The 2013 Lawyer’s Handbook

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The North Carolina State Bar Lawyer’s Handbook 2013 (Abridged)
Actually, there are many stories. Every one of them about someone in the legal field.

Lawyers are as vulnerable to personal and professional problems as anyone else.

Competition, constant stress, long hours, and high expectations can wear down even the most competent and energetic lawyer. This can lead to depression, stress, career problems, relationship issues, financial problems, or alcohol and substance abuse.

So where's the uplifting part? That's where we come in.

The Lawyer Assistance Program was created by lawyers for lawyers. While we started as a way for attorneys to deal with alcohol related problems, we now address any personal issue confronted by those in the legal profession.

Our message to anyone who may have a personal issue, whether a lawyer, a judge, or a law student, is don't wait. Every call we take is confidential and is received by a professional staff person. You can be confident that you're talking to the right person and that no one will know about it.

We understand what it's like to face personal problems within the profession, because we only help lawyers.

Our service is not only confidential, it's free, paid for with your yearly bar fees.

If you have a personal issue, or know someone who does, we can be the crucial first step in turning things around, a role we've played for many of your peers.

We have countless success stories we could tell, and yes, they are uplifting. But we do our work quietly, confidentially, and professionally so the stories will stay with us.

We're here for you. Visit www.nclap.org, call Eastern District: Ed Ward (919) 828-6425, Piedmont Region: Towanda Garner (919) 719-9290, Western District: Cathy Killian (704) 910-2310; or email us at info@nclap.org. We can help if you get in touch with us.
### State Bar Contacts

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<thead>
<tr>
<th>Position</th>
<th>Name</th>
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<tr>
<td>program)</td>
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<td></td>
<td>Towanda Garner</td>
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<td>Charlotte Office: (704) 892-5699</td>
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<tr>
<td></td>
<td>Raleigh Office: (919) 828-6425</td>
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<td></td>
<td><a href="http://www.ncbar.org">www.ncbar.org</a></td>
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<tr>
<td>Membership Records</td>
<td>Tammy Jackson</td>
<td><a href="mailto:tjackson@ncbar.gov">tjackson@ncbar.gov</a></td>
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<tr>
<th>Position</th>
<th>Name</th>
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<tr>
<td>Administration</td>
<td>Tom Lunsford</td>
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<td>complaints from clients)</td>
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<td>victims of lawyer theft)</td>
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<td>disciplinary orders)</td>
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<tr>
<td>District Bar Liaison</td>
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<td>Specialization</td>
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</table>

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Visit the State Bar online at: [www.ncbar.gov](http://www.ncbar.gov)
## North Carolina General Statutes, Chapter 84:
### Attorneys-at-Law: Selected

#### Statutes

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<td>§ 84-37.</td>
<td>State Bar may investigate and enjoin unauthorized activities</td>
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<td>Chairperson of the Grievance Committee: Powers and Duties</td>
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<td>Secretary: Powers and Duties in Discipline and Disability Matters</td>
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<td>Grievances: Form and Filing</td>
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<td>.0116</td>
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</table>

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- .0205 Chairperson of the Authorized Practice Committee - Powers and Duties
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§ 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.

§ 84-4. 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 counsel 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 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 amendable 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 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 roll 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 ($250.00), 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.
      i. 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 non-profit 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.

§ 84-8. Punishment for violations.

(a) Any person, corporation, or association of persons violating any of the provisions of G.S. 4 through G.S. 84.6 or G.S. 84.9 shall be guilty of a Class I misdemeanor.

(b) No person shall be entitled to collect any fee for services performed in violation of G.S. 4 through G.S. 84.6, G.S. 84.9, or G.S. 84.10.1.

§ 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 its 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.
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 to 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.

(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 Statistics. 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.

(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 suspension of the attorney's license;
(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 effec-
tive 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.


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 presiding 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.


(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 State 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 active practice 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.
§ 84-30. 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.

§ 84-32.1. 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, counselors, 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), plus a surcharge of fifty dollars ($50.00) for the implementation of Article 22D of Chapter 163 of the General Statutes, 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 the 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 fifty-dollar ($50.00) surcharge shall be sent on a monthly schedule to the State Board of Elections. 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.

The list submitted to several clerks of the superior court shall also be submitted to the Council at its October meeting of each year and it shall take the action thereon that is necessary and proper.

§ 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.
Section .0100 Board of Law Examiners

.0101 Election
(a) At the first meeting of the council, it shall elect as members of the Board of Law Examiners, two members of the State Bar to serve for a term of one year from July 1, 1933; and two members of the State Bar to serve for a term of two years from July 1, 1933; and two members of the State Bar to serve for a term of three years from July 1, 1933. The council, at its regular meeting, in April of each year, beginning in 1934, shall elect two members of the Board of Law Examiners to take office on the 1st day of July of the year in which they are elected, and such members shall serve for a term of three years or until their successors are elected and qualified. Beginning with the year 1935 and every third year thereafter the council shall elect three members for a term of three years or until their successors are elected and qualified.
(b) No member of the council shall be a member of the Board of Law Examiners, and no member of the Board of Law Examiners shall be a member of the council.

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

.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 N.C. 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;
(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.

History Note: Statutory Authority G.S. 84-24
Adopted March 3, 1999
Amended February 27, 2003

Section .0200 Rules Governing Practical Training of Law Students

.0201 Purpose
The following rules are adopted to encourage law schools to provide their students with supervised practical training of varying kinds during the period of their formal legal education and to enable law students to obtain supervised practical training while serving as legal interns for government agencies.

History Note: Statutory Authority G.S. 84-8; G.S. 84-23
Readopted Effective December 8, 1994
Amended June 7, 2001; March 6, 2008

.0202 Definitions
The following definitions shall apply to the terms used in this section:
(1) Eligible persons - Persons who are unable financially to pay for the legal services of an attorney as determined by a standard established by a judge of the General Court of Justice, a legal services corporation, or the legal aid clinic providing representation. “Eligible persons” includes non-profit organizations serving low-income communities.
(2) 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 defender’s office or a district attorney’s office.
(3) 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.
(4) Legal aid clinic - A department, division, program, or course in a law school that operates under the supervision of an active member of the State Bar and renders legal services to eligible persons.
(5) Legal intern - A law student who is certified to provide supervised representation to clients or to appear on behalf of government agencies under the provisions of the rules of this Subchapter.
(6) Legal services corporation - A nonprofit North Carolina corporation organized exclusively to provide representation to eligible persons.
(7) Supervising attorney - An active member of the North Carolina State Bar who satisfies the requirements of Rule .0205 of this Subchapter and who supervises one or more legal interns.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended June 7, 2001; March 6, 2002; March 6, 2008

.0203 Eligibility
To engage in activities permitted by these rules, a law student must satisfy the following requirements:
(1) be enrolled in a law school approved by the Council of the North Carolina State Bar;
(2) have completed at least three semesters of the requirements for a professional degree in law (J.D. or its equivalent);
(3) be certified in writing by a representative of his or her law school, authorized by the dean of the law school to provide such certification, as being of good character with requisite legal ability and training to perform as a legal intern;
(4) be introduced to the court in which he or she is appearing by an attorney admitted to practice in that court;
(5) neither ask for nor receive any compensation or remuneration of any kind from any client for whom he or she renders services, but this shall not prevent an attorney, legal services corporation, law school, or government agency from paying compensation to the law student or charging or collecting a fee for legal serv-
.0204 Form and Duration of Certification

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

(a) Duration. The certification shall be effective for 18 months or until the announcement of the results of the first bar examination following the legal intern’s graduation whichever is earlier. If the legal intern passes the bar examination and is admitted to the bar, the certification shall be withdrawn.

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

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

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

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

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

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

.0205 Supervision

(a) A supervising attorney shall

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

(2) supervise no more than two legal interns concurrently, provided, however, there is no limit on the number of legal interns who may be supervised concurrently by an attorney who is a full-time member of a law school’s faculty or staff whose primary responsibility is supervising legal interns in a legal aid clinic and, further provided, that an attorney who supervises legal interns through an externship or out-placement program of a law school legal aid clinic may supervise up to five legal interns;

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

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

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

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

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

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994
Amended June 7, 2001; March 6, 2002; March 6, 2008

.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 of 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
Amended 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
Amended June 7, 2001; March 6, 2008; October 7, 2010
A lawyer should maintain communication with a client concerning the appropriate means, rules and limitations for the provision of legal services. As evaluator, a lawyer zealously asserts the client's position under the rules of the adversary system. A lawyer should perform, or transmit funds to another lawyer for the performance of, professional functions for which the lawyer has been retained. The correlation tables for the comparable numbers.

The 1997 Revised Rules went into effect on July 24, 1997. Prior to the adoption of the 1997 Rules, the professional conduct of North Carolina lawyers was governed by the 1985 Rules of Professional Conduct, which were in effect from January 1, 1986 until July 23, 1997. From January 1, 1974 until the adoption of the 1985 Rules, lawyers were regulated under the North Carolina Code of Professional Responsibility (adopted on April 30, 1973).

The complete text of the Rules as amended through March 2009, and all of the comments thereto, as approved by the North Carolina Supreme Court, follows this note. An index follows the Rules, and correlation tables appear in the Additional Resources section. These tables cross-reference the 2003 and 1997 versions of the Revised Rules with the comparable provisions of the superseded 1985 Rules of Professional Conduct and 1973 Code of Professional Conduct.

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 copy of a CPR opinion may be obtained by calling the ethics department at the State Bar.) The CPR opinions cite Ethical Considerations and Disciplinary Rules from the 1973 Code for authority. The RPC opinions 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 Revised Rules. Reference the correlation tables for the comparable numbers.

In the annotations, the term "FEO" designates a "Formal Ethics Opinion" promulgated under the 1997 Rules, or any subsequent revision thereof. The FEO opinions cite rules from the 1997 Revised Rules, and subsequent revisions to those rules.

To cite a North Carolina Rule of Professional Conduct, the following format is recommended: N.C. Rules of Prof'l Conduct Rule 1.1 (2003).

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] A lawyer should have due regard for the interests of the public, the administration of justice, and the profession. 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.

[5] 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 should 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.

[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 approval 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 should 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 duties to a client and a lawyer's duties to the legal profession.
This role requires an understanding by lawyers of their relationship to our legal serves. In securing their observance by other lawyers. Neglect of these responsibilities assure that its regulations are conceived in the public interest and not in further-ulated profession. Under law, for the abuse of legal authority is more readily challenged by a self-reg-indendent legal profession is an important force in preserving government maintain the legal profession's independence from government domination. An the fact that ultimate authority over the legal profession is vested largely in the pro cesses of government and law enforcement. This connection is manifested in the courts. 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.

[1] 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 interpreta-
tion, but the text of each Rule is authoritative. Research notes were prepared to
come 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.
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).

[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 materials 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 materials 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, 84-23
Adopted July 24, 1997; Amended March 1, 2003

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.”)

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 transactions 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).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

Distinguishing Professional Negligence

[7] An error by a lawyer may constitute professional malpractice under the applicable standard of care and subject the lawyer to civil liability. However, conduct that constitutes a breach of the civil standard of care owed to a client giving rise to liability for professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client competently. A lawyer who makes a good-faith effort to be prepared and to be thorough will not generally be subject to professional discipline, although he or she may be subject to a claim for malpractice. For example, a single error or omission made in good faith, absent aggravating circumstances, such as an error while performing a public records search, is not usually indicative of a violation of the duty to represent a client competently.

[8] Repeated failure to perform legal services competently is a violation of
this rule. A pattern of incompetent behavior demonstrates that a lawyer cannot or will not acquire the knowledge and skills necessary for minimally competent practice. For example, a lawyer who repeatedly provides legal services that are inadequate or who repeatedly provides legal services that are unnecessary is not fulfilling his or her duty to be competent. This pattern of behavior does not have to be the result of a dishonest or sinister motive, nor does it have to result in damages to a client giving rise to a civil claim for malpractice in order to cast doubt on the lawyer’s ability to fulfill his or her professional responsibilities.

History Note: Statutory Authority G, 84-23
Adopted July 24, 1997; Amended March 1, 2003.

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 assistant, 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.

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

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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."


**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. 84-23

Adopted July 24, 1997; Amended 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

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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 employer'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.

**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 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 substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client 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 sufficient to warrant the imposition of professional discipline is typically characterized by the element of intent or scienter manifested when a lawyer knowingly or recklessly disregards his or her obligations. Breach of the duty of diligence sufficient to warrant professional discipline occurs when a lawyer consistently fails to carry out the obligations that the lawyer has assumed for his or her clients. A pattern of negligent conduct is not excused by a burdensome case load or inadequate office procedures.

History Note: Statutory Authority G. 84-23
Adopted July 24, 1997; Amended March 1, 2003

**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 set-
tlement 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. Client telephone calls should be promptly returned or acknowledged.

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. 84-23
Adopted July 24, 1997; Amended March 1, 2003

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 insured or insurer 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.

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) 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.

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. Before filing an action to collect a disputed fee, the client must be advised of the fee dispute resolution program. Notification must occur not only when there is a specific issue in dispute, but also when the client simply fails to pay. However, when the client expressly acknowledges liability for the specific amount of the bill and states that he or she cannot presently pay the bill, the fee is not disputed and notification of the client is not required. In making reason-
able efforts to advise the client of the existence of the fee dispute resolution program, it is preferable to address a written communication to the client at the client's last known address. If the address of the client is unknown, the lawyer should use reasonable efforts to acquire the current address of the client. Notification is not required in those instances where the State Bar does not have jurisdiction over the fee dispute as set forth in 27 N.C.A.C. 1D, .0702.

[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. 84-23
Adopted July 24, 1997; Amended March 1, 2003

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 has 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 collectible 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 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 represen-
tation, 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 cer-
tain 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 servic-
es 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, authoriz-
es minimum fees earned upon payment, and provides model fee provisions.
2010 FEO 4. A lawyer may accept barter dollars as payment for legal servic-
es 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 responsibili-
ity 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 represent-
ation 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 per-
centage is a reasonable resolution of the dispute over the division of future fees.

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; or
(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.

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 provid-
ed 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.
[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 wrong-
ful 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 evi-
dence concerning a client. The rule of client-lawyer confidentiality applies in sit-
uations 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 dis-
lose 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 prop-
erly 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.

Rules of Prof'l. Conduct: 9-12
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).

Acting Competently to Preserve Confidentiality

[17] A lawyer must act competently to safeguard information acquired during 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. See Rules 1.1, 5.1 and 5.3.

[18] 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.
Former Client

[19] 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

[20] 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. 84-23
Adopted July 24, 1997; Amended March 1, 2003

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 without the client's consent.

RPC 77. A lawyer may disclose confidential information to his or her liability insurer to defend against a claim but not for the sole purpose of assuring coverage.

RPC 113. A lawyer may disclose information concerning advice given to a client at a closing in regard to the significance of the client's lien affidavit.

RPC 117. An attorney may not reveal confidential information concerning a client's contagious disease without the client's consent.

RPC 120. An attorney may, but need not necessarily, disclose confidential information concerning child abuse pursuant to a statutory requirement.

RPC 133. A law firm may make its waste paper available for recycling.

RPC 157. A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent but in so doing the lawyer may disclose only her belief that there exists a good faith basis for the relief requested and may not disclose confidential information which led her to conclude the client is incompetent.

RPC 175. A lawyer may ethically exercise his or her discretion to decide whether to reveal confidential information concerning child abuse or neglect pursuant to a statutory requirement.

RPC 179. A lawyer must comply with the client's request that the information regarding a settlement be kept confidential if the client enters into a settlement agreement conditioned upon maintaining the confidentiality of the terms of the settlement.

RPC 195. The attorney who represented an estate and the personal representative in her official capacity may divulge confidential information relating to the representation of the estate and the personal representative to the substitute personal representative of the estate.

RPC 206. A lawyer may disclose the confidential information of a deceased client to the personal representative of the client's estate but not to the heirs of the estate.

RPC 209. Opinion provides guidelines for the disposal of closed client files.

RPC 215. When using a cellular or cordless telephone or any other unsecure method of communication, a lawyer must take steps to minimize the risk that confidential information may be disclosed.

RPC 230. A lawyer representing a client on a good faith claim for social security disability benefits may withhold evidence of an adverse medical report in a hearing before an administrative law judge if not required by law or court order to produce such evidence. (But see Rule 3.3)

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.

RPC 3.3.)
ceasing 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 clients.

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 worker’s 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 reconcile 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.

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 rela-
tionship 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 whom the representation 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 a 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 Services

[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 “troubled” under Rule 1.0(nn)), such representation may be precluded by paragraph (b)(1).

Informed Consent

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).

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

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 client 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 defendant. 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 finan-
cial 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 when 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. 84-23
Adopted July 24, 1997; Amended March 1, 2003

ETICS 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 the official or agency.

Multi-disciplinary practice groups in which a lawyer is a partner of an entity orPractice groups in which a lawyer is a partner of an entity or
representing an entity or another lawyer is a partner of a legal entity should be carefully considered in determining whether they create a conflict of interest.

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 the official or agency.

Multi-disciplinary practice groups in which a lawyer is a partner of an entity or Practice groups in which a lawyer is a partner of an entity or representing an entity or another lawyer is a partner of a legal entity should be carefully considered in determining whether they create a conflict of interest.
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 undertined 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 insured or insurer 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 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.

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 mortgage’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.)

RPC 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 represent, 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.)

RPC 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.)

RPC 220. An attorney’s secretary may not be trustee if the attorney wishes to represent the lender at a contested foreclosure.

