment when deciding what documents or information to retain in a client's file." Whether a lawyer should retain an electronic record that relates to a client's representation "depends upon the requirements of competent representation under the circumstances of the particular case." *Id.*

A lawyer must also exercise legal judgment, subject to the duty of competent representation, when deciding which format (electronic or paper) is the most appropriate for the retention of records generated during the representation of a client. 2002 FEO 5; *see also* RPC 234 (paper documents in client's file may be converted and saved in an electronic format if original documents with legal significance, such as wills, are stored in a safe place or returned to the client, and documents stored in electronic format can be reproduced in a paper format).

If an electronic record relative to a client's matter would be helpful to successor counsel, the electronic record is a part of the client's file. As explained in CPR 3, a client file does not include "the lawyer's personal notes and incomplete work product," or "preliminary drafts of legal instruments or other preliminary things which, unexplained, could place a lawyer in a bad light without furthering the interest of his former client." Therefore, a lawyer may omit from the records that are considered a part of the client's file the following: (1) email containing the client's name if the email is immaterial, represents incomplete work product, or would not be helpful to successor counsel; (2) drafting notes saved in preliminary versions of a filed pleading since these are incomplete work product; (3) notations or categorizations on documents stored in a discovery database since these are incomplete work product; and (4) other items that are associated with a particular client such as backups, voicemail recordings, and text messages unless the items would be helpful to successor counsel.

If the lawyer determines that an electronic record is a part of a client's file, then the lawyer has a duty to provide a copy of the record to the client upon the termination of the representation. Conversely, if the lawyer, in the exercise of legal judgment, determines that the electronic record is not a part of the client's file, then the lawyer is not required, but may, provide a copy of the electronic record to the client.

Inquiry #2:

Are lawyers required to organize or store electronic records relative to a specific client matter in any particular manner?

Opinion #2:

An organized record-keeping system designed to safeguard client information must include electronic records. *See* Opinion #1. The electronic records must be organized in a manner that can be searched and compiled as necessary for the representation of the client and for the release of the file to the client upon the termination of the representation. A document management system to track records by client and matter is recommended.

Because of the potential for electronic records to accumulate, one important aspect of an organized record-keeping system is a procedure for regularly exercising legal judgment as to whether to retain an electronic record in the client's virtual file. Such a procedure would, for example, require the regular identification of emails that should be retained and made a part of the client's virtual file. Waiting until the representation has ended and the client has requested the file to identify electronic records that are a part of the client's file may increase the likelihood that an important electronic record will not be identified properly.

Inquiry #3:

When the representation terminates and the client requests the file, is the lawyer or law firm required to provide the records in the format (electronic or paper) requested by the client?

Opinion #3:

Many clients, or successor counsel, will have the technical expertise and financial ability to receive client records in an electronic format without experiencing any problem or undue expense in opening, using, or reproducing the records. These clients will probably prefer to receive the records in an electronic format. However, there are clients, such as individuals or small businesses with limited financial means or technical expertise, that cannot afford to purchase expensive software or computer equipment simply to gain access to the records in their own legal files. There must be a weighing of the interests of the lawyer or law firm in producing the client's file in an efficient and cost-effective manner against the client's interest in receiving the records in a format that will be useful to the client or successor counsel.

Therefore, records that are stored on paper may be copied and produced to the client in paper format if that is the most convenient or least expensive method for reproducing these records for the client. If converting paper records to an electronic format would be a more convenient or less expensive way to provide the records to the client, this is permissible if the lawyer or law firm determines that the records will be readily accessible to the client in this format without undue expense. Similarly, electronic records may be copied and provided to the client in an electronic format (they do not have to be converted to paper) if the lawyer or law firm determines that the records will be readily accessible to the client in this format without undue expense. *See* 2002 FEO 5 ("in light of the widespread availability of computers," emails may be provided to a departing client in an electronic format even if the client requests paper copies).

A lawyer should in most instances bear the reasonable costs of retrieving and producing electronic records for a departing client. However, a lawyer or law firm may charge a client the expense of providing electronic records if the client asks the lawyer or law firm to do any of the following: (1) convert electronic records from a format that is already accessible using widely used or inexpensive business

software applications; (2) convert electronic records to a format that is not readily accessible using widely used or inexpensive business software applications; or (3) provide electronic records in a manner that is unduly expensive or burdensome.

Nevertheless, if the usefulness of an electronic record in a client file would be undermined if the document is provided to the client or successor counsel in a paper format, the record must be provided to the client in an electronic format unless the client requests otherwise. For example, providing a spreadsheet without the underlying formulas or providing a complex discovery database printed in streams of text on reams of paper would destroy the usefulness of such data to both the client and successor counsel. Similarly, a video recording cannot be reduced to a paper format and therefore must be provided to the client in its original format.

Lawyers are encouraged to discuss with a client at the beginning of a representation the records that will be retained as a part of the client's file, and the format in which the records will be produced at the termination of the representation.

2014 Formal Ethics Opinion 1

February 1, 2016

Protecting Confidential Client Information when Mentoring

Opinion encourages lawyers to become mentors to law students and new lawyers ("protégés") who are not employees of the mentor's firm, and examines the application of the duty of confidentiality to client communications to which a protégé maybe privy.

Editor's Note: This opinion does not apply to law students certified pursuant to the Rules Governing the Practical Training of Law Students (27 N.C.A.C 1C, Section .0200) or to law students who are participating in formal law school *pro bono p*rograms, externship programs, and clinics in which students participate in client representation under the supervision of a lawyer. In addition, the opinion does not apply to lawyers, employees, or law clerks (paid or volunteer) being mentored or supervised by a lawyer *within the same firm*. This opinion addresses issues pertaining to informal mentoring relationships between lawyers, or between a lawyer and a law student, as well as to established bar and/or law school mentoring programs. Mentoring relationships between a lawyer and a college or a high school student are not addressed by this opinion because such relationships require more restrictive measures due to these students' presumed inexperience and lack of understanding of a lawyer's professional responsibilities, particularly the professional duty of confidentiality.

For a legal analysis of whether a third party is an agent of the lawyer or the client such that the attorney-client privilege is not waived although the third party is privy to client-lawyer communications, *see Berens v. Berens*, No. COA15–230, 2016 WL 1569215 (N.C. April 19, 2016)(applying *State v. Murvin*, 304 N.C. 523, 284 S.E.2d 289 (1981)).

Inquiry #1:

May a lawyer who is mentoring a law student ("protégé") allow the student to observe confidential client consultations between the lawyer and the lawyer's client?

Opinion #1:

Yes, if the client gives informed consent.

The duty of confidentiality is set forth in Rule 1.6. It provides that all communications relative to a client's matter are confidential and cannot be disclosed unless the client consents, the client's consent is implied as necessary to carry out the representation, or one of the specific exceptions to the duty of confidentiality in Rule 1.6(b) applies. If a law student/protégé is not an agent of the lawyer for the purpose of representing the client, there is no implied client consent to disclosure of the client's confidential information to the student. Moreover, none of the specific exceptions to the duty of confidentiality apply in this situation. Only the express informed consent of the client will permit disclosure of confidential client information to a law student/protégé.

"Informed consent," as defined in Rule 1.0, *Terminology*, "denotes the agreement by the person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate under the circumstances." Rule 1.0(f). Informed consent must be given in writing by the client or confirmed in writing by the lawyer. *See* Rule 1.0(c). In the mentoring situation, obtaining the client's informed consent requires the lawyer to explain the risks to the representation of the client that will be presented by the law student's knowledge of client confidential information and the law student's presence during client consultations.

One such risk is the possibility that the law student, who is not subject to the Rules of Professional Conduct, will intentionally or unintentionally reveal the client's confidential information to unauthorized persons. To minimize this risk, it is recommended that the law student be required to sign a confidentiality agreement that emphasizes the duty not to disclose any client confidential information unless the client and the lawyer give express consent.

The lawyer should also explain to the client any risk that the attorney-client privilege[1] will not attach to client communications with the lawyer because of the presence of the law student during the lawyer's consultation with the client. If the lawyer concludes that the student's presence will jeopardize the attachment of the privilege and the resulting harm to the client's interests is substantial, the lawyer should consider carefully whether it is appropriate to ask the client to consent to the student's presence during the consultation.

Inquiry #2:

A lawyer wants to be a mentor to a new lawyer ("protégé") who is not employed by or affiliated with the lawyer/mentor's law firm. The lawyer/mentor wants to allow the new lawyer to observe his consultations with clients and he also wants to observe the new lawyer's consultations with the new lawyer's clients in order to critique and advise the new lawyer.

May the lawyer/mentor allow the lawyer/protégé to observe confidential client consultations between the lawyer/mentor and his client? May the lawyer/protégé allow the lawyer/mentor to observe confidential client consultations between the lawyer/protégé and his client?

Opinion #2:

Yes, these observations are allowed with the client's informed consent. *See* Opinion #1. The observing lawyer should sign an agreement to maintain the confidentiality of the information of the other lawyer's client, in accordance with Rule 1.6, and to avoid representations adverse to the client in accordance with Rule 1.7 and Rule 1.9.

Both the lawyer/protégé and the lawyer/mentor should avoid the creation of a conflict of interest with any existing or former clients by virtue of the mentoring relationship. For example, the lawyer/protégé should not consult with a lawyer he knows has represented the opposing party in the past without first ascertaining that the matters are not substantially related and that the opposing party is not represented in the current matter by the lawyer/mentor. Similarly, the lawyer/mentor should obtain information sufficient to determine that the lawyer/protégé's matter is not one affecting the interests of an existing or former client. Rule 1.7 and Rule 1.9.

Inquiry #3:

When a lawyer seeks advice from a lawyer/mentor, what actions should be taken to protect confidential client information?

Opinion #3:

If possible, the lawyer/protégé should try to obtain guidance from the lawyer/mentor without disclosing identifying client information. This can often be done by using a hypothetical. If the consultation is general and does not involve the disclosure of identifying client information, client consent is unnecessary.

If the consultation is intended to help the lawyer/protégé comply with the ethics rules, client consent is not required because Rule 1.6(b)(5) allows a lawyer to reveal protected client information to the extent that the lawyer reasonably believes necessary "to secure legal advice about the lawyer's compliance with [the Rules of Professional Conduct]." Pursuant to Comment [10] to Rule 1.6:

> A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with [the Rules of Professional Conduct.] In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

If the consultation is for the client's benefit, limited disclosure of client information may be "impliedly authorized to carry out the representation." *See*

Rule 1.6(a). The lawyer should only disclose client information to a colleague if the lawyer has determined that the confidentiality of the consultation is adequately protected. Once the lawyer makes that determination, the client's express consent is unnecessary.

If the consultation does not involve advice about the lawyer's compliance with the Rules of Professional Conduct, a hypothetical is not practical, or the consultation is not for the client's benefit, the lawyer/protégé must obtain client consent. *See* Opinion #2.

Under all circumstances, the lawyer/protégé and the lawyer/mentor should avoid the creation of a conflict of interest with any existing or former clients by virtue of the mentoring relationship. *See* Opinion #2; Rule 1.7 and Rule 1.9.

Endnote

1. The attorney-client evidentiary privilege to avoid compelled testimony applies to client communications with a lawyer if (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated, and (5) the client has not waived the privilege. *State v. McIntosh*, 336 N.C. 517, 444 S.E.2d 438 (1994).

2014 Formal Ethics Opinion 2

April 25, 2014

Dual Representation of Trustee and Secured Creditor in Contested Foreclosure

Opinion rules that a lawyer may not represent both the trustee and the secured creditor in a contested foreclosure proceeding.

Inquiry:

A law firm has entered into a contract with an independent corporation to serve as substitute trustee in any foreclosure proceeding initiated by the law firm. No member of the law firm, or anyone related to any member of the law firm, has any affiliation with or financial interest in the corporation.

May the law firm represent the corporation serving as the trustee in a contested foreclosure proceeding, while also representing the secured creditor in the proceeding?

Opinion:

No. As noted in NC Gen. Stat. §45-21.16(c), a trustee on a deed of trust is "a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding." Because of the conflict between the neutral, fiduciary role of trustee and the role of an advocate for one of the parties to a contested foreclosure, a number of ethics opinions hold that a lawyer serving as a trustee in a contested foreclosure proceeding may not represent the secured creditor or the debtor in the proceeding. 2008 FEO 11 (listing opinions).

By extension, a lawyer representing the trustee in a contested foreclosure proceeding is also prohibited from representing the secured creditor or the debtor in the proceeding. This is because the lawyer must advise the trustee on maintaining a neutral role, and this representation would be materially limited by the advocacy required to represent either the secured creditor or the debtor. In fact, 2008 FEO 11 specifically prohibits the simultaneous representation in a contested foreclosure proceeding of the secured creditor and a corporate trustee specifically created by the lawyer's firm to serve in this capacity. 2008 FEO 11, Opinion #5.

The Ethics Committee has recognized a limited exception to the prohibition on representation of the secured creditor by a lawyer for the trustee in a contested foreclosure proceeding. This exception permits joint representation of both the trustee and the secured creditor, but not in the contested foreclosure itself. In 2004 FEO 3, a lawyer proposed to represent both the secured creditor and the trustee in an unfair debt collection action filed by the borrower against the secured creditor and the trustee. To enjoin the pending foreclosure proceeding, the trustee was named as a party-defendant in the action. The opinion holds that the lawyer may represent both the secured creditor and the trustee as codefendants in this separate, tangential lawsuit brought by the borrower if the lawyer determines that his representation will not be impaired, and both the secured creditor and the trustee give informed consent. 2004 FEO 3 (applying a conflict of interest analysis under Rule 1.7).

2014 Formal Ethics Opinion 3

April 25, 2014

Pro Bono **Legal Services Provided by Government and Public Sector Lawyers**

Opinion encourages government lawyers to engage in pro bono *representation unless prohibited by law from doing so.*

Inquiry:

May a lawyer who works for the government or the public sector (hereafter "government lawyer") provide *pro bono* legal services to private individuals and organizations pursuant to Rule 6.1?

Opinion:

Yes, if the government lawyer is not otherwise prohibited by law from engaging in the private practice of law.

All lawyers have a professional responsibility to provide legal services to those who are unable to pay as stated in Rule 6.1:

> Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:
>
> (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
>
> (1) persons of limited means;
>
> (2) charitable, religious, civic, community, governmental, and educational organizations in matters that are designed primarily to address the needs of persons of limited means; or
>
> (3) individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights, or charitable, religious, civic, community, governmental, and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.
>
> ...

Some government lawyers, however, are prohibited by statute from engaging in the private practice of law. *See, e.g.,* NC Gen. Stat. §84-2 ("No justice, judge, magistrate, full-time district attorney, full-time assistant district attorney, public defender, assistant public defender, clerk, deputy, or assistant clerk of the General Court of Justice, register of deeds, deputy, or assistant register of deeds, sheriff, or deputy sheriff shall engage in the private practice of law.") and NC Gen. Stat. §7A-754 ("Neither the chief administrative law judge nor any administrative law judge may engage in the private practice of law...").

A government lawyer is subject to the requirements of the Rules of Professional Conduct when providing *pro bono* legal services. Although the *pro bono* legal services may be very different from the legal work that the government lawyer performs for his or her employer, the government lawyer must provide competent and diligent representation. *See* Rule 1.1 and Rule 1.3. Therefore, the government lawyer must ensure that he or she has the training necessary to represent the *pro bono* client competently. In addition, the government lawyer must communicate to the *pro bono* client that, in the course of providing *pro bono* legal services, the lawyer is not acting on behalf of a government agency or office but in his or her private capacity. *See* Rule 1.2 and Rule 1.4.

A government lawyer must also avoid conflicts of interests that may arise when providing *pro bono* legal services to private persons or entities. *See* Rule 1.7. The Arizona State Bar opined that the unique position of a lawyer employed by the government suggests that a heightened level of scrutiny for possible conflicts of interest is warranted when a government lawyer engages simultaneously in the private practice of law, albeit on a *pro bono* basis. Az. State Bar, Ethics Op. 93-08 (1993). The government lawyer must examine whether his or her employer and/or any public body that the government lawyer represents has an interest in the *pro bono* matter. If so, and the interests of the prospective private client are adverse to the government, or the government lawyer's representation of either the government or the prospective private client will be materially limited, the lawyer must decline the representation unless both the government and the prospective client give informed consent. *See* Rule 1.7. Similarly, if the government lawyer formerly represented a public

body in the same matter or a matter that is substantially related to the proposed *pro bono* representation, the government lawyer is prohibited from taking on the *pro bono* representation if it would be adverse to formerly represented public body unless this former client gives informed consent. *See* Rule 1.9. Because of the potential for conflicts to arise, it is recommended that a government lawyer limit his or her pro bono activities to practice areas that are unrelated to the lawyer's government work.

Government and public sector lawyers must abide by the confidentiality rule. Rule 1.6(a) provides that a lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by an exception set forth in paragraph (b) of the rule. If the government lawyer is prohibited by his or her employer from entering into a confidentiality agreement with a private person or entity, the lawyer may not provide *pro bono* legal services to private clients. Nevertheless, the government lawyer may still find opportunities to provide *pro bono s*ervice by participating in activities for improving the law, the legal system, or the legal profession. *See* Rule 6.1(b)(2).

If a government lawyer intends to provide *pro bono* services outside the context of a legal services organization or a nonprofit organization, before doing so the lawyer would be wise to consult with a liability insurance carrier to determine whether to carry malpractice insurance. If the government lawyer will be providing *pro bono* services under the auspices of a legal services organization or other nonprofit or charitable organization, the government lawyer would be wise to determine whether the legal services or nonprofit organization has liability insurance that will cover the government lawyer's *pro bono* activities.

Government agencies and public sector offices are encouraged to adopt internal policies that will facilitate *pro bono* legal service by government lawyers. These policies should address, *inter alia*, the definition of *pro bono*, the types of *pro bono* services to be performed, conflicts of interests, use of the employer's resources such as support staff and office equipment, and whether *pro bono* legal services are to be provided during working hours or after.

2014 Formal Ethics Opinion 4

July 25, 2014

Serving Subpoenas on Health Care Providers Covered by HIPAA

Opinion rules that a lawyer may send a subpoena for medical records to an entity covered by HIPAA without providing the assurances necessary for the entity to comply with the subpoena as set out in 45 C.F.R. §164.512(e)(ii).

Introduction:

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) required the US Department of Health and Human Services (USDHHS) to establish a set of national standards for the protection of certain health information including identifiable medical records of individual patients. Pursuant to this mandate, the USDHHS issued Standards for Privacy of Individually Identifiable Health Information (the Privacy Rule), which established national standards for the protection of protected health information. The Privacy Rule applies to any health care provider who transmits health information in electronic form in connection with certain specified transactions.[1]

At issue in this inquiry is 45 C.F.R. §164.512(e) of the Privacy Rule, which pertains to disclosure of protected health information in judicial and administrative proceedings. Pursuant to 45 C.F.R. §164.512(e), covered entities may disclose protected health information in a judicial or administrative proceeding if the request for the information is in response to an order from a court or administrative tribunal. Such information may also be disclosed in response to a subpoena or other lawful process if certain assurances regarding notice to the individual or a protective order are provided. Specifically, a covered entity may disclose protected health information if the covered entity receives satisfactory assurance from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the requested protected health information was given notice of the request, or the covered entity received satisfactory assurance from the party seeking the information that reasonable efforts were made by such party to secure a qualified protective order. 45 C.F.R. §164.512(e)(1)(ii)(2013).

However, 45 C.F.R. §164.512(e)(1)(vi) allows a covered entity to disclose protected health information in response to a subpoena without receiving satisfactory assurance from the requesting party if the covered entity itself makes reasonable efforts to provide notice to the individual or to seek a qualified protective order.

Inquiry #1:

May a lawyer send a subpoena to an entity covered by HIPAA and demand compliance without providing the assurances set out in 45 C.F.R. §164.512(e)(ii)?

Opinion #1:

Yes, assuming the subpoena complies with the Rules of Civil Procedure.

As a matter of professional courtesy, if the lawyer does not provide the necessary assurances set out in the Privacy Rule, the lawyer may include a letter with the subpoena alerting the entity that certain health information may be subject to state and/or federal privacy laws and informing the entity that it may delay compliance with the subpoena for a reasonable amount of time to comply with any applicable privacy laws. *See* Rule 1.2(a)(2) (lawyer does not violate rules by treating others with courtesy). In addition to being a matter of professional courtesy, it may be in the client's best interest to seek compliance with federal and state privacy laws to avoid subsequent objections to the disclosure of the produced materials that may cause delay, additional expense, or prohibit the use of the produced materials.

Inquiry #2:

Would the response to Inquiry #1 be different if the health care provider receiving the subpoena is also a client of the lawyer's firm in an unrelated matter?

Opinion #2:

Assuming that the client seeking the medical records and the provider/client have the same interest in seeing that the medical records are produced in accordance with applicable law, the lawyer serving the subpoena may, with the informed consent confirmed in writing of both clients, provide advice to the provider/client relative to the requirements of the various privacy rules and may give the provider/client a reasonable amount of time to comply.

If the lawyer provides advice to the provider/client relative to the subpoena and a conflict arises pertaining to the subpoena (i.e., provider/client desires to quash the subpoena or, upon the provider/client's failure to respond to the subpoena, the client seeking the medical records is required to file a motion to compel or a motion for sanctions), the lawyer may not represent either the client seeking the records or the provider/client relative to the enforcement of the subpoena, unless both clients give their informed consent confirmed in writing.

Endnote

1. Summary of the HIPAA Privacy Rule, OCR Privacy Brief, US Department of Health and Human Services, Office for Civil Rights: hhs.gov/ocr/privacy/hipaa/ understanding/summary/index.html.

2014 Formal Ethics Opinion 5

July 17, 2015

Advising a Civil Litigation Client about Social Media

Opinion rules a lawyer must advise a civil litigation client about the legal ramifications of the client's postings on social media as necessary to represent the client competently. The lawyer may advise the client to remove postings on social media if the removal is done in compliance with the rules and law on preservation and spoliation of evidence.

Inquiry #1:

A client's postings and other information that the client has placed on a social media[1] website (referred to collectively as "postings") are relevant to the issues in the client's legal matter and, if the matter is litigated, might be used to impeach the client. The client's lawyer does not use social media and is unfamiliar with how social media functions.

What is the lawyer's duty to be knowledgeable of social media and to advise the client about the effect of the postings on the client's legal matter?

Opinion #1:

Rule 1.1 requires lawyers to provide competent representation to clients. Comment [8] to the rule specifically states that a lawyer "should keep abreast of changes in the law and its practice, including the benefits and risks associat-

ed with the technology relevant to the lawyer's practice." "Relevant technology" includes social media. As stated in an opinion of the New Hampshire Bar Association, N. H. Bar Ass'n Op. 2012-13/05, "counsel has a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation."

If the client's postings could be relevant and material to the client's legal matter, competent representation includes advising the client of the legal ramifications of existing postings, future postings, and third party comments.

Inquiry #2:

The client's legal matter will probably be litigated, although a law suit has not been filed. May the lawyer instruct the client to remove postings on social media?

Opinion #2:

A lawyer may not counsel a client or assist a client to engage in conduct the lawyer knows is criminal or fraudulent. Rule 1.2(d). In addition, a lawyer may not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. Rule 3.4(a). The lawyer, therefore, should examine the law on preservation of information, spoliation[2] of evidence, and obstruction of justice to determine whether removing existing postings would be a violation of the law.

If removing postings does not constitute spoliation and is not otherwise illegal, or the removal is done in compliance with the rules and law on preservation and spoliation of evidence, the lawyer may instruct the client to remove existing postings on social media. The lawyer may take possession of printed or digital images of the client's postings made for purposes of preservation. See N.Y. State Bar, Ethics Op. 745 (2013)(lawyer may advise a client about the removal of postings if the lawyer complies with the rules and law on preservation and spoliation of evidence).

Inquiry #3:

May the lawyer instruct the client to change the security and privacy settings on social media pages to the highest level of restricted access?

Opinion #3:

Yes, if doing so is not a violation of law or court order.

Endnotes

1. "Social media" is defined as "forms of electronic communication ([such] as Websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content ([such] as videos)." Social Media, Merriam-Webster, merriam-webster.com/dictionaty/social%20 media (last visited Jan. 20, 2015).
2. *Black's Law Dictionary* 1437 (8th ed. 2004) defines spoliation as the intentional concealment, destruction, alteration or mutilation of evidence, usually documents, thereby making them unusable or invalid. The doctrine of spoliation of evidence holds that when "a party fails to introduce in evidence documents that are relevant to the matter in question and within his control...there is a presumption, or at least an inference that the evidence withheld, if forthcoming, would injure his case." *Jones v. GMRI, Inc.*, 144 N.C. App. 558, 565, 551 S.E.2d 867, 872(2001) (quoting *Yarborough v. Hughes*, 139 N.C. 199, 209, 51 S.E. 904, 907-08 (1905)).

2014 Formal Ethics Opinion 6

July 25, 2014

Duty to Avoid Conflicts When Advising Members of Nonprofit Organization

Opinion rules that a lawyer who provides free brief consultations to members of a nonprofit organization must screen for conflicts prior to conducting a consultation.

Inquiry:

A nonprofit organization of nonlawyer professionals provides its members with contact information for certain medical and other professionals who have agreed to provide the members with brief consultations to answer questions on various subjects that are relevant to the members' professional practices.

The organization has asked Lawyer if she is willing to provide such consultations to its members concerning their legal questions. If Lawyer agrees, she will be described by the organization on its website as a member support legal resource. It will be clear that Lawyer is not an employee of the organization and that she has volunteered to provide such consultations directly to the organization's members. Such consultations will be without charge to the members, and the organization will not compensate Lawyer for her services.

Lawyer will secure the informed consent of each inquiring member to the limited scope of such representation. However, Lawyer believes that it would be impractical for Lawyer to conduct a conflicts search on each member who calls her before she consults with that member concerning his or her legal question.

It is reasonable to suppose that some members who call Lawyer for a free consultation may, thereafter, wish to engage her to represent them on a paid basis. However, the initial consultation is not conditioned on such continued representation. Lawyer will conduct a conflicts check as to any member who seeks to engage her in an ongoing representation before commencing such representation.

Rule 6.5(a), Limited Legal Services Programs, provides:

> A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter: (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

Is Lawyer's initial consultation with members of the organization governed by Rule 6.5 such that Lawyer is subject to Rules 1.7 and 1.9(a) only if she *knows* that the representation of the client involves a conflict of interest?

Opinion:

No. Rule 6.5 does not apply. Comment [1] to Rule 6.5 states that "[l]egal services organizations, courts, and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services—such as advice or the completion of legal forms—that will assist persons to address their legal problems without further representation by a lawyer." Rule 6.5 is designed to encourage lawyers to participate in nonprofit programs offering limited legal services on a short-term basis. Examples of such programs include legal-advice hotlines, advice-only clinics, or pro se counseling programs. *See* Rule 6.5, cmt. [1]. As noted in Comment [1] to Rule 6.5: "Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation." Therefore, Rule 6.5 relaxes the application of the conflict of interest rules.

Rule 6.5 was adopted in response to concerns that a strict application of the conflicts of interest rules may be deterring lawyers from serving as volunteers in programs providing short-term limited legal services under the auspices of a nonprofit organization or a court-annexed program. *See* Ann. Model Rules of Prof'l Conduct R. 6.5 (7th ed. 2009). Rule 6.5's exception to the duty to avoid conflicts of interest applies only where it is not feasible for the lawyer to complete a comprehensive conflicts check prior to undertaking the representation. The proposed arrangement with Lawyer does not present such a scenario. Upon being contacted by a member of the nonprofit organization, it is feasible for Lawyer to complete a conflicts check prior to conducting the initial consultation. Therefore, Rule 6.5 does not apply and Lawyer has a duty to screen for conflicts of interest as otherwise set out in the Rules of Professional Conduct.

2014 Formal Ethics Opinion 7

October 24, 2014

Use of North Carolina Subpoena to Obtain Documents from Foreign Entity or Individual

Opinion rules that a lawyer may provide a foreign entity or individual with a North Carolina subpoena accompanied by a statement/letter explaining that the subpoena is not enforceable in the foreign jurisdiction, the recipient is not required to comply with the subpoena, and the subpoena is being provided solely for the recipient's records.

Editor's note: This opinion supplements and clarifies 2010 FEO 2, *Obtaining Medical Records from Out of State Health Care Providers.*

Inquiry #1:

In a state legal matter, a lawyer wishes to obtain documents from a medical

provider or other entity that is not located in North Carolina and does not have a registered agent in the state (foreign entity). The lawyer contacts the foreign entity and requests the documents. The lawyer informs the foreign entity that the subpoena power set out in N.C. R. Civ. P. 45 does not extend to the foreign jurisdiction. The foreign entity indicates that it will comply with the request for documents upon the receipt of a North Carolina subpoena "for its records."

May the lawyer provide the foreign entity with a North Carolina subpoena accompanied by a statement/letter explaining that the subpoena is not enforceable in the foreign jurisdiction and is provided to the entity solely for the entity's records?

Opinion #1:

Yes. Rule 8.4(c) states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. RPC 236 provides that it is false and deceptive for a lawyer to use the subpoena process to mislead the custodian of documentary evidence as to the lawyer's authority to require the production of such documents. 2010 FEO 2 prohibits a lawyer's use of a subpoena to request medical records under the authority of Rule 45 knowing that the North Carolina subpoena is unenforceable. 2010 FEO 2 explains that if "the North Carolina subpoena is not enforceable out of state, the lawyer may not misrepresent to the out of state health care provider that it must comply with the subpoena."

RPC 236 and 2010 FEO 2 prohibit a lawyer from making misrepresentations to the subpoena recipient that the lawyer has the legal authority to issue the subpoena under Rule 45 or misleading the recipient as to whether compliance with the subpoena is required by law.

If the subpoena is accompanied by a statement/letter explaining that the subpoena is not enforceable in the foreign jurisdiction, the recipient is not required to comply with the subpoena, and the subpoena is being provided solely for the entity's records, the lawyer has not made misrepresentations to, nor misled, the subpoena recipient. The subpoena recipient is aware that it cannot be compelled to comply with the subpoena and may determine whether to provide the requested documents voluntarily.

Inquiry #2:

Would the answer differ if the lawyer wishes to obtain the appearance and testimony of an individual over which the North Carolina court does not have in personam jurisdiction?

Opinion #2:

No. If an individual requests a North Carolina subpoena, knowing that the North Carolina court lacks in personam jurisdiction over the individual and the subpoena will not be enforceable, the lawyer may provide the individual with the subpoena, accompanied by a statement/letter explaining that the subpoena is not enforceable as to the individual and is being provided solely at the individual's request.

2014 Formal Ethics Opinion 8

January 23, 2015

Accepting an Invitation from a Judge to Connect on LinkedIn

Opinion rules that a lawyer may accept an invitation from a judge to be a "connection" on a professional networking website, and may endorse a judge. However, a lawyer may not accept a legal skill or expertise endorsement or a recommendation from a judge.

Facts:

Lawyer has a profile listing on LinkedIn, a social networking website for people in professional occupations. The website allows registered users ("members") to maintain a list of contact details on their LinkedIn pages for people with whom they have some level of relationship via the website. These contacts are called "connections." Members can invite anyone (whether a site user or not) to become a connection.

LinkedIn can be used to list jobs and search for job candidates, to find employment, and to seek out business opportunities. Members can view the connections of other members, post their photographs, and view the photos of other members. Members can post comments on another member's profile page. Members can also endorse or write recommendations for other members. Such endorsements or recommendations, if accepted by the recipient, are posted on the recipient's profile listing.

Inquiry #1:

May a lawyer with a professional profile on LinkedIn accept an invitation to connect from a judge?

Opinion #1:

Yes. Interactions with judges using social media are evaluated in the same manner as personal interactions with a judge, such as an invitation to dinner. In certain scenarios, a lawyer may accept a judge's dinner invitation. Similarly, in certain scenarios, a lawyer may accept a LinkedIn invitation to connect from a judge. However, if a lawyer represents clients in proceedings before a judge, the lawyer is subject to the following duties: to avoid conduct prejudicial to the administration of justice; to not state or imply an ability to influence improperly a government agency or official; and to avoid *ex parte* communications with a judge regarding a legal matter or issue the judge is considering. *See* Rule 3.5 and Rule 8.4. These duties may require the lawyer to decline a judge's invitation to connect on LinkedIn.

Rule 8.4(d) provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." Rule 8.4(e) provides that it is professional misconduct for a lawyer to "state or imply an ability to influence improperly a government agency or official." Lawyers have an obligation to protect the integrity of the judicial system and to avoid creating an appearance of judicial partiality. *See* 2005 FEO 1.

If a lawyer receives an invitation to connect from a judge during the pendency of a matter before the judge, and the lawyer concludes that accepting the invitation will impair the lawyer's compliance with these duties, the lawyer should not accept the judge's invitation to connect until the matter is concluded. The lawyer may communicate to the judge the reason the lawyer did not accept the judge's invitation. Such a communication with the judge is not a prohibited *ex parte* communication provided the communication does not include a discussion of the underlying legal matter.

Rule 3.5 prohibits lawyers from engaging in *ex parte* communications with a judge. Because connected members can post comments on each other's profile pages, the connection between a judge and a lawyer appearing in a matter before the judge could lead to improper *ex parte* communications. Therefore, while the lawyer has a matter pending before a judge, the lawyer may not use LinkedIn or any other form of social media to communicate with the judge about the pending matter.

Rule 8.4(f) provides that it is professional misconduct for a lawyer to "knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law." To the extent that a judge is prohibited by the North Carolina Code of Judicial Conduct from participating in LinkedIn, or from sending invitations to connect to lawyers, a lawyer may not assist the judge in violating such prohibitions.

Inquiry #2:

May the lawyer send an invitation to connect to a judge?

Opinion #2:

Yes, subject to the limitations described in Opinion #1.

Inquiry #3:

A LinkedIn member has the option of displaying a "skills & expertise" section within his profile. A member can add items to the "skills & expertise" section of his profile page. In addition, some connections can add a new item to another member's "skills & expertise" section, can "endorse" a skill or expertise already listed for the member, or write a recommendation for the member. A member who is being endorsed by another member will receive a notification containing the identity of the endorser and the specific skill or expertise that is being endorsed. The member may decline the endorsement entirely or choose the specific endorsements to be displayed. The endorsed member may also subsequently edit the "skills & expertise" section to "hide" selected endorsements. If a member endorses another member, and the endorsement is not declined by the recipient, the endorser's name and profile picture will appear next to the skill on the endorsed member's profile.

A recommendation is a comment written by a LinkedIn member to recognize or commend another member. When someone recommends a member, the recommended member will receive a message in the recommended mem-

ber's LinkedIn inbox and a notification on the member's "Manage Recommendations" page. Recommendations are only visible to connections. A member can choose to hide a recommendation from the member's profile but cannot delete it. Recommendations written for others can be withdrawn or revised.

May a lawyer endorse a judge's legal skills or expertise or write a recommendation on the judge's profile page?

Opinion #3:

Yes, subject to the limitations explained in Opinion #1.

Inquiry #4:

May a lawyer accept an endorsement or recommendation from a judge and display the endorsement or recommendation on his profile page?

Opinion #4:

No. Displaying an endorsement or recommendation from a judge on a lawyer's profile page would create the appearance of judicial partiality and the lawyer must decline. *See* Rule 8.4(e).

Inquiry #5:

May a lawyer accept and post endorsements and recommendations on his LinkedIn profile page from persons other than judges?

Opinion #5:

Lawyers are professionally obligated to ensure that communications about the lawyer or the lawyer's services are not false or misleading. *See* Rule 7.1(a). Provided that the content of the endorsement or recommendation is truthful and not misleading in compliance with the requirements of Rule 7.1, the lawyer may post endorsements and recommendations from persons other than judges on the lawyer's LinkedIn profile page. *See* 2012 FEO 8.

Inquiry #6:

Lawyer A previously accepted and displayed on his LinkedIn profile page an endorsement or recommendation from Lawyer B, who subsequently became a judge. Is Lawyer A required to remove Lawyer B's endorsement or recommendation?

Opinion #6:

Yes, if Lawyer A knows, or reasonably should know, that Lawyer B has become a judge. *See* Opinion #4.

Inquiry #7:

Do the holdings in this opinion apply to other social media applications such as Facebook, Twitter, Google+, Instagram, and Myspace?

Opinion #7:

The holdings apply to any social media application that allows public display of connections, endorsements, or recommendations between lawyers and judges.

2014 Formal Ethics Opinion 9

July 17, 2015

Use of Tester in an Investigation that Serves a Public Interest

Opinion rules that a private lawyer may supervise an investigation involving misrepresentation if done in pursuit of a public interest and certain conditions are satisfied.

Note: This opinion does not apply to the conduct of a government lawyer. As explained in comment [1] to Rule 8.4, the prohibition in Rule 8.4(a) against knowingly assisting another to violate the Rules of Professional Conduct or violating the Rules of Professional Conduct through the acts of another does not prohibit a government lawyer from providing legal advice to investigatory personnel relative to any action such investigatory personnel are lawfully entitled to take.

In addition, this opinion is limited to private lawyers who advise, direct, or supervise conduct involving dishonesty, deceit, or misrepresentation as opposed to a lawyer who personally participates in such conduct.

Inquiry:

Attorney A was retained by Client C to investigate and, if appropriate, file a lawsuit against Client C's former employer, E. Employer E employed Client C as a janitor and required him to work 60 hours per week. E paid Client C a salary of $400 per week. Attorney A believes that because his client's employment was a "non-exempt position" under the North Carolina Wage and Hour Act, the payment method used by E was unlawful. Instead, E should have paid Client C at least $7.25 (minimum wage) per hour for each of the first 40 hours Client C worked per week, and at least $10.88 (time and a half) for each hour in excess of 40 (overtime) that Client C worked per week.

Prior to filing a lawsuit, Attorney A wants to retain a private investigator to investigate E's wage payment practices. The private investigator suggests using lawful, but misleading or deceptive tactics, to obtain the information Attorney A seeks. For example, the private investigator may pose as a person interested in being hired by E in the same capacity as Client C to see if E violates the North Carolina Wage and Hour Act when compensating the investigator.

Prior to filing a lawsuit, may Attorney A retain a private investigator who will misrepresent his identity and purpose when conducting an investigation into E's wage payment practices?

Opinion:

The Rules of Professional Conduct are rules of reason and there are instances when the use of misrepresentation does not violate Rule 8.4(a)'s prohibition on the use of third parties to engage in conduct involving misrepresentation. *See* Rule 0.2, *Scope*, and Rule 8.4(a) and (c).

Other jurisdictions have interpreted their Rules of Professional Conduct to permit lawyer supervision of investigations involving misrepresentation in circumstances similar to that set out in the instant inquiry. For example, the bars of Arizona and Maryland permit lawyers to use "testers" who employ misrepresentation to collect evidence of discriminatory practices. Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Op. 99-11 (1999); Maryland Bar Ass'n, Op. 2006-02 (2005). These ethics opinions conclude that testers are necessary to prove discriminatory practices and, therefore, serve an important public policy. The State Bar of Arizona opined that it would be inconsistent with the intent of the Rules of Professional Conduct to interpret the rules to prohibit a lawyer from supervising the activity of testers. Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Op. 99-11 (1999).

The objective of Rule 8.4 is set out in comment [3] to the rule: "The purpose of professional discipline for misconduct is not punishment, but to protect the public, the courts, and the legal profession." The challenge is to balance the public's interest in having unlawful activity fully investigated and possibly thereby stopped, with the public's and the profession's interest in ensuring that lawyers conduct themselves with integrity and honesty. In an attempt to balance these two important interests, we conclude that a lawyer may advise, direct, or supervise an investigation involving pretext under certain limited circumstances.

In the pursuit of a legitimate public interest such as in investigations of discrimination in housing, employment and accommodations, patent and intellectual property infringement, and the production and sale of contaminated and harmful products, a lawyer may advise, direct, and supervise the use of misrepresentation (1) in lawful efforts to obtain information on actionable violations of criminal law, civil law, or constitutional rights; (2) if the lawyer's conduct is otherwise in compliance with the Rules of Professional Conduct;[1] (3) the lawyer has a good faith belief that there is a reasonable possibility that a violation of criminal law, civil law, or constitutional rights has taken place, is taking place, or will take place in the foreseeable future;[2] (4) misrepresentations are limited to identity or purpose; and (5) the evidence sought is not reasonably available through other means. A lawyer may not advise, direct, or supervise the use of misrepresentation to pursue the purely personal interests of the lawyer's client, where there is no public policy purpose, such as the interests of the principal in a family law matter.

If Attorney A concludes that each of the above conditions is satisfied, he may retain a private investigator to look into E's wage payment practices, which investigation may include misrepresentations as to identity and purpose.

Endnotes

1. Rule 4.2(a) prohibits a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the other lawyer consents or the communication is authorized by law or court order. A lawyer may not violate this rule through the acts of another, including an investigator. Rule 8.4(a).

2. Government evidence or data that supports the conclusion that random testing will uncover illegal discriminatory conduct is a sufficient basis for a lawyer's "good faith belief" under this condition. For example, federal funding and contracts for Legal Aid of North Carolina, Inc.'s (LANC) Fair Housing Project require the performance of systematic fair housing testing to uncover patterns, practices, barriers, and other more subtle forms of unlawful housing discrimination in North Carolina. Studies and evidence developed by US Department of Housing and Urban Development confirm that systematic fair housing testing is an important tool to detect housing discrimination. A LANC lawyer may rely on such evidence to form a good faith belief that there is a reasonable possibility that a violation of fair housing law has, is, or will take place and that random audits by "testers" supervised by the lawyer will uncover such conduct.

2014 Formal Ethics Opinion 10

January 23, 2015

Lawyer Owned Adoption Agency

Opinion rules that a lawyer who handles adoptions as part of her or his law practice and also owns a financial interest in a for-profit adoption agency may, with informed consent, represent an adopting couple utilizing the services of the adoption agency but may not represent the biological parents.

Facts:

Attorneys A and B, who handle independent adoptions as part of their law practice, also manage a for-profit adoption agency called "Adopt a Child." Adopt a Child is a limited liability company. Attorneys A and B receive compensation from Adopt a Child. The agency's office is located in separate office space within Attorneys A and B's firm. It has a separate telephone number, signage, fax machine, and copy machine. Adopt a Child is staffed by one employee. Adopt a Child contracts with independent social workers to screen and counsel birthmothers. Without assistance or influence from Attorneys A and B, a social worker conducts a home study on the adopting couple. The social worker then prepares a report which is reviewed by a supervisor and a review committee. A director of Adopt a Child may or may not be a member of the review committee. If the review committee approves the home study, the adoption proceeds. The adopting couple then engages a lawyer to represent their interests. If the home study report is unfavorable, the report is sent to the Department of Social Services. The adopting couple thereafter cannot become a client of Adopt a Child.

Typically, adopting couples learn about Adopt a Child through the agency's website and advertisements. An initial consultation with Attorney A or Attorney B is arranged. Attorney A or Attorney B meets with the adopting couple to discuss the adoption process. If the adopting couple has identified a child to adopt, then Attorneys A and B proceed with the legal work necessary to complete an independent adoption. If the adopting couple is interested in adoption, but needs assistance in finding a child, a list of licensed adoption agencies is provided to the adopting couple. The adopting couple is informed that Attorneys A and B manage and own Adopt a Child. The adopting couple is encouraged to investigate other available agencies. If the adopting couple decides to use Adopt a Child, the adopting couple is given an application form and asked to pay a $200 application fee. Once approved, the adopting couple becomes a client of Adopt a Child.

Adopting couples pay a $4,500 fee to Adopt a Child, which gives adopting couples the following services: a completed home study, a family profile by a local artist, a two-page website, and access to birthmothers. Once there is a match between a birthmother and an adopting couple, the adopting couple signs a fee contract with the law firm and pays a legal fee to the law firm for legal services. Additional fees may occur in the form of pass-through costs for the birthmother's living and medical expenses, and legal fees as necessary for termination of parental rights, interstate legal representation, etc. The adopting couple is informed that if there is a conflict of interest, such as a dispute between the birthmother and the adopting couple or between the adopting couple and Adopt a Child, the adopting couple must hire another lawyer to represent them.

Inquiry #1:

May Attorneys A and B co-manage and accept compensation as managers of Adopt a Child and provide legal services to the adopting couple and Adopt a Child?

Opinion #1:

Yes. The primary concern in this inquiry is the ability of Attorneys A and B to identify and manage conflicts of interest. Actual or potential conflicts of interest exist based on (1) the lawyers' ownership of Adopt a Child, and (2) the referral of an adopting couple represented by Attorney A or Attorney B to Adopt a Child, or the referral of a client of Adopt a Child to Attorney A or Attorney B for legal representation in the adoption.

Rule 1.7 prohibits concurrent conflicts of interest. One type of concurrent conflict of interest exists if the representation of one or more clients may be materially limited by a personal interest of the lawyer. Comment [10] to Rule 1.7 provides, "[t]he lawyer's own interests should not be permitted to have an adverse effect on representation of a client. In addition, 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 financial interest."

Before Adopt a Child may refer an adopting couple to Attorney A and Attorney B for legal services, the agency, acting through the two lawyers, must reasonably conclude that the lawyers can adequately protect the interests of the adopting couple and that their professional judgment on behalf of the adopting couple will not be adversely affected by their financial interest in Adopt a Child. The adopting couple must give informed consent to the representation, confirmed in writing. As part of the disclosure necessary for informed consent, the adopting couple must be informed that in the event of a conflict between the adopting couple and Adopt a Child, Attorneys A and B must withdraw from the representation and the adopting couple will need to obtain new counsel. *See* Rule 1.7(b).

If a couple that wants to adopt are already clients of either Attorney A or Attorney B, the lawyers may refer the couple to Adopt a Child for adoption services only in compliance with the Rules of Professional Conduct.

The referral of the adopting parents to Adopt a Child implicates Rule 5.7 as well as Rule 1.8. Adopt a Child provides "law-related services." Rule 5.7 sets out the ethical responsibilities for a lawyer who provides such services. Comment [6] to Rule 5.7 provides that when a client-lawyer relationship exists with a person who is referred by a lawyer to an ancillary business controlled by the lawyer, the lawyer must comply with Rule 1.8(a) pertaining to business transactions with clients. *See also* Rule 1.8, cmt. [1]. Pursuant to Rule 1.8(a) a lawyer may only enter into a business transaction with a client if: (1) the transaction and terms are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction. Accordingly, a lawyer must make these disclosures and secure the requisite consent before providing law related services to a client.

In 2000 FEO 9, the Ethics Committee held that a lawyer who was also a certified public accountant could provide legal services and accounting services from the same office. The opinion cites Rule 1.7 and provides that the lawyer may offer accounting services to his legal clients, provided the lawyer fully discloses his self-interest in making a referral to himself, and the lawyer determines that the referral is in the best interest of the client.

Before referring legal clients to Adopt a Child, Attorneys A and B must make an independent professional determination that the services offered by Adopt a Child will best serve the interests of the adopting couple. In addition, the adopting couple must be informed that, if they become clients of Adopt a Child, they are not obligated to employ Attorneys A and B to handle the legal work related to an adoption, and that they have the right to legal counsel of their choice. Likewise, if a couple comes in for a legal consultation concerning adoption, Attorneys A and B must explain the relationship between Adopt a Child and their firm and their financial interest in the agency before referring the adopting couple to their agency. The adopting couple must be given access to other agencies and the freedom to choose another adoption agency even if they decide to retain Attorneys A and B to perform their legal work.

If Attorneys A and B comply with the requirements set out in Rule 1.7(b), Rule 1.8(a), and Rule 5.7, they may refer their legal clients to Adopt a Child. Similarly, if Attorneys A and B comply with the requirements of Rule 1.7(b)

and Rule 1.8(a), they may accept referrals from Adopt a Child.

Inquiry #2:

May Attorneys A and B simultaneously represent the adopting couple, Adopt a Child, and the birth parent(s)?

Opinion #2:

No. Rule 1.7(a) provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if (1) the representation of one client will be directly adverse to another client; or (2) the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client.

In an informal opinion, the ABA opined as follows,

> An adoption is a highly emotional undertaking for both the adoptive and the biological parent. In such situations, the lawyer must take particular care that the client fully understands the significance of the legal actions being taken. The lawyer has the obligation not only to advise the client of the legal rights and responsibilities, but also to counsel regarding the advisability of the action contemplated. *See* Rule 1.4. The biological parent is entitled to a full disclosure of all rights and obligations involved in the consent to the adoption , revocation of consent, post-adoptive rights, and post-adoptive restrictions, as well as the rights and obligations assumed by the adoptive parent. Where represented by counsel, the biological parent has the right to expect the lawyer to anticipate the consequences of the surrender and advise accordingly.
>
> The rights surrendered by the biological parent and those assumed by the adoptive parent are in potential conflict . The biological parent's right to revoke the consent is in direct conflict with the interests of the adoptive parent. The biological parent has the right to independent advice regarding the revocation of the consent.
>
> The lawyer representing the adoptive parent owes the duty to counsel the adoptive parent and to assist the adoptive parent in securing the consent and avoiding revocation. The rights of the adoptive parent after the adoption decree is final may be antagonistic to perceived rights of the biological parent.
>
> The inherent conflicts cannot be reconciled. Thus, the lawyer seeking to represent both the adoptive and biological parents in a private adoption proceeding cannot have a reasonable belief that the representation of one client would not adversely affect the relationship with or representation of the other client. *See* Rule 1.7

ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 87-1523 (1987).

We agree with the reasoning of the ABA opinion and conclude that it is a nonconsentable conflict for Attorneys A and B to represent the birth parents and simultaneously represent the adopting couple and/or Adopt a Child.

Inquiry #3:

What, if any, communication may Attorneys A and B have with a birth parent?

Opinion #3:

Rule 4.3 provides,

> [i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not: (a) give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that 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.

Any communication between a birth parent and the law firm must be limited to providing or collecting information to be used to complete the forms required by Adopt a Child.

Attorneys A and B must ensure that the birth parent(s) are provided with a written disclosure statement that explains that Adopt a Child is not a law firm; Attorneys A and B do not represent the birth parent(s) and cannot provide the birth parent(s) with legal advice; any communication with the law firm does not create a client-lawyer relationship; and the birth parent(s) are entitled to retain separate legal representation; and that the adopting couple will pay the legal fees.

2015 Formal Ethics Opinion 1

April 17, 2015

Preparing Pleadings and Other Filings for an Unrepresented Opposing Party

Opinion rules that a lawyer may not prepare pleadings and other filings for an unrepresented opposing party in a civil proceeding currently pending before a tribunal if doing so is tantamount to giving legal advice to that person.

Background:

The Ethics Committee recently received several inquiries on whether a lawyer may prepare a pleading or other filing for an unrepresented opposing party in a civil proceeding. There are a number of rules and ethics opinions that address this issue, but not collectively. The purpose of this opinion is to provide guiding principles for when a lawyer may prepare a pleading or other filing for an unrepresented opposing party.

This opinion is limited to the drafting of pleadings and filings attendant to a proceeding that is currently pending before a tribunal (as that term is defined in Rule 1.0(n)), and to the drafting of any agreement between the parties to resolve the issues in dispute in the proceeding including a release or settlement agreement. The principles do not address the drafting of documents necessary to close a business transaction or other matters that are not the subject of a formal proceeding before a tribunal. "Pleading or filing" is used throughout the opinion to include any document that is filed with the tribunal and any agreement between the parties to settle their dispute and terminate the proceeding.

Survey of Rules and Opinions:

Rule 4.3(a) provides that, in dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment [2] to Rule 4.3 clarifies that Rule 4.3 does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. As long as the lawyer explains that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter and may prepare documents that require the unrepresented person's signature.

CPR 296, which was adopted in 1981 under the Code of Professional Responsibility which was then in effect, opines that a lawyer may not send to or directly make available to an unrepresented defendant an acceptance of service and waiver form waiving the right to answer and to be notified of the date of trial. However, a lawyer may send to a defendant a form solely for acceptance of service. *See* CPR 121.

RPC 165, adopted in 1993, states that, "[i]n 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." The opinion continues:

> [a]lthough 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.

2009 Formal Ethics Opinion 12 rules that a lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party provided the lawyer explains who he represents and does not give the unrepresented party legal advice; however, the lawyer may not prepare a waiver of exemptions for the adverse party.

2002 Formal Ethics Opinion 6 provides that the lawyer for the plaintiff

may not prepare the answer to a complaint for an unrepresented adverse party to file pro se. The basis for this holding is also the prohibition on giving legal advice to a person who is not represented by the lawyer.

Guiding Principles

The survey of the existing opinions demonstrates that some pleadings or filings that solely represent the interests of one party to a civil proceeding may be prepared by a lawyer representing the interests of the opposing party.

However, because of the prohibitions in Rule 4.3, a lawyer may not draft a pleading or filing to be signed solely by an unrepresented opposing party if doing so is tantamount to giving legal advice to that person. A lawyer may draft a pleading or filing to be signed solely by an unrepresented opposing party if the document is necessary to settle the dispute with the lawyer's client and will achieve objectives of both the lawyer's client and the unrepresented opposing party. Pursuant to Rule 4.4(a), which prohibits the use of "means" that have no substantial purpose other than to embarrass, delay, or burden a third person, when presenting a pleading or filing for execution, the lawyer must avoid using tactics that intimidate or harass the unrepresented opposing party.

In applying these guiding principles, a lawyer must avoid the overreaching which is tantamount to providing legal advice to an unrepresented opposing party. The lawyer should consider whether (1) the rights, if any, of the unrepresented opposing party will be waived, lost, or otherwise adversely impacted by the pleading or filing, and the significance of those rights; (2) the pleading or filing solely represents the position of the unrepresented opposing party (e.g., an answer to a complaint); (3) the pleading or filing gives the unrepresented opposing party some benefit (e.g., acceptance of service to avoid personal service by the sheriff at the person's home or work place); (4) the legal consequences of signing the document are not clear from the document itself (e.g., the hidden consequences of signing a waiver of right to file an answer in a divorce proceeding has hidden consequences); (5) the pleading or filing goes beyond what is necessary to achieve the client's primary objectives; or (6) the pleading or filing will require the signature of a judge or other neutral who can independently evaluate the pleading or filing. If a disinterested lawyer would conclude that the unrepresented opposing party should not agree to sign the pleading or filing under any circumstances without advice of counsel, or the lawyer is not able to articulate why it is in the interest of the unrepresented opposing party to rely upon the lawyer's draft of the document, the lawyer cannot properly ask the unrepresented opposing party to sign the document.

Opinion:

Applying the guidelines and considerations above leads to the conclusion that a lawyer may prepare the following pleadings or filings for an unrepresented opposing party: an acceptance of service, a confession of judgment, a settlement agreement, a release of claims, an affidavit that accurately reflects the factual circumstances and does not waive the affiant's rights, and a dismissal with (or without) prejudice pursuant to settlement agreement or release. However, prior to obtaining the signature of the unrepresented opposing party on the pleading or filing, the person must be given the opportunity to review and make corrections to the pleading or filing. It is recommended that the pleading or filing include a written disclosure that indicates the name of the lawyer preparing the document, and specifies that the lawyer represents the other party and has not and cannot provide legal advice to the unrepresented opposing party except the advice to seek representation from independent counsel.

A lawyer should not prepare on behalf of an unrepresented opposing party a waiver of right to file an answer to a complaint, an answer to a complaint, or a waiver of exemptions. A waiver of notice of hearing should only be prepared for the unrepresented opposing party if the lawyer is satisfied that, upon analysis of the considerations indicated above, the lawyer is not asking the unrepresented opposing party to relinquish significant rights without obtaining some benefit.

Neither of the above lists of pleadings or filings is intended to be exhaustive. Before determining whether a pleading or filing may be prepared for an unrepresented opposing party, the lawyer must conclude that she is able to comply with the guiding principles above.

2015 Formal Ethics Opinion 2

April 17, 2015

Preparing Waiver of Right to Notice of Foreclosure for Unrepresented Borrower

Opinion rules that when the original debt is $100,000 or more, a lawyer for a lender may prepare and provide to an unrepresented borrower, owner, or guarantor a waiver of the right to notice of foreclosure and the right to a foreclosure hearing pursuant to N.C.G.S. § 45-21.16(f) if the lawyer explains the lawyer's role and does not give legal advice to any unrepresented person. However, a lawyer may not prepare such a waiver if the waiver is a part of a loan modification package for a mortgage secured by the borrower's primary residence.

Inquiry #1:

N.C. Gen. Stat. §45-21.16(f) provides that in a nonjudicial power of sale foreclosure, any person entitled to notice of the foreclosure (including owners, borrowers, and guarantors) (the "Notice Parties") "may waive after default the right to notice and hearing by written instrument signed and duly acknowledged by such party." The statute provides that in foreclosures where the original debt was less than $100,000, only the clerk may send the waiver form to the Notice Parties and the form can only be sent "after service of the notice of hearing." In foreclosures where the original debt is $100,000 or more, the statute does not specify how the waiver form shall be provided to the Notice Parties or who can draft the waiver form.

It is common practice for lenders dealing with defaulted loans in excess of $100,000 to require Notice Parties to execute a N.C. Gen. Stat. §45-21.16(f) waiver in connection with a forbearance, modification, or reinstatement agreement.

The filing of a foreclosure notice of hearing does not require a Notice Party to file an answer or to attend the foreclosure hearing. See N.C.G.S. §45-21.16(c)(7)(a) (requiring foreclosure notice to inform debtor that "failure to attend the hearing will not affect the debtor's right to pay the indebtedness...or to attend the actual sale, should the debtor elect to do so.") The execution of a N.C. Gen. Stat. §45-21.16(f) waiver "waives" the right to receive notice of the foreclosure hearing and the right to require a foreclosure hearing to be held. The clerk is still required to receive evidence and make the findings required by N.C.G.S. § 45-21.16(d), but can do so based upon affidavits from the lender without holding a formal hearing.

May a lawyer who represents the lender on a debt of $100,000 or more draft a N.C. Gen. Stat. §45-21.16(f) waiver form and provide the waiver form to unrepresented Notice Parties for execution?

Opinion #1:

Yes, provided the lawyer complies with the requirements of N.C. Gen. Stat. §45-21.16 and with Rule 4.3 (Dealing with Unrepresented Persons). However, in the consumer context, when the property subject to foreclosure is the borrower's primary residence, compliance with Rule 4.3 prohibits a lawyer from drafting the waiver form for inclusion in a loan modification package for execution by the unrepresented borrower.

In dealing on behalf of a client with a person who is not represented by counsel, Rule 4.3(a) states that a lawyer shall not give legal advice to the person, other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client. In addition, paragraph (b) of the rule prohibits the lawyer from stating or implying that the lawyer is disinterested and requires the lawyer to make reasonable efforts to correct any misunderstanding that the unrepresented person may have in this regard.

The Ethics Committee has previously considered whether a lawyer may prepare documents for execution by an unrepresented person. 2004 FEO 10 rules that the lawyer for the buyer in a residential real estate closing may prepare a deed as an accommodation to the needs of her client, the buyer, provided the lawyer makes the disclosures required by Rule 4.3 and does not give legal advice to the seller other than the advice to obtain legal counsel. Similarly, 2009 FEO 12 holds that a lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party as long as the lawyer explains who he represents and does not give the unrepresented party legal advice. *Accord* RPC 165.

However, other opinions have held that a lawyer may not prepare an answer or an acceptance of service and waiver form for an unrepresented opposing party. *See* CPR 121, CPR 296, RPC 165. 2002 FEO 6 explains the rationale for these prior opinions as follows:

> The committee has consistently held, however, that a lawyer representing the plaintiff may not send a form answer to the defendant that admits the allegations of the divorce complaint nor may the lawyer send the defendant an "acceptance of service and waiver" form waiving the defendant's right to answer the complaint. CPR 121, CPR 125, CPR 296. The basis for these opinions is the prohibition on giving legal advice to a person who is not represented by counsel.

Except as noted below, the waiver form contemplated by the current inquiry is like a deed or a confession of judgment: it is prepared to accommodate the needs of the lawyer's client and usually prepared in conjunction with negotiations between the lender and the borrower relative to avoiding the consequences of a default by execution of a forbearance, modification, or reinstatement agreement. A foreclosure notice of hearing does not require a Notice Party to take any action prior to a foreclosure hearing or to attend the hearing. After execution of a waiver form, the borrower may still pay the indebtedness or attend the foreclosure sale. Therefore, except as noted below, preparing a N.C. Gen. Stat. §45-21.16(f) waiver form for unrepresented Notice Parties is not tantamount to giving legal advice to an unrepresented person and the lender's lawyer may draft the waiver and give it to unrepresented Notice Parties if the lawyer does not undertake to advise the unrepresented Notice Parties concerning the meaning or significance of the waiver form or state or imply that the lawyer is disinterested.

There is an exception to this holding in the consumer context. When the property subject to foreclosure is the borrower's primary residence, compliance with Rule 4.3 prohibits a lawyer from drafting a waiver form for inclusion in a loan modification package for execution by the unrepresented borrower. In this context, preparation of the waiver form is tantamount to giving legal advice to an unrepresented person because the waiver prospectively eliminates a significant right or interest of the unrepresented person—the borrower's right to notice of foreclosure upon default on the new or modified loan—and there is a substantial risk that an unsophisticated, distressed borrower will not understand this. *See* Proposed 2015 FEO 1.

Inquiry #2:

Does it make a difference if the waiver is executed in conjunction with other lender prepared documents, such as a forbearance agreement, modification agreement, or reinstatement agreement?