RPC 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.)

RPC 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.

RPC 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.)

RPC 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.

See also RPC 82.)

RPC 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.)

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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
(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 concerning 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 (f).

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 fees 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 real 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.
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. 84-23
Adopted July 24, 1997; Amended March 1, 2003

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 lawyer’s involvement in a matter substantially related subject matter.

[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. 84-23
Adopted July 24, 1997; Amended 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 conditions are met.

RPC 229. A lawyer who jointly represented a husband and wife in the preparation and execution of estate planning documents may not prepare a codicil to the will of one spouse without the knowledge of the other spouse in 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

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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.

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

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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, 84-23
Adopted July 24, 1997; Amended 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. (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 procure 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 participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(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

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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(f) (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. 84-23
Adopted July 24, 1997; Amended 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 multijudge 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 multijUDGE panel, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term “adjudicative officer” includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

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(b). 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. 84-23
Adopted July 24, 1997; Amended 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.

2010 FEO 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. 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 the highest 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 matter 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

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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. 84-23
Adopted July 24, 1997; Amended 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 rent back.

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.

**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 confidence 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. 84-23
Adopted July 24, 1997; Amended 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 three subparts: Rule 1.15-1, Definitions; Rule 1.15-2, General Rules; and Rule 1.15-3, Records and Accountings. 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 three subparts as well as the annotations appear after the text for Rule 1.15-3.

Rule 1.15-1: DEFINITIONS

For purposes of this Rule 1.15, the following definitions apply:

(a) “Bank” denotes a bank or savings and loan association 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) “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.

(f) “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.

(g) “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.

(h) “Funds” denotes any form of money, including cash, payment instruments such as checks, money orders, or sales drafts, and receipts from electronic fund transfers.

(i) “General trust account” denotes any trust account other than a dedicated trust account.

(j) “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.

(k) “Legal services” denotes services rendered by a lawyer in a client-lawyer relationship.

(l) “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.

(m) “Trust account” denotes an account, designated as such, maintained by a lawyer for the deposit of trust funds.

(n) “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. 84-23
Adopted July 24, 1977; Amended March 1, 2003; March 6, 2008; October 8, 2009; August 23, 2012

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) Segregation of Lawyer’s Funds. No funds belonging to a lawyer shall be deposited in a trust account or fiduciary account of the lawyer except:

(1) funds sufficient to open or maintain an account, pay any bank service charges, or pay any tax levied on the account; or

(2) funds belonging in part to a client or other third party and in part currently or conditionally to the lawyer.

(g) Mixed Funds Deposited Intact. When funds belonging to the lawyer are received in combination with funds belonging to the client or other persons, all of the funds shall be deposited intact. The amounts currently or conditionally belonging to the lawyer shall be identified on the deposit slip or other record. After the deposit has been finally credited to the account, the lawyer may withdraw the amounts to which the lawyer is or becomes entitled. If the lawyer’s entitlement is disputed, the disputed amounts shall remain in the trust account or fiduciary account until the dispute is resolved.

(h) 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 the client balance on which item is drawn. Any item that does not capture 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 means of a debit card.

(j) No Personal Benefit. A lawyer shall not use or pledge any entrusted property to obtain credit or other personal benefit for the lawyer or any person other than the legal or beneficial owner of that property.

(k) Bank Directive. Every lawyer maintaining a trust account or fiduciary account 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.

(l) Notification of Receipt. A lawyer shall promptly notify his or her client of the receipt of any entrusted property belonging in whole or in part to the client.

(m) Delivery of Client Property. A lawyer shall promptly pay or deliver to the client, or to third persons as directed by the client, any entrusted property belonging to the client and to which the client is currently entitled.

(n) Property Received as Security. Any entrusted property or document of title delivered to a lawyer as security for the payment of a fee or other obligation to the lawyer shall be held in trust in accordance with this Rule 1.15 and

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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.

(e) Duty to Report Misappropriation. A lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the North Carolina State Bar.

(p) Interest on Deposited Funds. 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 ID 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.

(q) Abandoned Property. If entrusted property is unclaimed, the lawyer shall make due inquiry of his or her personnel, records and other sources of information in an effort to determine the identity and location of the owner of the property. If that effort is successful, the entrusted property shall be promptly transferred to the person or entity to whom it belongs. If the effort is unsuccessful and the provisions of G.S. 116B-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.

History Note: Statutory Authority G. 84-23
Adopted July 24, 1997; Amended March 1, 2003; March 6, 2008; February 5, 2009; August 23, 2012

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 printed digital images thereof furnished by the bank, showing the amount, date, and recipient of the disbursement, and, in the case of a general trust account, the client balance against which each 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 the fund balance for the trust account.

(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 printed digital images thereof furnished by the depository, showing the amount, date, and recipient of the disbursement, provided, that the images satisfy the requirements set forth in Rule 1.15-3(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. At least quarterly, the individual client balances shown on the ledger of a general trust account must be totaled and reconciled with the current bank statement balance for the trust account as a whole.

(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 retain a record of the reconciliations of the general trust account for a period of six years in accordance with Rule 1.15-3(g).

(e) Accounts 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) Accounts for Fiduciary Property. Inventories and accounting 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.

Comment

[1] The purpose of a lawyer’s trust account or fiduciary account is to segregate the funds belonging to others from those belonging to the lawyer. Money received by a lawyer while providing legal services or otherwise serving as a fiduciary should never be used for personal purposes. Failure to place the funds of others in a trust or fiduciary account can subject the funds to claims of the lawyer’s creditors or place the funds in the lawyer’s estate in the event of the lawyer’s death or disability.

Property Subject to these Rules

[2] Any property belonging to a client or other person or entity that is received by or placed under the control of a lawyer in connection with the lawyer’s furnishing of legal services or professional fiduciary services must be handled and maintained in accordance with this Rule 1.15. The minimum records to be maintained for accounts in banks differ from the minimum records to be maintained for accounts in other financial institutions (where permitted), to accommodate brokerage accounts and other accounts with differing reporting practices.

Client Property

[3] Every lawyer who receives funds belonging to a client must maintain a trust account. The general rule is that every receipt of money from a client or
for a client, which will be used or delivered on the client's behalf, is held in trust and should be placed in the trust account. All client money received by a lawyer, except that to which the lawyer is immediately entitled, must be deposited in a trust account, including funds for payment of future fees and expenses. 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."

Bursden 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.

Abandoned Property

[13] Should a lawyer need technical assistance concerning the escheat of property to the State of North Carolina, the lawyer shall contact the escheat officer at the Office of the North Carolina State Treasurer in Raleigh, North Carolina.

Disputed Funds

[14] 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.

[15] 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 Accounting

[16] 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.

[17] 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).

[18] 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.

[19] 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.

[20] 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

[21] 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.

History Note: Statutory Authority G. 84-23
Adopted July 24, 1997; Amended March 1, 2003; October 6, 2004; March 6, 2008

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.
tion, 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 funds 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 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.

RULE 1.15-4: RESERVED

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.

Rules of Prof’l. Conduct: 9-36
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 obligated 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 if 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 sub-

mission. 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. 84-23
Adopted July 24, 1997; Amended 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 is 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.

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 work for the purchaser as an independent contractor 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 prohibits 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 partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the 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 for the purchaser. 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.

[4] The Rule permits a sale attendent 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 more 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. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be 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).

Applicability of the Rule

[13] 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.

[14] 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.

[15] 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. 84-23
Adopted July 24, 1997; Amended March 1, 2003; November 16, 2006

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 discusses with a lawyer 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 had discussions with a prospective client shall not use or reveal information learned in the consultation, 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 discussions 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] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a “prospective client” within the meaning of paragraph (a).

[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 interview 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, such consent from all affected present or former clients must be obtained before accepting the representation.

[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. 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. 84-23
Adopted March 1, 2003.
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.


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

(1) A lawyer shall not have sexual relations with a current client of the lawyer.

(2) Paragraph (a) shall not apply if a consensual sexual relationship existed between the lawyer and the client before the legal representation commenced.

(3) A lawyer shall not require or demand sexual relations with a client incident to or as a condition of any professional representation.

(4) For purposes of this rule, "sexual relations" means:

(a) Sexual intercourse;

(b) 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 such persons from acting as a condition of any professional representation.

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. 84-23
Adopted July 24, 1997; Amended 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

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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. 84-23

Adopted July 24, 1997; Amended 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 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 non cooperation of persons having relevant information. Any such limitations that 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 status 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. 84-23

Adopted July 24, 1997; Amended 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

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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. 84-23
Adopted March 1, 2003

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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 prohibit-
bunal by the lawyer;
(2) fail to disclose to the tribunal legal authority in the controlling juris-
diction 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 caused, 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 mat-
ters 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 dis-
terested 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 elic or otherwise per-
mit 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 testi-
mony 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 reasonable: 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 advoca-
te’s proper course is to communicate 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 oth-
ewise would be protected by Rule 1.6. It is for the tribunal 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 conse-
quences 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 crimi-
nal 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

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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. 84-23
Adopted July 24, 1997; Amended 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.

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;
(c) 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 preatory 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(1). 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 (c). 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 impugned to the client. See also Rule 4.2.

ETHICS OPINION NOTES
CPR 2. An attorney generally does not need the consent of the adverse party to talk to witnesses.
CPR 284. An attorney may seek alimony for a wife although he has evidence of the wife’s adultery so long as he does not have to offer perjured testimony or other false evidence.
CPR 340. An attorney may represent a client with a malpractice claim even though the client has entered a contingent fee contract with a medical consultant for case evaluation, preparation and expert witness location, so long as the consultant does not present evidence and the compensation of the expert witness provided by the consultant is not contingent upon the outcome of the litigation.

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL
(a) A lawyer shall not:
(1) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
(2) communicate ex parte with a juror or prospective juror except as permitted by law;
(3) communicate ex parte with a judge or other official except:
(A) in the course of official proceedings;
(B) in writing, if a copy of the writing is furnished simultaneously to the opposing party;
(C) orally, upon adequate notice to opposing party; or
(D) as otherwise permitted by law;
(4) engage in conduct intended to disrupt a tribunal, including:

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(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;
(C) the communication involves misrepresentation, coercion, duress or harassment.

(b) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a juror or a prospective juror.

(c) A lawyer shall reveal promptly to the court improper conduct by a juror or a prospective juror, or by another toward a juror, a prospective juror or a member of a juror or a prospective juror's family.

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 prospective jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with prospective jurors 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 prospective juror 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 prospective jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on the lawyer's behalf who conducts an investigation of jurors or prospective jurors should act with circumspection and restraint.
[5] Communications with, or investigations of, members of families of jurors or prospective jurors by a lawyer or by anyone on the lawyer's behalf are subject to the restrictions imposed upon the lawyer with respect to the lawyer's communications with, or investigations of, jurors or prospective jurors.
[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, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal.
[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 impurities 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] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

History Note: Statutory Authority G. 84-23
Adopted July 24, 1979; Amended March 1, 2003

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
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. Recognition 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).

[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 identity of a party, 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. 84-23
Adopted July 24, 1997; Amended March 1, 2003; October 9, 2008
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. 84-23
Adopted July 24, 1997; Amended March 1, 2003

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 privileged mitigating information known to the prosecutor,

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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.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply of an advocate; the prosecutor’s duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. 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.

History Note: Statutory Authority G. 84-23
Adopted July 24, 1997; Amended March 1, 2003; November 16, 2006

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 becoming 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. 84-23
Adopted July 24, 1997; Amended 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 or in 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.

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**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 been 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 un counselled 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 whom, 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, 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, the 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. 84-23
Adopted July 24, 1997; Amended March 1, 2003
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 per-
son 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 unrepresen-ted 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 unrepresents 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. 84-23
Adopted July 24, 1997; Amended March 1, 2003

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS
(a) In representing a client, a lawyer shall not use means that have no substan-tial 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 evi-dence from third persons and unwarranted intrusions into privileged rela-tionships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive writings that were mistakenly sent or produced by opposing parties or their lawyers. 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 original 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 wrongfully obtained by the sending person. See Rule 1.0(o) for the definition of “writing.”

[3] Some lawyers may choose to return a writing unread, for example, when the lawyer learns before receiving the writing that it was inadvertently sent to the wrong address. 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 is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

History Note: Statutory Authority G. 84-23
Adopted July 24, 1997; Amended March 1, 2003; August 18, 2005

RULE 6.2: ACCOMMODATION OF CONFLICTS OF INTEREST
(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 evi-dence from third persons and unwarranted intrusions into privileged rela-tionships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive writings that were mistakenly sent or produced by opposing parties or their lawyers. 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 original 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 wrongfully obtained by the sending person. See Rule 1.0(o) for the definition of “writing.”

[3] Some lawyers may choose to return a writing unread, for example, when the lawyer learns before receiving the writing that it was inadvertently sent to the wrong address. 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 is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

History Note: Statutory Authority G. 84-23
Adopted July 24, 1997; Amended March 1, 2003; August 18, 2005

RULES OF PROF’L CONDUCT: 9-52
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.

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.

RULE 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

(a) A partner 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 partner 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 senior partner 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 partners 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 partner 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. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner 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 partner 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 avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate 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 supervising 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 partner, associate or subordinate. Moreover, this Rule is not intended to establish a standard for vicarious criminal or civil liability for the acts of another lawyer. Whether a lawyer may be liable civilly or criminally for another lawyer’s conduct is a question of law beyond the scope of these Rules.

[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. 84-23
Adopted July 24, 1997; Amended March 1, 2003

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. 84-23
Adopted July 24, 1997
RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm 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 partner 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] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer’s professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[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.

[3] 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(c).

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997; Amended March 1, 2003

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.

RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer’s firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;
(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer, provided that the lawyer has not purchased the practice of a deceased lawyer for the purpose of operating the practice as a business;
(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.

(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] 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).

[3] 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. 84-23
Adopted July 24, 1997; Amended March 1, 2003

ETHICS OPINION NOTES

CPR 239. A law firm may set up a-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.

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.
(b) A lawyer 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 jurisdiction, but not in this 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; or
   (2) other than engaging in conduct governed by paragraph (1):
      (A) the lawyer provides legal services to the lawyer's employer or its organizational affiliates and the services are not services for which pro hac vice admission is required; a lawyer acting pursuant to this paragraph is not subject to the prohibition in Paragraph (b)(1);
      (B) the lawyer acts with respect to a matter that arises out of or is other-
wise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice; 
(C) 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 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; 
(D) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation; or 
(E) 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. 
(F) 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 
(i) is licensed to practice law in a state with which North Carolina has comity in regard to admission to practice law; 
(ii) is a member in good standing in every jurisdiction in which the lawyer is licensed to practice law; 
(iii) has satisfied the educational and experiential requirements prerequisite to comity admission to the North Carolina State Bar; 
(iv) is domiciled in North Carolina; 
(v) 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 
(vi) 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 is not subject to the prohibition in Paragraph (b) (1), 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. 
(D) A lawyer shall not assist another person in the unauthorized practice of law. 
(e) 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. 
(F) 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 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. 

Comment 
[1] A lawyer may regularly practice law only in a jurisdiction in which the lawyer is admitted 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 jurisdiction, but not in this jurisdiction, will engage in conduct in this jurisdiction under circumstances that do not create significant risk to the interests of their clients, the courts or the public. Paragraph (c) identifies six 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 paragraph (c)(2)(A) and (F), nothing in this Rule is intended to authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice here. Presence may be systematic and continuous even if the lawyer is not physically present in this jurisdiction. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b). However, a lawyer admitted to practice in another jurisdiction who is partner, 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] Lawyers not admitted to practice generally in the jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before a tribunal or agency. Such authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (b)(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. Nothing in paragraph (c)(1) is intended to authorize a lawyer not licensed in this jurisdiction to solicit clients in this jurisdiction. 
[4] When lawyers appear or anticipate appearing before a tribunal or administrative agency with authority to admit the lawyer to practice pro hac vice, their conduct is governed by paragraphs (a) and (c)(1) and not by (c)(2). Paragraph (c)(2) authorizes a lawyer to engage in certain conduct other than making or preparing for appearances before such a tribunal. For example, paragraph (c)(2)(A) recognizes that some clients hire a lawyer as an employee in circumstances that may make it impractical for the lawyer to become admitted to practice in this jurisdiction. Given that these clients are unlikely to be deceived about the training and expertise of these lawyers, lawyers may act on behalf of such a client without violating this Rule. The lawyer may also act on behalf of the client's commonly owned organizational affiliates but only in connection with the client's matters. 
[5] Paragraph (c)(2)(B) 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. 
[6] Paragraph (c)(2)(C) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction 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, 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. 
[7] Paragraph (c)(2)(D) recognizes that association with a lawyer licensed to practice in this jurisdiction is likely to protect the interests of both clients and the public. The lawyer admitted to practice in this jurisdiction, 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. 
[8] Paragraph (c)(2)(F) 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.
[9] 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.

[10] Lawyers may also provide professional advice and instruction to non-lawyers 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.

[11] In the absence of statutory prohibitions or specific conditions placed on a disbarred or suspended attorney in the order revoking or suspending the license, such individual may be hired to perform the services of a law clerk or legal assistant by a law firm with which he or she was not affiliated at the time of or after the acts resulting in discipline. Such employment is, however, subject to certain restrictions. A licensed attorney in the firm must take full responsibility for, and employ independent judgment in, adopting any research, investigatory results, briefs, pleadings, or other documents or instruments drafted by such individual. The individual may not directly advise clients or communicate in person or in writing in such a way as to imply that he or she is acting as an attorney or in any way in which he or she seems to assume responsibility for a client's legal matters. The disbarred or suspended attorney should have no communications or dealings with, or on behalf of, clients represented by such disbarred or suspended attorneys or by any individual or group of individuals with whom he or she practiced during the period on or after the date of the acts which resulted in discipline through and including the effective date of the discipline.