Opinion #2:

Subject to the limitation noted in the last paragraph of Opinion #1 on drafting a waiver form for inclusion in a loan modification package for a loan secured by the unrepresented borrower's primary residence, this does not make a difference. Comment [2] to Rule 4.3 clarifies that Rule 4.3 does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party, the lawyer may inform the unrepresented person of the terms on which the lawyer's client will enter into an agreement or settle a matter and may prepare documents that require the unrepresented person's signature. In dealing with unrepresented Notice Parties, however, the lender's lawyer must fully disclose that the lawyer represents the interests of the lender and will draft the documents consistent with the interests of the lender. The lawyer may not give any legal advice to the Notice Parties except the advice to obtain legal counsel. Rule 4.3.

2015 Formal Ethics Opinion 3

April 17, 2015

Offering Prospective Client a Computer Tablet in Direct Mail Solicitation

Opinion rules that a lawyer may not offer a computer tablet to a prospective client in a direct mail solicitation letter.

Inquiry #1:

Lawyer represents clients in personal injury matters. Lawyer advertises his legal services by way of targeted direct mail solicitation. The solicitation letter includes a flyer that states:

> NEW CLIENTS TO LAW FIRM: NEW COMPUTER TABLET
>
> New clients of law firm wishing to communicate electronically may be issued a computer tablet with an internet-capable web cam that will allow low cost-free video conferences and electronic mail directly with the lawyer.
>
> Disclaimer: Any equipment issued is issued free-of-charge to new clients to better facilitate communication with the law firm during representation.

The flyer does not indicate that the computer tablet is on loan and must be returned to Lawyer at the conclusion of the representation.

After a client hires the firm, Lawyer presents the client with an office equipment agreement. The agreement provides that the tablet must be returned to Lawyer at the end of the representation and, at that time, the client will have the option to purchase the tablet at cost. The client must pay for the tablet if it is not returned timely and in good condition. If the tablet is damaged, the client agrees to repair the tablet, replace the tablet with one of equal value, or purchase the tablet at cost from Lawyer.

May Lawyer offer a computer tablet to a prospective client in a direct mail solicitation letter?

Opinion #1:

No. A lawyer shall not make false or misleading communications about the lawyer or the lawyer's services. Rule 7.1. Neither Lawyer's direct mail solicitation letter nor the flyer makes clear that the tablet is on loan and must be returned at the conclusion of the representation unless the client elects to purchase the tablet from Lawyer. The disclaimer included on the flyer is inadequate under the circumstances and is misleading.

Even with an adequate disclaimer, Lawyer's direct mail solicitation campaign is not permissible. A lawyer may advertise legal services by way of direct mail solicitation letters, but is prohibited from engaging in in-person, live, or telephone solicitation of prospective clients with whom the lawyer has no prior professional relationship. Rule 7.3. Rule 7.3(a) prohibits lawyer-initiated telephone solicitation of a prospective client because of the potential for abuse inherent in live telephone contact by a lawyer with a person known to be in need of legal services. An offer of promotional merchandise, whether on loan or as a gift, in a targeted direct mail solicitation letter is an inducement to a prospective client to call the lawyer's office solely to inquire about the merchandise, thereby giving the lawyer the improper opportunity to solicit the caller in person. 2004 FEO 2 (lawyer may not offer promotional merchandise in a targeted direct mail solicitation letter as an inducement to call the lawyer's office).

Inquiry #2:

Lawyer sends direct mail solicitation letters to prospective clients known to be in need of legal services. Lawyer does not offer merchandise to prospective clients in the solicitation letter. After being hired by a client, may Lawyer offer to clients temporary use of a computer tablet for purposes of communicating with Lawyer or gathering information and/or evidence to be used for the client's matter?

Opinion #2:

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.

Pursuant to comment [10] to Rule 1.8:

> Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination *and the costs of obtaining and presenting evidence*, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted. [Emphasis added.]

Lawyer may loan a tablet to a client provided the tablet is necessary for the client to communicate with Lawyer and/or for the collection of evidence; the tablet is not *quid pro quo* for hiring Lawyer or law firm; and the client understands that the tablet is not a gift, but is on loan and must be returned to

Lawyer or purchased at the end of the representation. Lawyer may not give a tablet to a client solely for use that is unrelated to the representation because to do so would be tantamount to loaning money to the client for living expenses. *See* 2001 FEO 7 (advancing cost of rental car prohibited if vehicle used only occasionally for client's transportation to medical exams).

2015 Formal Ethics Opinion 4

July 17, 2015

Disclosing Potential Malpractice to a Client

Introduction

Lawyers will, inevitably, make errors, mistakes, and omissions (referred to herein as an "error" or "errors") when representing clients. Such errors may constitute professional malpractice, but are not necessarily professional misconduct. This distinction between professional or legal negligence and professional misconduct is explained in comment [9] to Rule 1.1, *Competence*:

> 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.

Although an error during the representation of a client may not constitute professional misconduct, the actions that the lawyer takes following the realization that she has committed an error should be guided by the requirements of the Rules of Professional Conduct. This opinion explains a lawyer's professional responsibilities when the lawyer has committed what she believes may be legal malpractice.

This opinion does not address requirements under a lawyer's malpractice insurance policy to give the insurer notice or to report a potential claim. Lawyers are encouraged to read their policies. This opinion also does not address settlement of a malpractice claim. Lawyers are reminded that Rule 1.8(h)(2) prohibits settlement of a malpractice claim with an unrepresented client or former client unless the person is advised in writing of the desirability of seeking and given a reasonable opportunity to seek the advice of independent legal counsel.

Inquiry #1:

When the lawyer determines that an error that may constitute legal malpractice has occurred, is the lawyer required to disclose the error to the client?

Opinion #1:

Disclosure of an error to a client falls within the duty of communication. Rule 1.4(a)(3) requires a lawyer to "keep the client reasonably informed about the status of the matter," while paragraph (b) of the rule requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Comment [3] to the rule explains that paragraph (a)(3) requires that the lawyer keep the client reasonably informed about "significant developments affecting the timing or the substance of the representation." Comment [7] to Rule 1.4 adds that "[a] lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person."

In the spectrum of possible errors,[1] material errors that prejudice the client's rights or claims are at one end. These include errors that effectively undermine the achievement of the client's primary objective for the representation, such as failing to file the complaint before the statute of limitations runs. At the other end of the spectrum are minor, harmless errors that do not prejudice the client's rights or interests. These include nonsubstantive typographical errors in a pleading or a contract or missing a deadline that causes nothing more than delay. Between the two ends of the spectrum are a range of errors that may or may not materially prejudice the client's interests.

Whether the lawyer must disclose an error to a client depends upon where the error falls on the spectrum and the circumstances at the time that the error is discovered. The New York State Bar Association, in a formal opinion, described the duty as follows:

> [W]hether an attorney has an obligation to disclose a mistake to a client will depend on the nature of the lawyer's possible error or omission, whether it is possible to correct it in the present proceeding, the extent of the harm resulting from the possible error or omission, and the likelihood that the lawyer's conduct would be deemed unreasonable and therefore give rise to a colorable malpractice claim.

N.Y. State Bar Ass'n Comm. Prof'l Ethics, Op. 734 (2000). Under this analysis, it is clear that material errors that prejudice the client's rights or interests as well as errors that clearly give rise to a malpractice claim must always be reported to the client. Conversely, if the error is easily corrected or negligible and will not materially prejudice the client's rights or interests, the error does not have to be disclosed to the client.

Errors that fall between the two extremes of the spectrum must be analyzed under the duty to keep the client reasonably informed about his legal matter. If the error will result in financial loss to the client, substantial delay in achieving the client's objectives for the representation, or material disadvantage to the client's legal position, the error must be disclosed to the client. Similarly, if disclosure of the error is necessary for the client to make an informed decision about the representation or for the lawyer to advise the client of significant changes in strategy, timing, or direction of the representation, the lawyer may not withhold information about the error. Rule 1.4. When a lawyer does not know whether disclosure is required, the lawyer should err on the side of disclosure or should seek the advice of outside counsel, the State Bar's ethics counsel, or the lawyer's malpractice carrier.[2]

Inquiry #2:

Applying the analysis in Opinion #1, the lawyer has determined that her error must be disclosed to the client. Is the lawyer also required to withdraw from the representation?

Opinion #2:

No, unless the conditions in Rule 1.7, *Conflict of Interest: Current Clients*, that allow a representation burdened with a conflict to proceed cannot be satisfied.

Rule 1.7(a)(2) states that a lawyer may not represent a client if the representation of a client may be materially limited by a personal interest of the lawyer. When a lawyer realizes that she made an error that may give rise to a malpractice claim against her, the lawyer's personal interest in avoiding liability may materially impair her professional judgment. Specifically, she may take actions that are contrary to the interests of the client to protect herself from liability. This is the essence of a conflict of interest.

Nevertheless, in many instances the lawyer may reasonably believe that she can mitigate or avoid any loss to the client by taking corrective action.[3] For example, an error made in a title search may be readily repaired or a motion in limine may prevent the use of privileged communications that were improperly produced in discovery. It is often in the best interest of both the lawyer and the client for the lawyer to attempt such repair. When the interests of the lawyer and the client are aligned in this way, withdrawal is not required if the conditions for consent in Rule 1.7(b) are satisfied.

Rule 1.7(b) allows a lawyer to proceed with a representation burdened by a conflict if the lawyer reasonably believes that she will be able to provide competent and diligent representation to the client and the client gives informed consent, confirmed in writing. If the lawyer reasonably concludes that she is still able to provide the client with competent and diligent representation—that she can exercise independent professional judgment to advance the interests of the client and not solely her own interests—the lawyer may seek the informed consent of the client to continue the representation.

Of course, when an error is such that the client's objective can no longer be achieved, as when a claim can no longer be filed because the statute of limitations has passed, the lawyer must disclose the error to the client and terminate the representation.

Inquiry #3:

If an error must be disclosed to a client, what must the lawyer tell the client?

Opinion #3:

The lawyer must candidly disclose the material facts surrounding the error,

including the nature of the error and its effect on the lawyer's continued representation. If the lawyer believes that she can take steps to remedy the situation or mitigate or avoid a loss, the lawyer should discuss these with the client while informing the client that the client has the right to terminate the representation and seek other counsel. Rule 1.4.

Whether a lawyer must inform the client that the client may have a malpractice action against the lawyer was addressed in Colorado Formal Ethics Opinion 113. The opinion states that

> The lawyer need not advise the client about whether a claim for malpractice exists, and indeed the lawyer's conflicting interest in avoiding liability makes it improper for the lawyer to do so. The lawyer need not, and should not, make an admission of liability. What must be disclosed are the facts that surround the error, and the lawyer should inform the client that it may be advisable to consult with an independent lawyer with respect to the potential impact of the error on the client's rights or claims.

Co. Formal Ethics Op. 113 (November 19, 2005). The Colorado approach appropriately limits the possibility that a lawyer will attempt to give legal advice to a client about a potential malpractice claim against the lawyer. To do so would place the lawyer squarely in a nonconsentable conflict between the client's interest and the lawyer's personal interest. However, the lawyer is required to tell the client the operative facts about the error and to recommend that the client seeking independent legal advice about the consequences of the error.

Under this approach, the lawyer is not required to inform the client of the statute of limitations applicable to legal malpractice actions, nor is she required to give the client information about the lawyer's malpractice insurance carrier or information about how to file a claim with the carrier. Nevertheless, the lawyer should seek the advice of her malpractice insurance carrier prior to disclosing the error to the client, and should discuss with the carrier what information, if any, should be provided to the client about the lawyer's malpractice coverage or how to file a claim.

Inquiry #4:

Is there any information that the lawyer should not provide to the client when disclosing her error to the client?

Opinion #4:

The lawyer should not disclose to the client whether a claim for malpractice exists or provide legal advice about legal malpractice. *See* Opinion #3.

Inquiry #5:

When is the lawyer required to inform the client of the error?

Opinion #5:

The error should be disclosed to the client as soon as possible after the lawyer determines that disclosure of the error to the client is required. *See* Rule 1.4(a)(1) (lawyer shall promptly inform the client of any decision requiring consent).

Inquiry #6:

Is filing a motion to undo the error based upon excusable neglect sufficient disclosure to the client if the client is copied with the motion? May the lawyer wait until the court has ruled on the motion to send a copy of the motion and order to the client?

Opinion #6:

As noted above, comment [3] to Rule 1.4 explains that a lawyer must keep the client reasonably informed about "significant developments affecting the timing or the substance of the representation." If the client will lose a significant right or interest if the motion fails, the client is entitled to know about the error in order to determine whether the client is willing to allow the lawyer to attempt to correct the error or would prefer that the motion be handled by another lawyer. The client must be advised of the error prior to filing the motion to allow the client to make an informed decision about the representation. Rule 1.4(b).

Inquiry #7:

When disclosing the error to the client, may the lawyer refer the client to another lawyer for advice?

Opinion #7:

Yes, if the lawyer concludes that she can exercise impartial, independent professional judgment in recommending other counsel to the client. *See* Opinion #2.

Inquiry #8:

If the client has paid legal fees to the lawyer, is the lawyer required to return some or all of the fees that she received?

Opinion #8:

Rule 1.5(a) prohibits a lawyer from collecting a clearly excessive fee. As stated in 2000 FEO 5,

> 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.

Therefore, the lawyer must determine whether, in light of the lawyer's error and its consequences for the client's interests and legal representation, a refund is necessary to avoid a clearly excessive fee. In addition, the lawyer should never charge or collect legal fees for any legal work or expenses necessitated by the lawyer's attempts to mitigate the consequences of the lawyer's error.

Endnotes

1. The "spectrum" concept of legal errors is borrowed from Colorado Formal Ethics Op. 113 (November 19, 2005).
2. Rule 1.6(b)(5) allows a lawyer to disclose confidential client information to secure legal advice about the lawyer's compliance with the Rules of Professional Conduct.
3. Insurance carriers are experienced at repairing malpractice. A lawyer should seek the advice and assistance of her carrier.

2015 Formal Ethics Opinion 5

October 23, 2015

Authority to Discuss Former Client's Appellate Case with Successor Lawyer

Opinion provides that in post-conviction or appellate proceedings, a discharged lawyer may discuss a former client's case and turn over the former client's file to successor counsel if the former client consents or the disclosure is impliedly authorized.

NOTE: As a general rule, lawyers representing a client in the pre-conviction stages of a case have more personal contact and receive confidential information that is not relevant to or shared with post-conviction lawyers. While the Rules of Professional Conduct are the same for each, the application of the relevant rules must be guided by the unique relationship that both the pre-conviction and the post-conviction lawyer have with the client. As a result, this opinion only applies to the situation where this issue arises between a discharged appellate lawyer and the subsequent appellate lawyer.

Inquiry:

Lawyer A is appointed to represent a criminal defendant in an appellate matter. Subsequently, Lawyer A withdraws from the representation of the client and Lawyer B is appointed successor appellate counsel.

Must Lawyer A obtain the former client's consent prior to discussing the client's case with Lawyer B or prior to turning over the former client's file to Lawyer B?

Opinion:

No. Unless the former client specifically instructed Lawyer A not to discuss his case with Lawyer B or not to give his appellate file to Lawyer B, such actions are permissible without the former client's express consent.

CPR 300 (1981), an ethics opinion adopted under that now superseded North Carolina Code of Professional Responsibility (in effect from 1973 to 1985), provides that a lawyer who withdraws from a client's case may not discuss the client's confidences and secrets with the client's successor lawyer unless the client gives express consent. Although the Code has been superseded, the ethics opinions that were issued under the Code 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 current North Carolina Rules of Professional Conduct. *See* NC Rules of Prof'l Conduct, NC State Bar *Lawyer's Handbook* (editor's note) (2014).

CPR 300 analyzes a lawyer's duty of confidentiality pursuant to the Code's Disciplinary Rule 4-101, *Preservation of Confidences and Secrets of a Client.* DR

4-101(B)(1) provides that, with certain exceptions, a lawyer may not knowingly reveal "a confidence or secret of his client." The duty to protect client confidences has been modified since the time of the Code and is currently embodied in Rule 1.6 of the Rules of Professional Conduct, *Confidentiality of Information.*

Rule 1.6(a) provides that a lawyer "shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)." Thus, under the current confidentiality rule, a lawyer may disclose client information if the client consents or the disclosure is impliedly authorized. A disclosure is impliedly authorized if the disclosure is appropriate to carry out the representation and there are no client instructions or special circumstances that limit the lawyer's authority. Rule 1.6 [cmt. 5].

Providing a client's new appellate counsel with information about the client's case, and turning over the client's appellate file to the successor appellate counsel, is generally considered appropriate to protect the client's interests in the appellate representation.

2015 Formal Ethics Opinion 6

October 23, 2015

Lawyer's Professional Responsibility When Third Party Steals Funds from Trust Account

Opinion rules that when funds are stolen from a lawyer's trust account by a third party who is not employed or supervised by the lawyer, and the lawyer was managing the trust account in compliance with the Rules of Professional Conduct, the lawyer is not professionally responsible for replacing the funds stolen from the account.

NOTE: This opinion is limited to a lawyer's professional responsibilities and is not intended to opine on a lawyer's legal liability.

Inquiry #1:

John Doe, a third party unaffiliated with Lawyer, created counterfeit checks that were identical to Lawyer's trust account checks. John Doe made the counterfeit checks, purportedly drawn on Lawyer's trust account, payable to himself and presented the counterfeit checks for payment at Bank. Bank honored some of the counterfeit checks. As a consequence, client funds held by Lawyer in his trust account were utilized for an unauthorized purpose. Lawyer properly supervised all nonlawyer staff participating in the record keeping for the trust account. Lawyer also maintained the trust account records and reconciled the trust account as required by Rule 1.15-3. Lawyer had no knowledge of the fraud and had no opportunity to prevent the theft.

Does Lawyer have a professional responsibility to replace the stolen funds?

Opinion #1:

No.

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 1.15-2, RPC 191, and 97 FEO 9. 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. RPC 191 and 97 FEO 9. Rule 1.15-3 requires a lawyer to keep accurate records of the trust account and to reconcile the trust account. A lawyer has an obligation to ensure that any nonlawyer assistant with access to the trust account is aware of the lawyer's professional obligations regarding entrusted funds and is properly supervised. Rule 5.3.

If Lawyer has managed the trust account in substantial compliance with the requirements of the Rules of Professional Conduct (*see* Rules 1.15-2, 1.15-3, and 5.3) but, nevertheless, is victimized by a third party theft, Lawyer is not required to replace the stolen funds. If, however, Lawyer failed to follow the Rules of Professional Conduct on trust accounting and supervision of staff, and the failure is a proximate cause of theft from the trust account, Lawyer may be professionally obligated to replace the stolen funds. *Compare* RPC 191 (if a lawyer disburses against provisionally credited funds, the lawyer is responsible for reimbursing the trust account for any losses caused by disbursing before the funds are irrevocably credited).

Under all circumstances, Lawyer must promptly investigate the matter and take steps to prevent further thefts of entrusted funds. Lawyer must seek out every available option to remedy the situation including researching the law to determine if Bank is liable;[1] communicating with Bank to discuss Bank's liability; asking Bank to determine if there is insurance to cover the loss; considering whether it is appropriate to close the trust account and transfer the funds to a new trust account; and working with law enforcement to recover the funds.

Inquiry #2:

Prior to learning of the fraud and theft from the trust account, Lawyer issued several trust account checks to clients and/or third parties for the benefit of a client. Despite the theft, there are sufficient total funds in the trust account to satisfy the outstanding checks. However, because of the theft, funds belonging to other clients will be used if the outstanding checks are cashed.

What is Lawyer's duty to safeguard the remaining funds in the trust account?

Opinion #2:

Lawyer must take reasonable measures to ensure that funds belonging to one client are not used to satisfy obligations to another client. Such reasonable measures include, but are not limited to, requesting that Bank issue stop payments on outstanding trust account checks; providing Bank with a list of outstanding checks and requesting that Bank contact Lawyer before honoring any outstanding checks; and determining if Bank is liable and, if so, demanding the outstanding checks be covered by Bank. If Lawyer determines Bank is not liable or liability is unclear, Lawyer must maintain the status quo and prevent further loss by not issuing new trust account checks. If payment will be stopped on the outstanding checks, Lawyer must contact the payees and alert them to the problem.

Inquiry #3:

Assume the same facts in Inquiry #2 except there are insufficient funds in the trust account to satisfy the outstanding checks. Must Lawyer deposit funds into the trust account to ensure that the outstanding checks are not presented against an account with insufficient funds?

Opinion #3:

No. In addition to the remedial measures listed in Opinion #2, Lawyer should notify the payees if Lawyer knows that the checks will not clear.

Inquiry #4:

Hacker gains illegal access to Lawyer's computer network and electronically transfers the balance of the funds in Lawyer's trust account to a separate account that is controlled by Hacker. Lawyer's trust account now has a zero balance. Lawyer has written several trust account checks to clients and/or third parties for the benefit of clients. Because of the theft, there are insufficient funds in the trust account to satisfy the outstanding checks.

Does Lawyer have a professional responsibility to replace the stolen funds?

Opinion #4:

No, Lawyer is not obligated to replace the stolen funds provided he has taken reasonable care to minimize the risks to client funds by implementing reasonable security measures in compliance with the requirements of Rule 1.15.

Rule 1.15 requires a lawyer to preserve client property, to deposit client funds entrusted to the lawyer in a separate trust account, and to manage that trust account according to strict recordkeeping and procedural requirements. To fulfill the fiduciary obligations in Rule 1.15, a lawyer managing a trust account must use reasonable care to minimize the risks to client funds on deposit in the trust account. 2011 FEO 7.

In 2011 FEO 7 the Ethics Committee opined that a lawyer has affirmative duties to educate himself regularly as to the security risks of online banking; to actively maintain end-user security at the law firm through safety practices such as strong password policies and procedures, the use of encryption and security software, and the hiring of an information technology consultant to advise the lawyer or firm employees; and to insure that all staff members who assist with the management of the trust account receive training on and abide by the security measures adopted by the firm.

If Lawyer has taken reasonable care to minimize the risks to client funds, Lawyer is not ethically obligated to replace the stolen funds. If, however,

Lawyer failed to use reasonable care in following the Rules of Professional Conduct on trust accounting and supervision of staff, and the failure is a proximate cause of theft from the trust account, Lawyer may be professionally obligated to replace the stolen funds.

Inquiry #5:

Lawyer is retained to close a real estate transaction. Prior to the closing, Lawyer obtains information relevant to the closing, including the seller's name and mailing address. Lawyer also receives into his trust account the funds necessary for the closing. Lawyer's normal practice after the closing is to record the deed and disburse the funds. Lawyer then mails a trust account check to the seller in the amount of the seller proceeds.

Hacker gains access to information relating to the real estate transaction by hacking the email of one of the parties (lawyer, realtor, or seller). Hacker then creates a "spoof" email address that is similar to realtor's or seller's email address (only one letter is different). Hacker emails Lawyer with disbursement instructions directing Lawyer to wire funds to the account identified in the email instead of mailing a check to seller at the address included in Lawyer's file as previously instructed.[2] Lawyer follows the instructions in the email without first implementing security measures such as contacting the seller by phone at the phone number included in Lawyer's file to confirm the wiring instructions. After the closing and disbursement, the true seller calls Lawyer and demands his funds. Lawyer goes to Bank to request reversal of the wire. Bank refuses to reverse the wire and will not cooperate or communicate with Lawyer without a subpoena.

While pursuing other legal remedies, does Lawyer have a professional responsibility to replace the stolen funds?

Opinion #5:

Yes. Lawyers must use reasonable care to prevent third parties from gaining access to client funds held in the trust account. As stated in Opinion #4, Lawyer has a duty to implement reasonable security measures. Lawyer did not verify the disbursement change by calling seller at the phone number listed in Lawyer's file or confirming seller's email address. These were reasonable security measures that, if implemented, could have prevented the theft. Lawyer is, therefore, professionally responsible and must replace the funds stolen by Hacker. If it is later determined that Bank is legally responsible, or insurance covers the stolen funds, Lawyer may be reimbursed.

Inquiry #6:

While pursuing the remedies described in Opinion #2, may Lawyer deposit his own funds into the trust account?

Opinion #6:

Yes.

Generally, no funds belonging to a lawyer shall be deposited in a trust account or fiduciary account of the lawyer. Rule 1.15-2(f). The exceptions to the rule permit the lawyer to deposit funds sufficient to open or maintain an account, pay any bank service charges, or pay any tax levied on the account. *Id.* The exceptions were expanded in 1997 FEO 9 to include the deposit of lawyer funds when a bank would not route credit card chargeback debits to the lawyer's operating account. These exceptions to the prohibition on commingling enable lawyers to fulfill the fiduciary duty to safeguard entrusted funds.

Therefore, notwithstanding the prohibition on commingling, Lawyer may deposit his own funds into the trust account to replace the stolen funds until it is determined whether the Bank is liable for the loss, insurance is available to cover the loss, or the funds are otherwise recovered. If Lawyer decides to deposit his own funds, he must ensure that the trust accounting records accurately reflect the source of the funds, the reason for the deposit, the date of the deposit, and the client name(s) and matter(s) for which the funds were deposited.

Inquiry #7:

With regard to all of the situations described in this opinion, what duties does Lawyer owe to the clients whose funds were stolen?

Opinion #7:

Lawyer must notify the clients of the theft and advise the clients of the consequences for representation; help the clients to identify any source of funds, such as bank liability and insurance, to cover their losses; defer a client's matter (by seeking a continuance, for example) if necessary to protect the client's interest; and explain to third parties or opposing parties as necessary to protect the client's interests. If stop payments are issued against outstanding checks, Lawyer must take the remedial measures outlined in Opinions #1 and #2 to protect the client's interest. Finally, Lawyer must report the theft to the North Carolina State Bar's Trust Accounting Compliance Counsel.

Endnote

1. *See e.g.* N.C. Gen. Stat. §25-4-406.
2. The inquiry assumes that Lawyer believed that, by wiring the funds to the account designated in the email, he was disbursing the funds to the seller as required by the settlement statement.

This opinion does not address the issues of professional responsibility raised when a lawyer knowingly makes disbursements contrary to a settlement statement.

2015 Formal Ethics Opinion 7

October 23, 2015

Prior Business Relationships Permit In-Person Solicitation

Opinion rules that the business relationships with health care professionals created by a lawyer previously employed as a health care consultant constitute prior professional relationships within the meaning of Rule 7.3(a) thus permitting the lawyer to directly solicit legal employment by in-person, live telephone, or real-time electronic contact with the health care professionals.

Inquiry:

Smith is a lawyer and also holds a graduate degree. Following her admission to the North Carolina bar, Smith worked as a health care consultant for a health care consulting firm. During her years as a consultant, she developed a number of professional relationships with health care professionals. Recently, Smith joined a law firm where she concentrates on health law. She now wishes to contact directly those health care professionals with whom she developed professional relationships when she was a health care consultant. Her purpose in doing so is to inform the health care professionals of her career change and her availability to provide legal services in health care related matters.

Rule 7.3(a) prohibits a lawyer from soliciting professional employment from a potential client for the lawyer's pecuniary gain via "in-person, live telephone, or real-time electronic contact..." Among the exceptions to the rule, a lawyer is not prohibited from soliciting professional employment by direct contact if the person contacted "has a family, close personal, or *prior professional relationship* with the lawyer" [emphasis added].

Are Smith's prior relationships with health care professionals "prior professional relationships" as that term is used in Rule 7.3(a), thereby allowing her to engage in in-person solicitation of the health care professionals?

Opinion:

Yes.

The purpose of the prohibition on in-person solicitation is to prevent undue influence, intimidation, and over-reaching by the lawyer. Comment [2] to Rule 7.3 provides:

> There is a potential for abuse when a solicitation involves direct in-person, live telephone, or real-time electronic contact by a lawyer with someone known to need legal services....The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

The rule specifically exempts prior relationships because it is unlikely that a lawyer will engage in abusive practices when the lawyer has a family, close personal, or prior professional relationship with the person she is contacting. *See* Rule 7.3, cmt [5].

"Professional relationship" is not defined in the Rules of Professional Conduct. However, the Ethics Committee previously opined that a lawyer, who is also a certified public accountant working for an accounting firm, may call or visit a prospective client to solicit legal business if the lawyer established a "prior professional relationship" with the individual as a client of the accounting firm. *See* 2000 FEO 9. This indicates that the phrase "prior professional relationship" as used in Rule 7.3(a) is not limited to prior client-lawyer relationships, but includes business relationships such as client-accountant relationships. Therefore, the business relationships Smith developed while working as a health care consultant constitute "prior professional relationships" within the meaning of Rule 7.3(a), and Smith may directly contact these individuals

to solicit legal employment.

2015 Formal Ethics Opinion 8

July 22, 2016

Representing One Spouse on Domestic and Estate Matters After Representing Both Spouses

Opinion rules that a lawyer who previously represented a husband and wife in several matters may not represent one spouse in a subsequent domestic action against the other spouse without the consent of the other spouse unless, after thoughtful and thorough analysis of a number of factors relevant to the prior representations, the lawyer determines that there is no substantial relationship between the prior representations and the domestic matter.

Inquiry #1:

Lawyer A is a partner in ABC Law Firm. Lawyer A represented Husband and Wife jointly for over 15 years. During this time, Lawyer A prepared wills for Husband and Wife, represented the estate of Wife's mother, represented the couple's son on several traffic citations, represented the couple on the purchase of three parcels of real property, and advised the couple on the filing of a joint bankruptcy petition (which was not filed). Lawyer A has not represented Husband and Wife on any matter in two years.

Husband and Wife are having marital difficulties and have separated. Husband has asked Lawyer A to represent him on all matters related to the dissolution of the marriage.

May Lawyer A represent Husband in the domestic action against Wife?[1]

Opinion #1:

No, Lawyer A has a conflict of interest under Rule 1.9(a) and may not represent Husband in the domestic action unless Wife gives informed consent.

In RPC 32 (1989), the Ethics Committee considered an inquiry essentially the same as the current inquiry and ruled that the lawyer had a conflict of interest in representing the husband against the wife in alimony and equitable distribution proceedings. The opinion holds that it is a conflict because of the nature of the prior representations and the information received by the lawyer:

> [t]hese [prior representations] 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.

RPC 32.

The Ethics Committee affirms the holding in RPC 32; however, the opinion provides little analysis of why representation of a husband and wife may disqualify a lawyer from the subsequent representation of one spouse in the legal actions attendant to a domestic dissolution. Because this situation occurs frequently—especially in small communities where there are a limited number of lawyers—the committee concluded that more explicit guidance should be provided.

Rule 1.9(a) states that a lawyer who has formerly represented a client in a matter is prohibited from representing 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 gives informed consent. Obviously, Husband's and Wife's interests in the domestic action are materially adverse. However, whether the domestic action is the same or substantially related to the prior representations of Husband and Wife by Lawyer A is more difficult to determine.

Comment [3] to Rule 1.9 states that matters are substantially related "if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." As further noted in comment [3],

> [a] former client is not required to reveal the information learned by the lawyer to establish a substantial risk that the lawyer has information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

A "domestic dissolution" or "domestic action" is essentially a winding-up and comprehensive reorganization of the economic affairs of a husband and a wife. The legal representation of either spouse necessitates an examination of the financial affairs of both spouses. Confidential information from a prior representation relative to the financial interests of the other spouse may materially advance a client's position in the domestic dissolution.

To determine whether there is a disqualifying "substantial relationship" conflict when a lawyer who previously represented spouses proposes to represent one spouse in a domestic action, the lawyer must exercise discretion in the thoughtful and thorough analysis of the following: (1) the nature of prior representations, including an examination of whether any representation involved sensitive family issues or serious financial matters (e.g., representation on a contemplated bankruptcy); (2) the number and frequency of the prior representations; (3) the passage of time since the last representation;[2] and (4) the substance of the confidential information received by the lawyer during any of the representations.

In addition to the protection of confidences, loyalty is an essential element of a lawyer's relationship to a client. *See* Rule 1.7, Cmt. [1]. There are few situations in which a former client will feel more acutely that this loyalty has been compromised than when a marriage is dissolving and a lawyer who was considered the "family lawyer" takes the side of one spouse. For this reason, the lawyer must consider the totality of the circumstances and has the burden of demonstrating that prior representations of the husband and wife were not substantially related to the domestic dissolution. When it is unclear whether there is a substantial relationship between the prior representations and the current one, the lawyer must err on the side of declining to represent one spouse unless the other spouse gives informed consent.

In light of the number of prior representations over a number of years, the serious and sensitive financial interests and personal issues addressed in the prior representations, the limited passage of time since the last representation, and the relevant confidential information received during the prior representations of Husband and Wife, there is a substantial relationship between the prior representations and current representation of Husband in the domestic action. Therefore, the proposed representation of Husband violates Rule 1.9(a). Accordingly, unless Wife gives her informed consent, Lawyer A has a conflict of interest and may not undertake representation of Husband.

Inquiry #2:

May another lawyer in ABC Law Firm represent Husband in the domestic matter?

Opinion #2:

No, if Lawyer A has a conflict of interest, that conflict is imputed to all of the other lawyers in the firm. Rule 1.10(a). Another lawyer in the firm may represent Husband only with the informed consent of Wife.

Inquiry #3:

Lawyer A also previously represented Husband and Wife jointly on the preparation of reciprocal wills. May Lawyer A, or another lawyer in his firm, prepare a new will/estate plan for Husband?

Opinion #3:

Yes, if there is a separation agreement between Husband and Wife that authorizes each spouse to prepare a new estate plan, the wife gives informed consent confirmed in writing, or an order of divorce has been entered. Cf. RPC 229 (1996)(lawyer who jointly represented husband and wife on estate plan may not prepare codicil to the will of one spouse without knowledge of the other if each spouse agreed not to change estate plan without informing other spouse).

As noted in Opinion #1, Rule 1.9(a) prohibits a lawyer who has represented a client in a matter from representing another client in the same or a substantially related matter in which the new client's interests are materially adverse to those of the former client unless the former client consents. Lawyer A's prior representation of Husband and Wife on the preparation of reciprocal wills constitutes the same matter as the preparation of a new will for Husband. However, once the couple has executed an agreement to waive their claims against each other's estates or they are divorced, the element of material adversity required for disqualification under Rule 1.9 is no longer present.

Endnotes

1. This opinion applies to all domestic partner relationships.
2. *See* Rule 1.9, Comment [3]: "[i]nformation acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related."

2015 Formal Ethics Opinion 9

July 22, 2016

Holding Out Non-Equity Firm Lawyers as "Partners"

Opinion rules that a lawyer who does not own equity in a law firm may be held out to the public by the designation "partner," "income partner," or "non-equity partner," provided the lawyer was officially promoted based upon legitimate criteria and the lawyer complies with the professional responsibilities arising from the designation.

Inquiry:

ABC Law Firm is a North Carolina professional corporation. Three lawyers, A, B, and C, are shareholders in the firm and own all of the equity of the firm. In the firm's communications, Lawyers A, B, and C are held out as "partners" at the firm, and they are referred to internally as "equity partners."

Lawyers E and F also work for the firm, but they do not own any interest in the firm and are not shareholders. However, Lawyers A, B, and C consider Lawyers E and F to be "partners in every sense of the word except actual ownership." Lawyers E and F have the authority to bind the firm and to sign opinion letters on behalf of the firm, but they do not vote on matters of corporate governance. Within the firm, Lawyers E and F are referred to as "income partners."

The firm would like to hold Lawyers E and F out to the public as "partners" or "income partners." May the firm do so?

Opinion:

Yes, provided that any lawyer who is held out by the firm as a "partner," "income partner," or "non-equity partner" has been officially promoted by the law firm's management or pursuant to the law firm's governing documents and such promotion is based upon legitimate criteria.

Black's Law Dictionary defines "partner" as "[o]ne of two or more persons who jointly own and carry on a business for profit." *Black's Law Dictionary* (10th ed. 2014). However, within the legal profession, the designation is often used without regard to the legal definition. For example, shareholders in a professional corporation for the practice of law are frequently referred to as "partners." Like lawyers themselves, laymen generally equate the designation with the achievement by a lawyer of a certain level of experience, status, or authority within a law firm.

Nevertheless, referring to a lawyer as a "partner" in external communications cannot be a sham. Rule 7.1(a)(1) states that a communication is false or misleading if it "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." To avoid misrepresentation, a law firm may designate a lawyer as a partner, regardless of whether the lawyer satisfies the legal definition of that term, if the lawyer was promoted to the position by formal action or vote of firm management or pursuant to the firm's governing documents. Further, to prevent the public from being misled as to the lawyer's achievements, the promotion must be based upon criteria that indicates that the lawyer is worthy of the promotion. The Ethics Committee acknowledges that law firms have different standards or criteria for promoting a lawyer to equity or non-equity partner, and the committee declines to dictate what those criteria must be. However, the following list provides examples of legitimate criteria for such a promotion:

• Experience: Engaged in the practice of law for a substantial period of time.

• Integrity: Adherence to principles of honesty and high professional ethics.

• Industry: Willingness to work hard, beyond normal hours where clients' needs and professional development so require, evidencing a drive to achieve.

• Intelligence: Ability to analyze law and facts; imagination and creativity.

• Communication: Ability to express thoughts clearly, both orally and in writing.

• Legal knowledge: Skill in general and specialized areas of law.

• Motivation: Willingness to accept responsibility for client's problems, to perform work assigned punctually.

• Judgment: Ability to make logical, practical decisions.

• Efficiency: Ability to do high quality work in a reasonable amount of time.

• Involvement: Participation in professional, civic, and other outside activities.

Any firm lawyer who is identified as a "partner" shall be held to the professional responsibilities in the Rules of Professional Conduct that may arise from that designation. *See, e.g.,* Rule 5.1.

2016 Formal Ethics Opinion 2

July 22, 2016

Duty of Defense Counsel Appointed after Defendant Files Pro Se Motion for Appropriate Relief

Opinion rules that, when advancing claims on behalf of a criminal defendant who filed a pro se Motion for Appropriate Relief, subsequently appointed defense counsel must correct erroneous claims and statements of law or facts set out in the previous pro se filing.

Inquiry:

A motion for appropriate relief (MAR) is a procedure whereby defendants may challenge a conviction or sentencing. A MAR seeks relief from an error committed at the trial level and may be made before or after the entry of judgment. *See* N.C. Gen. Stat. §15A-1411. Indigent defendants filing pro se MARs may have legal counsel appointed. *See* N.C. Gen. Stat. §7A-451(a) (3). Pursuant to the statute and upon request, the court will appoint defense counsel to represent the defendant on the MAR. Defense counsel is generally allowed 120 days to investigate the defendant's case and file either an amended MAR or a written notice of intent not to file an amended MAR. The district attorney and his or her assistants are responsible for filing a response on behalf of the state.

In support of the defendant's legal arguments and request for relief, many of the MARs filed by pro se defendants cite case law that has been overruled by an appellate court and is, therefore, no longer binding authority.

If in defense counsel's informed and reasonable legal opinion the MAR is frivolous, is defense counsel professionally obligated to file an amended MAR or provide written notice to the tribunal that the legal authority cited in the *pro se* MAR is no longer good law?

Opinion:

No.

This is a difficult position for defense counsel who has an obligation to protect defendant's constitutional rights and to seek relief from the court, but must also adhere to her duties to the court.

As an advocate for the defendant, defense counsel is duty-bound to abide by the defendant's decisions concerning the objectives of the representation, and as required by Rule 1.4, to consult with the client as to the means by which they are to be pursued. Rule 1.2. Defense counsel must pursue defendant's objectives unless doing so would violate the law, a court order, or the Rules of Professional Conduct.

Defense counsel must provide competent and diligent representation to the defendant. Competent and diligent representation requires defense counsel to familiarize herself with the facts in defendant's underlying criminal matter; research the relevant law, including the statutes and case law cited in the defendant's pro se MAR; and determine whether a reasonable interpretation of the law cited in the MAR supports the defendant's claims for relief. See Rule 1.1 and Rule 1.3. Defense counsel must also determine whether there is a good faith basis in law and fact, that is not frivolous, to proceed. *See* Rule 3.1.

The comment to Rule 3.1 provides,

> [w]hat is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. 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 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.
Rule 3.1, cmt 2.

Ordinarily, defense counsel is prohibited from defending a claim she knows is frivolous. *See* Rule 3.1. However, as stated in Rule 3.1, "[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."

The Ethics Committee has previously opined that a lawyer may not proceed if the lawyer determines that the client's civil claims are frivolous. In 2006 FEO 9 the Ethics Committee concluded that if after filing a civil complaint the lawyer concludes that pursuit of the lawsuit is frivolous, but the client insists on continuing the litigation, the lawyer must move to withdraw from the representation. *But see* 2008 FEO 17 (Ethics Committee found that a lawyer may sign and file a notice of appeal although the lawyer did not believe that the appeal had merit because the notice of appeal preserves a client's options and does not assert a particular legal argument).

In addition to following the requirements of Rule 3.1, defense counsel must follow Rule 3.3, Candor Toward the Tribunal. The rule provides, in pertinent part, that,

> [a] lawyer shall not knowingly 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...

Rule 3.3(a) (2).

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. Rule 3.3, cmt [4].

Under the present circumstances, the MAR was filed *pro se* by defendant. Defense counsel did not affirmatively make representations to the court that defense counsel knew to be false, inaccurate, or frivolous. Defense counsel, by virtue of being appointed, is not professionally obligated to assume defendant's position in the *pro se* MAR or any other *pro se* filing. If defense counsel elects to advance any potential MAR claims on behalf of defendant, counsel must observe the duties under Rule 3.1 and Rule 3.3 regarding any such claim and statement of law or fact upon which counsel will rely to advance the claim including any statement of law or fact in a previous *pro se* filing. However, if defense counsel is allowed to withdraw from the representation before advancing any of defendant's potential MAR claims, counsel is not professionally obligated to correct any previous pro se filing.

If after reviewing the *pro se* MAR defense counsel reaches an informed and reasonable legal opinion that there is no good faith basis in fact or law for the MAR and that the MAR is frivolous, defense counsel must advise defendant of the same. Defense counsel must further advise defendant that she is prohibited from affirmatively making an argument (oral or written) to the court that she believes is frivolous. If defendant insists that defense counsel make frivolous arguments to the court, defense counsel must seek the court's permission to withdraw. *See* Rule 1.16(a).

2016 Formal Ethics Opinion 3

January 27, 2017

Negotiating Private Employment with Opposing Counsel

Opinion rules that a lawyer may not negotiate for employment with another firm if the firm represents a party adverse to the lawyer's client unless both clients give informed consent.

Note: This opinion is limited to the explanation of the professional responsibilities of a lawyer moving from one place of private employment to another. Rule 1.11(d)(2)(B) governs the conduct of a government lawyer seeking private employment.

Inquiry:

May a lawyer negotiate for employment with a law firm that represents a party on the opposite side of a matter in which the lawyer is also representing a party?

Opinion:

Yes, with client consent.

A lawyer shall not represent a client if the representation of a client may be materially limited by a personal interest of the lawyer unless the lawyer reasonably believes that he can provide competent and diligent representation to the affected client and the client gives informed consent, confirmed in writing. Rule 1.7(b)(2). As observed in Rule 1.7, cmt. [10], when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client.

On the same issue, ABA Formal Ethics Op. 96-400 (1996) advises that there are two overriding factors affecting the "likelihood that a conflict will eventuate" and "materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclosing courses of action": the nature of the lawyer's role in the representation of the client; and the extent to which the lawyer's interest in the firm is concrete, and has been communicated and reciprocated. The ABA opinion states:

> [t]he likelihood that a lawyer's job search will adversely affect his "judgment in considering alternatives or foreclosing courses of action" is far greater when the lawyer has an active and material role in representing a client. Thus, if the posture of the case is such that there is no call on the lawyer's judgment in representing a client during the period of his job search, it is not likely that his search and negotiations will adversely affect his judgment. Furthermore, if a lawyer's interest in another firm, or its interest in him, is not reciprocated, it seems unlikely, in most cases, that such unreciprocated interest will have a material effect on a lawyer's judgment in a matter between them.

While the exact point at which a lawyer's own interest may materially limit his representation of a client may vary, the committee believes that clients, lawyers, and their firms are all best served by a rule that requires consultation and consent at the earliest point that a client's interests could be prejudiced.

The ABA opinion concludes that a lawyer who is interested in negotiating employment with a firm representing a client's adversary must obtain the client's consent before engaging in substantive discussions[1] with the firm or the lawyer must withdraw from the representation.

The Restatement (Third) of the Law Governing Lawyers advises that once the discussion of employment has become concrete and the interest is mutual, the lawyer must promptly inform the client; without effective client consent, the lawyer must terminate all discussions concerning the employment, or withdraw from representing the client. *Restatement (Third) of the Law Governing Lawyers: A Lawyer's Personal Interest Affecting the Representation of a Client,* §125, cmt. d (2000). See also Kentucky Ethics Op. E-399 (1998) (lawyer may not negotiate for employment with another firm where firms represent adverse parties and lawyer is involved in the client's matter or has actual knowledge of protected client information, unless the client consents to negotiation).

We agree: a job-seeking lawyer who is representing a client, or has confidential information2 about the client's matter, may not engage in substantive negotiations for employment with the opposing law firm without the client's informed consent.

To obtain the client's informed consent, the job-seeking lawyer must explain to the client the current posture of the case, including what, if any, additional legal work is required, and whether another firm lawyer is available to take over the representation should the lawyer seek to withdraw. If the client declines to consent, the job-seeking lawyer must either cease the employment negotiations until the client's matter is resolved or withdraw from the representation but only if the withdrawal can be accomplished without material adverse effect on the interests of the client. Rule 1.16(b)(1). Because personal conflicts of interests are not imputed to other lawyers in the firm, another lawyer in the firm may continue to represent the client. Rule 1.10(a).

Similarly, the hiring law firm must not engage in substantive employment negotiations with opposing counsel unless its own client consents. If the client does not consent, the firm must cease the employment negotiations or withdraw from the representation. The firm may only withdraw if the withdrawal can be accomplished without material adverse effect on the interests of the client. Rule 1.16(b) (1).

Endnote

1. A substantive discussion entails a communication between the job-seeking lawyer and the hiring law firm about the job-seeking lawyer's skills, experience, and the ability to

bring clients to the firm; and the terms of association. ABA Formal Ethics Op. 96-400 (1996). Thus there is a two-prong test for "substantive discussions." There must be (1) a discussion/negotiation that is (2) substantive. Sending a resume blind to a potential employer is not a "discussion." Speaking generally with a colleague at a social event about employment opportunities is not "substantive."

2016 Formal Ethics Opinion 4

January 27, 2017

Disclosing Confidential Information to Execute on a Judgment for Unpaid Legal Fees

Opinion rules that lawyer may not disclose financial information obtained during the representation of a former client to assist the sheriff with the execution on a judgment for unpaid legal fees.

Inquiry:

A lawyer with Firm represents Client in a domestic matter. Client fails to pay Firm for legal services and Firm withdraws from representation. Firm provides Client written notice of the North Carolina State Bar's Fee Dispute program. Client waives the right to participate in the program. Firm files a lawsuit against Client to recover the unpaid legal fees and obtains a default judgment against Client. Firm now wants to execute on its judgment against Client.

During the course of Firm's representation of Client, Firm learned financial information about Client, including the location of Client's bank accounts and the account numbers. Firm does not know if that information is still accurate. Firm would like to provide this information to the sheriff to aid the sheriff in executing on a writ of execution.

May Firm provide the sheriff with information about Client's bank accounts to execute on Firm's judgment for unpaid fees against Client?

Opinion:

No. Disclosing Client's financial information to the sheriff would violate Rule 1.6(a) of the Rules of Professional Conduct.

Rule 1.6(a) provides that a lawyer "shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." None of the exceptions set out in Rule 1.6(b) applies to the instant scenario.

It is true that Rule 1.6(b)(6) allows a lawyer to disclose information 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." Comment [12] to Rule 1.6 specifically addresses actions to collect legal fees and provides that "[a] lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services rendered in an action to collect it."

The instant scenario does not fall within the Rule 1.6(b)(6) exception because the action to collect the unpaid legal fees has concluded. Firm has proven the legal services rendered and has obtained a default judgment against Client. The purpose of the exception to the duty of confidentiality having been fulfilled, Firm may not now use Client's confidential information to collect on the judgment. Firm may utilize post-judgment procedures to obtain information about Client's assets without breaching the duty of confidentially set out in Rule 1.6.

2017 Formal Ethics Opinion 1

April 21, 2017

Text Message Advertising

Opinion rules that lawyers may advertise through a text message service that allows the user to initiate live telephone communication.

Background:

ABC Texting is a Short Message Service (SMS) that provides a free subscriber-based text messaging service. Subscribers go to the ABC Texting website and register by providing a cell phone number and zip code. No other information is provided. Once registered, subscribers receive text messages from ABC Texting for various products and services, including, but not limited to, messages from lawyers offering legal services in the subscriber's specific zip code. Subscribers can unsubscribe at any time. ABC Texting earns revenue by selling text message advertising to businesses and professional service providers that wish to advertise to subscribers in a specified zip code.

Inquiry #1:

Lawyer represents clients in workers' compensation matters and would like to purchase advertising with ABC Texting. Lawyer's advertisements would be sent via text message to ABC Texting subscribers. The text message advertisement will state, "Injured at work? We can help." The text message will also include a link to Lawyer's website. The subscriber will have the option to click on the link or delete the text message. If the subscriber chooses to click on the link, he will be directed to Lawyer's website. The website provides information about Lawyer's firm, including areas of practice, location, contact information, and Lawyer's profile.

May Lawyer advertise through this text message service?

Opinion #1:

Yes, provided the text message advertising complies with Rules 7.1, 7.2, and 7.3 and all applicable federal and state laws, rules, and regulations.

Rule 7.1 requires all communications about a lawyer and the lawyer's services to be truthful and not misleading. Rule 7.2(a) permits a lawyer to advertise services through written, recorded, or electronic communications subject to the requirements of Rule 7.1 and Rule 7.3. Rule 7.2(b) permits a lawyer to pay the reasonable costs of advertisement or communications permitted by the rule. Rule 7.2(c) requires that any communication about the lawyer or the lawyer's services include the name and office address of at least one lawyer or law firm responsible for the advertisement. Rule 7.3 limits direct contact with potential clients for the purpose of soliciting business.

Advertising through the ABC Texting service is an electronic communication about Lawyer's services. However, it is not a solicitation that requires the extra precautionary measures set out in Rule 7.3(c) governing targeted communications.[1] Comment [1] to Rule 7.3 provides,

A solicitation is a communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website, or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

Text message advertising as described herein is akin to billboard or banner advertisement directed to the general public. Therefore, Lawyer may advertise through ABC Texting. However, before Lawyer can allow ABC Texting to send his advertisement to subscribers, the advertisement must be revised to comply with Rule 7.2(c). The advertisement must include Lawyer's name (or law firm name) and office address, or a website address wherein the lawyer's office address can be found.

Inquiry #2:

If the answer to Inquiry # 1 is yes, may Lawyer use text message advertising if the subscriber has the option to reply to the text message as follows:

ABC Texting: Have you or someone you know been injured at work? If so, type YES.
Subscriber: YES
ABC Texting: Lawyer can help. May we contact you at this number? If so, type YES.
Subscriber: YES
ABC Texting: Thank you. A representative will contact you soon.

If the subscriber replies YES to both questions, ABC Texting provides the subscriber's cell phone number to Lawyer. Lawyer will then contact subscriber directly.

Opinion #2:

Yes. The communication as described above is not a prohibited live telephone or real time electronic contact.

Rule 7.3(a) provides that, "[a] lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a potential client when a significant motive of the lawyer's doing so is the lawyer's pecuniary gain." Comment [2] explains the prohibition as follows:

There is a potential for abuse when a solicitation involves direct in-person, live telephone, or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to 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.

In the context of autodialed recorded telephone advertising, the Ethics Committee opined in 2006 FEO 17 that,

[A]lthough it appears that recorded telephone advertising messages are permitted by the Rules of Professional Conduct, Rule 7.3(a) and the comment to the rule do not contemplate that a recorded message will lead to an interpersonal encounter with a lawyer (or the lawyer's agent) at the push of a button on the telephone key pad. To avoid the risks of undue influence, intimidation, and over-reaching, a potential client must be given an opportunity to contemplate the information about legal services received in a recorded telephone solicitation. This cannot occur if a brief, unexpected, and unsolicited telephone call leads to an in-person encounter with a lawyer, even if the recipient of the phone call must choose to push a number to be connected with the lawyer.

However, in 2006 FEO 17, the legal advertisement at issue was an unsolicited communication about a lawyer's services and required an immediate response from the potential client.

2011 FEO 8 addresses utilizing live chat support service on law firm websites. The opinion concludes that lawyers may use a live chat support service on the lawyer's website even though a live chat communication constitutes a real-time electronic contact. In the opinion, the website visitor made the initial contact with the firm. Similar to the ABC Texting service, the website visitor described in 2011 FEO 8 chose to visit the law firm's website and has the ability to ignore the live chat button or to indicate with a click that he or she wishes to participate in a live chat session.

In the instant scenario, the subscriber voluntarily registered with ABC Texting expecting to receive various advertisements from various service providers, including lawyers. In addition, the subscriber is given the opportunity to accept or decline Lawyer's offer to contact the subscriber. "It is important to note that the prohibition in Rule 7.3(a) applies only to lawyer-initiated contact. Rule 7.3 does not prohibit real-time electronic contact that is initiated by a potential client." 2001 FEO 8. The potential for abuse that Rule 7.3 is intended to guard against is not present. Therefore, because the subscriber consents to a phone call, Lawyer may call subscriber and offer legal services.

Inquiry #3:

Does the answer to Inquiry #2 change if the second text message from ABC Texting includes Lawyer's phone number and an invitation to call Lawyer?

Opinion #3:

No.

Endnote

1. The assumption in this inquiry is that this is not a targeted communication to someone known to be in need of legal services in a particular matter. Such communications must comply with Rule 7.3(c).

2017 Formal Ethics Opinion 2

October 27, 2017

Maintaining Fiduciary Account in Accordance with Rule 1.15

Opinion rules that a lawyer representing an estate must maintain the checking account for the estate in accordance with Rule 1.15 consistent with the extent to which the lawyer has control over the account.

Background:

On June 9, 2016, the North Carolina Supreme Court approved amendments to Rule 1.15, Safekeeping Property, and its subparts (frequently referred to as the "trust accounting rules"). The following opinion concerns a lawyer's obligations with respect to a fiduciary account, such as an estate account. Inquiries are answered based upon the rule as amended.

Inquiry #1:

A's will names Lawyer as executor. After A dies, Lawyer opens a client file for the estate in his law office and begins serving as the personal representative for the estate. Lawyer intends to seek compensation for his services. Lawyer opens a checking account for the estate, makes himself the signatory on the account, and manages the checking account throughout the administration of the estate. What are Lawyer's management obligations for the account under Rule 1.15?

Opinion #1:

The checking account must be established as a lawyer's fiduciary account and managed in accordance with the provisions of Rule 1.15 and its subparts.

As the personal representative for the estate, Lawyer will serve in the role of a fiduciary and provide professional fiduciary services. The phrase "professional fiduciary services" is defined and explained in Rule 1.15-1(l) and cmt. [6] as 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." Rule 1.15, cmt. [6].

The funds Lawyer receives for the benefit of the estate are fiduciary funds and must be deposited in a fiduciary account. Fiduciary funds, another term defined in Rule 1.15-1, 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. Rule 1.15-1(g). A "fiduciary account," also defined in Rule 1.15, is "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." Rule 1.15-1(f).

Any property belonging to the estate received by or placed under the control of the lawyer in connection with the lawyer's furnishing of legal services or professional fiduciary services must be handled and maintained in accordance with all of the applicable provisions of Rule 1.15, including but not limited to:

- Rule 1.15-2: General Rules
- Rule 1.15-3(a): Check Format
- Rule 1.15-3(b) or (c)(as appropriate): Minimum Records
- Rule 1.15-3(f): Accountings for Fiduciary Property
- Rule 1.15-3(g): Minimum Record Keeping Period
- Rule 1.15-3(i): Reviews

See Rule 1.15, cmts. [2], and [6]-[9].

These duties include promptly depositing all fiduciary funds received by or placed under the control of the lawyer in a fiduciary account. Rule 1.15-2(c). They also include (1) review of the monthly bank statements and canceled checks for the account each month (the "monthly review"); (2) for each quarter, review of the statement of costs and receipts, client ledger, and cancelled checks of a random sample of representative transactions completed during the quarter (the "quarterly review"); (3) resolution within ten days of any discrepancies found during the monthly or quarterly reviews; and (4) preparation of a signed and dated report on each monthly and quarterly review. Rule 1.15-3(i). This list is not exhaustive and Lawyer is obligated to review Rules 1.15-2 and 1.15-3 to ensure compliance.

Inquiry #2:

Lawyer represents Estate of B and the personal representative of Estate of B in her official capacity. Lawyer opens a checking account for the estate and designates the personal representative as the signatory on the account. The personal representative will receive the bank statements. Lawyer, however, intends to retain possession of the checkbook, preparing checks for the personal representative's signature as needed and depositing estate funds into the account when obtained. What are Lawyer's obligations for the account under Rule 1.15?

Opinion #2:

The requirements of Rule 1.15-2 and 1.15-3 apply only to the extent that the lawyer has control over the estate account. In the instant inquiry, Lawyer has possession of the checkbook, but does not have signatory authority.

Therefore, Lawyer is not obligated to follow the requirements of Rule 1.15 and its subparts that apply to the maintenance and disbursement of funds by one having signatory authority over the account, or with the review and reconciliation requirements of Rule 1.15-3. Lawyer, however, is obligated to follow the requirements of Rule 1.15 as applicable to items over which Lawyer has possession or control, such as properly safeguarding checks received for the estate, properly safeguarding the checkbook for the estate account, and not using any debit card received for the estate account to withdraw funds from the estate account.

For example, if Lawyer receives a check or other entrusted property for the benefit of the estate, Lawyer must comply with the provisions of Rule 1.15 governing the handling of entrusted funds, including Rule 1.15-2(a), which sets forth the duty to identify, hold, and maintain entrusted property separate from the property of the lawyer and to deposit, disburse, and distribute only in accordance with Rule 1.15. This would include labeling a check or funds as property of the estate, and placing the check or funds in a suitable place of safekeeping until deposited in the estate account. Notice must be promptly given to the personal representative if the personal representative is responsible for depositing funds to the account.

Lawyer represents the estate and the personal representative in her official capacity. RPC 137. Therefore, Lawyer has a duty to provide competent and diligent representation. Rule 1.1 and Rule 1.3. Competent and diligent representation requires Lawyer to advise the personal representative of her fiduciary responsibilities relative to the safekeeping of the funds of the estate and her duty to administer the estate in compliance with the law. *See generally* 2002 FEO 3 (lawyer for estate may seek removal of personal representative if the personal representative's breach of fiduciary duties constitutes grounds for removal under the law). To ensure that the estate account is properly managed, checks are not written against insufficient funds, and estate funds are protected from theft, competent and diligent representation dictates that Lawyer periodically meet with the personal representative to review the estate account documents, including the bank statements and canceled checks. If Lawyer prepares checks for the personal representative's signature, Lawyer must conduct a periodic review of the balance for the estate account sufficient to guard against the preparation of a check for the personal representative's signature that would exceed the balance of the account.

Inquiry #3:

Lawyer represents Estate of C and the personal representative of the Estate of C in her official capacity. Lawyer opens the checking account for the estate. Lawyer and the personal representative are designated as signatories on the estate account. Lawyer has the checkbook for the account and receives the bank statements. Although Lawyer is the person primarily responsible for depositing funds into the estate account and writing checks, the personal representative may also deposit funds into the estate account and write checks. What are Lawyer's duties with regard to the estate account?

Opinion #3:

As stated in Opinion #2, the requirements of Rule 1.15-2 and Rule 1.15-3 apply only to the extent the lawyer has control over the estate account. Because Lawyer has signatory authority, has possession of the checkbook, and receives the bank statements, Lawyer has control of the estate account and is, therefore, obligated to follow the requirements of Rule 1.15-2 and Rule 1.15-3. Lawyer must open the estate account as a lawyer's fiduciary account and review the estate account in accordance with Rule 1.15-3(i): Reviews. Furthermore, Lawyer must advise the personal representative of her fiduciary responsibilities relative to the safekeeping of the funds of the estate and her duty to administer the estate in compliance with the law. *See* Opinion #2.

Inquiry #4:

Lawyer represents Estate of D and the personal representative of Estate of D in her official capacity. The personal representative opens the checking account for the estate and manages the account, including the preparation of checks at Lawyer's direction. What are Lawyer's obligations for the account under Rule 1.15?

Opinion #4:

Lawyer is not obligated to follow Rule 1.15. *See* Opinion #2.

Inquiry #5:

Lawyer represents Estate of E and the personal representative of Estate of E in her official capacity. The personal representative opens a checking account for the estate and manages the account, including receipt of the bank statements and the preparation of checks. The personal representative is the only signatory on the estate checking account. The personal representative, however, asks Lawyer's paralegal to take possession of the checkbook. Each month, the personal representative goes to Lawyer's law firm, writes checks, and gives the bills and the checks to paralegal. Paralegal then mails out the checks. What are Lawyer's obligations to the estate account under these circumstances?

Opinion #5:

See Opinion #2. Additionally, under Rule 5.3(b), Lawyer must make reasonable efforts to ensure that the paralegal's conduct is compatible with the professional obligations of Lawyer. This includes making reasonable efforts to ensure that the paralegal understands and complies with the professional obligation of Lawyer to safeguard the checkbook under Rule 1.15-2(d) as well as with the professional obligation of Lawyer under Rule 8.4(b) and (c) not to misappropriate fiduciary funds by means of forged checks or other methods.