Further, the employing attorney or law firm should perform no services for clients represented by the disbarred or suspended attorney during such period. Care should be taken to ensure that clients fully understand that the disbarred or suspended attorney is not acting as an attorney, but merely as a law clerk or lay employee. Under some circumstances, as where the individual may be known to clients or in the community, it may be necessary to make an affirmative statement or disclosure concerning the disbarred or suspended attorney's status with the law firm. Additionally, a disbarred or suspended attorney should be paid on some fixed basis, such as a straight salary or hourly rate, rather than on the basis of fees generated or received in connection with particular matters on which he or she works. Under these circumstances, a law firm employing a disbarred or suspended attorney would not be acting unethically and would not be assisting a nonlawyer in the unauthorized practice of law.

[12] An attorney or law firm should not employ a disbarred or suspended attorney who was associated with such attorney or firm at any time on or after the date of the acts which resulted in the disbarment or suspension through and including the time of the disbarment or suspension. Such employment would show disrespect for the court or body which disbarred or suspended the attorney. Such employment would also be likely to be prejudicial to the administration of justice and would create an appearance of impropriety. It would also be practically impossible for the disciplined lawyer to confine himself or herself to activities not involving the actual practice of law if he or she were employed in his or her former office setting and obliged to deal with the same staff and clientele.

History Note: Statutory Authority G. 84-23
Adopted July 24, 1997; Amended March 1, 2003; November 16, 2006

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.
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
future fees. after the departing lawyer announced his departure from the firm and the spe-
Rule 5.6 if the agreement was negotiated by the departing lawyer and the firm

able and may not penalize or deter the withdrawing lawyer from taking clients

ing legal fees received after a lawyer's departure from a firm must be reason-

able and is not based solely upon loss in value due to the loss of client billings.

firm value generated by the lawyer's departure provided the provision is fair

include a repurchase or buy-out provision that takes into account the loss in

lawyer's ability to represent future claimants.

employment agreement with a law firm that includes a provision reducing the

benefits.

status as a member of the State Bar as a condition of payment of retirement

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 deci-
dions 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 adjust-
ment, 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 termina-
tion of the relationship, except an agreement concerning benefits upon retire-
ment; or

(b) an agreement in which a restriction on the lawyer's right to practice is
part of the settlement of a controversy between private parties.

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 serv-
vice with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other
persons in connection with settling a claim on behalf of a client.

[3] This Rule does not prohibit restrictions that may be included in the
terms of the sale of a law practice pursuant to Rule 1.17.

History Note: Statutory Authority G. 84-23
Adopted July 24, 1997; Amended March 1, 2003

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 con-
tains 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 divid-
ing legal fees received after a lawyer’s departure from a firm must be reason-
able 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 rep-
resentation 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 spe-
ific percentage is a reasonable resolution of the dispute over the division of
future fees.

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 oth-
ers 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 provi-
sion 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, psy-
chological counseling, tax preparation, and patent, medical or environmental
consulting.

[2] When a lawyer performs law-related services or controls an organiza-
tion that does so, there exists the potential for ethical problems. Principal
among these is the possibility that the person for whom the law-related serv-
ices are performed fails to understand that the services may not carry with
them the protections normally afforded as part of the client-lawyer relation-
ship. 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 pro-
fessional 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 con-
duct 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 dis-
tinct 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, indi-
vidually 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

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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. 84-23
Adopted 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 as 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.

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)(5) 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 judicial 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. 84-23
Adopted January 28, 2010

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 services 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. 84-23
Adopted 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. 84-23
Adopted July 24, 1997; Amended 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. 84-23
Adopted 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.

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. 84-23
Adopted July 24, 1997; Amended 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.

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 misleading.

[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. 84-23
Adopted July 24, 1997; Amended March 1, 2003

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 may provide legal services and accounting services from the same office.

2003 FEO 3. 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.
RULE 7.2: ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise 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 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 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 is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television 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. Electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

[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.

Pauling Others to Recommend a Lawyer

[5] Lawyers are not permitted to pay others for channeling professional work. 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, banner ads, 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. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] 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 prospective clients 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 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. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service.

[7] A lawyer who accepts assignments or referrals from a prepaid or group legal services 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 prospective clients, 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.

History Note: Statutory Authority G. 84-23
Adopted July 24, 1997; Amended March 1, 2003

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.

RULE 7.3: DIRECT CONTACT WITH POTENTIAL 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 potential client has made known to the lawyer a desire not to be solicited by the lawyer; or
(2) the solicitation involves coercion, duress, harassment, compulsion, intimidation, or threats.
(c) 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 a potential client 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) 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 envelope. 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 letter in a font as large as or larger than any other printing contained in the letter.
(2) Electronic Communications. The advertising notice shall appear in the “in reference” block of the address 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.
(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, harassment and the communication with the solicited person is not false, deceptive or misleading.

(e) For purposes of this rule, a potential client is a person with whom a lawyer would like to form a client-lawyer relationship.

Comment

[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 lawyer 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.

[3] 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.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or 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.

[5] 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 a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the potential client may violate the provisions of Rule 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer’s firm is willing to offer. This form of communication is not directed to a potential client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become 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.

[7] 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. 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 at the beginning of an enclosed letter or electronic communication in a font that is at least as large as the font used for any other printing in the letter or electronic communication. The font size requirement does not apply to a brochure enclosed with the letter if the letter 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. The advertising notice must also appear in the “in reference to” section of an email communication. The requirement that certain communications be marked, “This is an advertisement for legal services,” does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Paragraph (d) of this Rule 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. 84-23
Adopted July 24, 1997; Amended March 1, 2003; October 6, 2004; November 16, 2006; August 23, 2007; August 25, 2011

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.
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.”


History Note: Statutory Authority G. 84-23
Adopted July 24, 1997; Amended 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 substan-
tial 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 suc-
cession 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 accep-
table 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 dis-
claimer that it is not a public legal aid agency may be required to avoid a mis-
leading implication. A firm name that includes the surname of a deceased or
retired partner 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 per-
missible 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 partner may be used in the name of a law firm
only if the partner 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, pro-
vided 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 prac-
tice 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. 84-23
Adopted July 24, 1997; Amended March 1, 2003

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 part-
nership.

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 con-
flicting interests if they maintain separate telephones and have different secre-
taries.

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 des-
ignation, “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 tolist an unlicensed attorney on letterhead as “of
counsel” or “consulting attorney.”

RPC 31. A law firm may not list on its letterhead a “corresponding” attor-
ney 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 prac-
ticing 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 provid-
ed the URL is not otherwise misleading.

2006 FEO 20. A law firm may not continue to use a former member’s sur-
name 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.

RULE 7.6: RESERVED

RULE 8.1: BAR ADMISSION AND DISCIPLINARY MAT-
TERS

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 law-
ful demand for information from an admissions or disciplinary authority,
except that this rule does not require disclosure of information otherwise pro-
tected 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. 84-23
Adopted July 24, 1997; Amended 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. 84-23
Adopted July 24, 1997; Amended 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.

[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 gov-
eralized 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, 84-23
Adopted July 24, 1997; Amended March 1, 2003; October 7, 2010

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.

RULE 8.4: MISCONDUCT
It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official;
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
(g) intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3.

Comment
[1] 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 the most 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. 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] 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.
[6] 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, 84-23
Adopted July 24, 1997; Amended March 1, 2003

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.

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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 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.

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.

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.

[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. 84-23
Adopted July 24, 1997; Amended March 1, 2003

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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 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 I 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 I’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 I’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 it's 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 on the basis 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 District 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-
**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 there-to. 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 of 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 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. Canon 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 knowledge 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 proprietary 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 in fact maintains 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 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)(1) 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
October 24, 1986

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 #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 law 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 then 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: 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 law 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 then 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.

Inquiry:
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 A 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 to 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 the 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 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 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 con-
servator. There appear to be few ethics opinions dealing with ultimate dispo-
sition 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 gen-
erally 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 attor-
ney's office or elsewhere, would certainly be appropriate. Otherwise, Attorney
A should comply with the direction of the court which appointed him conser-
vator and follow his personal conscience and sense of professional responsibil-
ity 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-bear-
ing 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 viola-
tions, 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 work-
ning privately in partnership with a loan officer at the bank involved in the trans-
action described above and of obtaining a large loan from that bank for the
stated purpose of construction work on the property. According to third par-
ties, 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 prop-
erty to pay for construction work which did actually occur. Although the com-
pany 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 liqui-
dated 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 con-
tract, 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 certain-
ty 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 offi-
cials. 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 undisput-
et 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 share-
holders moved that the corporation sue its president for mismanagement, but
that motion was defeated by a majority vote of the directors, who were con-
trolled by the president. Law Firm B filed a counterclaim against the corpora-
tion and its president, praying for independent relief for the minority share-
holders 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 he 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 to 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).

**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 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?

**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 situation subject, 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 1'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.
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?

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)(1) 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 it in any way, and instead hopes 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 believes this would save the client from incurring the expenses of sale and partial or full payment of 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 affect 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 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.
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.

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(c).

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 ... 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.”

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 represent only his interests, that he may discharge the attorney who will assist in having him brought before the Court so that the district attorney knows to be represented by counsel. 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

Opinions: 10-12
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 A 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 the husband 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.

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**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 formerly 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.

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**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.

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**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 services. 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 performance of legal services and representation of the client. Assuming that the contractual arrangements specify what the employing attorney or firm is paying, the rate to be paid to the contracting attorney, and the placement fee to be paid to APS, the arrangement would not violate either Rule 2.6(d) or Rule 3.2.

**RPC 39**
July 15, 1988

**Communication with Adverse Party's Insurer**

*Editor's Note: This opinion was originally published as RPC 40 (Revised).*

*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

**Lender Preparation of Closing Documents**

*Editor's Note: This opinion was originally published as RPC 40 (Revised).*

*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**

*Editor's Note: This opinion was originally published as RPC 40 (Revised).*

*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**

*Editor's Note: This opinion was originally published as RPC 40 (Revised).*

*Opinion* rules that an attorney who has been certified as a specialist by the Board of Legal Specialization may use in an advertisement in any way that is not false, deceptive or misleading.

**Inquiry:**

Lawyer 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 order 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 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 obligated 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 incidental 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 note holder’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 like-
ly to be misunderstood, the lawyer should be careful to offer the client an ade-
quate explanation of the agreement prior to its execution.

Retainers and advance payments should be carefully distinguished. In its
trust 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 gen-
eral account. Assume that the client has agreed in writing to the above agree-
ment 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 considera-
tions.

Private Employment of Appointed Counsel

Opinion describes circumstances under which a lawyer who has been appoint-
ed 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 appoint-
ed for the representation of indigent defendants shall not accept any compen-
sation other than that awarded by the court." This provision, when read in con-
junction with Rule 2.6 of Rules of Professional Conduct prohibiting the collec-
tion 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 overreach-
ing 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 con-
vinced 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 (award-
ushed 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 aris-
es 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 accord-
dance 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 appor-
tioned 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 con-
sidered 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 posses-
sion property was seized may not without consent seek the property as a fine or for-
feiture 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
distric and superior courts.

Opinions: 10-18
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.
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) forevers 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?
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.

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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 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.

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**RPC 67**

July 14, 1989

**Interviewing Employee of Adverse Corporate Party**

Opinion rules that an attorney generally may interview a rank and file employee of an adverse corporate party without the knowledge or consent of the corporate party or its counsel.

**Inquiry:**

After a workers’ compensation claim has been filed and the employer is represented by counsel, may the claimant’s attorney contact a nonmanagerial co-employee of the claimant to discuss the circumstances of the alleged accident without obtaining consent of counsel for the employer?

**Opinion:**

Yes. Rule 7.4(a) of the Rules of Professional Conduct generally prohibits contact with only those employees of a represented corporate party which have managerial responsibility or who have been authorized to speak for the corporation. Rank and file employees whose personal acts or omissions are not at issue may ordinarily be interviewed without the knowledge or consent of the corporate party or its counsel. See CPR 2.

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**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?

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**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 3.6(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 lawyer'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 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: A lawyer may disclose confidential information to another, but only if the other person is a liability insurer. The lawyer may disclose the information only to the extent necessary to represent the lawyer's client.

Inquiry: Attorney C asks Attorney B to disclose confidential information to Insurance Company without obtaining Attorney B's consent.

RPC 78
October 20, 1989

Conditional Delivery of Trust Account Checks

Opinion: A closing attorney cannot conditionally deliver trust account checks to the real estate agent before disbursement. A conditional delivery would violate the terms of the insurance policy.

Inquiry: Attorney B delivers trust account checks to the real estate agent before disbursement.
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 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 the client. One means of avoiding such prejudice is, in the language of the rule, “delivering to the client all papers and property to which the client is entitled.” Although the rule itself does not define the extent of the client’s entitlement, the comment to the rule does indicate that, “anything in the file which would be helpful to successor counsel should be turned over.” There follows in the comment a nonexclusive listing of such items. While the comment does not specifically identify information gathered by a law firm incident to its determination whether it will accept a case as material which must be surrendered, there appears to be no logical reason to except such material from the obligation imposed by the rule. Regardless of the decision ultimately made by Firm X as to whether it wishes to prosecute the client’s case to its conclusion, it is obvious that an attorney/client relationship exists during the period the case is being evaluated. That being the case, Rule 2.8 concerning withdrawal from representation would govern an attorney’s actions in the wake of a decision not to undertake further prosecution of the client’s case. If material obtained during the evaluation process on the client’s account would be of some value to the client in pursuing her claim, it must, under the terms of the rule, be surrendered unconditionally without regard to whether the cost of its acquisition was advanced by the law firm or the client.

RPC 80
January 12, 1990
Lending Money to a Client

Opinion rules that a lawyer may not lend money to a client who is represented in pending or contemplated litigation except to finance costs of litigation.

Inquiry:
Under what circumstances, if any, may a lawyer lend money to a client for whom the lawyer is handling a personal injury claim?

Opinion:
Rule 5.3(b) of the Rules of Professional Conduct generally prohibits lawyers advancing or guaranteeing financial assistance to a client while representing the client in connection with contemplated or pending litigation. There is one narrow exception to the rule which permits a lawyer to “advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.”

RPC 81
January 12, 1990
Interviewing the Former Employee of an Adverse Corporate Party

Opinion rules that a lawyer may interview an unrepresented former employee of an adverse corporate party without the permission of the corporation’s lawyer.

Inquiry:
May a lawyer interview an unrepresented former employee of an adverse corporate party without the permission of the corporation’s lawyer?

Opinion:
Yes. Rule 7.4(a) prohibits contact only with the party itself. Where the party in question is corporate, the protection of the rules also extends to persons who have the legal power to bind the corporation or who are responsible for implementing the advice of the corporation’s lawyer. This is necessary to prevent improvident settlements and similarly major capitulations of legal position on the part of a momentarily uncounseled, but represented, party and to enable the corporation’s lawyer to maintain an effective lawyer-client relationship with members of management. The rule is not meant to protect a corporation whose interests might be impaired by factual information willingly shared by a former employee. A former employee is in no sense the alter ego of the corporation and may be interviewed by any interested party regarding relevant matters.

RPC 82
January 12, 1990
The Lawyer as Trustee

The State Bar has received an increasing number of inquiries related to the role of an attorney serving as trustee under a deed of trust. In an effort to clarify the responsibilities of the lawyer-trustee, the Ethics Committee has reviewed CPRS 94, 107, 106, 201, 218, 220, 297, 303, 305 and RPC 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 trustee 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 trustee 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 himself 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 makes 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 trustee 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
rendered 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.
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 obligated 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 certifi-

**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 review 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 with respect to a matter about which Attorney A has sued Z. X is thinking of assisting Attorney A, however, since Attorney A learns that X has an attorney, must Attorney 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**

**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).
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 crim-
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 comments 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 circum-
Opinions: 10-33

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 attorneys 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. Does attorney B, practicing with law firm XYZ, have a "prior professional relationship" with Corporation C 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?"
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, tacking should be limited to tacking onto owners’ 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:
Yes. Attorney A would not be automatically disqualified from representing an interest adverse to that of the hospital or one of its staff physicians 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
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 her or his 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 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.

Opinions: 10-35
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?

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 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.

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?

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.

**RPC 108**

Editor's Note: This 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 children in matters involving an individual's criminal or juvenile matters, unless at least both parents are available for consultation. 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.
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.

Opinion #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.

Opinion #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 #3:

See the opinion in response to inquiry one.

Opinion #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 #5:

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.

Opinion #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.

Opinion #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 insured (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.

Opinions: 10-37
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 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 any rights to any “mechanics’ lien” on the real property.

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:
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?

Opinion #1:
Yes, as the comment to Rule 3.1 makes clear, an attorney may counsel non-lawyers 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.
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 advertisements 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 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.

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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(c) allows a lawyer to hold himself 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 a firm in 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.
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.
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 renders 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?

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 123
January 17, 1992

Representation of Parents and Child
Opinion rules that a lawyer may represent parents and an independent guardian ad litem for their child concerning related tort claims under certain circumstances.

Inquiry:
A child is injured due to the apparent malpractice of a physician. Incident to the injury there accrues to the parents of the child a claim against the physician for negligent infliction of emotional distress. Under what circumstances, if any, may the same attorney represent the interests of the parents and the child?