Inquiry #6:

Did the June 2016 amendments to Rule 1.15 change or add to the obligations of a lawyer with respect to a fiduciary account, or otherwise change the answers to Inquiries #1 and #2 above?

Opinion #6:

Yes. The 2016 amendments found in Rule 1.15-3(i) now require monthly and quarterly reviews for fiduciary accounts as well as general trust accounts.

Inquiry #7:

In the representations described in Inquiries #1 and #2 above, may Lawyer delegate the management of the fiduciary account to a nonlawyer assistant?

Opinion #7:

Day-to-day management of the account may be delegated to a nonlawyer assistant. However, the responsibility for conducting the monthly and quarterly reviews required by Rule 1.15-3(i) may not be delegated. The rule specifies that "the lawyer" shall review the records. To fulfill the intended purpose of this provision, the lawyer, rather than an assistant, must conduct these reviews. Lawyer must periodically review underlying bank records, independently of any records prepared or provided by the assistant, to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer. As explained in comment [23] to Rule 1.15:

> The mandatory monthly and quarterly reviews and oversight measures in Rule 1.15-3(i) facilitate early detection of internal theft and early detection and correction of errors. They are minimum fraud prevention measures necessary for the protection of funds on deposit in a firm trust or fiduciary account from theft by any person with access to the account. Internal theft from trust accounts by insiders at a law firm can only be timely detected if the records of the firm's trust accounts are routinely reviewed. For this reason, Rule 1.15-3(i)(1) requires monthly reviews of the bank statements and cancelled checks for all general, dedicated, and fiduciary accounts.

Although Lawyer may delegate day-to-day management of the account to a nonlawyer assistant, Lawyer remains professionally responsible for compliance with the requirements of Rule 1.15 and its subparts. Therefore, the assistant must be appropriately instructed, trained, and supervised concerning the requirements of the rule. Rule 5.3.

Inquiry #8:

If Lawyer delegates the day-to-day management of a fiduciary account to a nonlawyer assistant, may that assistant be a signatory on the account?

Opinion #8:

The trust accounting rules do not prohibit this. However, the practice increases the risk of internal fraud. *See, e.g.*, Rule 1.15-2(s) (prohibiting an assistant responsible for reconciling a trust account from being a signatory on the account). A lawyer should not permit an assistant to be a signatory on a fiduciary account unless the lawyer or law firm has established fraud prevention procedures that will protect the fiduciary funds from internal theft. *See* Rule 1.15, cmt. [25].

2017 Formal Ethics Opinion 3

July 28, 2017

Advertisement with URL and No Other Identifying Information

Opinion rules that a billboard advertisement need not contain the lawyer's name, firm name, or the firm's office address if the URL address on the advertisement lands on the lawyer's website where such information can be easily found.

Editor's Note: The opinion is not limited to billboard advertisements; it applies to all forms of legal advertisement.

Inquiry:

Law Firm owns numerous Uniform Resource Locators (URLs) such as www.ABCtowndwi.com. Each of the URLs is a "landing page" for Law Firm's website. Law Firm's website includes Law Firm's full name, the names of the individual lawyers in Law Firm, and Law Firm's office address.

Law Firm would like to start a billboard advertising campaign. Law firm does not want to include Law Firm's full name, the names of the individual lawyers in Law Firm, or Law Firm's office address in the advertisement, but does intend to include one of the URLs.

Is the proposed billboard campaign permissible under the Rules of Professional Conduct?

Opinion:

Yes. Rule 7.1 requires all communications about a lawyer and the lawyer's services to be truthful and not misleading. Rule 7.2(c) requires any communication about a lawyer or a lawyer's services to include the name and office address of at least one lawyer or law firm responsible for its content.

Traditionally, Rule 7.2(c) has been applied so as to require all forms of print and media legal advertising to include the listed information to avoid misleading the public about the identity of the responsible lawyer or firm and the location of the firm. However, the Rules of Professional Conduct are rules of reason to be applied in a reasonable manner under the circumstances. *See* Rule 0.2, Scope, cmt. [1]. For example, in 2012 FEO 6, the Ethics Committee determined that a law firm may use a leased time-shared office address or a post office address to satisfy the address disclosure requirement for advertising communications in Rule 7.2(c). In 2005 FEO 14, the Ethics Committee concluded that, "as long as a URL of a law firm is not otherwise misleading or false and the homepage of the website identifies the sponsoring law firm or lawyer, the URL does not have to contain language specifically identifying the website as one belonging to a law firm." Similarly, 2017 FEO 1 holds that a text message advertisement that does not include the lawyer's office address but does include the lawyer's website address, where the office address can be found, satisfies the requirements of Rule 7.2(c).

A law firm's website will generally contain more than enough information to satisfy the requirements of Rule 7.2(c) and avoid misleading the public. Utilizing a website address in an advertisement actually provides a consumer with the ability to access more information about the lawyer or law firm than an advertisement that contains only the lawyer's or the firm's name and office address. Therefore, an advertisement that includes a URL for a law firm's website complies with Rule 7.2(c) so long as the law firm's website contains the law firm's official name or trade name, or the name of a responsible lawyer, and the firm's office address. The firm name, trade name, or the name of the lawyer must appear on the website homepage. The firm's office address need not appear on the homepage provided it can be easily found on the website.

2017 Formal Ethics Opinion 4

July 28, 2017

Settlement Funds Subject to Statutory Lien

Opinion rules that a lawyer is prohibited from disbursing settlement funds pursuant to the client's directive if the funds are subject to a perfected lien.

Inquiry:

Client was injured in a vehicular collision. Client was not at fault for the collision. Client incurred various medical expenses as a result of the collision. Lawyer represents Client in her personal injury case against the driver who caused the collision. All medical providers perfected liens on Client's anticipated recovery pursuant to the requirements for perfection of a medical lien on a personal injury settlement set forth in N.C. Gen. Stat. § 44-49. With Client's consent, Lawyer settled the matter. Lawyer received and deposited Client's settlement proceeds in his trust account. The settlement proceeds do not cover the entirety of Client's medical expenses, so Lawyer prepared a proposed pro rata disbursement plan, consistent with N.C. Gen. Stat. §44-50 (lien "shall in no case, exclusive of attorney's fees, exceed 50% of the amount of damages recovered"), and submits the proposal to Client for approval.

Client disapproves of the proposed disbursement, explaining that she does not want one particular medical provider (Provider A) to receive any funds from the settlement. Lawyer advises Client of Provider A's perfected lien, but Client instructs Lawyer not to pay Provider A.

May Lawyer disburse Client's settlement proceeds in accordance with Client's instructions not to pay Provider A such that the funds designated for Provider A are disbursed to Client instead?

Opinion:

No, if the lien is perfected. Generally, a lawyer must follow a client's directives as to the disbursement of settlement proceeds. Rule 1.15-2(n) provides that 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." However, Provider A has perfected a lien against the settlement proceeds pursuant to N.C Gen. Stat. § 44-49. The perfected lien creates a question as to whether Client is "currently entitled" to the share of the settlement proceeds designated for Provider A.

Comment [15] to Rule 1.15 recognizes that a third party may have a lawful claim (such as a medical provider lien) against specific funds in a lawyer's custody, and a lawyer "may have a duty under applicable law to protect such third-party claims against wrongful interference by the client."

The applicable law provides that a lien exists upon any sums recovered as damages for personal injury in any civil action. N.C. Gen. Stat. § 44-49(a). The lien is in favor of any provider to whom the injured person may be indebted for any medical attention rendered in connection with the injury. Id. The lien attaches to all funds paid to a lawyer in compensation for or settlement of the personal injury claim. To perfect the lien, the medical provider must furnish an itemized statement, hospital record or medical report, without charge, for the lawyer to use in the resolution of the personal injury claim and give written notice to the lawyer of the lien claim. N.C. Gen. Stat. § 44-49(b).

Before disbursing settlement proceeds subject to a perfected lien, N.C. Gen. Stat. § 44-50 provides that the lawyer "shall retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims." Section 44-50 further states that a client's instructions for the disbursement of settlement proceeds are "not binding on the disbursing attorney" to the extent that the instructions conflict with the requirements of the medical lien statutes. However, when the client disputes the amount of the claim, N.C. Gen. Stat. § 44-51 provides that payment of the claim is not compelled until the claim is "fully established and determined, in the manner provided by law." Comment [15] to Rule 1.15 provides that when a third-party claim "is not frivolous under applicable law, the lawyer *must refuse* to surrender the property to the client until the claim is resolved" (emphasis added). Therefore, when a statute requires a lawyer not to disburse settlement funds to a client, the lawyer must comply with the law regardless of any instructions by the client to the contrary.

Lawyer must determine whether Provider A's lien is perfected. If so, Lawyer must segregate and retain the funds in question in Lawyer's trust account and inform Client that, absent a prompt resolution of Provider A's claim that is satisfactory to both parties, Lawyer will eventually be obligated to deposit the funds into the court for disposition. In the interim, if a final judgment is entered on Provider A's claim such that the claim is no longer in dispute, pursuant to N.C. Gen. Stat. § 44-50, Lawyer must pay Provider A over the client's objections.

To the extent that RPC 69 and RPC 125 conflict with this opinion, they are overruled.

2017 Formal Ethics Opinion 5

October 27, 2017

Agreement Not to Solicit or Hire Lawyers from Another Firm as Part of Merger Negotiations

Opinion rules that an agreement between law firms engaged in merger negotiations not to solicit or hire lawyers from the other firm for a relatively short period of time after expiration of the term of the agreement is permissible because it is a de minimis restriction on lawyer mobility that does not impair client choice and is reasonable under the circumstances.

Inquiry:

Law Firm A entered into an agreement with Law Firm B to explore merger of the two law firms. In addition to provisions addressing non-disclosure of confidential client and proprietary firm information, the agreement included the following provision:

> Non-Solicitation. During the term of this Agreement and, should Law Firm A and Law Firm B decide not to merge, for a period of two (2) years after termination of this Agreement (the "Non-Solicitation Period"), (i) Law Firm A agrees that it shall not induce or solicit any of the partners, associates, or other employees of Law Firm B to join Law Firm A; and (ii) Law Firm B agrees that it shall not induce or solicit any of the partners, associates, or other employees of Law Firm A to join Law Firm B. The foregoing restriction shall not apply to (i) associates or other employees who are hired through a party's recruiting efforts resulting from the placement of general media advertisements or the retention of "headhunters" (provided that the headhunters are not specifically directed to solicit associates or other employees from the other party), or (ii) the hiring by a party of the other party's associates or other employees who make unsolicited contacts seeking employment so long as such individuals did not directly participate in meetings, negotiations, or similar discussions between the parties concerning the terms of the potential merger. Each party agrees not to hire or engage as partners or counsel any individual who is currently a partner or counsel with the other party to this Agreement for a period of two years from the termination of this Agreement.

The term of the agreement is one year, but is subject to early termination based upon ten days' notice by a party. Therefore, the potential period of restriction may be as long as three years.

Attorney X is a partner in Law Firm A and is interested in joining Law Firm B. She did not participate in meetings, negotiations, or discussions between the law firms relative to the agreement or to a potential merger with Law Firm B. Nevertheless, the managing lawyers for Law Firm B have refused to talk to her about becoming a partner because the period of restriction has not expired. Law Firm B will talk to Attorney X about joining the firm if she obtains a waiver of the restriction from Law Firm A.

Is this provision of the agreement prohibited under Rule 5.6(a)?

Opinion:

No, because it imposes a *de minimis* restriction on the mobility of the lawyers in the firms, does not impair client choice, and is reasonable under the circumstances.

Rule 5.6(a) prohibits a lawyer from participating in offering or making a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement. As explained in 2012 FEO 12, "[t]his prohibition on restrictive covenants protects the freedom of clients to choose a lawyer and promotes lawyer mobility and professional autonomy." Rule 5.6, cmt. [1]." Ethics opinions interpreting the rule usually address the former concern. For example, three State Bar opinions evaluate whether financial disincentives upon departure from a law firm are disguised penalties for competition because "firm" clients will follow the departing lawyer. *See* 2007 FEO 6, 2008 FEO 8, and 2012 FEO 12. There are no opinions that provide insight into agreements that solely restrict the mobility of lawyers as does the agreement at issue. Therefore, this is a matter of first impression.

Restrictive covenants are not, however, foreign to the Rules of Professional Conduct. Rule 1.17, Sale of a Law Practice, permits a lawyer to sell a law practice or an area of law practice, including good will, if a number of conditions are satisfied, including the following: "the seller ceases to engage in the private practice of law, or in the area of practice that has been sold, from an office that is within a one-hundred (100) mile radius of the purchased practice..." Rule 1.17(a). Where a reasonable business purpose exists, the Rules permit some limitations on lawyer mobility.

Similarly, 2007 FEO 6 and 2008 FEO 8 recognize that a financial disincentive upon the departure of a lawyer may be permissible. Those opinions permit partnership, shareholder, or other similar agreements to include a post-departure repurchase, buy-out, or fee division provision if the provision is fair, takes into account the loss in firm value generated by the lawyer's departure, and is not based solely upon loss in value due to the loss of client billings. Again, if there is a reasonable business purpose, a restriction that impacts lawyer mobility may be permissible.

The non-solicitation provision in this inquiry is primarily a restriction on the law firms that are a party to the agreement in that it restricts the recruiting activities of the firms. To the extent that the provision restricts the mobility of lawyers in the two firms, the restriction is for a relatively short, defined period of time and only with regard to employment with one other law firm; the lawyers in the firms are free to seek employment with any other law firm. In addition, the provision does not prevent or inhibit a client from following a lawyer who departs one of the firms for employment with a firm not subject to the agreement. Thus, the provision imposes a *de minimis* restriction on lawyer mobility and does not impair client choice

As noted in the Scope section of the Rules, "[t]he 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." Rule 0.2, cmt. [1]. It is surmised that the non-solicitation provision was included in the agreement to foster the trust necessary for both firms to disclose financial information about the productivity of the lawyers in the firms without fear that, should the merger negotiations be abandoned, the other firm would attempt to lure highly productive lawyers or "rainmaker" lawyers away from the other firm. The provision was reasonable[1] under the circumstances and, given its limited duration and effect, does not violate Rule 5.6(a).

No opinion is expressed on the legal enforceability of the provision in this inquiry or other similar provisions.

Endnote

1. Whether a restriction on lawyer mobility in an agreement between law firms engaged in merger negotiations is reasonable will depend on various factors, including the specific terms of the restriction, the number of law firms involved in the merger negotiations, and the likelihood of employment opportunities with law firms not involved in the merger negotiations.

2018 Formal Ethics Opinion 1

July 27, 2018

Participation in Website Directories and Rating Systems that Include Third Party Reviews

Opinion explains when a lawyer may participate in an online rating system, and a lawyer's professional responsibility for the content posted on a profile on a website directory.

Inquiry #1:

May a lawyer "claim her profile" or set up a profile on a website directory or business listing service such as Google's My Business, LinkedIn, or Avvo and provide information for inclusion in the profile?

Opinion #1:

Yes, if the information provided by the lawyer and as presented in the profile is truthful and not misleading. Rule 7.1(a).

Inquiry #2:

May a lawyer pay to be included in a website directory of lawyers?

Opinion #2:

Yes. A lawyer may pay the reasonable costs of advertisements. Rule 7.2(b).

Inquiry #3:

May a lawyer provide profile information to a website that will use the

information to rate the lawyer in an online lawyer rating system?

Opinion #3:

Yes, if the information provided by the lawyer is truthful and not misleading. Rule 7.1(a). In addition, no money may be paid by the lawyer for a rating and, before voluntarily providing information to a rating system, the lawyer must determine that the rating system uses objective standards that are verifiable and would be recognized by a reasonable lawyer as establishing a legitimate basis for evaluating the lawyer's services. *See, e.g.,* 2003 FEO 3 and 2007 FEO 14. Further, the standards for the rating system must be disclosed to the public at a location on the website that a user of the website can readily find.

Inquiry #4:

If a lawyer participates in a website directory, is the lawyer professionally responsible for claims on the website about participating lawyers such as statements that the participating lawyers are "top rated" or "the best"?

Opinion #4:

Yes, the lawyer is professionally responsible for statements or claims made about the lawyer or the lawyer's services and may not participate in any communication about the lawyer that is false or misleading in violation of Rule 7.1.

Pursuant to Rule 7.1(a)(3), a communication is false or misleading if it "compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated." Further explanation of this prohibition is set out in comment [3] to Rule 7.1 which states that "[a]n unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated." Characterizing lawyers listed in a website directory as "top rated" or "the best" is a comparison of the participating lawyers' services with those of other lawyers. A lawyer may not participate in such a directory unless objective, verifiable standards for participation, as required by 2007 FEO 14, Advertising Inclusion in List in North Carolina Super Lawyers and Other Similar Publications, are applied and disclosed by the website.

Inquiry #5:

A website directory that permits lawyers to "claim their profiles" also allows consumers—usually present and former clients—to post "reviews" of a lawyer on the lawyer's profile page. May a lawyer ask present or former clients to post reviews on her profile page?

Opinion #5:

Yes, as long as there is no quid pro quo. Rule 7.2(b) (a lawyer shall not give anything of value to a person for recommending the lawyer's services). Under no circumstances may a lawyer solicit, encourage, or assist in the posting of fake, false, or misleading reviews. Rule 8.4(c).

Inquiry #6:

When a client is pleased with the lawyer and her services, the client's posted review on the lawyer's profile or webpage may contain hyperbolic accolades such as the lawyer was "the best," "awesome," "the smartest," "the toughest," etc. Rule 7.1(a)(2) and (3) prohibit a lawyer from engaging in misleading communications that create unjustified expectations or that compare a lawyer's services with the services of other lawyers unless the comparison can be factually substantiated. Is a lawyer required to seek the removal of any review that does not meet this standard?

Opinion #6:

Yes. Most users of the Internet understand that reviews by third parties generally contain statements of opinion, not fact. To the extent that a third party review is a statement of opinion about the lawyer or her services, the lawyer is not professionally responsible for the statement and does not have to disclaim the review or take action to have the review removed or redacted from the lawyer's profile or webpage. If a review contains a material misstatement of objective fact, however, the lawyer must take action to have the review removed or edited to delete the misstatement, or to post a disclaimer. For example, the lawyer must take action to remove, redact, or disclaim a review that falsely states that the lawyer obtained a million dollar settlement.

Inquiry #7:

Lawyer A, at the urging of a marketing firm, initially claimed her website profile or set up business pages on a number of websites like Facebook. However, she tired of posting to the profiles and pages, and soon ceased to visit the majority of them altogether. Most of the profiles and website pages allow for third party reviews that Lawyer A no longer reads. Is Lawyer A responsible for the content of the reviews posted on these website profiles and pages?

Opinion #7:

No, a lawyer is professionally responsible only for third-party content about the lawyer of which the lawyer is aware or reasonably should be aware. The lawyer is not required to monitor online profiles or pages if the lawyer does not visit the website, post to that website, or otherwise actively participate in the website. If a lawyer has abandoned a profile or webpage and the lawyer is unaware of the content of the reviews posted on the profile or webpage, the lawyer has no professional responsibility relative to that content. However, if the lawyer becomes aware, or reasonably should be aware, that material misstatements of fact are included in reviews posted on her profile or webpage, the lawyer is professionally responsible and must take action to have the offensive content removed or an explanatory disclaimer posted.

Inquiry #8:

A lawyer determines that third-party generated content on her profile on an online directory contains material misstatements of fact and that she is professionally responsible for seeking to remove or disclaim the misstatements. When she asks the website to remove the content or post an explanatory disclaimer, the website refuses to do so. What should the lawyer do?

Opinion #8:

The lawyer must withdraw from participation in the website and seek to have the lawyer's profile or page on the website removed.

Inquiry #9:

Is a lawyer required to seek the removal of negative reviews that the lawyer perceives to be false or misleading?

Opinion #9:

Because there is no risk of creating unjustified expectations, there is no duty to correct or seek removal of a negative review posted on a lawyer's profile or website page. Nevertheless, the lawyer may seek removal of negative reviews to protect the lawyer's reputation. Lawyers are cautioned to avoid disclosing confidential client information when responding to a negative review. *See* Rule 1.6(a).

Inquiry #10:

For a monthly fee, a website offers a premium service called "Pro" that is promoted as enabling a lawyer to "upgrade" the lawyer's profile on the website. This service provides the following benefits according to the website: no competitive ads will be shown on the lawyer's profile page; the lawyer's contact information is shown in a search result; the lawyer can see who is contacting her by phone, email, or on her website; the lawyer can select the best reviews and promote them at the top of the profile page; and the lawyer can write her own headline at the top of her profile. In addition, under the lawyer's photo, whether it appears on the lawyer's profile page or in a search result, the word "Pro" appears. On search results, a sidebar states that "Pro" indicates that information is "verified." May a lawyer subscribe to this service?

Opinion #10:

Yes, if the information on the profile page continues to be truthful and not misleading and an explanation of the "Pro" designation appears in a prominent location beside or near the designation wherever the designation appears on the lawyer's profile or webpages. In the absence of the explanation that the designation indicates that the lawyer paid for enhanced services, the designation implies that lawyers without the designation are not professional or "Pro." This is a comparison of the lawyer's services with the services of other lawyers that cannot be factually substantiated in violation of Rule 7.1(a)(3). If the website does not post the explanation, the lawyer must do so or must discontinue the premium service.

In addition, to avoid misleading users, if only selected reviews can be read by a user, there must be an explanation that the lawyer has selected the best reviews to promote. If there is an implication that the selected reviews are the only reviews that the lawyer has received or, if the lawyer has received unfavor-

able reviews and the profile page falsely implies that the "promoted reviews" are typical, there must be an explanation.

2018 Formal Ethics Opinion 2

July 27, 2018

Duty to Disclose Adverse Legal Authority

Opinion rules that a lawyer has a duty to disclose to a tribunal adverse legal authority that is controlling as to that tribunal if the legal authority is known to the lawyer and is not disclosed by opposing counsel.

Inquiry:

Rule 3.3(a)(2) provides that a lawyer shall not knowingly "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."

Does the duty of disclosure set out in Rule 3.3(a)(2) require a lawyer to inform the tribunal of rulings entered in lateral and lower courts?

Opinion:

Pursuant to Rule 3.3(a)(2), the lawyer's duty is to disclose to the tribunal legal authority that is controlling as to that tribunal. The lawyer must make a legal determination as to the legal authority that is controlling for the particular tribunal.

Rule 3.3, Candor Toward the Tribunal, sets forth the duties of lawyers as officers of the court "to avoid conduct that undermines the integrity of the adjudicative process." Rule 3.3, cmt. [2]. Preserving the integrity of the adjudicative process is consistent with the principle of *stare decisis*.

As an officer of the court, a lawyer has a duty to assist the tribunal in fulfilling its duty to apply the law fairly and properly. Therefore, a lawyer must not allow the tribunal to be misled by false statements of law and "must recognize the existence of pertinent legal authorities." Rule 3.3, cmt. [4]. As explained in Rule 3.3, cmt. [4], the "underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case."

The comments to Rule 3.3 reference "pertinent legal authorities" and "legal premises properly applicable" to the case. These phrases indicate that the lawyer's duty is to disclose to the tribunal legal authority that is controlling as to that tribunal. The disclosure duty covers not only court decisions, but also statutes and regulations adverse to a client's position. A lawyer is not required to inform the tribunal of authority that is not controlling.

Pursuant to Rule 3.3(a)(2), a lawyer has a duty to disclose to a tribunal considering a matter legal authority that is controlling as to the tribunal if the authority is directly adverse to the position of the lawyer's client, is known to the lawyer, and is not disclosed by opposing counsel. The lawyer's knowledge of the adverse authority may be inferred from the circumstances. *See* Rule 1.0(g).

2018 Formal Ethics Opinion 3

July 27, 2018

Use of Suspended Lawyer's Name in Law Firm Name

Opinion rules that the name of a lawyer who is under an active disciplinary suspension must be removed from the firm name.

Inquiry #1:

Lawyer is a named partner in a law firm. Pursuant to an order issued by the Disciplinary Hearing Commission, Lawyer is actively suspended from the practice of law. Must Lawyer's name be removed from the law firm name during the suspension period?

Opinion #1:

Yes. A suspended lawyer may not be associated with her former firm during the suspension period. The Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law state that if a shareholder in a professional corporation or member of a professional limited liability company becomes legally disqualified to render professional services in North Carolina, the name of the professional corporation or professional limited liability company shall be promptly changed to eliminate the name of such shareholder or member, and such shareholder or member shall promptly dispose of her shares of stock in the corporation or interest in the professional limited liability company. 27 N.C. Admin. Code 1E, Rule .0102. In addition, Rule 5.5(b) of the Rules of Professional Conduct prohibits a lawyer who is not admitted to practice law in North Carolina from holding out to the public or otherwise representing that the lawyer is admitted to practice law in this jurisdiction.

Therefore, within a reasonable timeframe from the effective date of the active disciplinary suspension not to exceed three months and until the active suspension ends, the suspended lawyer's name must be removed from the firm name, firm signage, letterhead, all forms of advertisement, and the firm website. The law firm is reminded to amend the articles of incorporation with the North Carolina secretary of state and, if the suspended lawyer's name is contained in the firm's website URL, to change or redirect the URL to a URL that does not contain the suspended lawyer's name. (If a URL with appropriate is not available, the law firm may adopt a trade name for its URL provided the URL is registered with and approved by the North Carolina State Bar. 2005 FEO 8.)

Inquiry #2:

Does the answer to Inquiry #1 change if Lawyer is under a stayed disciplinary suspension?

Opinion #2:

Yes. If Lawyer's disciplinary suspension is stayed, she is permitted to practice law. Therefore, inclusion of Lawyer's name in the firm name, firm signage, letterhead, all forms of advertisement, and the firm website is not false or misleading in violation of Rule 7.1, and does not violate other State Bar rules.

Should the suspension become active and Lawyer is no longer permitted to practice law, Lawyer's name must be removed from the firm name, firm signage, letterhead, all forms of advertisement, and the firm website. *See* Opinion #1.

Inquiry #3:

Lawyer is administratively suspended for failure to pay State Bar membership dues and/or failure to satisfy the continuing legal education (CLE) requirements of State Bar membership. Must Lawyer's name be removed from the firm name?

Opinion #3:

Yes. Whenever a member of the North Carolina State Bar fails to fulfill an administrative obligation of membership in the State Bar, the member is subject to administrative suspension. 27 N.C. Admin. Code 1D, Rule .0903. However, unlike a disciplinary suspension, administrative suspensions can be cured within a relatively short period of time. *See* 27 N.C. Admin. Code 1D, Rule .0904(f) (Reinstatement by Secretary of the State Bar). As noted in the Scope section, the Rules of Professional Conduct are rules of reason. Rule 0.2, Scope. It would be impractical and expensive for a firm to remove a lawyer's name from the firm name, firm signage, letterhead, all forms of advertisement, and the firm website if the administrative suspension is of limited duration. Therefore, provided Lawyer is reinstated to active status within a reasonable period of time not to exceed three months from the effective date of the administrative suspension, it is not a violation of Rule 7.1 or Rule 7.5 for Lawyer's name to remain in the firm name, firm signage, letterhead, all forms of advertisement, and the firm website.

2018 Formal Ethics Opinion 4

April 20, 2018

Offering Clients On-site Access to Financial Brokerage Company for Legal Fee Financing

Opinion rules that a lawyer may offer clients on-site access to a financial brokerage company as a payment option for legal fees so long as the lawyer is satisfied that the financial arrangements offered by the company are legal, the lawyer receives no consideration from the company, and the lawyer does not recommend one payment option over another.

Inquiry:

Lawyer would like to associate with a financial brokerage company

(Company) that would assist clients in obtaining legal fee financing. Company is not a lending institution. Company would act as a broker to find lenders willing to finance the client's legal fees. Company charges Lawyer an initial setup fee of $1,500 and a monthly fee of $99 for maintaining the payment webpage and administration. Lawyer also pays a merchant fee of 4.99 % on the amount of the financed legal fee. The loan brokerage service would be explained to clients as a "payment option" along with any other options such as credit card, check, cash, etc.

Company provides a loan application for clients who wish to pursue a loan for legal fees. Approved clients receive offers from competing banks, and are free to pick the offer that works best for them, or to decline all offers. If the client accepts an offer, the loan amount is paid from a third-party lender directly to the client. The client pays the fees to Lawyer in accordance with the fee agreement.

The company maintains that the program helps lawyers get paid and also removes the cost barrier for clients who are seeking legal representation.

May Lawyer associate with Company under the proposed arrangement?

Opinion:

Yes, under certain circumstances. Many law firms currently accept credit card payments for legal fees or offer in-house payment plans. In 2000 FEO 4, the Ethics Committee concluded that a lawyer may refer a client in need of money for living expenses to a finance company if the lawyer is satisfied that the company's financing arrangement is legal, the lawyer receives no consideration from the financing company for making the referral, and, in the lawyer's opinion, the referral is in the best interest of the client. The lawyer may not allow his own financial interests to interfere with his duty to act in the best interests of his client. Rule 1.7(a) (concurrent conflict exists if representation of client is materially limited by personal interest of lawyer). For example, in 2006 FEO 2, the Ethics Committee concluded that a lawyer may not refer a client to a company that pays a cash lump sum to a client in exchange for the client's interest in a structured settlement merely as a means of paying the lawyer for his legal services.

A lawyer does not put his own financial interests ahead of those of his client by providing payment options to a client who requires financial assistance in paying the lawyer's legal fees. However, given the lawyer's self interest in being paid in full for his services, the lawyer may not recommend one payment option over another. Therefore, Lawyer may offer clients on-site access to Company as a payment option for Lawyer's legal fees—along with any other potential payment options—so long as Lawyer is satisfied that the financial arrangements offered by Company are legal, Lawyer receives no consideration from Company, and Lawyer does not recommend one payment option over another.

2018 Formal Ethics Opinion 5

July 19, 2019

Accessing Social Network Presence of Represented or Unrepresented Persons

Opinion reviews a lawyer's professional responsibilities when seeking access to a person's profile, pages, and posts on a social network to investigate a client's legal matter.

Introduction

Social networks are internet-based communities that individuals use to communicate with each other and to view and exchange information, including photographs, digital recordings, and files. Examples of currently popular social networks include, but are not limited to, Facebook, Twitter, Instagram, and LinkedIn. On some forms of social media, such as Facebook, users create a profile page with personal information that other users may access online. Websites that host the social networks often allow the user to establish the level of privacy for the profile page and postings thereon, and to limit those who may view the profile page and postings to "friends"—those who have specifically sent a computerized request to view the profile page which the user has accepted. NYCBA Formal Op. 2010-2 (September 2010).

Lawyers increasingly access social networks to prepare or to investigate a client's matter. However, the use of social networks has ethical implications. Several rules restrict a lawyer's communications with people involved in a client's matter. Rule 4.2 restricts a lawyer's communications with persons represented by counsel. Rule 4.3 restricts a lawyer's communications with unrepresented persons. Furthermore, all communications by a lawyer are subject to Rule 4.1's prohibition on knowingly making a false statement of material fact or law to a third person and to Rule 8.4(c)'s prohibition on conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer.

The technology and features of social networks are constantly changing. It is impossible to address every aspect of a lawyer's ethical obligation when utilizing a social network to prepare or to investigate a client's legal matter. Every lawyer is required by the duty of competence to keep abreast of the benefits and risks associated with the technology relevant to the lawyer's practice, including social networks. Rule 1.1, cmt. [8]. Further, when using a social network as an investigative tool, a lawyer's professional conduct must be guided by the Rules of Professional Conduct.

This opinion will address ethical issues that arise when lawyers, either directly or indirectly, seek access to social network profiles, pages, and posts (collectively referred to as "social network presence") belonging to another person. Throughout the opinion, "person" refers to opposing parties and to witnesses.

This opinion does not obviate comment [1] to Rule 8.4. The comment explains that the prohibition in Rule 8.4(a) against knowingly assisting another to violate the Rules of Professional Conduct or violating the Rules of Professional Conduct through the acts of another does not prohibit a lawyer from advising a client or, in the case of a government lawyer, investigatory personnel, of action the client, or such investigatory personnel, is lawfully entitled to take. *See* 2014 FEO 9 (use of tester in investigation that serves a public interest).

For guidance on communicating with a judge on a social network, *see* 2014 FEO 8. For the restrictions on communicating with a juror or a member of the jury venire, see Rule 3.5.

Inquiry #1:

Regardless of the privacy setting established by a user, some social network sites allow public access to certain limited user information. May a lawyer representing a client in a matter view the public portion of a person's social network presence?

Opinion #1:

Yes. The public portion of a person's social network presence refers to any information or posting that is viewable by anyone using the internet or anyone who is a member of the social network. Such information is no different than other information that is publicly available. Nothing in the Rules of Professional Conduct prohibits a lawyer from accessing publicly available information.

As noted by the Colorado Bar Association, "[a] lawyer's conduct in viewing [the public portion of a person's social media profile or any public posting made by an individual] does not implicate any of the restrictions upon communications between a lawyer and certain others involved in the legal system." Colorado Formal Op. 127 (September 2015).

Some social networks automatically notify a person when his or her presence has been viewed. The person whose presence is viewed may receive information about the individual who viewed the presence. Under these circumstances, when a lawyer views a person's public social network presence, it is the social network sending a communication, not the lawyer. Therefore, the notification generated by the social network is not a prohibited communication by the lawyer. See, e.g., ABA Formal Op. 466 (2014) (communication generated because of technical feature of electronic social media service is communication by the service, not the lawyer). However, a lawyer who engages in repetitive viewing of a person's social network presence so as to generate multiple notifications from the network may be in violation of Rule 4.4(a). That rule prohibits a lawyer from using means that have no substantial purpose other than to embarrass, delay, or burden a third person, and from using methods of obtaining evidence that violate the legal rights of such a person.

Lawyers may view the public portion of a person's social network presence. However, the lawyer may not engage in repetitive viewing of a person's social network presence if doing so would violate Rule 4.4(a).

Inquiry #2:

May a lawyer use deception to access a restricted portion of a person's social network presence?

Opinion #2:

No. Lawyers must never use deception, dishonesty, or pretext to gain access to a person's restricted social network presence. Rules 4.1 and 8.4(c). When seeking access to a person's restricted social network presence, a lawyer must not state or imply that he is someone other than who he is or that he is disinterested. Furthermore, lawyers may not instruct a third party to use deception.

Inquiry #3:

May a lawyer, using his true identity, request access to the restricted portions of an unrepresented person's social network presence?

Opinion #3:

Yes. A lawyer's duty of competent and diligent representation under Rules 1.1 and 1.3 encompasses the use of readily available forms of informal discovery. A lawyer who seeks informal discovery may request the same access to an unrepresented person's social network presence that is available to any nonlawyer, as long as the lawyer uses his true identity and does not engage in deception or dishonesty. The person contacted is free to accept, reject, or ignore the request, or to ask for additional information. If the unrepresented person asks the lawyer for additional information, the lawyer must accurately provide the information or withdraw the request.

Rule 4.3(b) provides that a lawyer, in dealing on behalf of a client with a person who is not represented by counsel, shall not "state or imply that the lawyer is disinterested." In addition, 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."

By simply requesting access, the lawyer does not violate Rule 4.3. A lawyer who requests access is not making any statement, nor is he implying disinterest. *See* Oregon State Bar, Formal Opinion No. 2013-189 (2016 Revision) ("A simple request to access nonpublic information does not imply that Lawyer is 'disinterested' in the pending legal matter."). The person contacted has full control over who views the information on her social network site. A grant of the lawyer's request, without additional inquiry, does not indicate a misunderstanding of the lawyer's role.

Inquiry #4:

May a lawyer, using his true identity, request access to the restricted portions of a represented person's social network presence?

Opinion #4:

No. 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 to do so by law or by court order. Rule 4.2(a). Rule 4.2 contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation. Rule 4.2, comment [1].

Unless the lawyer has obtained express consent from the represented person's lawyer, the request interferes with the attorney-client relationship and could lead to the uncounseled disclosure of information relating to the representation. Therefore, requesting access to the restricted portions of a represented person's social network presence is prohibited unless the lawyer obtains consent from the person's lawyer. Furthermore, the lawyer may not direct a third party to request access to restricted portions of a represented person's social network presence. *See* Rule 8.4(a).

Inquiry #5:

May a lawyer request or accept information from a third party with access to restricted portions of a person's social network presence?

Opinion #5:

Yes. Nothing in the Rules of Professional Conduct prevents a lawyer from engaging in lawful and ethical informal discovery such as communicating with third party witnesses to collect information and evidence to benefit a client. Witnesses who have obtained information from the restricted portions of a person's (represented or unrepresented) social network presence are no different in this regard than any other witness with information relevant to a client's matter. Therefore, when a lawyer is informed that a third party has access to restricted portions of a person's social network presence and can provide helpful information to the lawyer's client, the lawyer is not prohibited from requesting such information from the third party or accepting information volunteered by the third party. Similarly, a lawyer may accept information from a client who has access to the opposing party's or a witness's restricted social network presence.

However, the lawyer may not direct or encourage a third party or a client to use deception or misrepresentation when communicating with a person on a social network site. *See* Opinion #2.

2018 Formal Ethics Opinion 6

July 27, 2018

Shifting Cost of Litigation Cost Protection Insurance to Client

Opinion rules that, with certain conditions, a lawyer may include in a client's fee agreement a provision allowing the lawyer's purchase of litigation cost protection insurance and requiring reimbursement of the insurance premium from the client's funds in the event of a settlement or favorable trial verdict.

Inquiry:

Lawyer would like to purchase "litigation cost protection" insurance for matters he handles on a contingency fee basis. The insurance is purchased by a lawyer on a case-by-case basis for a one-time premium payment. The insurance is available for purchase up until 90 days after the initial complaint has been served upon the defendant(s). The insurance reimburses a lawyer for litigation costs advanced by the lawyer only in the event of a trial loss.

Inquiry #1:

Do the Rules of Professional Conduct prohibit a lawyer from purchasing litigation cost protection insurance for his contingency fee cases?

Opinion #1:

No. A lawyer has a duty to avoid conflicts of interest with his client. According to Rule 1.7(a), a lawyer has a conflict of interest if the representation of a client will be materially limited by a personal interest of the lawyer. The purpose of the insurance policy is to protect the lawyer's investment in the costs and expenses of litigation. However, the insurance reimburses the lawyer only in the event of a trial loss. The lawyer and the client may have different cost-benefit calculations. Therefore, the terms of the policy incentivize going to trial in certain scenarios, which raises the possibility of a conflict of interests between the lawyer and the client.

However, there are inherent conflicts of interests present in every case taken on a contingency basis. A lawyer may prefer that his client accept a low settlement offer to ensure that the lawyer receives his fee, while the client wants to reject a settlement offer and take his chances at trial. In either event, the client has the ultimate authority regarding settlement of the client's matter. Rule 1.2(a)(1). The presence or absence of a litigation cost protection insurance policy does not alter this dynamic of the client-lawyer relationship.

Lawyer may purchase litigation cost protection insurance so long as Lawyer does not allow the terms of the coverage to adversely affect Lawyer's independent professional judgment, the client-lawyer relationship (including the client's ultimate authority as to settlement), or the client's continuing best interests.

Inquiry #2:

If Lawyer recovers funds for the client through a settlement or favorable trial verdict, Lawyer proposes to be reimbursed for the insurance premium from the judgment or settlement funds. Lawyer intends to disclose the cost of the insurance to the client as part of the representation agreement.

May Lawyer include in a client's fee agreement a provision allowing Lawyer's purchase of litigation cost protection insurance and requiring reimbursement of the insurance premium from the client's funds in the event of a settlement or favorable trial verdict?

Opinion #2:

Yes. A provision in a fee agreement requiring client reimbursement of a par-

ticular expense implicates a lawyer's professional duties under Rule 1.5. Rule 1.5(a) provides that a lawyer shall not charge an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. Rule 1.5(b) requires a lawyer who has not regularly represented a client to communicate to the client the basis of the fee and expenses for which the client will be responsible. Specifically as to contingency fees, Rule 1.5(c) provides:

> A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal; *litigation and other expenses to be deducted from the recovery*; and whether such expenses are to be deducted before or after the contingent fee is calculated [emphasis added]. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party....

The premium for the insurance is an "other expense" that Lawyer intends to deduct from any recovery. Therefore, the amount of the insurance premium must not be clearly excessive, and the circumstances under which the client is responsible for reimbursement of the premium must be clearly communicated to the client and clearly set out in the written fee agreement. Lawyer must describe with specificity what the insurance is and why Lawyer believes a litigation cost protection policy will serve the client's best interests. Lawyer must also inform the client that other lawyers may choose not to purchase or to charge the client for the cost of a litigation cost protection policy. Finally, Lawyer must provide the client with the opportunity to review the insurance policy.

The Florida Bar determined that litigation cost protection insurance is "part of a business agreement, albeit with a third party rather than with the client, creating circumstances resembling the conflicts of interest that can arise, and be cured, pursuant to [Rule 1.8(a)]." Florida Bar Staff Opinion 37289 (Revised 2018). Florida's version of Modal Rule 1.8(a) (which is substantially the same as NC Rule 1.8(a)) provides that a lawyer may enter into a business transaction with a client or acquire a pecuniary interest directly adverse to a client if: (1) the transaction and terms are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction.

The Florida Bar concluded that in each instance in which a lawyer wishes to purchase litigation cost protection insurance and shift the cost to the client, the lawyer must consider the ethics concerns set out in Rule 1.8(a). Florida Bar Staff Opinion 37289 (Revised 2018). The Florida Bar also concluded that, prior to seeking the client's informed consent, the lawyer must make "an objectively reasonable determination" that purchasing the insurance benefits the client prior to seeking the client's informed consent. *Id.*

Similarly, a North Carolina lawyer must satisfy these professional responsibilities, in addition to those implicated by Rule 1.5, when the lawyer intends to be reimbursed for the insurance premium from the judgment or settlement proceeds. The lawyer may include in a client's fee agreement a provision allowing the lawyer's purchase of litigation cost protection insurance and requiring reimbursement of the insurance premium from the client's funds in the event of a settlement or favorable trial verdict upon satisfying the following conditions:

(1) the amount to be charged to the client is not clearly excessive under the guidelines set out in Rule 1.5;

(2) the circumstances under which the client is responsible for reimbursement of the insurance premium are clearly communicated to the client and clearly set out in the written fee agreement;

(3) the lawyer fully explains to the client what litigation cost protection insurance is, why the lawyer believes a litigation cost protection policy will serve the client's best interests, and that other lawyers may advance the client's costs without charging the client the cost of a litigation cost protection policy;

(4) the lawyer provides the client with the opportunity to review the litigation cost protection policy;

(5) the transaction and terms are fair and reasonable to the client pursuant to the guidelines set out in Rule 1.8(a);

(6) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel regarding the arrangement;

(7) the lawyer obtains the client's informed consent in writing at the beginning of the representation; prior to seeking the required informed consent, the lawyer has to make an objectively reasonable determination that purchasing the insurance benefits the client; and

(8) the lawyer does not allow the terms or availability of coverage under the insurance policy to adversely affect the lawyer's independent professional judgment, the client-lawyer relationship (including the client's ultimate authority as to settlement), or the client's continuing best interests.

2018 Formal Ethics Opinion 7

October 26, 2018

Online Review Solicitation Service July 26, 2018

Opinion rules that, subject to certain conditions, a lawyer may participate in an online service for soliciting client reviews that collects and posts positive reviews to increase the lawyer's ranking on internet search engines.

Repsight.com is an online service that offers to help lawyers accumulate more positive client reviews. Repsight contends that positive client reviews give law firms added credibility with potential customers and help increase search rankings in Google searches. For a monthly fee, Repsight will contact a client via text or email to solicit a review from the client. The number of contacts made by Repsight is based on the amount of the monthly fee.

After completing legal services for a client, the lawyer will log in to Repsight.com and enter the client's email address or phone number and presses the "send" button. Repsight then sends the client a text or an email thanking the client for the client's business and asks the client to click a button to rate the lawyer's services. The client then chooses between 1 and 5 stars, with 5 stars being the highest rating. If the client rates the lawyer 3 stars or less, Repsight redirects the client to a private feedback form. The lawyer will receive the client's comments, but the comments will not be posted on the lawyer's Google review page. If the client gives the lawyer a 4- or 5-star review, the client is redirected to the lawyer's Google review page (with 5 stars already populated) so that the client can leave the lawyer a positive review.

Inquiry #1:

May a lawyer participate in the Repsight service?

Opinion #1:

Yes, if certain conditions are met.

A client's name and contact information are confidential and may not be revealed unless the client gives informed consent. Rule 1.6(a). Before the lawyer may provide a client's contact information to Repsight, the lawyer must obtain the client's informed consent. "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate to the circumstances. Rule 1.0(f).

To obtain the client's informed consent and to avoid misrepresentation, the lawyer must explain to the client that the lawyer uses Repsight. The lawyer is also obligated to disclose Repsight's process, to wit: the lawyer pays a monthly fee for Repsight services; the lawyer will provide the client's name and contact information to Repsight after the representation has concluded; Repsight will contact the client regarding the review; only 4- and 5-star reviews will be posted on Google and other internet search engines; and 3 stars or less reviews will be shared with the lawyer, but will not be posted by Repsight or the lawyer anywhere on the internet. *See* Rule 1.4; Rule 8.4(c).

Inquiry #2:

If a lawyer obtains the client's informed consent to provide the client's contact information to Repsight, must the lawyer post or direct Repsight to post all reviews, including reviews of 3 stars or less?

Opinion #2:

No, provided the lawyer does not deceive the client about the treatment of negative reviews and adequately explains that reviews of 3 stars or less will not

be posted on the internet. *See* Rule 8.4(c).

Inquiry #3:

When a client gives a lawyer a negative review, the lawyer may contact the client to address the client's concerns. If after the communication the client agrees to change the negative review and provide a 4- or 5-star review, may the lawyer direct Repsight to contact the client to obtain and post the revised review?

Opinion #3:

Yes, subject to certain conditions. There can be no quid pro quo for the revised review. *See* Rule 7.2(b). Also, the lawyer may not solicit, encourage, or assist in the posting of fake, false, or misleading reviews. *See* Rule 8.4(c). Finally, the lawyer may not threaten, bully, or harass the client to provide a positive 4- or 5-star review. *See* Rule 8.4, cmt. [5]. *See generally* 2018 FEO 1.

2018 Formal Ethics Opinion 8

October 25, 2019

Advertising Inclusion in Self-Laudatory List or Organization

Opinion rules that a lawyer may advertise the lawyer's inclusion in a list or membership in an organization that bestows a laudatory designation on the lawyer subject to certain conditions.

Editor's Note: 2007 FEO 14, Advertising Inclusion in List in North Carolina Super Lawyers and Other Similar Publications, was withdrawn by the State Bar Council on October 25, 2019 upon adoption by the Council of the opinion below.

Inquiry:

Numerous companies and organizations provide lawyers with the opportunity to be included in a list or to become members of a group that describes itself with self-laudatory terms and/or bestows self-provided accolades to its members. Examples of such lists or groups are those that describe their included lawyers as "best," "super," and "distinction." Lawyers then advertise their inclusion in these groups or lists to consumers.

Do the Rules of Professional Conduct permit a lawyer to advertise their inclusion in such self-laudatory groups or lists?

Opinion:

Yes, subject to certain conditions.

Rule 7.1(a) prohibits a lawyer from making false or misleading communications about himself or his services. The rule defines a false or misleading communication as a communication that contains a material misrepresentation of fact or law, or omits a necessary fact; one that is likely to create an unjustified expectation about results the lawyer can achieve; or one that compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Rule 7.1 derives from a long line of Supreme Court cases holding that lawyer advertising is commercial speech that is protected by the First Amendment and subject to limited state regulation. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Supreme Court first declared that First Amendment protection extends to lawyer advertising as a form of commercial speech. The Court held that a state may not constitutionally prohibit a lawyer's advertisement for fees for routine legal services although it may prohibit commercial expression that is false, deceptive, or misleading and may impose reasonable restrictions as to time, place, and manner. Id. at 383-84. Subsequent Supreme Court opinions clarified that the commercial speech doctrine set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission of N.Y.,* 447 U.S. 557 (1980), is applicable to lawyer advertising. See In re R.M.J., 455 U.S. 191 (1982). Specifically, a state may absolutely prohibit inherently misleading speech or speech that has been proven to be misleading; however, other restrictions are appropriate only where they serve a substantial state interest, directly advance that interest, and are no more restrictive than reasonably necessary to serve that interest. *Id.* at 200-04.

Thirteen years after *Bates*, in P*eel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), a plurality of the Supreme Court concluded that a lawyer has a constitutional right, under the standards applicable to commercial speech, to advertise his certification as a trial specialist by the National Board of Trial Advocacy (NBTA). The Court found NBTA to be a "bona fide organization," with "objectively clear" standards, which had made inquiry into Peel's fitness for certification and which had not "issued certificates indiscriminately for a price." *Id.* at 102, 110. If a state is concerned that a lawyer's claim to certification may be a sham, the state can require the lawyer "to demonstrate that such certification is available to all lawyers who meet objective and consistently applied standards relevant to practice in a particular area of the law." *Id.* at 109. In concluding that the NBTA certification advertised by Peel in his letterhead was neither actually nor potentially misleading, the Court emphasized "the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decision-making than is concealment of such information." *Id.* at 108.

Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy, 512 U.S. 136 (1994), similarly held that a state may not prohibit a CPA from advertising her credential as a "Certified Financial Planner" (CFP) where that designation was obtained from a private organization. As in Peel, the Court found that a state may not ban statements that are not actually or inherently misleading such as a statement of certification, including the CFP designation, by a "bona fide organization." *Id.* at 145. The Court dismissed concerns that a consumer will be mislead because he or she cannot verify the accuracy or value of the designation by observing that a consumer may call the CFP Board of Standards to obtain this information. *Id.*

The question here is whether advertising one's membership in a group or inclusion on a list of lawyers that implies that the lawyer is, for example, "best" or "super" or "distinguished" is misleading because the term creates the unjustified expectation that the lawyer can achieve results that an ordinary lawyer cannot or compares the lawyer's services with the services of other lawyers without factual substantiation. When a potential consumer of legal services sees the words "*super*" or "distinguished" associated with a lawyer by way of a bestowed award or accolade purporting to pertain to legal services, the consumer may view these awards or accolades as evidence of a lawyer's competence and achievement. Therefore, to avoid misleading consumers, a lawyer may advertise such accolades or inclusion in self-laudatory groups or lists only when certain conditions are met.

First, no compensation may be paid by the lawyer, or the lawyer's firm, for the award or accolade being bestowed upon the lawyer or for inclusion in the group or listing. Although a lawyer may pay the reasonable costs of advertisements as a result of inclusion, see Rule 7.2(b) and 2018 FEO 1, marketing or advertising fees that must be paid prior to the lawyer's inclusion in the group or listing or the lawyer's receipt of the accolade or award effectively become compensation required from the lawyer for inclusion or for the accolade. As such, the accolade, award, or inclusion is misleading in violation of Rule 7.1(a) because it is bestowed, at least in part, because of a lawyer's willingness and ability to pay, and not for reasons that are objective, verifiable, and bona fide. After the award, accolade, or inclusion has been granted, a lawyer may pay the reasonable costs of advertisements concerning the inclusion. However, marketing or advertising fees charged by the self-laudatory group that serve as a barrier to the lawyer's inclusion in the group or receipt of an accolade are not permissible.

Second, before advertising the inclusion or any award associated with inclusion, the lawyer must ascertain that the organization conferring the award is a bona fide organization that made adequate and individualized inquiry into the lawyer's qualifications for the inclusion or award. The selection methodology must be based upon objective, verifiable, and consistently applied factors relating to a lawyer's qualifications (including but not limited to a lawyer's years of practice, types of experience, peer review, professional discipline record, publications and/or presentations, and client and other third-party testimonials) that would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience, or expertise indicated by the designated membership.

Third, any advertisement by the lawyer of his inclusion in a self-laudatory group or list must also contain an explanation of the standards for inclusion or provide the consumer with information on how to obtain the inclusion standards. *See Bates,* 433 U.S. at 375. The explanation of the standards for inclusion – wherever located – must be such that a potential consumer of legal services can reasonably determine how much value to place in the lawyer's inclusion in such group or list. Additionally, the advertisement must state only that

the lawyer was included in the list, and not suggest that the lawyer has the attribute(s) conferred by the group or list. This requirement applies equally to groups or lists that contain a superlative in the name of the group or list itself, such as "super" or "best," and groups or lists that do not contain superlatives in the name of the group or list but bestow such superlatives on its included lawyers through the group's or list's marketing materials (including its online presence). When the group or list inclusion may create unjustified expectations, such as the expectation that a lawyer obtains a high-dollar verdict in every case, the advertisement must also include a disclaimer providing notice that similar results are not guaranteed, and that each case is different and must be evaluated separately *See* 99 FEO 7, 2000 FEO 1, and 2003 FEO 3. Lastly, the advertisement must indicate the year(s) in which the lawyer received the award or was a member of the organization.

A lawyer must determine whether a particular group or list satisfies each of these requirements before advertising their inclusion in the group or list, and a lawyer has a continuing obligation to ensure the group or list remains compliant with the requirements of this opinion upon each renewal. If all requirements are met, the lawyer may advertise his inclusion in the group or list.

2019 Formal Ethics Opinion 1

April 26, 2019

Lawyer as an Intermediary

Opinion rules that a lawyer may not jointly represent clients and prepare a separation agreement.

Inquiry:

Lawyer represents clients in domestic relations matters. Lawyer has been contacted by a married couple wishing to separate and then later obtain a divorce. No litigation has been initiated. The married couple agree on the terms of separation. The couple does not have sufficient funds to pay two lawyers and wants Lawyer to prepare the separation agreement for both parties. May Lawyer prepare a separation agreement for both parties?

Opinion:

No. Rule 1.7 provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client, or the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client. Rule 1.7(a).

Rule 1.7(b) recognizes that a conflict can be resolved by client consent. However, some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. Rule 1.7, cmt. [14]. The commentary to Rule 1.7 further provides,

> Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

Rule 1.7, cmt. [15].

In 2013 FEO 14, the Ethics Committee determined that, in most instances, common representation in a commercial loan closing is nonconsentable. Common representation was found to be inappropriate because of the "numerous opportunities for a lawyer to negotiate on behalf of the parties" and "numerous opportunities for an actual conflict to arise between the borrower and the lender." 2013 FEO 14.

These same issues and concerns are present in the case of a separation agreement. Although the parties may believe they have agreed on the terms of separation, there are potentially numerous opportunities for Lawyer to negotiate on behalf of the parties regarding, *inter alia*, custody, property division, and family support. In the event an actual conflict arises, the prejudice to the parties would be substantial.

Lawyer has a professional duty to provide competent and diligent representation to each client and ensure that the legal interests of each client are protected. Rules 1.1 and 1.3. When the clients are legally adverse to each other in the same matter and there are numerous opportunities for Lawyer to negotiate on behalf of the parties, impartiality is rarely possible. *See* 2013 FEO 14. Lawyer, therefore, cannot adequately advise one client without compromising the interest of the other client. Because Lawyer cannot adequately represent the interests of each client, Lawyer has a nonconsentable conflict and cannot prepare the separation agreement for both parties.

2019 Formal Ethics Opinion 2

April 26, 2019

Conditions Imposed on Lawyer by Client's ERISA Plan

Opinion rules that a lawyer may not agree to terms in an ERISA plan agreement that usurp client's authority as to the representation.

Lawyer represents an injured worker in a denied workers' compensation claim. Client participated in a self-funded health benefits plan (Plan) though his workplace. The Plan was established under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.A. § 1001 *et seq.* As a precondition to issuing payments for Client's medical expenses, the Plan requested that Client and Lawyer sign an Agreement that includes the provisions described below.

The Agreement between the Plan and Lawyer's client (referred to as "the promisor") sets out that the promisor was injured on the job; that the promisor is currently proceeding or promises to initiate a claim against his employer; that the promisor's claim is disputed; and that the promisor is in need of benefits under the Plan.

The Agreement states that, as a condition of receiving Plan benefits, the promisor agrees to fully prosecute his pending claim and agrees not to abandon or settle his claim without the written approval of the Plan. The Agreement states that the promises made in the Agreement are binding upon the promisor and the promisor's attorney and requires the signature of the promisor's attorney.

Inquiry:

Do the Rules of Professional Conduct permit Lawyer to agree not to abandon or settle the Client's claim without the approval of the Plan?

Opinion:

No. Lawyer may not agree to any terms in the Agreement that contradict Lawyer's professional responsibility to abide by Client's directives regarding the representation as set out in Rule 1.2.

The Agreement requires Client and his counsel to fully prosecute the pending workers' compensation claim and to obtain written approval from the Plan before abandoning or settling the claim. As to Lawyer, these requirements conflict with Lawyer's professional responsibilities to Client as set out in Rule 1.2. Pursuant to Rule 1.2, Lawyer has an ethical obligation to "abide by a client's decisions concerning the objectives of representation" and "abide by a client's decision whether to settle a matter." If Client signs the Agreement and subsequently decides to abandon or settle the matter without the Plan's approval, Lawyer has a professional obligation to follow Client's directives. Lawyer may not agree to the conditions in the Agreement that usurp Client's authority as to the objectives of the representation.

2019 Formal Ethics Opinion 3

April 26, 2019

Engaging in Intimae Relationship with Opposing Counsel

Opinion rules that an ongoing sexual relationship between opposing counsel creates a conflict of interest in violation of Rule 1.7(a).

Introduction:

The Rules of Professional Conduct apply to all lawyers in their various representative capacities. Accordingly, although this opinion is based upon a scenario involving representation in a criminal matter, the conduct at issue may threaten the integrity of both the criminal and civil justice systems, and therefore the analysis contained herein is applicable to lawyers in both criminal and civil matters.

Lawyer A is an assistant district attorney in District Q. Lawyer B represents criminal defendants in District Q. Lawyer A and Lawyer B engage in a sexual relationship over a one- to three-month period. During the relationship,

Lawyer A prosecutes several cases in which Lawyer B represents the defendants. Lawyer A and Lawyer B do not inform their respective clients or superiors about the relationship.

Inquiry #1:

Does Lawyer A's and Lawyer B's conduct violate the Rules of Professional Conduct?

Opinion #1:

Yes. Rule 1.7(a) states that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." The Rule goes on to say that a concurrent conflict of interest exists "if the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer." Rule 1.7(a)(2). Rule 1.7 addresses situations where there is both an actual material limitation and a potential material limitation. *See id.* ("...*may* be materially limited...") (emphasis added). Comment 8 to Rule 1.7 states that "[t]he mere possibility of subsequent harm does not itself preclude the representation or require disclosure and consent." Instead, the critical questions to consider in determining whether a material limitation exists as a result of a personal interest during a representation are "[1] the likelihood that a difference in interests will eventuate and, if it does, [2] 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." Rule 1.7, cmt. [8]. Accordingly, determining whether a materially limiting personal interest exists depends on an examination of the surrounding circumstances of the situation at issue. If a materially limiting personal interest exists, representation may only continue if the lawyer satisfies the terms of Rule 1.7(b), including that the lawyer reasonably believes that s/he will be able to provide competent and diligent representation to the affected client, and the lawyer discloses the conflicting interest to his/her client and obtain the client's written, informed consent to continue in the representation. See also Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

We have previously opined that spouses cannot participate in a matter as opposing counsel unless their relationship is disclosed to the affected clients and the clients provide written, informed consent to continue in the representation. *See* RPC 11. Other jurisdictions have similarly determined spousal relationships between opposing counsel constitute a conflict of interest. *See generally* Mich. Formal Op. R-3 (1989) ("A lawyer whose spouse represents the opposing party in a case may not continue to handle the case unless the parties are informed of the relationship between the lawyers and consent to continued representation."). At least one jurisdiction (New York) found that dating relationships between opposing counsel can constitute a conflict of interest because "[a] dating relationship between adversaries is inconsistent with the independence of professional judgment[.]" N.Y. State Bar Ass'n Op. 660 (1993). ("Whatever hereafter may be said of friendships in varying degrees, we believe that a frequent dating relationship is clearly over the line that separates ethically cognizable conflicting interests from those which are not.") That same opinion found that criminal cases required heightened scrutiny in evaluating potential conflicts of interest resulting from personal relationships to preserve the integrity of the criminal justice system. *Id.* ("Irrespective of the subjective intent of the prosecutor and defense counsel, and regardless of howsoever scrupulous they may be in the conduct of their professional obligations, the appearance of partiality in the administration of justice is so strong that a couple who date frequently should not be permitted to appear opposite one another in criminal cases.")

In *Commonwealth v. Croken*, the Supreme Court of Massachusetts vacated a trial court's denial of the defendant's motion for a new trial based in part on the question of whether the defendant's counsel engaged in a conflict of interest by participating in an intimate relationship with a member of the prosecuting office during the representation. *Commonwealth v. Croken*, 432 Mass. 266, 277 (2000). In reaching its conclusion, the court held:

> A lawyer's personal interests surely include his interest in maintaining amicable relations with his relatives, his spouse, and anyone with whom he is comparably intimate. This interest is, of course, often significantly pecuniary in character, but it also has irreducible emotional and moral dimensions, and it heavily bears on how any ordinary human being goes about making important decisions. It follows that in a case where a lawyer's representation of a client may be significantly limited by his ties to his relatives and intimate companions, professional ethics are implicated just as they would in a case where the lawyer represents a second client with litigation interests potentially adverse to those of the first client....We do hold that, where a criminal defense lawyer represents a client and a close relative or an intimate companion is a colleague of the prosecutor who seeks to convict the client, the requirements of [Rule 1.7] must be met.