Opinion:
Note: This opinion is intended to address in a broader way the issues raised in RPC 109. It is offered for the general guidance of the bar and is not intended to contradict the advice given in response to the specific facts recited in RPC 109.

Although the interests of the parents and the child are potentially in conflict, an attorney may represent the parents and through them the child in negotiating with the physician or his insurer prior to the initiation of litigation. Once a lawsuit is commenced, the attorney should insist upon the appointment of an independent guardian ad litem for the child. If it appears that the interests of the parents and the child will not necessarily conflict, the attorney may undertake to represent both with the intelligent consent of the parents and the child’s independent guardian ad litem. Since the interests of the child and the parents would be inextricably linked in the establishment of the physician’s liability for negligence, it is unlikely that any actual conflict between the attorney’s two clients would arise prior to the receipt of a settlement offer. Should the defendant make a joint offer requiring the plaintiffs to divide the proceeds, the potential conflict of interest would become actual. Given the fact that the attorney’s clients are bound by family ties and would have economic interests which would not be necessarily antagonistic, the conflict of interest would not automatically disqualify the attorney from continuing the joint representation. In some instances it may also be appropriate for an attorney to attempt to assist his clients in evaluating their respective claims and in amicably agreeing to an equitable and appropriate division which could then be presented to the court for its approval. Under no circumstances may the attorney, while representing both clients, assume a role of advocacy for one as opposed to the other.

Should it become apparent to the attorney that his clients’ conflicting interests cannot be mediated, the attorney will generally be required to withdraw from the representation of both. It is conceivable that the attorney may continue to represent one or the other with the consent of the former client whose case he relinquishes. Rule 5.1(d).

RPC 124
January 17, 1992
Editors Note: But see In re S.E. Hotel Properties Ltd. Partnership, 151 F.R.D. 597 (W.D.N.C. 1993).
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 holds that 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 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 125
January 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. 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 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

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appeared at trial as a person having managerial responsibility on behalf of the
general counsel for the insurance company. Although Mr. C is an attorney, he
was also the corporate representative for the insurance company. Mr. C is an assistant
attorney in the life insurance policy. At the trial of the action, Mr. C appeared as
party's house counsel, who appears in the case as a corporate manager, without the

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
attorney’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
attorney's trustworthiness and would necessitate a report of the apparent vio-
lation to the State Bar. If, however, it appears that the failure to satisfy the con-
tions 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 knowing-
ly violated the conditions of tender, there would be a duty to report the appar-
ent 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 Canon X 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 inten-
tional. Under such circumstances, an attorney would have an obligation to report the misconduct to the State Bar.

Opinion: No. Since Mr. C. participated at trial as a person having managerial respon-
sibility, Rule 7.4(a) prohibited Attorney A from contacting him concerning the
case without the consent of the corporation's counsel of record.

Inquiry: Whether a plea agreement is constitutional and otherwise lawful is a ques-
tion 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 coun-
zel 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 the rules of the United States District Courts in this state. See Eastern District Rule 2.10, Middle District Rule 505 and Western District Rule 1(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 he 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 select an arbitrator and the two arbitrators should select 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 L 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 continued 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:

Rule 2.6(a) provides that, “A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.” Generally speaking, it is necessary to examine all relevant facts and circumstances relating to a fee and the legal services for which it is charged in order to make a determination as to whether it is “clearly excessive.” For that reason, the Ethics Committee has generally refrained from adopting per se rules prohibiting certain types of agreements or methods of computation. Nevertheless, the committee is of the opinion that where an attorney is entitled to receive a contingent fee calculated as a percentage of any amount recovered and arrangements are made for the payment of sums certain over a prolonged period of time in the form of a structured settlement, the attorney may collect immediately only the prescribed percentage of the total settlement reduced to its present value.

RPC 142
January 15, 1993

Lawyer as a Witness

Opinion rules that a lawyer may not represent an estate in litigation against a claimant where the lawyer’s testimony may be necessary to resolve the validity of the claim.

Inquiry:

Mr. X, the father of Miss M, applied for life insurance in the amount of $100,000 in 1985. Miss M contends that Mr. X intended for the proceeds of the policy to be used to educate Miss M who was then 13 years old. Mr. B, the uncle of Mr. X, was living with Mr. X when the policy was issued. Mr. B was shown as the primary beneficiary of the policy, and Miss M was shown as the secondary beneficiary.

Mr. X died intestate on January 20, 1989. Mr. B hired Lawyer L to represent his interests in regard to the estate of Mr. X. The insurance company paid Mr. B $100,000. Mr. B subsequently invested some of the insurance proceeds in certificates of deposit in his own name. Shortly after the death of Mr. X, Lawyer L, on behalf of Mr. B, wrote a letter to Ms. W, the former wife of Mr. X and the mother of Miss M, in which Ms. W was asked to renounce any rights she might have to administer the estate of Mr. X. Thereafter Ms. W did renounce her right to administer the estate. She and Miss M contend that the renunciation was executed only after they had met with Lawyer L in his office and had been assured by Lawyer L that Mr. B would use the entire insurance proceeds to pay for Miss M’s college and law school education. Lawyer L denies ever having offered such assurances to Ms. W and Miss M.

After the renunciation was filed, Mr. B was appointed administrator of Mr. X’s estate and employed Lawyer L to represent him in that capacity.

Mr. B died intestate on September 22, 1990, and his daughter, Ms. F, qualified as administratrix of his estate. Ms. F employed Lawyer L as attorney for the estate of Mr. B. The certificates of deposit mentioned above and perhaps other funds derived from the subject insurance proceeds became assets of the estate of Mr. B.

Sometime after Mr. B’s death, Miss M and Ms. W were informed by Ms. F, either personally or through Lawyer L, that only $25,000 from the estate of Mr. B would be paid toward Miss M’s educational expenses.

On April 1, 1991, Miss M filed a claim against the estate of Mr. B for $92,773.49. This claim was rejected on April 11, 1991, in a letter from Lawyer L.

Subsequently, Attorney A filed suit against the estate of Mr. B on behalf of Miss M seeking payment of Miss M’s claim. Attorney A has requested that
Lawyer L withdraw citing conflicts and the possibility that Lawyer L will be called upon to testify in the lawsuit. Lawyer L has refused to withdraw.

May Lawyer L continue representing the estate of Mr. B in the defense of the lawsuit brought by Miss M?

Opinion:

No. At issue in the lawsuit will almost certainly be Mr. B's understanding of why Mr. X purchased life insurance, how Mr. B came to be named as the primary beneficiary and what assurances, if any, were offered to Ms. W and Miss M by Lawyer L in conjunction with the renunciation of Ms. W's right to administer Mr. X's estate. The testimony of Lawyer L will be necessary to the resolution of these questions. In particular, only Lawyer L is in a position to deny the contentions of Ms. W and Miss M that it was affirmatively represented to them by Lawyer L that in consideration for Ms. W's renunciation, the proceeds of the life insurance would be used to pay for Miss M's education. Rule 5.2(a) of the Rules of Professional Conduct provides that "a lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he...ought to be called as a witness..." None of the exceptions to the general rule appear to be applicable in this case. Since it appears that it will be necessary for Lawyer L to testify, he is disqualified from representing the estate in a litigation.

RPC 143
October 29, 1993
Editor's Note: This opinion was originally published as RPC 143 (Second Revision).

City Council Member as Client

Opinion rules that a lawyer who represents or has represented a member of the city council may represent another client before the council.

Inquiry:

Attorney A represents X, a dairy farmer, whose entire property (including the milking machines but not the cows) is being condemned for a new airport by the city. Attorney A also represents Y, a landowner whose real estate was condemned in 1968 for the express purpose, as stated in the petition, of extending the runway and relocating state highway and public utility lines and other alleged matters of then public convenience and necessity concerning the old airport, which purposes were never undertaken.

The city recently had an election in which none of the incumbent council members who favored the new airport were reelected.

Mr. B, who received about 70% of the vote to unseat an incumbent has now been scheduled for a hearing concerning his residency under G.S. §163-282 and G.S. §163-57.

Attorney A has been asked to consider appearing before the county board of elections on behalf of Mr. B.

Is it ethical for Attorney A to represent Mr. B concerning his residency when Attorney A has two legal matters pending involving the city which might come before Mr. B as one of six regularly voting members of the city council? Will Mr. B have to disqualify himself? If Attorney A handles some of Mr. B's real estate matters, can he appear before the city council or otherwise contact the city or its employees?

Opinion:

It is ethical for a lawyer to represent persons before an elected or appointed governing body following or during representation of a member of the governing body so long as the lawyer does not use his relationship to the member of the governing body to obtain favorable decisions from the body. Rule 1.2(d). The lawyer should also take care not to suggest that he has the ability improperly to influence the body on account of his representation of the member. Rule 1.2(e).

RPC 144
January 15, 1993

Conflict in Joint Representation

Opinion rules that a lawyer, having undertaken to represent two clients in the same matter, may not thereafter represent one against the other in the event their interests become adverse without the consent of the other.

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.

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**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 prior to 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.

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**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.

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**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 own law firm unless the division is based upon the work done by one 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 B but within the area of practice of Attorney B (IRS estate tax matters). 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 purposes 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.

Opinion:
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 ac-
ing 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 individuals, 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 insuring 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 Dismission 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 underinsured motorist 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 Client 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 non-
refundable 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 posed 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 abstained 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. As 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.

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 she 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.

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.
edness. 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 169
January 14, 1994

Provisioning Client withCopies 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 adverse-
ly 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 rep-
resenting 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 con-
flict of interest arises?

Opinion #3:
Yes, provided the four conditions for a waiver of a future conflict of inter-
est 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.

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 counter-
claim 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 sit-
tuation. 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 repre-
sent A on the counterclaim if Defense Counsel reasonably foresees no con-
rant 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.

Opinion #2:
Yes, if Defense Counsel does not wish to represent A on the counterclaim and A cannot find separate counsel to prosecute the counterclaim.

RPC 173
April 15, 1994

Advancing Funds to Client to Post Bond

Opinion rules that a lawyer who represents a client on a criminal charge may not lend the client the money necessary to post bond.

Inquiry:
Attorney A represents Client B who is charged with assault on a female. In light of G.S. §15A-541 and Rule 5.3(b) of the Rules of Professional Conduct, may Attorney A ethically lend Client B the sum necessary for Client B to post a cash bond?

Opinion:
No. Rule 5.3(b) prohibits a lawyer from advancing or guaranteeing financial assistance to his client while representing the client in connection with contemplated or pending litigation. Although the Rule contains an exception allowing a lawyer to advance the expenses of litigation provided the client remains ultimately liable for such expenses, lending a client the funds necessary to post a cash bond does not fall within this exception and is contrary to the policies prohibiting conflicts of interest and solicitation which underlie Rule 5.3(b). A lawyer who lends a client the funds to post a bond has a vested interest in seeing that the client is apprehended if he or she flees the jurisdiction. This creates a conflict of interest for the lawyer between his professional responsibilities to his client and his personal interests. Also, there is a strong likelihood that a lawyer could solicit clients by suggesting that he is willing to lend a criminal defendant bond money in order to solicit the defendant's criminal case.

Whether lending a client the funds to post a bond is a violation of G.S. §15A-541 is a question of law upon which the State Bar has no authority to rule.

RPC 174
April 15, 1994

Fees for the Collection of "Med-Pay"

Opinion rules that a legal fee for the collection of "med-pay" which is based upon the amount collected is unreasonable.

Inquiry:
Lawyer B charges $150.00 to collect up to $2000.00 due to a client under the medical payments provisions (or "med-pay" provisions) of the client's liability insurance policy. He charges $250.00 to collect a client's med-pay if the med-pay is $2000.00 or more. Is it ethical for Lawyer B to charge a sliding fee for the collection of med-pay?

Opinion:
No. RPC 35 ruled that a lawyer may not charge a contingent fee to collect med-pay because with most med-pay claims there is no risk that the insurance company will refuse payment and there is no dispute as to the amount due to the claimant. Therefore, such contingent fees are unreasonable, in violation of Rule 2.6(a), because "[t]he element of risk which is necessary to justify the typically elevated contingent fee is not present." Unless there exists a significant risk that a med-pay claim will not be paid, it is unreasonable for a lawyer to charge a fee for collecting med-pay which is not related to the cost to the lawyer of providing the service. A sliding fee for collecting med-pay claims is based upon the amount of the claim and not upon the cost to Lawyer B to provide the service. Such a fee structure is unreasonable in violation of Rule 2.6(a).

RPC 175
January 13, 1995

Editor's Note: This opinion was originally published as RPC 175 (Revised).

Reporting Child Abuse

Opinion rules that a lawyer may ethically exercise his or her discretion to decide whether to reveal confidential information concerning child abuse or neglect pursuant to a statutory requirement.

Inquiry #1:
RPC 120 was adopted by the Council of the State Bar on July 17, 1992. The opinion provides that a lawyer may, but need not necessarily, disclose confidential information concerning child abuse pursuant to a statutory requirement set forth in G.S. §7A-543 et seq. In 1993 the North Carolina General Assembly amended G.S. §7A-543 and G.S. §7A-551. G.S. §7A-543 now generally provides that as follows:

...any person or institution who has cause to suspect that any juvenile is abused, neglected, or dependent...or has died as a result of maltreatment shall report the case of that juvenile to the director of the Department of Social Services in the county where the juvenile resides or is found.

G.S. §7A-551 now generally provides as follows:

...[n]o privilege shall be grounds for any person or institution failing to report that a juvenile may have been abused, neglected or dependent, even if the knowledge or suspicion is acquired in an official professional capacity, except when the knowledge or suspicion is gained by an attorney from that attorney's client during representation only in the abuse, neglect or dependency case.

Does Rule 4 of the Rules of Professional Conduct require an attorney 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 the 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 it 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 7.4. 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 A must explain the nature of the proceedings to the extent reasonably necessary to permit Defendant M to make an informed decision with regard to individually retaining another lawyer to represent him or electing not to be represented in the lawsuit. RPC 156.

RPC 178
October 21, 1994
Editor’s Note: This opinion was originally published as RPC 178 (Revised).

Release of Client’s File

Opinion: examines a lawyer’s obligation to deliver the file to the client upon the termination of the representation when the lawyer represents multiple clients in a single matter.

Inquiry #1:
Attorney represented Client A on complicated litigation which resulted in the settlement and voluntary dismissal of all claims. Numerous documents were filed with the court and exchanged between the adverse parties. Client A agreed to reimburse Attorney for all out-of-pocket expenses associated with the representation. After the settlement agreement was signed, Client A obtained new counsel who required Client A to sign a release requesting Client A’s file from Attorney. The release provides that only authorized out-of-pocket expenses will be reimbursed. Client A then requested a copy of the entire file from

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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 company 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
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?

Opinion #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(b):
Yes. See Opinion #2 above.

Opinion #3(c):
After 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 marital property as payment of the legal fee?

Opinion #3(d):
Yes. See Opinion #2 above.

Opinion #3(e):
After the granting of an absolute divorce and the entry of a judgment of equitable distribution wherein 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(f):
Yes. See Opinion #2 above.

Inquiry #4:
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 #4:
No.

Inquiry #4(a):
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:

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.
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 retainee 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 retainee fee is to be paid against accrued legal fees until the retainee fee is exhausted. The excess amount will then be billed on a monthly basis. The agreement further provides that if the legal matter is settled or there is a reconciliation in a domestic action, Attorney shall keep the “retainee 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 retainee 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 non-payment 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 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 retainee,” 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 ensuring 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(c) imposes upon a prosecutor a special duty to advise unrepresented individuals who are charged in a criminal matter of the individual's right to obtain counsel. The district attorney and the other lawyers in his or her office must make reasonable efforts to ensure that the conduct of nonlawyer members of the staff is compatible with the professional obligations of the lawyers not to give legal advice to an unrepresented person 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 matters 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

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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, “once 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 191 was 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 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 provisionally extended by the depository institution for funds deposited into the trust account in one or more of the forms set forth in G.S. §49A-4.

The disbursement of funds from a trust account by a lawyer in reliance upon provisionally 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 disburse against provisionally extends to 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 disbursement 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 provisionally credit for the items is extended by the depository institution remains in effect. If provisionally 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 uninsured 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.
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 of the lawyer; (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 engaging in 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, 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.

Opinion #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 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 counters his appointment through such legal proceedings, he must be acting in good faith and not merely to avoid the inconvenience or expense of the appointment. See Rule 7.2(a)(1).

Although the lawyer has an initial duty to advise the court that he believes he is not competent to handle a matter, if the court nevertheless determines that the lawyer is competent and refuses to release the lawyer from the appointment, it is not unethical for the lawyer to proceed with the representation on this basis without further challenge to the appointment.

Inquiry #2:

Is it ethical for Attorney A to refuse to serve as appointed counsel for Defendant and accept the court's sanction?

Opinion #2:

Yes, if Attorney A has unsuccessfully challenged the appointment through reasonably available legal procedures and he continues, as a matter of professional responsibility, to believe that he is not competent to serve as legal counsel to Defendant, it is not unethical for Attorney A to refuse to serve and to accept the court's sanction. See Rule 6(a)(1).

Inquiry #3:

Would the responses to inquiry #1 or inquiry #2 be different if Attorney A is appointed to assist another experienced lawyer who will serve as lead 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 rep-
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 his ability to handle his own matters or to refer the clients to other attorneys who can handle their cases.

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

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 #4:
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 #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 the 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.