Id. at 273.

We find the reasoning expressed in the New York and Massachusetts opinions persuasive. The nature of a continuing, sexually intimate relationship between opposing counsel during an ongoing dispute creates a personal interest for the participating lawyers that materially limits the lawyers' respective abilities to exercise independent judgment, preserve confidences, and otherwise render unencumbered representation. Such a relationship could also detrimentally impact the profession and the administration of justice, as the relationship could serve as grounds for post-conviction or post-judgment relief, as well as contribute to the negative image of lawyers. As noted in comment 1 to Rule 1.7, "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." A client should be informed of the possibility that his or her lawyer may be professionally or emotionally compromised due to the lawyer's ongoing sexual relationship with the opposing lawyer.

This opinion does not undertake the task of determining the point at which a personal relationship with opposing counsel triggers the protection afforded to clients under Rule 1.7(a)(2). However, under the circumstances presented in this inquiry, a lawyer's representation of a client is materially limited by the lawyer's personal interest in an ongoing sexual relationship with opposing counsel, and that conflict of interest requires the participating lawyers to satisfy the conditions of Rule 1.7(b) in order to continue the representation, including disclosing the relationship to their clients and obtaining their clients' written, informed consent. The personal interest conflict is not imputed to members of the lawyer's firm or office under Rule 1.10 so long as the conflict "does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." Rule 1.10(a).

Inquiry #2:

Assume Lawyer B notifies his client(s) and the provisions of Rule 1.7(b) were met. Does Lawyer A have an obligation to obtain such consent? If so, from whom?

Opinion #2:

Yes. Lawyer A also has a conflict and must satisfy the requirements of Rule 1.7(b) to continue in the representation. *See* Opinion #1. Elected district attorneys are entitled to enact their own internal office policies in accordance with the law of this state. The identification of the person or governmental body to whom the assistant district attorney's report should be made is a legal and policy question that is beyond the purview of this committee.

Inquiry #3:

Would the answer to Inquiry #1 change if the relationship was a more long-standing, emotionally involved relationship?

Opinion #3:

No. The relationship described in this inquiry is more akin to a marital relationship and therefore must be disclosed to the client to continue with the representation, in addition to complying with the other requirements of Rule 1.7(b). *See* RPC 11; *see also* N.Y. State Bar Ass'n Op. 660 (1993). The added circumstance of a long-standing, emotionally involved relationship enlarges the personal interest conflict and creates a likelihood of material limitation in violation of Rule 1.7(a)(2).

2019 Formal Ethics Opinion 5

October 25, 2019

Receipt of Virtual Currency in Law Practice

Opinion rules that a lawyer may receive virtual currency as a flat fee for legal services, provided the fee is not clearly excessive and the terms of Rule 1.8(a) are satisfied. A lawyer may not, however, accept virtual currency as entrusted funds to be

billed against or to be held for the benefit of the lawyer, the client, or any third party.

Introduction:

Virtual currency[1] – most notably, Bitcoin – is increasingly used for conducting business and service-related transactions.[2] Although advocates for and users of virtual currency treat these assets as actual currency, the Internal Revenue Service in 2014 classified virtual currency as property, not recognized currency. *See* IRS Notice 2014-21, https://www.irs.gov/pub/irs-drop/n-14-21.pdf. Accordingly, for the purpose of determining a lawyer's professional responsibility in conducting transactions related to her law practice using virtual currency, this opinion adopts the IRS's position and views virtual currencies as property, rather than actual currency.

Inquiry #1:

Client wants to retain Lawyer for representation in a pending matter. Lawyer charges Client a flat fee for the representation. Client wants to pay Lawyer using virtual currency. May Lawyer accept virtual currency from Client as a flat fee in exchange for legal services?

Opinion #1:

Yes, provided the fee is not clearly excessive and the lawyer complies with the requirements in Rule 1.8(a).

A flat fee is a "fee paid at the beginning of a representation for specified legal services on a discrete legal task or isolated transaction to be completed within a reasonable amount of time[.]" 2008 FEO 10. With client consent, a flat fee is considered "earned immediately and paid to the lawyer or deposited in the firm operating account[.]" *Id.* Rule 1.5(a) prohibits a lawyer from making an agreement for, charging, or collecting an illegal or clearly excessive fee. Comment 4 to Rule 1.5 states that "a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client." Rule 1.8(a) prohibits a lawyer from entering into a business transaction with a client unless the following provisions are met:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Rule 1.8(a)(1) – (3).

As of the date of this opinion, the value of virtual currencies fluctuates significantly and unpredictably from day to day. Considering this extreme fluctuation, any transaction involving virtual currencies inherently involves a great deal of risk by the parties on the ultimate value of the services rendered. Without an express agreement between Lawyer and Client on when the valuation of the virtual currency is determined, Lawyer could receive an inappropriate windfall in the form of extreme overpayment for legal services. Accordingly, considering the nature of the property at issue in this exchange, Client's payment of virtual currency to Lawyer for legal services has "the essential qualities of a business transaction with the client." Rule 1.5, cmt. 4. As such, Lawyer must comply with the requirements of Rule 1.8(a) when conducting a transaction wherein legal services are exchanged for virtual currency. Therefore:

1. Lawyer must ensure the terms of the transaction are fair and reasonable to Client, and Lawyer must fully disclose the terms in writing to Client in a manner that can be reasonably understood by Client. To ensure a flat fee, which is earned upon receipt (see 2008 FEO 10), is not clearly excessive under Rule 1.5, and for the purposes of any potential required refunds following withdrawal or termination from the representation, Lawyer and Client must reach a mutually agreed upon determination of the value of the virtual currency exchanged at the time of the transaction. That valuation must be included as part of the written terms of the transaction;

2. Lawyer must advise Client in writing of the desirability of seeking independent legal counsel on the transaction, and Lawyer must give Client a reasonable opportunity to obtain that counsel; and

3. Lawyer must obtain Client's written, informed consent to the essential terms of the transaction as well as Lawyer's role in the transaction. Although Rule 1.8(a)(3) contemplates that Lawyer could represent Client in this transaction, Lawyer's potentially significant monetary interest in acquiring the virtual currency suggests that Lawyer may not represent Client in the transaction.

This opinion does not reach the legal issues surrounding an individual's receipt of and transacting in virtual currency. Before transacting in virtual currency, lawyers should apprise themselves of the legal ramifications surrounding the use of virtual currency, including potential tax and criminal implications. As with other forms of payment, lawyers should take the appropriate steps to ensure any virtual currency received is not the product of or otherwise connected to illegal activity.

Inquiry #2:

May Lawyer accept virtual currency from a third party on behalf of Client as a flat fee in exchange for legal services rendered?

Opinion #2:

Yes. Lawyer may receive compensation from a third party for the benefit of Client provided that a) Client provides informed consent to Lawyer regarding the third party's virtual currency payment, b) there is no interference with Lawyer's independence of professional judgment, or with the client-lawyer relationship, and c) information obtained by Lawyer during the client-lawyer relationship remains confidential and protected in accordance with Rule 1.6. See Rule 1.8(f). *See also* Answer #1.

Inquiry #3:

Client wants to retain Lawyer for representation in a pending matter. Lawyer plans to charge Client an hourly rate for the representation, and Lawyer wants Client to deposit a set amount of virtual currency with Lawyer to be billed against as work is completed by Lawyer. May Lawyer accept virtual currency from Client as an advance payment, against which Lawyer will bill Lawyer's hourly rate?

Opinion #3:

No. An advance payment is "a deposit by the client of money that will be billed against, usually on an hourly basis, as legal services are provided[.]" 2008 FEO 10. The advance payment is "not earned until legal services are rendered" and therefore must be deposited in the lawyer's trust account, with the unearned portion of the advance payment refunded to the client upon termination of the client-lawyer relationship. *Id.* Virtual currency is property and not actual currency; accordingly, virtual currency cannot be deposited in a lawyer trust account or fiduciary account in accordance with Rule 1.15-2. Instead, virtual currency – and all other non-currency property received as entrusted property – must 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." Rule 1.15-2(d).

Generally, virtual currency is received, held or maintained in, and distributed from an individual's computer (referred to as "cold storage") or in a digital "wallet" typically maintained by an individual through a digital asset exchange. Deidre A. Liedel, *The Taxation of Bitcoin: How the IRS Views Cryptocurrencies*, 66 Drake L. Rev. 107, 111-12 (2018). Holders of virtual currency access and exchange their virtual currency through the use of the holder's public and private keys associated with their virtual currency activity. *See generally* Lisa Miller, *Getting Paid in Bitcoin*, 41 Los Angeles Lawyer 18, 19-20 (December 2018); Carol Goforth, *The Lawyer's Cryptionary: A Resource for Talking to Clients about Crypto-transactions*, 41 Campbell L. Rev. 47, 112-13 (2019). Due to the decentralized nature of virtual currency, exchanges of virtual currency from one account to another cannot be reversed, and a virtual currency holder cannot recover a lost private key to access his or her virtual currency.

The methods in which virtual currency are held are not yet suitable places of safekeeping for the purpose of protecting entrusted client property under Rule 1.15-2(d). Rule 1.15-2(d)'s reference to "a safe deposit box or other suitable place of safekeeping" demonstrates that the "suitable place of safekeeping" referenced in the Rule is one that ensures confidentiality for the client and provides exclusive control for the lawyer charged with maintaining the property, as well as the ability of the client or lawyer to rely on institutional backing to

access the safeguarded property through appropriate verification should the lawyer's ability to access the property disappear (be it through the lawyer's misplacement of a physical key, or the lawyer's unavailability due to death or disability). The environment in which virtual currency presently exists, however, does not afford similar features that allow clients to confidently place entrusted virtual currency in the hands of their lawyers. A February 2019 report found that even knowledgeable users of virtual currency experienced a variety of complications and concerning issues in exchanging virtual currency that threatened the execution of and confidence in the exchange, including sending virtual currency to the wrong individual by inputting the wrong public key, losing their own private key (thereby rendering the user's virtual currency permanently inaccessible), or being subject to phishing attacks or other attempted hacks to illegally access their digital wallets. *See* Foundation for Interwallet Operability, *Blockchain Usability Report* (February 2019), https://fio.foundation/wp-content/themes/fio/dist/files/blockchain-usability-report-2019.pdf ("While the blockchain industry has grown dramatically over the last year, usability is clearly still an ongoing struggle and the use of blockchain in actual commerce and utility is still very limited. Blockchain transactions are, by definition, immutable. With immutable transactions, users must have extremely high confidence that transactions are occurring as intended, with the right counter party, for the right amount and for the right type of token. Today – blockchain is still far from achieving that high standard."). Any virtual currency received from a client by a lawyer – including lawyers who are experienced in handling and exchanging virtual currency – is subject to being permanently lost with no recourse available to secure the client's property as a result of a lawyer's private key becoming inaccessible, a lawyer's mistaken input of a public key destination for a transfer of virtual currency, or a sophisticated hack of the lawyer's virtual wallet.

This opinion does not preclude the possibility that, in time, digital wallets and other methods in which virtual currency may be held and exchanged could improve in terms of security and accessibility. Such improvements may warrant reconsideration of this opinion. This opinion also does not address the difficulty in reconciling the frequent and significant fluctuation in value of virtual currency while held by a lawyer during the representation, nor does the opinion address the need to segregate clients' virtual currency or the difficulty associated with investigating claims of lawyer misappropriation of a client's virtual currency. These concerns may present further barriers to a lawyer's ability under the Rules of Professional Conduct to handle virtual currency in an entrusted capacity. However, as of the date of this opinion, and with the primary interest of the State Bar being the protection of the public, the methods in which virtual currency are held and exchanged are not yet suitable places of safekeeping as required by Rule 1.15-2(d) for the proper safeguarding of virtual currency as entrusted client property. Accordingly, a lawyer may not receive, maintain, or disburse entrusted virtual currency.

Inquiry #4:

Client has retained Lawyer for a pending matter. Client and opposing party settle their dispute. As part of the settlement, Client agrees to provide opposing party with a set amount of virtual currency. Client and opposing party ask Lawyer to hold Client's virtual currency in trust for the benefit of opposing party via Lawyer's digital wallet until all settlement terms are satisfied, at which point Lawyer will transfer Client's virtual currency to opposing party. May Lawyer accept virtual currency as entrusted property to be held for the benefit of a third party?

Opinion #4:

No, a lawyer may not receive, maintain, or disburse entrusted virtual currency. *See* Answer #3.

Endnotes

1. This opinion uses the Internal Revenue Service's term "virtual currency" in referring to cryptocurrency and other financially-related digital assets.

2. In light of the abundance of information available on the topics of virtual currency and blockchain technology, this opinion will not recite a detailed overview of technological backgrounds or technical operations of these topics, but instead will presume a basic level of familiarity and understanding with the topic by the reader. For background information on these topics, consider the following resources:

   Nebraska Ethics Advisory Opinion No. 17-03 (2017);

   Deidre A. Liedel, *The Taxation of Bitcoin: How the IRS Views Cryptocurrencies,* 66 Drake L. Rev. 107, 111-12 (2018);

   Lisa Miller, *Getting Paid in Bitcoin*, 41 Los Angeles Lawyer 18, 19-20 (December 2018); and

   Carol Goforth, *The Lawyer's Cryptionary: A Resource for Talking to Clients about Crypto-transactions*, 41 Campbell L. Rev. 47, 112-13 (2019).

2019 Formal Ethics Opinion 6

October 25, 2019

Offering Incentive to Engage with Law Practice's Social Networking Sites

Opinion rules that, depending on the function of the social media platform, offering an incentive to engage with a law practice's social media account is misleading and constitutes an improper exchange for a recommendation of the law practice's services.

Inquiry:

Lawyer maintains an account for his law practice on various social media platforms. These platforms allow social media users to "connect" with other users, including both individuals and business-related entities, through the use of "likes," "follows," and "subscriptions". Some platforms also allow users to comment on posted content or share posted content on their own social networks.

To increase his social media exposure, Lawyer wants to offer a prize incentive to anyone who connects or interacts with any of his social media platforms. All users who connect or interact with Lawyer's law practice social media account will be entered into a drawing for a prize. The giveaway is open to all users of the social media platform used by Lawyer.

May Lawyer offer an incentive to all social media users to connect or interact with Lawyer's law practice social media account?

Opinion:

No. If a social media platform will broadcast or display a user's connection or interaction with Lawyer's law practice social media account to other users of the platform, Lawyer may not offer prize chances in exchange for activity on or with his social media accounts.

Generally, lawyers may not give anything of value to a person for recommending the lawyer's services. Rule 7.2(b). Certain social media platforms, such as Facebook, allow users to connect with or otherwise follow a business or service entity's social media account by "liking" the entity on the social media platform. Similarly, users may also comment on or share social media posts made by the business or service entity's account. The user's decision to "like" or follow the entity and the user's comments on the entity's posts are then displayed not only within the user's social media feed, but can also be displayed on the feeds of other users who have previously connected with that user. Also, when an individual "likes" a business' social media page, that business' posts/advertisements may appear in the individual's social media feed and may appear in the news feeds of the individual's other "friends" or connections with a caption such as "Jane Smith likes No Name law firm."

Without further context, other users could interpret an individual "liking" a law practice as a personal endorsement and recommendation of that law practice. If the social media platform broadcasts the user's "like" of the law practice on other users' social media feeds, Lawyer's offer of an entry in a giveaway for a prize to social media users in exchange for the user "liking" the law practice's social media account violates Rule 7.2(b).

Additionally, a lawyer may not make a false or misleading communication about the lawyer or the lawyer's services. Rule 7.1(a). A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. *Id.* The purpose behind Rule 7.2(b)'s prohibition on offering something of value in exchange for recommending services is to ensure that recommendations for a lawyer's services are based upon actual experiences or legitimate opinions of the lawyer's service, rather than financial incentive. The displayed "like" of a law practice may indicate some prior experience with the law practice or the personnel associated with the practice upon which the user's "liking" of the practice is based. Similarly, the credibility attributed to a particular social media account could be influenced by the number of account followers or subscribers. When the "like" or follow of a law practice's social media

account is based upon the user's interest in a prize giveaway, the incentivized "like," follow, or other interaction received by Lawyer and displayed on social media is misleading in violation of Rule 7.1(a).

This opinion does not prohibit a lawyer or law firm from having a social media presence, or encouraging or inviting other users to like, share, follow, or otherwise interact with the lawyer's or law firm's social media account. Non-incentivized social media interactions are not prohibited.

2019 Formal Ethics Opinion 7

January 24, 2020

Attorney Eyes Only Disclosure Restriction

Opinion rules that a lawyer may agree to an "attorney eyes only" disclosure restriction.

Inquiry:

Lawyer represents Client in a wrongful discharge action and seeks production of discovery related to other employees (including employee personnel files). Due to the sensitivity of the information, opposing counsel agrees to produce the requested material only if Lawyer agrees to a "Stipulated Protective Order" containing an "Attorney Eyes Only" provision, which provides that opposing counsel may designate certain sensitive or highly confidential information as "Attorney Eyes Only," and discovery materials designated as "Attorney Eyes Only" may not be disclosed to Client.

Lawyer reasonably believes that the requested material is necessary for Lawyer to effectively advise and represent Client. Lawyer is concerned that refusal to accept the "Attorney Eyes Only" restriction will cause opposing counsel to object to the discovery request and/or move for a protective order, resulting in delayed production, entry of a protective order for the requested material, or an order denying Lawyer's request for the material.

May Lawyer agree to the Stipulated Protective Order containing the "Attorney Eyes Only" provision?

Opinion:

Yes. Rule 1.2(a)(3) allows a lawyer to "exercise his or her professional judgment to waive or fail to assert a right or position of the client." Accordingly, a lawyer may agree to receive information under certain restrictions such as an "attorney eyes only" condition if the lawyer determines that doing so is in the client's best interest and is in accordance with applicable law. In evaluating an "attorney eyes only" disclosure restriction, the lawyer should consider whether such a restriction is appropriate in the client's specific matter. If the lawyer concludes that such a restriction is reasonably necessary to obtain relevant materials to effectively represent his or her client, the lawyer can receive the information pursuant to the restrictive conditions, but the lawyer should consider negotiating for the least restrictive disclosure requirement. Nevertheless, the lawyer may rely on his or her professional judgment to receive the information pursuant to an "attorney eyes only" or other limiting agreement. Rule 1.2(a)(3).

A lawyer, however, should proceed with caution when evaluating an "attorney eyes only" agreement. The use of an "attorney eyes only" disclosure restriction may create a conflict of interest for the lawyer under Rule 1.7(a)(2) in that the lawyer's representation of the client may be materially limited by the lawyer's responsibilities to opposing counsel via the disclosure restriction. This is particularly true in a criminal case, where a lawyer's duties under such an agreement could conflict with the client's statutory or constitutional rights to receive certain information. In addition, the lawyer must promptly inform his or her client of the discovery agreement. *See* Rule 1.4. If the lawyer and client cannot agree about the means to be used to accomplish the client's objectives, and the lawyer cannot reach a mutually acceptable resolution with the client, the lawyer may need to withdraw from the representation. Rule 1.2, cmt. [2].

Authorized Practice Advisory Opinions

Authorized Practice Advisory Opinion 2002-1

October 18, 2002

Revised January 26, 2012

On the Role of Laypersons in the Consummation of Residential Real Estate Transactions

The North Carolina State Bar has been requested to interpret the North Carolina unauthorized practice of law statutes (N.C. Gen. Stat. §§84-2.1 to 84-5) as they apply to residential real estate transactions. The State Bar issues the following authorized practice of law advisory opinion pursuant to N.C. Gen. Stat. §84-37(f) after careful consideration and investigation. This opinion supersedes any prior opinions and decisions of any standing committee of the State Bar interpreting the unauthorized practice of law statutes to the extent those opinions and decisions are inconsistent with the conclusions expressed herein.As a result of its review of the activities of more than 50 nonlawyer service providers since the adoption of this opinion on January 24, 2003, including injunctions issued against two companies, the Committee is clarifying the opinion concerning issues that it has addressed since adoption of the opinion.

Issue 1:

May a nonlawyer handle a residential real estate closing for one or more of the parties to the transaction?

Opinion 1:

No. Residential real estate transactions typically involve several phases, including the following: reviewing the purchase agreement for any conditions that must be met before closing; abstracting titles; providing an opinion on title; applying for title insurance policies, including title insurance policies that may require tailored coverage to protect the interests of the lender, the owner, or both[1]; preparing legal documents, such as deeds (in the case of a purchase transaction), deeds of trust, and lien waivers or affidavits; interpreting and explaining documents implicating parties' legal rights, obligations, and options; resolving possible clouds on title and issues concerning the legal rights of parties to the transaction; overseeing execution and acknowledgement of documents in compliance with legal mandates; handling the recordation and cancellation of documents in accordance with North Carolina law; disbursing proceeds when legally permitted after legally-recognized funds are available and all closing conditions have been satisfied; and providing a post-closing final opinion of title for title insurance after all prior liens have been satisfied. These and other functions are sometimes called, collectively, the "closing" of the residential real estate transaction. As detailed below, the North Carolina General Assembly has determined specifically that only persons who are licensed to practice law in this state may handle most of these functions.[2]

A person who is not licensed to practice law in North Carolina and is not working under the direct supervision of an active member of the State Bar may not perform functions or services that constitute the practice of law.[3] Under the express language of N.C. Gen. Stat. §§84-2.1 and 84-4, a non-lawyer who is not working under the direct supervision of an active member of the State Bar would be engaged in the unauthorized practice of law if he or she performs any of the following functions for one or more of the parties to a residential real estate transaction: (i) preparing or aiding in preparation of deeds, deeds of trust, lien waivers or affidavits, or other legal documents; (ii) abstracting or passing upon titles; or (iii) advising or giving an opinion upon the legal rights or obligations of any person, firm, or corporation.Under the express language of N.C. Gen. Stat. § 84-4, it is unlawful for any person other than an active member of the State Bar to hold himself or herself out as competent or qualified to give legal advice or counsel or as furnishing any services that constitute the practice of law.Additionally, under N.C. Gen. Stat. § 84-5, a business entity, including a corporation or limited liability company, may not provide or offer to provide legal services or the services of attorneys to its customers even if the services are performed by licensed attorneys employed by the entity. *See*, *Duke Power Co. v. Daniels*, 86 N.C. App. 469, 358 S.E.2d 87 (1987); *Gardner v. North Carolina State Bar*, 316 N.C. 285, 341 S.E.2d 517 (1986), and *State ex rel. Seawell v. Carolina Motor Club, Inc.*, 209 N.C. 624, 184 S.E. 540 (1936).

Accordingly, a nonlawyer is engaged in the unauthorized practice of law if he or she performs any of the following functions in connection with a residential real estate closing (identified only as examples):

1. Abstracts or provides an opinion on title to real property;

2. Explains the legal status of title to real estate, the legal effect of anything found in the chain of title, or the legal effect of an item reported as an exception in a title insurance commitment except as necessary to underwrite a policy of insurance and except that a licensed title insurer, agency, or agent may explain an underwriting decision to an insured or prospective insured, including providing the reason for such decision;

3. Explains or gives advice or counsel about the rights or responsibilities of parties concerning matters disclosed by a land survey under circumstances that require the exercise of legal judgment or that have implications with respect to a party's legal rights or obligations;

4. Provides a legal opinion, advice, or counsel in response to inquiries by any of the parties regarding legal rights or obligations of any person, firm, or corporation, including but not limited to the rights and obligations created by the purchase agreement, a promissory note, the effect of a pre-payment penalty, the rights of parties under a right of rescission, and the rights of a lender under a deed of trust;

5. Advises, counsels, or instructs a party to the transaction with respect to alternative ways for taking title to the property or the legal consequences of taking title in a particular manner;

6. Drafts a legal document for a party to the transaction or assists a party in the completion of a legal document, or selects or assists a party in selecting a form legal document among several forms having different legal implications;

7. Explains or recommends a course of action to a party to the transaction under circumstances that require the exercise of legal judgment or that have implications with respect to the party's legal rights or obligations;

8. Attempts to settle or resolve a dispute between the parties to the transaction that will have implications with respect to their respective legal rights or obligations;

9. Determines that all conditions of the purchase agreement or the loan closing instructions have been satisfied in accordance with the buyer's or the lender's interests or instructions;

10 Determines that the deed and deed of trust may be recorded after an update of title for any intervening conveyances or liens since the preliminary opinion;

11. Determines that the funds may be legally disbursed pursuant to the North Carolina Good Funds Settlement Act, N.C. Gen. Stat. § 45A-1 *et seq.*[4]

The foregoing list of examples of functions that constitute the practice of law is not exclusive, but reflects a range of responsibilities and duties that involve the following: the exercise of legal judgment; the preparation of legal documents such as deeds, deeds of trust, and title opinions; the explanation or interpretation of legal documents in circumstances that require the exercise of legal judgment; the provision of legal advice or opinions; and the performance of other services that constitute the practice of law.

Issue 2:

May a nonlawyer who is not acting under the supervision of a lawyer licensed in North Carolina (1) present and identify the documents necessary to complete a North Carolina residential real estate closing, direct the parties where to sign the documents, and ensure that the parties have properly executed the documents; and (2) receive and disburse the closing funds?

Opinion 2:

Yes. So long as a nonlawyer does not engage in any of the activities refer-

enced in Opinion 1, or in other activities that likewise constitute the practice of law, a nonlawyer may: (1) present and identify the documents necessary to complete a North Carolina residential real estate closing, direct the parties where to sign the documents, and ensure that the parties have properly executed the documents; or (2) receive and disburse the closing funds.

Although these limited duties may be performed by nonlawyers, this does not mean that the nonlawyer is handling the closing.Since, as described in issue 1 above, the closing is a collection of services, most of which involve the practice of law, a lawyer must provide the necessary legal services.[5]And, since N.C. Gen. Stat. § 84-5 prohibits nonlawyers from arranging for or providing the lawyer or any legal services, nonlawyers may not advertise or represent to lenders, buyers/borrowers, or others in any manner that suggests that the nonlawyer will (i) handle the "closing;" (ii) provide the legal services associated with a closing, such as providing title searches, title opinions, document preparation, or the services of a lawyer for the closing; or (iii) "represent" any party to the closing.[6] The lawyer must be selected by the party for whom the legal services will be provided.

Notwithstanding this opinion, evidence considered by the State Bar with respect to this advisory opinion indicates that, at the time documents are presented to the parties for execution, a lawyer who is present may identify or be asked about important issues affecting the legal rights or obligations of the parties. A lawyer may provide important legal guidance about such issues, but a nonlawyer is not permitted to do so. Moreover, a consumer's retention of a licensed North Carolina lawyer provides financial protection to the consumer. The North Carolina Rules of Professional Conduct require a lawyer to properly handle all fiduciary funds, including residential real estate closing proceeds. In the event a lawyer mishandles the closing proceeds, the lawyer is subject to professional discipline, and the State Bar Client Security Fund may provide financial assistance for a person injured by the lawyer's improper application of funds. On the whole, the evidence considered by the State Bar indicates that it is in the best interest of a consumer to be represented by a lawyer with respect to all aspects of a residential real estate transaction.

The evidence the State Bar has considered suggests, however, that performing administrative or ministerial activities in connection with the execution of residential real estate closing documents and the receipt and disbursement of the closing proceeds does not necessarily require the exercise of legal judgment or the giving of legal advice or opinions. Indeed, the execution of closing documents and the disbursement of closing proceeds may be accomplished—and often have been accomplished—by mail, by email, or by other electronic means, or by some other procedure that would not involve the lawyer and the parties being physically present at one place and time. The State Bar therefore concludes that it should not be presumed that performing the task of overseeing the execution of residential real estate closing documents and receiving and disbursing closing proceeds necessarily involves giving legal advice or opinions or otherwise engaging in activities that constitute the practice of law.

Nonlawyers who undertake such responsibilities, and those who retain their services, should also be aware that (1) the North Carolina State Bar retains oversight authority concerning complaints about activities that constitute the unauthorized practice of law; (2) the North Carolina criminal justice system may prosecute instances of the unauthorized practice of law; and (3) that N.C. Gen. Stat. §84 10 provides a private cause of action to recover damages and attorneys' fees to any person who is damaged by the unauthorized practice of law against both the person who engages in unauthorized practice and anyone who knowingly aids and abets such person. In addition, non-lawyers and consumers should bear in mind that other governmental authorities such as the Federal Trade Commission, the North Carolina Attorney General, district attorneys, and the banking commissioner, have jurisdiction over unfair trade practices and violations of requirements regarding lending practices.

Endnotes

1. By statute, title insurance in North Carolina can be issued only after the title insurance company has received an opinion of title from a licensed North Carolina attorney who is not an employee or agent of the company and who "has conducted or caused to be conducted under the attorney's direct supervision a reasonable examination of the title."N.C. Gen. Stat. § 58 26 1.
2. Except as permitted under *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962), which allows a party having a "primary interest" in a transaction to prepare deeds of trust and other documents to effectuate the transaction.
3. The State Bar notes that the North Carolina General Assembly and Supreme Court are the entities that have the power to make the ultimate determination whether an activity constitutes the practice of law.
4. Since the original adoption of this opinion, the Committee has reviewed numerous complaints concerning nonlawyers, many of whom hold out to the closing parties that they will conduct "closings," including disbursement of funds, at any time of day, including after normal business hours.However, under the Good Funds Settlement Act, N.C. Gen. Stat. § 45A 4, funds may not be disbursed until the deed and deed of trust (if any) have been recorded, which in most counties requires physical delivery to the Register of Deeds during normal business hours.Accordingly, while execution of the documents may be conducted at any time, the actual "closing" and disbursement of funds may not occur until after the required documents are recorded.
5. Except as permitted under *State v. Pledger, supra*, or by an individual *pro se*.
6. Almost without exception, these nonlawyer service providers are corporations or limited liability companies that market their services to lenders, not consumers.Most are also title insurance agents.Accordingly, lenders commonly inform borrowers that the nonlawyer will be conducting the closing without any meaningful opportunity for the borrower to decide to retain a lawyer to protect its interests.Additionally, when the nonlawyer is a title insurance agent, the borrower usually is given no choice on insurer or available rates.The Committee expresses no opinion whether these actions may violate N.C. Gen. Stat. § 75 17, which prohibits a lender from requiring its borrower to obtain a policy of title insurance from a particular insurance company, agent, broker or other person specified by the lender.Title companies (and other parties) may refer lenders or borrowers to attorneys at their customer's request, but may not require the use of a specific attorney or charge a fee for any such referral.