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 #4:
If their purpose is to solicit professional employment, may the lawyers with ABC Law Firm have an obligation to ensure that the representation of each client continues or is responsibly transferred to an outside lawyer chosen by the client? To the extent that RPC 48 or RPC 98 imply that a member of ABC Law Firm would be prohibited under these circumstances from contacting any of the clients whose matters were being handled by Attorney D at the time of his departure from the firm unless such a lawyer had a personal professional relationship with the client, RPC 48 and RPC 98 are overruled.
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:

Yes. 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:

Yes. 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:

Yes. 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 H 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?
Contributions

(a) in proportion to the services performed by each lawyer, or (b) if the fee divides lawyers who are not in the same firm to divide a fee in one of two ways: matter in which neither alone could serve the client as well.” Rule 2.6(d)(1) notes, “[a] division of a fee facilitates association of more than one lawyer in 2.6(d) of the Rules of Professional Conduct. As the comment to that rule referring cases?

This practice would also be contrary to a prosecutor’s special responsibility “to seek justice, not merely to convict.” Comment to Rule 7.3.

The charitable contributions would not be court fines and would not bechanneled 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 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 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 an 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.

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 X’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 possible 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 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 circum-
stances, 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. 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 lawyer’s role will be to 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 mortgage 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 insecure method of communication, a lawyer must take steps to minimize the risk that confidential information might be disclosed.

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**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.

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.

Opinion #3:
Yes, if the client inquires, Attorney A should advise the client that he uses the services of a nonlawyer title searcher.

Opinion #4:
No, unless the client requests this information.

Opinion #5:
No, unless the client requests this information.

Opinion #6:
Yes, a lawyer is always required to check for conflicts of interest. See Rule 3.3(b) and Rule 5.1.

Opinion #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?

RPC 217
October 20, 1995
Advertising a Local Telephone Number in a Community Where a Law Firm Has No Office

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 “every 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 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


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 delivery of an item of incriminatory 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 incriminatory 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 Attorney 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

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.
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 with a forwarding address. Client A’s telephone number was disconnected and there is no new listing for her. She no longer works for the company that employed her in July 1993. Attorney A asked Client A’s former employer to forward a letter to Client A at the last address the employer had on file for Client A. She received no response to this letter. Attorney A tried to get Client A’s new address from one of the doctors Client A was seeing in 1993. The doctor’s office had her old address. The insurance company for the prospective defendant in the automobile accident has not heard from Client A and has closed its file. Client A’s own automobile insurance policy was canceled in April 1994. The company does not have a new address for Client A. Finally, Attorney A checked the county property listings. The last listing for Client A was in 1993.

The statute of limitations on Client A’s claim will expire in ten months. A complaint has not been filed. A representative of Attorney A’s malpractice insurance carrier recommended that she file a complaint on behalf of Client A and then immediately make a motion to withdraw. What is Attorney A’s ethical responsibility to Client A?

**Opinion:**
When a client stops communicating with his or her lawyer, the lawyer must take reasonable steps to locate and communicate with the client. In the present inquiry, Attorney A’s efforts to locate Client A were more than reasonable. However, if the lawyer is still unable to locate the client and the client has made no effort to contact the lawyer, the client’s failure to contact the lawyer within a reasonable period of time after the lawyer’s last contact with the client must be considered a constructive discharge of the lawyer. Rule 2.8(b)(4) of the Rules of Professional Conduct requires a lawyer to withdraw from the representation of a client if the lawyer is discharged by the client. Therefore, Attorney A must withdraw from the representation.

Attorney A may not file a complaint on behalf of Client A although filing suit might stop the running of the statute of limitations. The determination of the objective of legal representation is the client’s prerogative. As the comment to Rule 7.1 observes, “[t]he client has ultimate authority to determine the purposes to be served by legal representation within the limits imposed by law and the lawyer’s professional obligation.” If a client disappears, the lawyer cannot know whether the client wanted to proceed with the lawsuit, who the client was prepared to sue, and whether the allegations in the complaint are accurate. Therefore, if a client disappears and the lawyer is unable to locate the client after reasonable efforts to do so, the lawyer should withdraw from the representation without taking further action on behalf of the client.

RPC 224
October 24, 1997

**Editor’s Note:** This opinion was originally published as RPC 224 (Third Revision).

**Communication with Treating Physician**

*Opinion prohibits the employer’s lawyer from engaging in direct communications with the treating physician for an employee with a workers’ compensation claim.*

**Inquiry #1:**
Employee was injured in a work-related accident. Attorney A represents Employee in his workers’ compensation claim. Attorney X represents the employer. Employee’s treating physician is Dr. Care. May Attorney X contact Dr. Care privately, without the consent of Employee or Attorney A, to discuss Employee’s medical treatment?

**Opinion #1:**
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.

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, plat, 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).

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. 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 malingering. Attorney considers this report biased and unfair. At the administrative hearing, Attorney submits the other medical records for Client L, and withhold 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...
A lawyer may not know at the beginning of the representation whether collection of the additional fee will render the lawyer's total fee clearly excessive in violation of Rule 2.19. However, at the conclusion of the representation, the lawyer may consider whether an additional contingency fee would be clearly excessive.

In order to determine the reasonableness of a fee, the Code presumes that a lawyer is not guilty of misconduct unless the lawyer either knew the fee to be clearly excessive or had reasonable grounds to believe that the fee was clearly excessive. In determining whether the additional fee is clearly excessive and whether such a fee should be charged, the lawyer should examine the factors listed in Rule 2.6(b) to determine the reasonableness of the fee.

The Code of Professional Conduct precludes assertion of the claim. If, however, the lawyer's knowledge of contrary medical reports, and if none of the evidence 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.


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:

Opinion #2:

See opinion #1.

Opinion #3:

See opinion #1.
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 pre-sentment 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.

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 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 retain her own counsel. Attorney A may ethically represent Motorist A on her personal injury claim while continuing representation of Motorist A on her property damage claim.

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:  
Yes. However, a lawyer is subject to the Rules of Professional Conduct with respect to the representation of a party to a lawyer who represents the insurance carrier. Rule 7.4(1) permits communications about the subject matter of the representation with the 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 respect 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 newly formed corporation 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 “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 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, Mr. A was served with a complaint for a divorce from bed and board.

Inquiry:
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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.

After the interview, Attorney X stated that he believed Mr. X would be considered the party at fault and he did not want to represent Mr. X.

Attorney X 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. 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, Ms. 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 for 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 nonscure 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. 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).

**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 #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 insurance proceeds are insufficient 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
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.
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.

Opinion #2:
Must Attorney A disclose his representation of Judge Z to his client?

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.

Opinion #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?

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.

Opinion #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?

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.

Opinion #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?

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

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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 forth in Rule 4.3. Rule 4.3(a) prohibits a lawyer from giving advice to an unrepresented person, other than the advice to secure legal counsel, if the interests of the person are in conflict with the interests of the lawyer’s client. Similarly, Rule 4.3(b) requires the lawyer to make known to the unrepresented person that the lawyer is not disinterested.

### 97 Formal Ethics Opinion 3

October 24, 1997

Editor's Note: Opinion was originally published as RPC 255. Before adoption, it was revised to reference the appropriate sections of the Revised Rules of Professional Conduct under which it was finally decided.

**Ex Parte Communication with a Judge Regarding a Scheduling or Administrative Matter**

**Opinion:** 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. If so, the lawyer may engage in 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. Cavington v. Rhodes, 38 N.C. App. 61, 65, 247 S.E.2d 305, 308 (1978), cert. denied, 296 N.C. 410, 215 S.E.2d 408 (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 businesses 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 unfilled 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 pro-
posed 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)(6)(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.”

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**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.

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**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 represen-
tative in his or her official capacity and the estate as an entity).

**Inquiry #2:**
During the period of time between the appointment of the Trustee and a court order appointing an attorney for the bankruptcy estate and the Trustee in the pending civil action against Attorney X, what information is the Trustee entitled to receive concerning the representation of Corporation B in the civil action?

**Opinion #2:**
Trustee is the fiduciary of the assets of the corporation, including its civil claims, and is entitled to receive all information concerning Corporation B’s pending civil claim. Attorney A may disclose to the Trustee all confidential information relating to the representation of the corporation in the civil action. See Rule 1.5(d)(1) and (2); compare RPC 195 (holding that in the representation of a decedent’s estate and the personal representative, the lawyer owes the duty of confidentiality to the personal representative acting in his official capacity and to the estate itself).

**Inquiry #3:**
Shareholder D notified Attorney A that he does not want the Trustee to pursue the lawsuit against Attorney X. May Attorney A represent the bankruptcy estate and the Trustee in the civil action if Shareholder D objects to the pursuit of the lawsuit?

**Opinion #3:**
The decision to pursue the action against Attorney X is within the discretion of the Trustee in the discharge of his fiduciary duties under the Bankruptcy Code. Shareholder D has no authority over the Trustee. If Attorney A represented only Corporation B and never represented Shareholder D individually, Attorney A does not owe Shareholder D a duty of loyalty. He may, therefore, follow the directions of the Trustee and pursue the claim against Attorney X pursuant to the directions of the Trustee.

If, however, Attorney A represented Shareholder D individually with regard to Shareholder D’s interests in the civil action against Attorney X or Attorney A made representations to Shareholder D that led Shareholder D reasonably to assume that Attorney A represented Shareholder D individually in the matter, Attorney A may have a conflict of interest in pursuing the civil action over the objection of Shareholder D. Rule 1.9(a) prohibits a lawyer who has formerly represented a client in a matter from thereafter representing another person in the same matter if the interests of the new client are materially adverse to the interests of the former client unless the former client consents. Although there is nothing in the facts that supports this conclusion, if Shareholder D was himself a client of Attorney A with regard to the action against Attorney X and the pursuit of the lawsuit against Attorney X is now materially adverse to the interests of Shareholder D, Attorney A may not represent the corporation’s bankruptcy estate and the Trustee in the civil action unless Shareholder D consents.

**Inquiry #4:**
If Shareholder D is deposed in the lawsuit, does Attorney A have any obligations to Shareholder D during the deposition?

**Opinion #4:**
Attorney A has an obligation to Shareholder D only if Attorney A represented Shareholder D in his individual capacity and his representation of Corporation B’s bankruptcy estate will be adverse to Shareholder D’s interests. If so, he may not represent the bankruptcy estate and the Trustee in the deposition or the lawsuit unless Shareholder D consents to the representation. See opinion #3 above. If, on the other hand, Attorney A never represented Shareholder D in his individual capacity, there is no conflict and Attorney A may appear on behalf of the bankruptcy estate and the Trustee at the deposition.

**Inquiry #5:**
What obligation does Attorney A have to report his knowledge of misconduct by Attorney X which knowledge was gained during discovery in the civil suit?

**Opinion #5:**
Rule 8.3(a) of the Revised Rules of Professional Conduct provides: [a] lawyer having knowledge that another lawyer has committed a violation of the Revised Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the North Carolina State Bar or the court having jurisdiction over the matter. Subparagraph (c) of the rule states that the rule does not require disclosure of confidential client information.

If Attorney A has reportable knowledge of lawyer misconduct that is not confidential, or, if the knowledge is confidential, the Trustee does not object to its disclosure to the State Bar or the appropriate court, Attorney A should disclose the information to the appropriate body.

**97 Formal Ethics Opinion 8**
January 16, 1998

**Representation of Developer and Buyer in Closing of a Residential Real Estate Transaction**

**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: [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, 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 man-
aged, 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:

May Attorney represent both Buyer and Seller if Attorney analyzed his relationship with Seller and determined that he can impartially represent both Seller and Buyer in closing the sale of the house and lot to Buyer. Buyer and the lender chosen by Buyer have agreed to the basic terms of the mortgage loan (amount, security, interest rate, installment, and maturity) prior to the engagement of Attorney to close the transaction. May Attorney represent both the lender and Buyer, as well as Seller?

Opinion #6:

Yes. See RPC 210.

Inquiry #7:

Seller believes that it will result in savings of time and money if Attorney closes all of the sales in the subdivision. Seller would like to offer financial incentives to potential buyers to encourage them to use the closing services of Attorney. In particular, Seller would like to offer to pay all legal fees to close the transaction if the buyer agrees that Attorney will handle the closing. Seller asks Attorney if Attorney will close all sales for a pre-agreed fee. Seller also asks Attorney if Seller may include a provision in the contract to purchase in which Seller agrees to pay the legal fees if the buyer agrees that Attorney will close the transaction. May Attorney agree to participate in this arrangement?

Opinion #7:

Yes, if Attorney reasonably believes that the common representation can be handled impartially and the proper disclosure of the professional relationship between Seller and Attorney is made prior to the execution of the contract by the buyer. See Opinion #1 above.

97 Formal Ethics Opinion 9
January 16, 1998

Credit Card Chargebacks Against a Trust Account

Opinion rules that, provided steps are taken to safeguard the client funds on deposit in a trust account, a lawyer may accept fees paid by credit card although the bank’s agreement to process such charges authorizes the bank to debit the lawyer’s trust account in the event a credit card charge is disputed by a client.

Inquiry #1:

To accept charges paid by MasterCard and Visa credit cards, as well as other national credit cards, a lawyer must enter into a standard form “Merchant Agreement” with a bank in which the bank agrees to deposit credit card payments from cardholders electronically into the merchant’s account with the bank subject to certain conditions. Among other conditions, such agreements typically permit the bank to debit a merchant’s account for the discount fee, or the bank’s charge to the merchant for advancing the credit card payments. In addition, such agreements typically permit the bank to “charge back” the merchant’s bank account, without prior notice, in the amount of a prior payment.
by credit card which is subsequently disputed by the cardholder.\textsuperscript{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: \textit{[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?

\textbf{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 debit (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.

\textbf{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?

\textbf{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.

\textbf{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?

\textbf{Opinion #3:}

Yes. Rule 1.15-1.

Endnotes

1. The Truth in Lending Act (§170, 15 USC §1666i) and Regulation Z (12 CFR §226.12(c)) contain provisions which preserve a cardholder’s claim and defenses against a card issuer in certain circumstances. A cardholder is given a right to assert against the card issuer all claims (other than tort claims) and defenses arising out of the credit transaction that it would otherwise have against the merchant. Regulation Z does not provide any guidance as to the nature of the claims and defenses that may be asserted. Since it does give the cardholder the right to assert against the card issuer any claims and defenses available that would be available against the merchant, however, most merchant agreements provided for a “pass through” of the problem.

The power of a cardholder to reverse a credit card transaction is very broad. The following is the mandatory disclosure that must appear in the credit card agreement with a prospective cardholder:

If you have a problem with the quality of property or services that you purchased with a credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the property or services. There are two limitations on this right:

- (A) You must have made the purchase in your home state, if not within your home state, within 100 miles of your current mailing address; and
- (B) The purchase price must have been more than $50.00.

These limitations do not apply if the card issuer owns or operates the merchant or if we mailed you the advertisement for the property or services (Regulation Z, App. G-3).

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January 16, 1998

\textbf{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.

\textbf{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?

\textbf{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. Is it ethical for Attorney X to explain to Husband the legal effect of service of process in fraudulent conduct.

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 the purpose of delay is disrespectful of the rights of Wife in violation of Rule 4.4 which provides in part, “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to…delay…a third person…”

Inquiry #3:
May Attorney X advise his client to evade service of process provided he does not tell the client how to evade service?

Opinion #3:
No. See opinion #2 above.

Inquiry #4:
Is the prohibition on instructing a client to evade service applicable to the service of other court documents such as subpoenas?

Opinion #4: 
Yes.

98 Formal Ethics Opinion 3
January 15, 1998

Adding Finance Charges to Past Due Client Accounts

Opinion rules that, subject to the requirements of law, a lawyer may add a finance charge to a client’s account if the client fails to pay the balance when due as agreed with the client.

Inquiry #1:
Law Firm does not have a written fee agreement with its clients; however, all bills for services rendered to clients state that payment is due in full upon receipt. To date, Law Firm has not added a finance charge to any past due client accounts. Law Firm would like to begin assessing finance charges on the outstanding past-due accounts of selected clients. Law Firm plans to send each of
these clients a notice stating that the client’s past due account balance will be charged a finance charge of 1.5% per month effective 60 days from the date of notice if the account balance is not paid in full by that time.

There are two groups of clients who will be affected by the decision to add finance charges. The first group consists of clients who have outstanding account balances because they have never paid anything on their accounts and clients who, without obtaining the consent of Law Firm, send partial payments to Law Firm each month. The second group consists of clients who have made arrangements with Law Firm to make monthly partial payments on their accounts. Law Firm agreed to represent these clients knowing that the clients would not be able to pay their accounts in full each month.

May Law Firm add finance charges to the accounts of clients with past due balances who have not made partial payment arrangements with the firm?

**Opinion #1:**

Yes, provided Law Firm complies with Revised Rule 1.5(a) of the Revised Rules of Professional Conduct which prohibits a lawyer from entering into an agreement for, charging, or collecting an illegal fee. This means that finance charges on legal fees must comply with usury laws and any other applicable consumer credit laws. N.C. Gen. Stat. §24-5(a) permits a creditor to charge simple interest at the legal rate on the principal owed after an account is contractually due. If a lawyer and a client did not agree in the oral or written fee contract at the beginning of the representation that interest on past due legal fees would be charged at a contract rate upon default, then interest may only be charged at the legal rate. Id. Similarly, if the lawyer and the client did not agree at the beginning of the representation when the account balance would be due and payable, the law provides that the account becomes due and payable in a reasonable time under the circumstances. No prior notice of the election to charge interest appears to be required under N.C. Gen. Stat. §24-5(a).

If a lawyer wants to charge up to 1.5% per month on the unpaid portion of the balance of the previous month, the lawyer must have an agreement to this effect with the client (whether the agreement is express, implied, or through course of dealing with the client), must comply with N.C. Gen. Stat. §24-11 which governs open-ended revolving credit charges, and must conform his or her conduct as a creditor to the requirements of any other applicable consumer credit laws.

Although not required by the Rules of Professional Conduct, it is preferable to put fee agreements with clients in writing at the beginning of the representation to resolve any misunderstanding about when the fees may be owed and to specify to a contractual certainty any finance charges that may be charged in the event that the client is delinquent in payments.

**Inquiry #2:**

Are there formal notice requirements before a law firm may add a finance charge to a past due client account?

**Opinion #2:**

The lawyer should comply with all legal requirements regarding notice of finance charges. In situations where the lawyer seeks only the interest permitted under N.C. Gen. Stat. §24-5(a), the answer is "no." In situations where there is an express agreement, implied agreement, or agreement by course of dealing between the lawyer and the client which gives the lawyer the right to charge a contract rate of interest, the answer is "no" unless the agreement otherwise provides for a notice requirement. See Opinion #1. The State Bar has no formal requirements for notice in this situation.

**Inquiry #3:**

May Law Firm assess a finance charge on the account balance of a client who made prior arrangements with the firm to pay less than the full amount due each month?

**Opinion #3:**

If the agreement (express, implied, or through course of dealing) with the client is interpreted as a comprehensive resolution of all outstanding amounts owed by the client (e.g., the law firm has elected to waive interest or finance charges to obtain payments on account), the answer is "no." Otherwise, finance charges may be assessed on the amount that is past due pursuant to (a) the legal rate under N.C. Gen. Stat. §24-5(a), or (b) any agreement between the client and Law Firm that has not been waived by prior conduct. Furthermore, subject to the laws on consumer credit and usury, Law Firm may seek to renegotiate the fee agreement and obtain the client’s consent to add finance charges provided “the attorney may not abandon or threaten to abandon the client to cut the attorney’s losses or to coerce an additional or higher fee. Any fee contract made or remade during the existence of the attorney-client relationship must be reasonable and freely and fairly made by the client having full knowledge of all material circumstances incident to the agreement.” Comment [3], Revised Rule 1.5.

**Inquiry #4:**

May Law Firm selectively assess late payment fees to some clients and not to others?

**Opinion #4:**

Yes, if such selectivity is not motivated by unlawful intent (e.g., racial or gender-based discrimination).

**Inquiry #5:**

Do clients with long-standing relationships with Law Firm, without past due account balances at present, require notice before Law Firm may begin assessing finance charges on their account balances when past due?

**Opinion #5:**

Unless there has been a course of dealing that creates an agreement between Law Firm and its long-standing clients that waives finance charges on the clients’ past-due balances, Law Firm may seek interest as permitted by N.C. Gen. Stat. §24-5. See Opinion #1.

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**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 by her school by another student. Plaintiffs also alleges 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 employ-
ees' 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 means of public communication if there is a reasonable likelihood that the statement will materially prejudice an adjudicative proceeding in the matter. 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 3.6 cmt., p. 352 (3rd ed. 1996). Third, extrajudicial statements concerning civil proceedings are generally not as strictly scrutinized as those regarding criminal proceedings. Id. Fourth, an attorney should be permitted some leeway in making a necessary response to protect a client from undue prejudicial effect of recent publicity not initiated by the attorney or his client. Model Rules, Rule 3.6(c). Fifth, whether the attorney intended a trial by media is also a significant factor. Model Rules, Rule 3.6 cmt. at 353.

In this case, the press release by the Board involved extrajudicial statements about a civil proceeding but none of the statements are specifically prohibited by Revised Rule 3.6(b). Moreover, because of the proceedings at the trial court level, much of the information contained in the press release was already in the public domain. For example, the denial of evidence to support the claim was present in the Board's answer to the complaint. Finally, the release was intended not to prejudice a court proceeding, but to counter adverse publicity about the Board. In light of these factors, the press release would not "materially prejudice an adjudicative proceeding" pursuant to Revised Rule 3.6.

Inquiry #2:

Does it matter that the release came from the Board rather than the attorney?

Opinion #2:

Revised Rule 3.6 does not impinge upon the constitutional right of clients to make extrajudicial statements concerning their case. The rule, however, does place restrictions on attorneys' extrajudicial speech and that of their agents. If the above press release had a reasonable likelihood of materially prejudicing an adjudicative proceeding, and the Board was merely used as conduit by the attorney to make prejudicial statements the attorney could not, then the attorney violated Revised Rule 3.6.

98 Formal Ethics Opinion 5
April 16, 1998

Disclosure of Client's Prior Driving Record

Opinion rules that a defense lawyer may remain silent while the prosecutor presents an inaccurate driving record to the court provided the lawyer and client did not criminally or fraudulently misrepresent the driving record to the prosecutor or the court and, further provided, that on application for a limited driving privilege, there is no misrepresentation to the court about the prior driving record.

Inquiry #1:

Client was charged with driving while impaired (DWI). Attorney A represented him at trial where Client was convicted. At the sentencing hearing, the prosecutor informed the court that Client had no record of prior convictions for DWI. Attorney A and Client were aware, however, that Client was convicted of DWI in federal court but the federal court failed to forward information regarding the conviction to the North Carolina Department of Motor Vehicles for inclusion in Client's driving record. Therefore, when the prosecutor checked the driving record, he found no record of the prior conviction. At the sentencing hearing, Attorney A and Client remained silent when the prosecutor informed the court that Client had no prior convictions for DWI. Neither Attorney A nor Client made any affirmative misrepresentations to the court about Client's driving record. The judge sentenced Client to punishment level three which can only be imposed if the court determines that the defendant has not been convicted of a prior DWI within the previous seven years.

Was it unethical for Attorney A to remain silent when he heard the prosecutor give erroneous information to the court?

Opinion #1:

No, it was not unethical for Attorney A to remain silent. The burden of proof was on the State to show that the defendant's driving record justified a more restrictive sentencing level. A defense lawyer is not required to volunteer adverse facts when the prosecutor fails to bring them forward. The duty of confidentiality to the client is paramount provided the defense lawyer does not affirmatively misrepresent the facts to the court. See Rule 1.6(c) and Rule 3.3(a)(1) of the Revised Rules of Professional Conduct; CPR 313 (lawyer may not volunteer to the court confidential information about a client's prior convictions); and RPC 33 (lawyer may not reveal confidential information about a client's prior criminal record to the court but may not misrepresent the client's criminal record). Although Rule 3.3(a)(2) prohibits a lawyer from failing to disclose a material fact to a tribunal "when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client," this rule was not violated because Client's driving record was inaccurate through no fault of Client and Client did not criminally or fraudulently conceal the prior conviction from the prosecutor or the court.

Inquiry #2:

Client wants a limited driving privilege. To obtain the privilege, Client must petition the court by filing a form prepared by the Administrative Office of the Courts (AOC). To be eligible for a limited driving privilege under G.S. §20-179.3, the court must find that the defendant, within the preceding seven years, was not convicted of an offense involving impaired driving. Although the AOC form does not require the defendant to represent to the court that the defendant has no prior DWI convictions, the court must find, and so acknowledge on the form, that there is evidence that satisfies the statutory requirements for the issuance of a limited driving privilege.

Assuming that at no point in the process Attorney A or Client will be required to misrepresent Client's prior driving record to the court, may Attorney A petition the court for a limited driving privilege for Client?

Opinion #2:

No. Unlike the prior inquiry, in this situation the burden of showing eligibility for a limited driving privilege is on the defendant. By petitioning the court for the privilege, the defendant is making an implicit representation to the court that he has no prior convictions and is eligible for the privilege. Attorney A is aware that this is a false representation of a material fact and he may not participate in its presentation to a tribunal by filing the petition. Rule 3.3(a)(1).

98 Formal Ethics Opinion 6
April 16, 1998

Sale of a Law Firm to Lawyers Employed by the Firm

Opinion rules that the requirements set forth in Rule 1.17 relative to the sale of a law practice to a lawyer who is a stranger to the firm do not apply to the sale of a firm.
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, PA., 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 “[c]ease 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 “[h]e seller....shall have no say regarding the purchaser's conduct of the law practice?

Opinion #4:

No. As noted in opinion #1 above, Rule 1.17 does not apply to the purchase of a law firm by lawyers who are currently members of the firm. Therefore, the prohibition in paragraph (g) of Rule 1.17 is also inapplicable.

98 Formal Ethics Opinion 7

April 16, 1998

Employment of Disbarred Lawyer

Opinion rules that a law firm may employ a disbarred lawyer as a paralegal provided the firm accepts no new clients who were clients of the disbarred lawyer’s former firm during the period of misconduct; however, a disbarred lawyer may not work as a paralegal at a firm where he was employed as a lawyer during the period of misconduct.

Inquiry #1:

Attorney A, a lawyer with ABC Law Firm, reported his professional misconduct to the North Carolina State Bar and voluntarily ceased the practice of law. The professional misconduct occurred while Attorney A was a member of ABC Law Firm. Approximately eighteen months later, after a complaint was filed with the Disciplinary Hearing Commission (DHC), Attorney A submitted to disbarment and surrendered his license. The DHC entered an order of disbarment effective as of the date Attorney A ceased the practice of law eighteen months earlier. Since the time that Attorney A discontinued the practice of law eighteen months ago, some of the people who were clients of ABC Law Firm when Attorney A practiced with the firm and engaged in professional misconduct ("former ABC clients") have sought legal representation from other law firms in the community. XYZ Law Firm has provided legal services to some former ABC clients and continues to be called upon to perform legal services for some former ABC clients. XYZ Law Firm proposed to employ Former Attorney A as a paralegal. May XYZ employ Former Attorney A as a paralegal, and continue to perform occasional legal services for former ABC clients if the clients first came to XYZ Law Firm for legal services prior to the employment of Former Attorney A as a paralegal?

Opinion #1:

Rule 5.5 (d) of the Revised Rules of Professional Conduct provides: A lawyer or law firm employing a disbarred or suspended lawyer as a law clerk or legal assistant shall not represent any client represented by the disbarred or suspended lawyer or by any lawyer with whom the disbarred or suspended lawyer practiced during the period on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

When a disbarred lawyer is employed by another law firm, the disbarred lawyer may attract clients from his former practice to the hiring law firm. As a consequence, it may be difficult for the disbarred lawyer to avoid the unauthorized practice of law with respect to these former clients. More problematic, however, is the possibility that the hiring law firm may be in collusion with the disbarred lawyer to employ the disbarred lawyer in exchange for the disbarred lawyer's delivery of his former clients to the hiring firm. If so, the firm is showing disrespect for the decision of the DHC and is encouraging unauthorized practice by the disbarred lawyer.

In the present situation, however, it is merely fortuitous that former clients of ABC Law Firm sought the legal services of XYZ Law Firm during the period prior to the employment of Former Attorney A as a paralegal. Therefore,
provided all clients of XYZ Law Firm fully understand that the disbarred lawyer is not acting as an attorney but merely as a paralegal, and, provided further, that, after the employment of Former Attorney A, XYZ Law Firm accepts no new clients who were clients of ABC Law Firm during the period of Former Attorney A’s misconduct. XYZ Law Firm may employ him as a paralegal. Care should also be taken to follow the recommendations in Comment [2] to Rule 5.5 relative to the supervision of a disbarred lawyer and related matters.

Inquiry #2:
May XYZ Law Firm employ Former Attorney A as a paralegal and perform legal services for former ABC clients if the clients come to XYZ Law Firm subsequent to the employment of Former Attorney A?

Opinion #2:
No. See opinion #1 above.

Inquiry #3:
If the answer to inquiry #1 or inquiry #2 is “no”, would the answer change if XYZ Law Firm agrees to screen Former Attorney A from participation as a paralegal in the legal services provided to the former ABC clients?

Opinion #3:
No.

Inquiry #4:
Former Attorney B was disbarred following a hearing before the DHC. In its order of disbarment, the DHC found, among other things, that Former Attorney B engaged in unethical conduct by failing to supervise an employee for a period of approximately three months during a time when he was a partner in a law firm with his father, Attorney C. As a result of his failure to supervise, the employee misappropriated funds from the firm trust account.

May Attorney C employ Former Attorney B as a paralegal, law clerk, or some capacity other than a lawyer?

Opinion #4:
No. Rule 5.5(c) provides:
A lawyer or law firm shall not employ a disbarred or suspended lawyer as a law clerk or legal assistant if that individual was associated with such lawyer or law firm at any time on or after the date of the acts which resulted in disbarment or suspension or including the effective date of disbarment or suspension.

The rule was adopted to prevent a disbarred lawyer from continuing to practice law as if no order of disbarment was entered. In Comment [3] to the rule, it is observed that it would be “practically impossible for the disciplined lawyer to confine himself or herself to activities not involving the actual practice of law if he or she were employed in his or her former office setting and obliged to deal with the same staff and clientele.”

This inquiry is different from the preceding inquiries because the disbarred lawyer is proposing to work as a non-lawyer at a firm where he formerly worked as a lawyer. Under these circumstances, the existing relationships with staff and clients are more likely to undermine the prohibition on the unauthorized practice of law by the disbarred lawyer. Therefore, Attorney C may not employ Former Attorney B.

98 Formal Ethics Opinion 8
April 16, 1998

Participation in a Witness Closing

Opinion rules that a lawyer may not participate in a closing or sign a preliminary title opinion if, after reasonable inquiry, the lawyer believes that the title abstract or opinion was prepared by a non-lawyer without supervision by a licensed North Carolina lawyer.

Inquiry #1:
Lender is located in another state but provides home loans to North Carolina residents. Lender asks Attorney, a licensed North Carolina lawyer, to close a loan for certain borrowers. Lender indicates that the following services will be required from Attorney: (1) oversight of the execution of the loan documents; (2) acknowledgment by an appropriate witness of the signatures of the borrowers on the documents; (3) recording of Lender’s deed of trust; (4) copying the loan documents without review; and (5) disbursement of the loan proceeds. Lender procures title insurance from an out-of-state title insurance company which issues title insurance binders in reliance upon the notes of a title abstractor. Attorney suspects that the title search was done by a non-lawyer who was not supervised by a North Carolina lawyer.

This type of closing is sometimes called a “witness closing.” May Attorney participate in the closing?

Opinion #1:
No. Rule 5.5(b) provides, “[a] lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.” N.C. Gen. Stat. §84-2.1 defines “practice [of] law” as, among other things, “abstracting or passing upon titles.” Attorney must make a reasonable inquiry concerning the preparation of the title search and/or the title opinion. If Attorney believes, after making this reasonable inquiry, that a non-lawyer abstracted the title and/or gave a title opinion on the property without the proper supervision of a licensed North Carolina lawyer 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 the lawyer 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 the lawyer 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 contracts with a paralegal to search titles in North Carolina. Title Insurance Company asks Attorney to sign a preliminary opinion based upon the paralegal’s abstract of title and/or preliminary opinion. Attorney has not reviewed the paralegal’s title notes and did not supervise the paralegal’s title research. May Attorney sign the preliminary opinion?

Opinion #4:
No, a lawyer has a duty to supervise any non-lawyer who assists her regardless of whether the non-lawyer is an employee of the lawyer, an independent contractor, or employed by another. Rule 5.3 and RPC 216. Execution of a preliminary title opinion that was prepared by an unsupervised non-lawyer is assisting the unauthorized practice of law in violation of Rule 5.5(b).

98 Formal Ethics Opinion 9
July 16, 1998

Charging for the Cost of Retrieving a Closed Client File

Opinion rules that a lawyer may charge a client the actual cost of retrieving a closed client file from storage, subject to certain conditions, provided the lawyer does not withhold the file to extract payment.

Inquiry:
May a lawyer charge a client for retrieving a closed file from storage?
Opinion:
A lawyer may charge a client the actual cost of retrieving a closed client file from storage subject to certain conditions.

RPC 209 requires a lawyer to keep a closed client file, on which no further representation is required, a minimum of six years unless the lawyer obtains the consent of the client to destroy the file or, after notice to the client, the client fails to retrieve the file. After six years pass, the lawyer may destroy the file without notifying the client provided the lawyer does not destroy any personal possessions or documents of the client.

To charge a client the actual cost of retrieving a closed file from storage, a lawyer must send a notice to the client at the client’s last known address within a reasonable period of time after the matter is concluded and the file is closed. The notice should ask the client what the client wants the lawyer to do with the closed file. The options that may be given to the client are as follows: consent to the destruction of the file; agree that the lawyer will store the file with the understanding that the client will be charged the actual cost of retrieving the file from storage; or retrieve the file free of charge from the lawyer’s office within a reasonable time after receipt of the notice. If the client directs the lawyer to mail the file, the lawyer may charge the shipping cost to client. If the client fails to respond to the notice, the lawyer must store the file for six years as required by RPC 209 and may recoup from the client the actual expense of retrieving the file at any time during the six year mandatory storage period.

The lawyer may not charge the client for photocopying the closed file (or any portion thereof) unless the client requests more than one copy of the file or a document in the file. The client may be charged for duplicate copies of the same document unless the lawyer retained the original document. RPC 178. Regardless of whether a notice was received by the client at the time that the representation was concluded, after a closed file is stored for six years and the lawyer is allowed to destroy the file without the client’s consent, the lawyer may charge the client the actual cost of retrieving the file and making copies of the file or any document therein. At no time may a lawyer withhold originals or copies of documents or a file to extract payment of legal fees, retrieval costs, or copying costs; the lawyer has a claim for payment but he may not assert an interest in or lien against the file to secure payment.