Authorized Practice Advisory Opinion 2006-1

October 20, 2006

Appearances at Quasi-Judicial Hearings on Zoning and Land Use

Inquiry:

May a person who is not a lawyer appear before planning boards, boards of adjustment, or other governmental bodies conducting quasi-judicial hearings in a representative capacity for another party?

Opinion:

At its October 2005 meeting, the Authorized Practice Committee responded to an inquiry concerning the propriety of a person who is not a lawyer appearing before planning boards, boards of adjustment, and city and county government in a representative capacity. The committee's advisory opinion distinguished appearances on legislative concerns, such as general rezoning cases and ordinance amendments, from appearances on behalf of petitioners for special use permits and variances, which are quasi-judicial matters. The committee has received comments from a number of interested parties, including architects, land use planners, and city and county attorneys as a result of that opinion. The committee is issuing this advisory opinion to supplement the prior opinion.

First, the committee reiterates that the adoption of ordinances and amendments to official zoning maps (i.e. general rezoning cases) by the elected officials in city and county governments are legislative in nature and that any interested person may appear and speak on such matters before governmental bodies, even as representatives of groups or interested parties, without engaging in the unauthorized practice of law. Nonetheless, the general statutory prohibitions on unauthorized practice of law still apply even to persons who appear before governmental bodies on legislative matters. Non-lawyers may not hold themselves out as attorneys, provide legal services or advice, or draft any legal documents with regard to such matters. *See* N.C. Gen. Stat. §§ 84 2.1 and 4.

The law is clear that hearings on applications for special use permits and variances under zoning ordinances, as well as appeals from staff level interpretations related to permits, are quasi-judicial proceedings. N.C. Gen. Stat. §§ 153A-345 and 160A-381 and 388. *See*, *Humble Oil & Refining Co. v. Bd. of Aldermen of Chapel Hill,* 284 N.C. 458, 202 S.E.2d 129 (1974) and *Woodhouse v. Board of Comm'rs of Nags Head*, 299 N.C. 211, 261 S.E.2d 882 (1980). (For simplicity, the quasi-judicial hearings before these bodies are hereafter referenced to as a "variance hearing" unless the context indicates otherwise.) The governmental body before which the variance hearing is conducted sits in a judicial role of applying the standards of an ordinance to the particular circum-

stances of a particular party. Accordingly, the role of the governmental body is to receive evidence and make decisions based upon the evidence presented.

Variance hearings require the governmental body hearing the matter to observe certain formalities. Evidence, including witness evidence, is presented to the hearing body, although the Rules of Evidence need not be strictly observed. All witnesses before the body must be sworn and their testimony is subject to cross-examination. The hearing body has the power and authority to issue subpoenas to compel witness testimony. A record of the proceedings must be preserved. The decision is to be based upon the evidence presented at an open hearing, and not on extraneous matters or personal knowledge of the members of the board. The applicant has the burden of proof. The board must make written findings of fact to support its decision. And, the decision of the board is reviewable by the courts on appeal based solely upon the record of the proceedings.

The committee believes that the law is also clear that an appearance on behalf of another person, firm, or corporation in a representative capacity for the presentation of evidence through others, cross-examination of witnesses, and argument on the law at a quasi-judicial proceeding is the practice of law. N.C. Gen. Stat. §§ 84 2.1 and 4. Consequently, because the variance hearings are by definition quasi-judicial proceedings, the committee concludes that it is the unauthorized practice of law for someone other than a licensed attorney to appear in a representative capacity to advocate the legal position of another person, firm, or corporation that is a party to the proceeding.

The committee has been urged to recognize that architects, landscape architects, land use planners, and engineers play a vital role at these quasi-judicial proceedings by presenting necessary facts and information on behalf of their clients at variance hearings. The committee agrees that the information these professionals can present is critical to the decision before the hearing body. These professionals are subject matter experts whose expert opinions, as witnesses, must be presented to the hearing body. They are witnesses who are in the best position to explain to the hearing body the facts of the proposed design and its anticipated effects on a variety of factors, including traffic, environment, and aesthetics, within the framework of matters properly under consideration at the variance hearing. The committee does not believe that the role of legal advocate by attorneys in quasi-judicial proceedings should interfere with or inhibit the role of non-lawyer professionals who speak as witnesses and present information at these quasi-judicial proceedings. In fact, their roles should be complementary.

It is axiomatic that the committee has no authority to amend or formulate exceptions to the statutes. In issuing an advisory opinion, it simply articulates how it believes a court would ultimately resolve the question for the guidance of the public. The committee cannot recognize or create exceptions to the law as expressed by the legislature and the courts. Further, we believe, as a practical matter, that effective representation of parties in variance hearings is becoming increasingly dependent upon legal advocacy of the rights of the parties with an eye toward compiling a supportable record in the event of an appeal. These are the skills an attorney provides. While it is true that many of these hearings involve routine and non-controversial matters, even questions about matters such as the height of residential fences may become the subject matter of an appeal where the appellate courts may only consider the record produced at the variance hearing. *See Robertson v. Zoning Board of Adjustment for the City of Charlotte*, 167 N.C. App. 531, 605 S.E.2d 723 (2004). It is difficult to predict in advance when a matter may require a comprehensive record for appellate purposes. Therefore, with this further elaboration, the committee re-affirms its initial opinion expressed by letter dated October 31, 2005, that the representation of another person at a quasi-judicial hearing is the practice of law.

That said, this opinion should not be interpreted to diminish the role and expertise of land use professionals as witnesses at variance hearings. These professionals may still present their evidence in support of the position of their clients. However, they may not examine or cross-examine other witnesses or advocate the legal position of their clients.

The committee's opinion is also not intended to affect the ability of city and county planning staff to present factual information to the hearing board, including a recitation of the procedural posture of the application, and to offer such opinions as they may be qualified to make without an attorney for the government present, as the committee understands is the proper, current practice and role of the planning staff. Further, nothing in this opinion should be interpreted as limiting the ability of a corporate officer or employee from testifying on factual matters on behalf of a corporate party during a hearing or suggesting that individual parties may not represent themselves before these boards.

In sum, the committee is of the opinion that land use professionals, including architects, engineers, and land use planners, may appear and testify as to factual matters and any expert opinions that they are qualified to present at quasi-judicial proceedings, but the presentation of other evidence, including the examination and cross-examination of witnesses, making legal arguments, and the advocacy for results on behalf of others before quasi-judicial zoning and land use hearings, is the practice of law that may be performed only by licensed attorneys at law.

Index to Ethics Opinions

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 under the Rules of Professional Conduct as comprehensively revised on July 24, 1997, and on February 27, 2003. See the editor's note that precedes the Rules, *supra*, for background on the 1997 and 2003 revisions of the Rules. The editor's note also explains the effect of the adoption and amendment of the Rules on ethics opinions promulgated under the 1985 Rules and the 1997 and 2003 versions of the Rules.

FIDUCIARY ACCOUNTS

FILES OF CLIENT

FINANCING LITIGATION

FORECLOSURES

Questions and Answers about IOLTA

Q. How can I get answers to questions about my trust account(s)?

The *Trust Account Handbook* published by the NC State Bar explains all trust account practices and policies. It can be found on the State Bar website at ncbar.gov/for-lawyers/trust-accounting.

If you cannot find the answer you need using the *Trust Account Handbook*, a number of staff people in different departments at the NC State Bar may be able to assist with your trust account question.

Questions about trust accounts generally fall into one of four categories:

1. For questions regarding client records, disbursement guidelines, client communication, and other trust account practices, contact the ethics department at 919-828-4620 ext. 575 or ethicsadvice@ncbar.gov.

2. For questions regarding trust account reconciliations, contact Anne Parkin at 919-828-4620 ext. 259.

3. For questions, explanations, or issues regarding a NSF (non-sufficient funds) notification, contact Joe Commisso 919-828-4620 ext. 200 or Sonja Puryear at 919-828-4620 ext. 203.

4. For questions regarding IOLTA compliance such as how to establish or close an IOLTA account or certify as to compliance, contact IOLTA at 919-828-0477.

Q. How do I comply with the NC State Bar rules regarding NC IOLTA?

All active members of the North Carolina State Bar who maintain general client trust accounts in North Carolina must ensure that all their general client trust accounts are established as interest-bearing IOLTA accounts.

On the annual State Bar dues notice form or electronically via the State Bar website, each active member of the State Bar must annually certify either (1) that all of the lawyer's and/or firm's general client trust accounts for North Carolina client funds are established as North Carolina IOLTA Accounts or (2) that neither the lawyer nor their employer maintain any general trust accounts holding North Carolina client funds.

Lawyers must be in compliance with this requirement no later than June 30 of each calendar year. A lawyer who fails to comply with all administrative requirements of the NC IOLTA Rules—including the annual certification—shall be reported to the NC State Bar's Administrative Committee, which may initiate proceedings to suspend administratively the lawyer's active membership status and eligibility to practice law.

Q. How do I notify IOLTA about new or closed accounts?

Lawyers must inform NC IOLTA when opening or closing IOLTA accounts. The NC IOLTA Information Update Form should be used for this purpose. It should also be used to report employment or address changes. *See* nciolta.org/media/425598/status-update.pdf.

Q. Where can I hold an IOLTA account?

As of July 1, 2010, lawyers may hold IOLTA accounts only at "eligible" banks that agree to pay IOLTA accounts the highest rate available to that bank's other customers when the IOLTA accounts meet the same minimum balance or other account qualifications. NC IOLTA maintains a list of eligible banks at nciolta.org/eligible-banks.

Some banks have agreed to go above and beyond the requirements to support the NC IOLTA program in its mission to ensure that low-income North Carolinians have access to critically needed legal aid. Prime Partners are banks that pay a net yield of 75% of the Federal Funds target rate or 0.75%, whichever is higher. These banks are specially recognized on the Eligible Bank list.

Many banks waive service charges on IOLTA accounts. Banks that waive service charges are noted on the list.

If you would like to have more information about IOLTA policies or accounts at a particular bank, you may call the NC IOLTA office at 919-828-0477.

Q. What if I want to open my general trust account at a bank that does not currently hold North Carolina IOLTA accounts?

A list of North Carolina banks eligible to hold IOLTA accounts is maintained by NC IOLTA. See nciolta.org/eligible-banks. If you wish to establish an IOLTA account at a bank that is not listed, please have the bank contact the IOLTA office at 919-828-0477.

Q. What forms are required to open an IOLTA account?

Rule 1.15-2(l) requires lawyers to file a bank directive with the financial institution for every trust account, whether it is a general trust account, designated trust account or fiduciary trust account. The Bank Directive can be found at ncbar.gov/media/425601/bank-directive.pdf.

No other forms are required by NC IOLTA to open the account as an IOLTA account. However, the NC IOLTA Information Update Form should be submitted to IOLTA once the account has been opened.

Q. How should my general trust account be labeled?

A trust account must be clearly labeled as a "trust account" and the name of the account should clearly identify the lawyer/firm—not NC IOLTA—as the fiduciary agent for the account. Lawyers/firms may use identifying names on their accounts such as Real Estate Trust Account, General Trust Account, IOLTA Trust Account, etc.

Q. Which of my law practice accounts must be established and maintained as IOLTA accounts?

All general client trust accounts must be established and maintained as interest-bearing IOLTA accounts, interest from which is remitted to NC IOLTA at the State Bar. General client trust accounts are those accounts that hold nominal and short-term deposits of client funds. Lawyers retain discretion to determine whether a trust deposit is of sufficient size or duration to justify placement in a separate (dedicated) interest-bearing account for the benefit of single client or transaction.

IOLTA accounts are subject to all trust account requirements established

by the North Carolina State Bar Rules of Professional Conduct. For additional information about trust account requirements, see Trust Accounting Questions and Answers and Rules 1.15 thru 1.15-3 of the Rules of Professional Conduct.

You may also visit the State Bar's website and download the *Trust Account Handbook* at ncbar.gov/for-lawyers/trust-accounting.

Q. Does maintaining IOLTA accounts deprive clients of any funds to which they are entitled?

No. Trust moneys of the type placed in IOLTA accounts (nominal in amount or expected to be held for a short duration) have traditionally been deposited in lawyers' pooled trust accounts. Prior to the IOLTA program, such accounts did not earn interest. The North Carolina State Bar now requires general trust accounts to earn interest, which is remitted to NC IOLTA for funding law-related charitable purposes.

Lawyers retain discretion to determine whether a trust deposit is of sufficient size or duration to justify placement in a separate (dedicated) interest-bearing account for the benefit of the client or a single transaction.

Should funds be placed into a general client trust account in error, NC IOLTA has policies and procedures through which the amount of interest erroneously remitted is refunded.

Q. Are there tax consequences to maintaining IOLTA accounts?

According to the Internal Revenue Service, maintaining IOLTA accounts imposes no tax consequences to the client or the lawyer. See Revenue Ruling 81-209. Each IOLTA account bears the tax identification number of the NC IOLTA Board of Trustees to ensure that all accumulated interest is reported as income of the IOLTA program. IOLTA's tax id number and related name, *Board of TTEES of The N Carolina St Bar Pl For Int On Lawyers Tr Acct*, are for purposes of interest reporting only and should not appear on the checks or deposits slips. If your bank needs IOLTA's tax id number or other assistance, please contact the IOLTA office at 919-828-0477.

Q. How are clients informed about IOLTA?

In 1988 the North Carolina Supreme Court approved the posting of a Client Notice Certificate to inform clients about the IOLTA program. NC IOLTA provides Client Notices to attorneys at no charge.

Q. Can a lawyer hold North Carolina client funds in an out-of-state account?

Under the Rules of Professional Conduct, North Carolina lawyers must maintain all general trust accounts holding North Carolina client funds at a bank in North Carolina or a bank with branch offices in North Carolina. As Comment [4] to Rule 1.15 notes, a law firm with offices in another state may send a North Carolina client's funds to a firm office in another state for centralized processing; however, the client funds are still subject to the requirements of the NC Rules of Professional Conduct. Therefore, the North Carolina client's funds should be placed into a general trust account established in North Carolina, the interest from which will be remitted to NC IOLTA.

Q. How are bank service charges on IOLTA accounts handled?

NC IOLTA pays routine service charges on IOLTA accounts. Some banks waive service charges on IOLTA accounts. It is permissible for banks that do not waive service charges on IOLTA accounts to deduct from interest or utilize earnings credit for routine service charges associated with the account. Routine service charges include monthly account maintenance charges, per item check or deposit charges, etc.

Business costs or costs billable to others are the responsibility of the law firm and should not be charged against client funds in the IOLTA account or against the interest or the earnings credit of an IOLTA account. These charges may be deducted from the firm's operating account, billed to the firm, or deducted from funds maintained or deposited by the lawyer in the IOLTA account for that purpose. Examples of such costs include but are not limited to check printing, NSF/OD fees, stop payment orders, wire transfer fees, account reconciliation, remote capture capability, online banking, digital imaging, CD-ROM statements, or interest charged on uncollected balances (float).

Q. How are IOLTA funds used?

The North Carolina State Bar and the North Carolina Supreme Court allow 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 NC IOLTA Board of Trustees and approved by the North Carolina Supreme Court.

IOLTA funds are not used for the Client Security Fund, which reimburses clients who have suffered financial loss as the result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina.

IOLTA administrative costs are paid from program income and are under ten percent of income since its inception.

Q. Who makes the IOLTA grant decisions?

Grant decisions are made annually by the NC IOLTA Board of Trustees, who administer the program according to the rules promulgated by the NC State Bar Council and approved by the NC Supreme Court. 27 NCAC 1D .1301-21. The board is a standing committee of the NC State Bar Council, the representative governing body of the State Bar, whose members are elected by the bar membership through the judicial districts. IOLTA trustees are appointed by the NC State Bar Council. NC IOLTA grants are for the calendar year, and all grant applications are reviewed annually by all the trustees.

A list of current and former IOLTA trustees can be found on the IOLTA website. *See* nciolta.org/about-nc-iolta/board-of-trustees.

Q. Where can I find rules governing NC IOLTA?

See 27 NCAC 1D, Sections .1301-.1321 of the State Bar's Administrative Rules and Rule 1.15 of the State Bar's Rules of Professional Conduct.

For more information about NC IOLTA, please contact our office.

Shannon Azzi, Accounts Data Assistant
Bethany Farrelly, Program Assistant
Claire Mills, Finance Director & Operations Manager
Mary Irvine, Executive Director

NC IOLTA
217 E. Edenton Street
Raleigh, North Carolina 27601

PO Box 25996
Raleigh, North Carolina 27611-5996

(919) 828-0477
(919) 821-9168 Fax
e-mail: iolta@ncbar.gov

2020 NC IOLTA Information Update Form

Field A – REQUIRED

Name:_____

NC State Bar #:_____

I am submitting this form to notify the IOLTA office of the following: (check all that apply)

( ) Changes to attorney contact information (Field B)
( ) New law firm or firm name change (Field C)
( ) Opening of a new IOLTA account (Field D)
( ) Closing of an IOLTA account (Field E)

Field B – Changes to Contact Information

Employer:_____

Address:_____

Phone:_____ e-mail:_____

Changes in contact information should also be reported to the NC State Bar Membership Department at 919-828-4620 or on-line at www.ncbar.gov.

Field C– New Firm Information (Include firm name changes and mergers here)

New Firm Name:_____

Address:_____

Phone:_____ e-mail:_____

Please include a list of all NC attorneys associated with the new firm.

Field D - New IOLTA Account Information

The following general trust accounts have been established as an NC IOLTA account:

Firm Name:_____

1. Account Name:_____
   Account Number:_____
   Bank Name:_____
2. Account Name:_____
   Account Number:_____
   Bank Name:_____

(For additional accounts, please attach a separate sheet.)

Field E – Closing an IOLTA account

The following IOLTA accounts have been closed:

Firm Name:_____

1. Account Name:_____
   Account Number:_____
   Bank Name:_____
   Date Closed:_____
2. Account Name:_____
   Account Number:_____
   Bank Name:_____
   Date Closed:_____

( ) My firm now has no open IOLTA accounts

NC IOLTA · PO Box 25996 · Raleigh NC · 27611-5996
919-828-0477 (phone) · 919-821-9168 (fax) · iolta@ncbar.gov

Correlation Table 1: 1997 Revised Rules of Professional Conduct and 2003 Amended Revised Rules of Professional Conduct

1997 Revised Rules of Professional Conduct	2003 Rules of Professional Conduct
Rule 1.1(a)	Rule 1.1
(b)	*
Rule 1.2(a)-(d)	Rule 1.2(a)-(d)
(e)	*
Rule 1.3	Rule 1.3
Rule 1.4	Rule 1.4
Rule 1.5(a)	Rule 1.5(a)
(b)	(a)
(c)	(b)
(d) - (f)	(d) - (f)
Rule 1.6(a)	Rule 1.6(a)
(b)	(c)
(c)	*
(d)(1)-(2)	(a)
(d)(3)	(b)(1)
(d)(4)	(b)(2)
(d)(5)	(b)(4)
(d)(6) - (7)	(b)(6)-(7)
Rule 1.7	Rule 1.7
Rule 1.8(a)-(h)	Rule 1.8(a)-(h)
(i)	*
(j)	(i)
Rule 1.9	Rule 1.9
Rule 1.10(a)	Rule 1.10(a)
(b)	(b)
(c)	(d)
Rule 1.11 (a)	Rule 1.11(a)
(b)	(c)
(c)	(d)
(d)	(e)
(e)	*
Rule 1.12	Rule 1.12
Rule 1.13	Rule 1.13
Rule 1.14	Rule 1.14
Rule 1.15-1	Rule 1.15-1
Rule 1.15-2	Rule 1.15-2
Rule 1.15-3	Rule 1.15-3
Rule 1.15-4	Rule 1.15-4
Rule 1.16(a)(1)	Rule 1.16(a)(1)
(a)(2)	*
(a)(3)	(a)(2)
(a)(4)	(a)(3)
(b)(1)	(b)(2)
(b)(2)	(b)(3)
(b)(3)	(b)(4)
(b)(4)	(b)(5)
(b)(5)	(b)(6)
(b)(6)	(b)(7)
(b)(7)	(b)(8)
(b)(8)	(b)(9)
Rule 1.16(c)-(d)	Rule 1.16(c)-(d)
Rule 1.17	Rule 1.17
Rule 1.18	Rule 1.19
Rule 2.1	Rule 2.1
Rule 2.2	*
Rule 2.3	Rule 2.3
Rule 3.1	Rule 3.1
Rule 3.2	Rule 3.2
Rule 3.3(a)(1)	Rule 3.3(a)(1)
(a)(2)	*
(a)(3)	(a)(2)
(a)(4)	(a)(3)
(b)	(c)
(c)	*
(d)	(d)
Rule 3.4	Rule 3.4
Rule 3.5	Rule 3.5
Rule 3.6(a)	Rule 3.6(a)
(b)	*
(c)	(b)
(d)	(e)
(e)	*
Rule 3.7	Rule 3.7
Rule 3.8(a)-(d)	Rule 3.8(a)-(d)
(e)	*
(f)	(e)
(g)	(f)
Rule 4.1	Rule 4.1
Rule 4.2	Rule 4.2
Rule 4.3	Rule 4.3
Rule 4.4	Rule 4.4
Rule 5.1	Rule 5.1
Rule 5.2	Rule 5.2
Rule 5.3	Rule 5.3
Rule 5.4	Rule 5.4
Rule 5.5(a)	Rule 5.5(a)
(b)	(d)
(c)	(e)
(d)	(f)
Rule 5.6	Rule 5.6
Rule 6.1 Reserved	
Rule 6.2 Reserved	

1997 Revised Rules of Professional Conduct	2003 Rules of Professional Conduct
Rule 6.3	Rule 6.3
Rule 6.4	Rule 6.4
Rule 6.5	Rule 6.6
Rule 7.1	Rule 7.1
Rule 7.2(a)	Rule 7.2(a)
(b)	*
(c)	(c)
(d)	(b)
(e)	(d)
Rule 7.3	Rule 7.3
Rule 7.4	Rule 7.4
Rule 7.5(a)-(e)	Rule 7.5(a)-(e)
(f)	*
Rule 8.1	Rule 8.1
Rule 8.2	Rule 8.2
Rule 8.3	Rule 8.3
Rule 8.4	Rule 8.4
Rule 8.5(a)-(b)(2)	Rule 8.5(a)-(b)(2)
(b)(2)(A)-(B)	*

Correlation Table 2: 1997 Revised Rules of Professional Conduct and 1985 Rules of Professional Conduct (Superceded)

1997 Revised Rules of Professional Conduct	Superseded 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)	*

1997 Revised Rules of Professional Conduct	Superseded Rules of Professional Conduct (1985)
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)
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
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 3: 1985 Rules of Professional Conduct (Superceded), 1997 Revised Rules of Professional Conduct, and 1973 Code of Professional Responsibility (Superceded)

Superseded 1985 Rules of Professional Conduct	1997 Revised Rules of Professional Conduct	Superseded 1973 Code of Professional Responsibility
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 1985 Rules of Professional Conduct	1997 Revised Rules of Professional Conduct	Superseded 1973 Code of Professional Responsibility
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 1985 Rules of Professional Conduct	1997 Revised Rules of Professional Conduct	Superseded 1973 Code of Professional Responsibility
(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, -2, -3	DR9-102
Rule 10.2	Rule 1.15-1, -2, -3	DR9-102
Rule 10.3	Rule 1.15-4	*

Headings for the Complete Rules of the North Carolina State Bar

(The text of the rules can be found online at ncbar.gov.)

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
.0204 Good Standing Definition and Certificates

Section .0300 Permanent Relinquishment of Membership in the State Bar

.0301 Effect of Relinquishment
.0302 Conditions for Relinquishment
.0303 Allegations of Misconduct Received by the State Bar On or After the Date of Relinquishment

Section .0400 Election, Succession, and Duties of Officers

.0401 Officers
.0402 Eligibility for Office
.0403 Term of Office
.0404 Elections
.0405 Nominating Committee
.0406 Vacancies and Succession
.0407 Removal from Office
.0408 Compensation of Officers
.0409 President
.0410 President-Elect, Vice-President, and Immediate Past President
.0411 Secretary
.0412 Emergency Authority

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 and EmergencyMeetings
.0603 Notice of Meetings
.0604 Quorum
.0605 Manner of Meeting of Council
.0606 Parliamentary Rules

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 Procedures Governing Elections by Electronic Vote
.0806 Procedures Governing Early Voting
.0807 Vacancies
.0808 Bylaws Providing for Geographical Rotation or Division of Representation

Section .0900 Organization of the Judicial District Bars

.0901 Bylaws
.0902 Annual Membership Fee
.0903 Fiscal Period

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
.1013 Selection of Nominees for District Court Judge

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

Section .1400 Rulemaking Procedures

.1401 Publication for Comment
.1402 Review by the Executive Committee
.1403 Action by the Council and Review by the North Carolina Supreme Court

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 Panel: Powers and Duties
.0110 Secretary: Powers and Duties in Discipline and Disability Matters
.0111 Grievances: Form and Filing
.0112 Investigations: Initial Determination; Notice and Response; Committee Referrals
.0113 Proceedings before the Grievance Committee
.0114 Proceedings Before the Discipline Hearing Commission: General Rules Applicable to All Proceedings
.0115 Proceedings Before the Disciplinary Hearing Commission: Pleadings and Prehearing Procedure
.0116 Proceedings Before the Disciplinary Hearing Commission: Formal Hearing
.0117 Proceedings Before the Disciplinary Hearing Commission: Posttrial Motions
.0118 Proceedings Before the Disciplinary Hearing Commission: Stayed Suspension
.0119 Effect of a Finding of Guilt in Any Criminal Case
.0120 Reciprocal Discipline & Disability Proceedings
.0121 Surrender of License While Under Investigation
.0122 Disability
.0123 Enforcement of Powers
.0124 Notice to Member of Action and Dismissal
.0125 Notice to Complainant
.0126 Appointment of Counsel to Protect Clients' Interests When Attorney Disappears, Dies, or Is Transferred to Disability Inactive Status
.0127 Imposition of Discipline; Findings of Incapacity or Disability; Notice to Courts
.0128 Obligations of Disbarred or Suspended Attorneys
.0129 Reinstatement
.0130 Address of Record
.0131 Disqualification Due to Interest
.0132 Trust Accounts; Audit
.0133 Confidentiality
.0134 Disciplinary Amnesty in Illicit Drug Use Cases
.0135 Noncompliance Suspension

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 Appointment
.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 Form and Duration of Certification
.0205 Supervision
.0206 Activities
.0207 Use of Student's Name
.0208 Field Placements
.0209 Relationship of Law School and Clinics; Responsibility Upon Departure of Supervising Attorney or Closure of Clinic
.0210 *Pro Bono* Activities

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
.0105 Procedures for Meetings of the Ethics Committee

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 Reserved

Section .0500 Reserved

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 Reserved
.0615 Regional Chapters
.0616 Suspension for Impairment, Reinstatement
.0617 Consensual Inactive Status
.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 Confidentiality
.0705 Selection of Facilitators
.0706 Powers and Duties of the Vice-Chairperson
.0707 Processing Requests for Fee Dispute Resolution
.0708 Settlement Conference Procedure
.0709 Record Keeping

Section .0800 Reserved

Section .0900 Procedures for Administrative Committee

.0901 Transfer to Inactive Status
.0902 Reinstatement from Inactive Status
.0903 Suspension for Failure to Fulfill Obligations of Membership
.0904 Reinstatement from Suspension
.0905 Pro Bono Practice by Out of State Lawyers

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 IOLTA Accounts
.1317 Comparability Requirements for IOLTA Accounts
.1318 Confidentiality
.1319 Certification
.1320 Noncompliance
.1321 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 Scope, 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, Duties, and Organization of the Board
.1517 Exemptions
.1518 Continuing Legal Education Requirements
.1519 Accreditation Standards
.1520 Registration of Sponsors and Program Approval
.1521 Credit Hours
.1522 Annual Report and Compliance Period
.1523 Noncompliance
.1524 Reinstatement
.1525 Reserved
.1526 Effective Date
.1527 Regulations

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

.1601 General Requirements for Program Approval
.1602 Course Content Requirements
.1603 Registered Sponsors
.1604 Reserved
.1605 Computation of Credit
.1606 Fees
.1607 Reserved
.1608 Reserved
.1609 Reserved
.1610 Reserved
.1611 Reserved

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 Revocation or Suspension 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
.1727 Inactive Status

Section .1800 Hearing and Appeal Rules of the Board of Legal Specialization

.1801 Reconsideration of Applications, Failure of Written Examinations and Appeals
.1802 Denial, Revocation, or Suspension of Continued Certification as a Specialist
.1803 Reserved
.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

.3205 Standards for Certification as a Specialist in Utilities Law
.3206 Standards for Continued Certification as a Specialist
.3207 Applicability of Other Requirements

Section .3300 Certification Standards for the Privacy and Information Security Law Specialty

.3301 Establishment of Specialty Field
.3302 Definition of Specialty
.3303 Recognition as a Specialist in Privacy and Information Security Law
.3304 Applicability of Provisions of the North Carolina Plan of Legal Specialization
.3305 Standards for Certification as a Specialist in Privacy and Information Security Law
.3306 Standards for Continued Certification as a Specialist
.3307 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
.0206 Non-renewal of Registration

Section .0300 Rules Concerning Prepaid Legal Services Plans

.0301 State Bar May Not Approve or Disapprove Plans
.0302 Registration Requirement
.0303 Definition of Prepaid Plan
.0304 Registration Procedures
.0305 Registration
.0306 Requirement to File Amendments
.0307 Annual Registration
.0308 Registration Fee
.0309 Index of Registered Plans
.0310 Advertising of State Bar Approval Prohibited
.0311 State Bar Jurisdiction
.0312 Revocation of Registration
.0313 Hearing before the Authorized Practice Committee
.0314 Action by the Council

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

Subchapter G: Certification of Paralegals

Section .0100 The Plan for Certification of Paralegals

.0101 Purpose
.0102 Jurisdiction: Authority
.0103 Operational Responsibility
.0104 Size and Composition of Board
.0105 Appointment of Members; When; Removal
.0106 Term of Office
.0107 Staggered Terms
.0108 Succession
.0109 Appointment of Chairperson
.0110 Appointment of Vice-Chairperson
.0111 Source of Funds
.0112 Fiscal Responsibility
.0113 Meetings
.0114 Annual Report
.0115 Powers and Duties of the Board
.0116 Retained Jurisdiction of the Council
.0117 Conferred and Limitations Imposed
.0118 Certification Committee
.0119 Standards for Certification of Paralegals
.0120 Standards for Continued Certification of Paralegals
.0121 Lapse, Suspension or Revocation of Certification
.0122 Right to Review and Appeal to Council
.0123 Inactive Status Upon Demonstration of Hardship
.0124 Retired Certified Paralegal Status

Section .0200 Rules Governing Continuing Paralegal Education

.0201 Continuing Paralegal Education (CPE)
.0202 Accreditation Standards
.0203 General Course Approval
.0204 Fees

Subchapter H: Attorneys Appearing Pro Hac Vice

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