98 Formal Ethics Opinion 10
July 16, 1998

Submission of Legal Bills to Audit Company at Request of Insurance Carrier

Opinion rules that an insurance defense lawyer may not disclose confidential information about an insured’s representation in bills submitted to an independent audit company at the insurance carrier’s request unless the insured consents.

Inquiry #1:
Law Firm is hired by Insurance Company to defend its insureds under its liability policies. Insurance Company requires great detail in the Law Firm’s bills. RPC 178 requires that an insurance company that is not affiliated with Insurance Company. The audit company makes all decisions about payment, nonpayment, or adjustment of the 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 author-
mation 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 rec-
ommended, 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, can-
not 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 oth-
erwise 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 relation-
ship 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 regard-
ing 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 condi-
tion. 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 direct-

ing 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 for-
merly 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 con-
tinuance 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 ini-
tiate 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 communi-
cations with a judge except in the following situations: (1) in the course of offi-
cial proceedings; (2) in writing, if the lawyer simultaneously delivers a copy of
the writing to opposing counsel; (3) orally, upon adequate notice to the oppos-
ing counsel; or (4) as otherwise authorized by law. Because an ex parte com-
munication 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 noti-
fy 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 commu-
nication with the judge?

Opinion #2:
Yes, provided she fully informs the judge of the reason for her ex parte com-
munication 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.

Opinions: 10-110
Inquiry #3:
Do the limitations on ex parte communications with a judge apply equally to criminal defense counsel and to the lawyers in the district attorney’s staff?

Opinion #3:
Yes.

98 Formal Ethics Opinion 13
July 23, 1999

Written Communications with a Judge or Judicial Official

Opinion restricts informal written communications with a judge or judicial official relative to a pending matter.

Inquiry:
Attorney A represents the employee in a workers’ compensation case. Attorney X represents the employer and the insurance carrier. After the case was assigned to a deputy commissioner for hearing, Attorney A wrote to Attorney X regarding discovery disputes, medical treatment and examination of the employee, and alternative employment for the employee. The letter implied that Attorney X had engaged in improper conduct by communicating with an examining physician and failing to respond to discovery. The letter was copied to the deputy commissioner scheduled to hear the case.

Apart from the submission or filing of formal pleadings, motions, petitions, or notices, may a lawyer communicate in writing with a judge or other judicial official about a proceeding that is pending before the judge or judicial official?

Opinion:
A lawyer may communicate in writing with a judge or judicial official under the limited circumstances set forth below.

Rule 3.5(a)(3) of the Revised Rules of Professional Conduct regulates ex parte communications by a lawyer with a judge or other judicial official. The phrase “other judicial official,” as used in the rule, includes, but is not limited to, the commissioners and deputy commissioners of the Industrial Commission.

On its face, Rule 3.5(a)(3) appears to permit unlimited written communications with a judge or other judicial official relative to a proceeding pending before the judge or judicial official provided a copy of the written communication is furnished simultaneously to the opposing party. The rule must be read, however, in conjunction with Rule 8.4(d) which prohibits conduct that is prejudicial to the administration of justice, and with comment [7] to Rule 3.5 which states:

All litigants and lawyers should have access to tribunals on an equal basis.

Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party.

The submission to a tribunal of formal written communications, such as pleadings and motions, pursuant to the tribunal’s rules of procedure, does not create the appearance of granting undue advantage to one party. 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.

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 funds from 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 safeguard 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 and as an award of attorneys’ fees, are the lawyers obligated to reimburse the donors to Client P’s legal fund?

Opinion #10:
See opinion #9.

98 Formal Ethics Opinion 15
January 15, 1999
The Year 2000 Problem and Lawyer Trust Accounts
Opinion rules that whether the year 2000 computer problem is being adequately addressed by a depository bank should be considered when selecting a depository bank for a trust account.

Inquiry:
Many older computer software and hardware systems record data and make calculations using only the last two digits of a year. Because computers with this limitation will interpret “00” as “1900,” 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.”

A lawyer has a fiduciary obligation to segregate and protect client funds by depositing them in a trust account with a North Carolina bank. Rule 1.15-1(d). What steps should a lawyer take to safeguard client funds in a trust account from potential loss due to a year 2000 problem at the depository bank for the lawyer’s trust account?

Opinion:
A lawyer must exercise due care in selecting a depository bank including consideration of how the year 2000 problem is addressed by the bank.

Endnotes:
1. Most computer operating systems do not recognize “1900.” Therefore, they will report the earliest possible date they support. This is usually January 1, 1980. Dollars & Cents at 4, American Society of Association Executives, (August 1998).
2. This is not intended to be a thorough explanation of the year 2000 problem. Lawyers are advised to research the problem thoroughly and to address in advance any potential malfunctions that may interrupt their practices.

98 Formal Ethics Opinion 16
January 15, 1999
Representation of Client Resisting an Incompetency Petition
Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

Inquiry #1:
Wife, who is elderly, was removed from the marital home. Husband, who is also elderly, contacted Attorney A because Husband did not understand why his wife was removed from the home. He asked Attorney A to investigate. Attorney A discovered that Wife was the subject of an involuntary incompetency proceeding. When Attorney A gained access to Wife, she indicated that she wanted Attorney A to represent her in resisting the involuntary incompetency petition. She repeatedly said that she wanted to go home to live with her husband.

Attorney A also learned that Husband was investigated by police relative to allegations of abuse and neglect of Wife. Attorney A met with Husband and told him that he could not represent Wife in resisting the incompetency petition and represent Husband in defending against an action in connection with Wife’s care or treatment. Husband agreed that Attorney A’s representation would be limited to representing Wife in resisting the incompetency petition and that Husband would be responsible for paying the legal fees for that representation. A written fee agreement memorializing this arrangement was executed. Although Wife was held in a hospital at this time, she continued to
express unequivocally that she desired Attorney A to represent her.

When Attorney A visited Wife, he noticed abnormalities in her behavior but he also witnessed extended periods of apparent lucidity. She repeatedly told Attorney A she wanted to go home, that she did not want an appointed guardian, and that she did not want to be declared incompetent. Attorney A filed several motions in the incompetency proceeding, including a motion to remove the guardian and for a jury trial. At the incompetency hearing before the clerk, the attorney for the Department of Social Services (DSS) and the guardian ad litem who had been appointed for Wife by the clerk, contended that Attorney A had no “standing or authority” to pursue motions on behalf of Wife. They argued that Attorney A had a conflict of interest due to his initial representation of Husband and Husband’s continued payment for the representation. The clerk found that Attorney A was without “standing or authority” to represent Wife and summarily denied all motions filed on Wife’s behalf by Attorney A. Attorney A’s motion to stay the incompetency proceeding was also denied.

During the incompetency hearing, Attorney A was not allowed to participate as counsel for Wife. Attorney A was called as a witness, however. Wife, when she testified, could not identify Attorney A as her lawyer. However, she expressed a desire to return home with her husband to avoid becoming a ward when she testified, could not identify Attorney A as her lawyer. However, she expressed unequivocally that she desired Attorney A to represent her.

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 rec-
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 representation. Therefore, Attorney A must honor Minor's request 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. Rule 1.6(d)(4) 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.

Opinion #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.

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.

Opinion #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?

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Yes, Rule 1.6(d)(2) permits a lawyer to disclose confidential information with the consent of the client.

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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.

Opinion #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.
Disclosing Confidential Information about Debtor's Property after Discharge in Bankruptcy

April 23, 1999

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).

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 entice 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.

Accepting a Referral Fee from an Investment Advisor

April 23, 1999

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 of several of the medical records custodians mailed Attorney D copies of the medical records. 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 office.” The letter contained a list of documents to be mailed to Attorney D. Attorney P was unaware that the depositions were 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 confidential information of clients with materially adverse interests. The Revised Rules of Professional Conduct impose a higher standard of conduct on lawyers in different local programs representing clients with materially adverse interests.

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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 confidence 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 local 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 Attorney X to assist with the administration of the estate.

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 mortgagee.”

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 uncanceled deed of trust may affect the marketability of title?

Opinion #5:
Attorney A must explain the limits of her representation sufficiently to allow the borrowers to make reasonably informed decisions about the representation. See opinion #1 above and Rule 1.4(b).

99 Formal Ethics Opinion 6
July 23, 1999

Ownership of Title Agency

Opinion examines the ownership of a title insurance agency by lawyers in North and South Carolina as well as the supervision of an independent paralegal.
Advertising Jury Verdicts

Opinion rules that a law firm may not state in a direct mail letter that lawyers in the firm have obtained jury verdicts of specified amounts because the statement may create unjustified expectations about the results the lawyers can achieve.

Inquiry:

ABC Law Firm wants to include the following paragraph in its targeted direct letters to traffic accident victims:

If you need a lawyer to represent you in connection with your recent accident, look no further. Our firm has obtained jury verdicts and settlements for individual clients in excess of $1,000,000.00. Although there is no guarantee of any recovery in your case, we will provide you with aggressive and comprehensive legal services to protect your rights and interests and maximize your chances of recovery.

May the statement regarding jury verdicts be included in the direct mail letters?

Opinion:

No. Rule 7.1 of the Revised Rules of Professional Conduct prohibits a lawyer from making a false or misleading communication about the lawyer’s services. Paragraph (b) of the rule defines a false or misleading communication, in part, as a communication that “is likely to create an unjustified expectation about the results the lawyer can achieve….” Comment [1] to the rule specifies that the prohibition in paragraph (b) “would ordinarily preclude advertisements about the results obtained on behalf of a client, such as the amount of a damage award or the lawyer’s record in obtaining favorable verdicts….” A general representation about past results without additional information that puts the past results in context is misleading. In the direct mail letter in this inquiry, the statement that “there is no guarantee of any recovery in your case” is not sufficient to mitigate the unjustified expectations created by the advertisement of jury verdicts proscribed by the comment to Rule 7.1.

99 Formal Ethics Opinion 8

October 22, 1999

Escrow Agreement Containing Waiver of Future Conflict

Opinion rules that a lawyer may represent all parties in a residential real estate closing and subsequently represent only one party in an escrow dispute provided the lawyer insures that the conditions for waiver of an objection to a possible future conflict of interest set forth in RPC 168 are satisfied.

Inquiry #1:

The fiduciary relationship that arises when a lawyer serves as an escrow agent is analyzed in 98 Formal Ethics Opinion 11. The opinion rules that a lawyer who represents the buyer in a residential real estate closing may serve as the escrow agent for funds for certain repairs to the house. If a dispute subsequently arises relative to the completion of the repairs and the right to receive the escrow, the lawyer may resign as escrow agent and represent the buyer in the dispute.

Assume that at the time the escrow is established, the buyer and the seller draft an escrow agreement. The agreement provides that in the event of a dispute over the disbursement of the escrow, the funds will be disbursed to another person who will act as escrow agent and the lawyer will represent the buyer in the escrow dispute. Does this arrangement violate the Revised Rules of Professional Conduct?

Opinion #1:

No, provided the funds are given to another individual who will serve as escrow agent. As noted in 98 Formal Ethics Opinion 11, the responsibilities of a lawyer acting as an escrow agent arise primarily from the lawyer’s fiduciary relationship to both the obligor and obligee and not from a client-lawyer relationship. An escrow agent must be impartial to both the obligor and the obligee. If a dispute arises, the lawyer may not advocate for one of the parties until he resigns as escrow agent. The agreement contemplated in this inquiry satisfies this condition.

Inquiry #2:

The closing lawyer represents the buyer, the seller, and the lender in the closing after satisfying the conditions for multiple representation set forth in RPC 210. As in the preceding inquiry, the buyer and the seller enter into an agreement that appoints the closing lawyer escrow agent. The escrow agreement also provides that, in the event of a dispute, the funds will be given to another escrow agent and the closing lawyer will represent the buyer in the escrow dispute. May a lawyer participate in an arrangement in which one of the lawyer’s clients agrees in advance to waive any objection to a possible future conflict of interest?

Opinion #2:

Yes, provided the conditions on waiver of a future conflict of interest set forth in RPC 168 are satisfied.
99 Formal Ethics Opinion 9
October 22, 1999

Lawyer’s Obligation to Disburse Closing Funds

Opinion rules that a lawyer who represents the buyer in a real estate closing, and subsequently records the deed, may not withhold the funds for the purchase price from the seller upon the buyer’s post-closing instruction.

Inquiry #1:

Attorney represented Small Corporation on the purchase of a lot from Development Company. After the closing, Attorney deposited the check for the purchase price in his trust account and recorded the deed at the register of deeds. When he returned from the courthouse, he received a telephone call from an official with Small Corporation who stated that Small Corporation did not want to purchase the lot anymore because company officials had just learned that a house with a basement could not be built on the lot. The corporate official instructed Attorney not to disburse any of the closing funds although the deed was already recorded and title vested in Small Corporation. Development Company, the seller, demanded the sale proceeds. What should Attorney do?

Opinion #1:

Comment [1] to Rule 1.2 of the Revised Rules of Professional Conduct states, “[t]he client has ultimate authority to determine the purposes to be served by legal representation within the limits imposed by law and the lawyer’s professional obligations.” Normally, a client’s decision not to proceed with a transaction must be honored by the lawyer and, if necessary, the lawyer must restore the status quo ante by returning documents, property, or funds to the appropriate parties to the transaction. However, once a closing lawyer records the deed to property, the lawyer must comply with the conditions placed on the delivery of the deed by the seller. If the seller delivered the executed deed to the lawyer upon the condition that the deed would only be recorded if the purchase price was paid, the lawyer has fiduciary responsibilities to the seller even if the seller is not the lawyer’s client. See, e.g., RPC 44 (conditional delivery of loan proceeds). If title has passed to the buyer, the lawyer must satisfy the conditions of the transfer of the property by disbursing the sale proceeds. The buyer must take appropriate legal action to have the sale rescinded.

Inquiry #2:

May Attorney represent Small Corporation in the subsequent action for rescission?

Opinion #2:

No. Rule 3.7(a) prohibits a lawyer from serving as a witness and an advocate in a trial proceeding. Moreover, Attorney’s testimony may be detrimental to the interests of Small Corporation. If so, Attorney is also barred from the representation because of the conflict of interest. Rule 3.7(b).

99 Formal Ethics Opinion 10
July 21, 2000

Communicating with Employee of Adverse Organization in a Criminal Investigation

Opinion rules that a government lawyer working on a fraud investigation may instruct an investigator to interview employees of the target organization provided the investigator does not interview an employee who participates in the legal representation of the organization or an officer or manager of the organization who has the authority to speak for and bind the organization.

Inquiry:

The Medicaid Investigations Unit of the North Carolina Department of Health and Human Services is investigating 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 have stated 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 to the communication 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 state-
ment 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 information to an independent audit company at the insurance carrier's request.

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?
poses 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)

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**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 non-lawyer may oversee the execution of documents outside the presence of the lawyer provided the closing lawyer provides adequate supervision and is present at the closing conference to complete the transaction.

**Inquiry #1:**
Paralegal is an in-house employee of Attorney A, a real estate lawyer. May Attorney A allow Paralegal to close a residential real estate purchase if Attorney A is not present at the closing?

**Opinion #1:**
No. A residential real estate closing, for purposes of this opinion, is defined as the entire series of events through which the ownership of property is transferred from one party to another party. One of the most important events in the typical transaction is the closing conference which occurs at the conclusion of the transaction when the documents are executed in the closing lawyer's office. The closing conference is the primary opportunity that the lawyer has to meet with the parties, to explain the closing documents, to define the client's rights and obligations, and to answer questions. More importantly, the closing conference may be the only opportunity that the lawyer has to intercede when the interests of the clients are threatened. Many, if not all, of these activities involve—and competent representation should require—the giving of advice and opinion upon the legal rights of the clients. The giving of such advice and opinion is the practice of law. See N.C.G.S. §84-2.1.

The duty to provide competent representation and the duty not to assist the unauthorized practice of law must be considered when supervising a non-lawyer. See Rule 1.1, Rule 5.3, Rule 5.5(b), and RPC 183. A non-lawyer does not have the requisite knowledge, skill, or authority to perform the critical advisory and advocacy roles necessary to provide competent representation in a residential real estate closing. Furthermore, a non-lawyer cannot give advice or opinion upon the legal rights of the client. Therefore, a non-lawyer may not close a residential real estate transaction.

**Inquiry #2:**
May Attorney A allow Paralegal to oversee the execution of the closing documents without Attorney A's presence in the room?

**Opinion #2:**
Yes, provided Attorney A is present at the closing conference to explain the documents, define the client's rights and obligations, answer questions, and advocate for the clients, and further provided, the clients are informed that Paralegal is not a lawyer. Paralegal must be instructed on the limitations of his or her role prior to the closing conference and Attorney A must maintain responsibility for the conduct and performance of Paralegal.

Rule 5.3(b) states that "a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer." Comment [1] to the rule adds the following:

A lawyer should give such nonlawyers appropriate instruction and supervision concerning the ethical aspects of their employment… and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

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**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 insured and the insured's insurer (or a third-party beneficiary). See RPC 91, RPC 103, and RPC 172. However, when the insured has contractually surrendered control of the defense and of the authority to settle the lawsuit to the insurance carrier, the defense lawyer is generally obliged to accept the instructions of the insurance carrier in these matters. RPC 91.

Attorney D should advise Defendant of the conditions of representation set forth in the insurance policy and should encourage Defendant to consult with independent legal counsel as to the legal consequences of her failure to cooperate with the defense of the lawsuit.

Attorney D should also inform Defendant that he cannot represent her in a coverage dispute with Insurance Company because it would be a conflict of interest. Rule 1.7(a). He must advise her to employ independent legal counsel to provide representation in a coverage dispute. RPC 91.

If Defendant insists that Attorney D limit his defense, Attorney D must determine whether Defendant's lack of cooperation will interfere with his independent professional judgment. If so, he may seek to withdraw from the representation of both parties. Rule 1.7(b).

**Inquiry #2:**
May Attorney D's defense of the lawsuit include offering evidence and arguments that are contrary to the evidence Defendant would like to provide in support of the Inlaws' claims? For example, may Attorney D examine Defendant about her credibility and sympathies if she takes the witness stand?

**Opinion #2:**
Attorney D may offer evidence and arguments that are consistent with an effective defense but he may not act in a manner that is harmful to the interests of Defendant. See generally Rule 1.7. This means that he may not treat her as an adverse witness, publicly question her credibility, or humiliate her. Again, if Defendant's lack of cooperation interferes with an effective defense, Attorney D may seek to withdraw.

**Inquiry #3:**
May Attorney D disclose to Insurance Company information relative to Defendant's desire to offer no defense including statements, actions, and conduct that indicate that Defendant would like the Inlaws to be successful in the lawsuit?

**Opinion #3:**
No. Disclosure of this information to Insurance Company may be harmful.
to the interests of Defendant because Insurance Company may use this information to deny coverage to Defendant. Rule 1.6(a). Nevertheless, Attorney D may inform Insurance Company that Defendant has instructed him to take a substantially different approach on the defense than that requested by Insurance Company. He may also inform Insurance Company that he cannot represent Insurance Company in a coverage dispute, and he may advise Insurance Company to obtain independent counsel on this matter.

**Inquiry #4:**
If Attorney D withdraws from the representation of Defendant, and Insurance Company is allowed to defend in its own name, may Attorney D represent only Insurance Company in the defense of the action?

**Opinion #4:**
No, unless Attorney D’s defense of Insurance Company does not require Attorney D to engage in defense tactics that are materially adverse to the interests of Defendant. Rule 1.9(a) prohibits a lawyer from representing a client whose interests are materially adverse to those of a former client in the same or a substantially related matter without the consent of the former client. A cross examination of Defendant in which Attorney D attempts to cast doubt on Defendant’s credibility and to demonstrate bias on her part is prohibited. Attorney D is also prohibited from using confidential information of Defendant in the defense of Insurance Company without Defendant’s consent. Rule 1.6(d).

**Inquiry #5:**
Is this ethics opinion binding as a matter of law?

**Opinion #5:**
Ethics opinions provide guidance to the members of the State Bar. Compliance with the opinions ensures that a lawyer’s conduct complies with the Revised Rules of Professional Conduct. Like the Revised Rules of Professional Conduct, ethics opinions provide a structure for the regulation of the conduct of members of the State Bar but are not designed to be a basis for civil liability, to create a procedural weapon in litigation, or to create a right of enforcement by a party other than an appropriate disciplinary authority such as the North Carolina State Bar or the courts. See Comment [6] of Rule .02, “Scope.”

**99 Formal Ethics Opinion 15**
October 20, 2000

**Disclosure of Fraud of Former Bankruptcy Client**

**Opinion:** Rules that a lawyer with knowledge that a former client is defrauding a bankruptcy court may reveal the confidences of the former client to rectify the fraud if required by law or if necessary to rectify the fraud.

**Inquiry:**
Client seeks advice from Attorney A on filing bankruptcy under either Chapter 7 or 13 of the bankruptcy code. During the course of the initial meeting, it becomes apparent to Attorney A that Client has substantial problems (e.g., preferential payments to friends or relatives, excessive equity in property, co-signed loans) that either preclude the filing of a Chapter 7 bankruptcy or significantly raise Client’s anticipated monthly Chapter 13 payment. Attorney A describes in detail the problems Client’s case presents. Client thanks Attorney A for his time and leaves his office.

Several weeks later, at the Section 341 First Meeting of Creditors, Attorney A learns that Client retained Attorney B to represent him and has filed a bankruptcy petition. Attorney A recalls that he previously determined that there were a number of obstacles to filing bankruptcy for Client. Attorney A believes that Client intentionally failed to reveal these problems to Attorney B.

What is Attorney A’s obligation under these circumstances?

**Opinion:**
The information that Attorney A learned during his conference with Client is confidential client information that Attorney A may not disclose to third parties, including bankruptcy officials and Client’s current lawyer, unless one of the exceptions to the duty of confidentiality found in Rule 1.6 of the Revised Rules of Professional Conduct applies. Two exceptions to the duty of confidentiality are relevant.

Rule 1.6(d)(3) permits Attorney A to reveal Client’s confidences if required to do so by law. A number of bankruptcy statutes require disclosure of debtor’s assets and liabilities and other financial information. 18 U.S.C. §152, a federal criminal statute, imposes criminal penalties on “a person who knowingly and fraudulently conceals...any property belonging to the estate of a debtor...”. Rule 1.6(d)(3) merely determines whether a lawyer is permitted to disclose confidential information, nor 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 A 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, and that all verdicts obtained were collected, and that 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.Bnk.R.), 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 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 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.

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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**

**Nonrefundable Advance Fees**

**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 deposit 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 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 regard-
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 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.
(Senior Lawyer: 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 is: (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 non-lawyer or legal services might be provided by an employee of a corporation other than a professional corporation or a non-lawyer proprietor.

Inquiry #1:
Attorney is a certified public accountant. He would like to open an office from which he will offer both legal services and accounting services. May he do so and, if he may, may he offer the services through one business entity?

Opinion #1:
Attorney may offer both accounting services and legal services from the same office and he may operate as one business provided he complies with the regulations of the State Board of Certified Public Accountant Examiners (G.S. Chapter 93) and with the North Carolina Revised Rules of Professional Conduct. See RPC 238 and RPC 201.

Inquiry #2:
May the signage for Attorney's office and his letterhead indicate that both accounting and legal services are provided through Attorney's business? May both services have the same telephone number?

Opinion #2:
Yes. See, e.g., RPC 201.

Inquiry #3:
May Attorney offer legal services to his accounting clients and vice versa?

Opinion #3:
Yes, provided Attorney fully discloses his self-interest in making a referral to himself and the referral is in the best interest of the client. See Rule 1.7(b).

Inquiry #4:
May advertisements for Attorney's services (including yellow page listings and business cards) indicate that Attorney offers both legal and accounting services?

Opinion #4:
Yes, subject to any requirements of the State Board of Certified Public Accountant Examiners. Rule 7.1.

Inquiry #5:
May Attorney decide to join an existing accounting practice as a CPA. If so, may Attorney operate a separate legal practice within his office in the accounting firm?

Opinion #5:
Yes, this arrangement is not distinct from the arrangement allowed in RPC 201 in which a lawyer/real estate agent operated a separate law practice within the offices of a real estate brokerage. Nevertheless, such an arrangement presents serious obstacles to the fulfillment of a lawyer's professional responsibility. Preserving the confidentiality of client information and records is virtually impossible in such a setting. Client information must be isolated and concealed from all of the employees of the CPA firm. See Rule 1.6. In addition, Attorney must avoid conflicts of interest between the interests of his legal clients and the interests of the clients of the CPA firm. See Rules 1.7 and 1.9. There may be no sharing of legal fees with the CPA firm in violation of Rule 5.4(a) which prohibits a lawyer from sharing legal fees with a non-lawyer. Finally, Attorney must maintain a separate trust account for the funds of his law clients pursuant to Rule 1.15 et seq.

Inquiry #6:
Under the facts in inquiry #5, may Attorney offer legal services to his accounting clients and vice versa?

Opinion #6:
Yes, if there is full disclosure of the lawyer's self-interest in making the referral and Attorney reasonably believes that he is exercising independent professional judgment on behalf of his legal clients in making such a referral. However, direct solicitation of legal clients is prohibited under Rule 7.3 although it may be permitted by the regulations for certified public accountants. Rule 7.3(a) does permit a lawyer to engage in in-person or telephone solicitation of professional employment if the lawyer has a "prior professional relationship" with a prospective client. If a prior professional relationship was established with a client of the accounting firm, Attorney may call or visit that person to solicit legal business.

Inquiry #7:
May Attorney share a telephone number with accounting firm?

Opinion #7:
Yes, if the confidences of legal clients can be preserved and clients are not confused about the relationship of Attorney's law practice to the accounting firm. See RPC 201.

Inquiry #8:
May advertisements for Attorney's law practice (including yellow page listings and business cards) indicate that Attorney also offers accounting services? May advertisements for the CPA firm or under the accounting heading of the yellow pages indicate that Attorney is also a lawyer and offers legal services?

Opinion #8:
Advertisements may not imply that legal services are offered by the accounting firm in violation of the statutes prohibiting the unauthorized practice of law and Rule 5.5 which prohibits a lawyer from assisting in the unauthorized practice of law. See G.S. 84-4 and 84-5. Nevertheless, advertisements for Attorney's law practice may include truthful information regarding Attorney's CPA license. Attorney's business cards may truthfully state that he is a lawyer and a CPA. See Rule 7.1. No opinion is expressed on the separate requirements of the State Board of Certified Public Accountant Examiners.

2000 Formal Ethics Opinion 10
July 27, 2001

Appearance of Non-Lawyer Employee at Calendar Call

Opinion rules that a lawyer may have a non-lawyer employee deliver a message to a court holding calendar call, if the lawyer is unable to attend due to a scheduling conflict with another court or other legitimate reason.

Inquiry:
Attorney A is a criminal defense lawyer in a solo practice. He frequently has

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cases on the calendar simultaneously in juvenile court, district court, superior court, and administrative court. When a client’s case is in court for a routine calendar call or an administrative status calendar call, Attorney A would like to send a non-lawyer member of his staff to the hearing to report to the court on his whereabouts and scheduling conflict. May Attorney A do so without violating the prohibition on assisting the unauthorized practice of law?

**Opinion:**
Yes, provided the nonlawyer employee is merely providing the court with information and does not request or argue for a particular action by the court.

Rule 5.5(b) prohibits a lawyer from assisting a person who is not a member of the bar in the performance of any activity that constitutes the unauthorized practice of law. G.S. § 1-11 provides that, “A party may appear either in person or by attorney in actions or proceedings in which he is interested.” G.S. §§84-4 permits only licensed North Carolina lawyers “to appear as attorney or counselor at law in any action or proceeding before any judicial body.” See also G.S. §§84-2.1, 84-4, and 84-36. Nevertheless, when a lawyer has a conflicting commitment to appear in another court or when another legitimate conflict prohibits a lawyer's appearance in court for a client, the lawyer may send a non-lawyer employee to the court to inform the court of the situation. This is not assisting in the unauthorized practice of law.1 In response to information about a lawyer’s availability, the court may, on its own motion, determine that a continuance or other action is appropriate.

A lawyer should rely on a nonlawyer to notify the court of a scheduling conflict only when necessary. Moreover, Rule 5.3 requires a lawyer who supervises a non-lawyer assistant to make reasonable efforts to ensure that the non-lawyer employee to the court to inform the court of the situation. This is not assisting in the unauthorized practice of law.1 In response to information about a lawyer’s availability, the court may, on its own motion, determine that a continuance or other action is appropriate.

A lawyer should rely on a nonlawyer to notify the court of a scheduling conflict only when necessary. Moreover, Rule 5.3 requires a lawyer who supervises a non-lawyer assistant to make reasonable efforts to ensure that the non-lawyer'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 Ill. 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 prove 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

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

Inquiry:
Law Firm wants to enter into a contract with a management company that will oversee the day-to-day administration of the firm. Among other things, the company will employ all of the non-lawyer employees of the firm. The company will be responsible for the hiring and training of employees. The company will also provide all accounting, marketing, human resources, and information-technology systems for the firm. The firm’s only employees will be the lawyers. The company will execute confidentiality agreements with the law firm and all employees of the company will also sign confidentiality 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

Inquiry:
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.

Opinion:
Attorney regularly represents individuals with personal injury claims. When an insurance company check for $5000 or more is paid in settlement of a tort 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:

Nowithstanding 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 not 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 provisionally credited funds 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 provisionally credited funds upon 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.

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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 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.

Opinions: 10-130
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 Wife #2, the stepchildren, and the joint child?

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 implicitly permits attorney/CPAs, who have a Series 6 license, to offer financial products and charge a fee or commission from the sale of these products.

May Attorney, with appropriate disclosures to and consent from the client, provide his estate-planning clients with financial planning services, which may include the sale of financial products, if Attorney will receive a fee or commission from the sale of such products?

Opinion #1:

No. Rule 1.8(b) of the Rules of Professional Conduct provides as follows: During or subsequent to legal representation of a client, a lawyer shall not enter into a business transaction with a client for which a fee or commission will be charged in lieu of, or in addition to, a legal fee, if the business transaction is related to the subject matter of the legal representation, any financial proceeds from the representation, or any information, confidential or otherwise, acquired by the lawyer during the course of the representation.

This rule prevents an attorney from taking advantage of financial information received from a client during the legal relationship. If the attorney learns through confidential communications that the client has received money, the attorney may not profit from the sale of a financial product to the client. Comment [2] to Rule 1.8 specifically admonishes an attorney who is also a securities broker or insurance agent not to “endeavor to sell securities or insurance to a client when the lawyer knows by virtue of the representation that such client has received funds suitable for investment.” But see RPC 238 (permitting a law firm to offer financial products to clients so long as no fee or commission is earned by the lawyer or law firm on the sale of such products).

Rule 1.8(b), however, does not prevent an attorney from providing law-related services to a legal client, so long as the attorney fully discloses his self-interest in the referral and the referral is in the best interest of the client. 2000 Formal Ethics Opinion 9 was not intended to and does not create an exception to Rule 1.8(b). That opinion allows an attorney to provide accounting services to his legal clients. Nothing in the opinion specifically permits an 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 changing 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 arrangement with another lawyer or law firm that restricts the right of a lawyer to practice after the termination of the relationship created by the agreement except as a condition to payment of retirement benefits. The purpose of the rule, as explained in Comment [1], is to encourage professional autonomy of lawyers and to facilitate the freedom of clients to choose a lawyer. In Ethics Decision 2000-6, the Ethics Committee held that a provision of a law firm employment agreement that made the payment of a client’s account with a law firm a condition precedent to a departing lawyer’s receipt of compensation from the client after leaving the firm is a violation of Rule 5.6(a). In the same ethics decision, the Ethics Committee held that an employment agreement with a law firm “must not create a financial disincentive that discourages or prevents a departing lawyer from representing a client from the former firm if the client chooses to follow the lawyer.” The Ethics Committee also found that a provision of the same employment agreement that limited the departing lawyer’s financial compensation for representation in contingency cases to a specified hourly rate for work done for a client after the lawyer left the firm was a violation of Rule 5.6.

The proposed provision set forth in the inquiry above clearly creates a specific financial disincentive for a lawyer to engage in the private practice of law in the same community in which there are likely to be clients who will want to continue to be represented by the lawyer after departing Law Firm. This will inhibit the right of clients to be represented by their chosen lawyer. This disincentive is a violation of Rule 5.6(a) and is prohibited.

2001 Formal Ethics Opinion 11
January 18, 2002

Disbursements to Medical Providers in Absence of Medical Lien

Opinion rules that when a client authorizes a lawyer to assure a medical provider that it will be paid upon the settlement of a personal injury claim, the lawyer may subsequently withhold settlement proceeds from the client and maintain the funds in her trust account, although there is no medical lien against the funds, until a dispute between the client and the medical provider over the disbursement of the funds is resolved.

Inquiry:

Attorney settled Client’s personal injury claim. Client is now demanding Attorney disburse all proceeds to her, even though there are outstanding medical bills to be paid. For two medical providers, Client signed written assignments of proceeds in the amount of the providers’ bills. For one of these providers, Attorney also signed a “letter of protection,” with Client’s knowledge and authorization, in which Attorney represented that the provider’s bill would be paid from the proceeds of any settlement or liquidated judgment. If Client insists that all of the settlement proceeds be paid to her, what should Attorney do?

Opinion:

Rule 1.15-2(m) generally requires a lawyer to disburse settlement proceeds in accordance with the client’s instructions. The only exception to this rule arises when the medical provider has managed to perfect a valid physician’s lien. In such a situation the lawyer is relieved of any obligation to pay the subject funds to his or her client, and may pay the physician directly if the claim is liquidated, or retain in his or her trust account any amounts in dispute pending resolution of the controversy.

RPC 69. A number of ethics opinions hold that settlement funds belong to the client who has the right to determine how to disburse the funds unless there is a valid lien against the funds. See RPC 69, RPC 75, and RPC 125. Thus, if Client instructs Attorney to pay the proceeds to Client rather than the medical providers, Attorney may ignore this instruction if there is a valid lien against the proceeds or other valid legal assignment of the rights in the proceeds. See Revised 2000 FEO 4. Attorney must determine whether the assignments given by Client to the medical providers are valid and whether they create liens against the proceeds. If Attorney determines that liens are created, she may hold the funds in her trust account or pay the providers, over the client’s objections, if the providers’ claims are liquidated. If the assignments do not create valid liens against the proceeds and no representation of payment was made to the medical provider, then Attorney must give the settlement proceeds to Client.

The ethics opinions have not previously addressed a lawyer’s professional responsibility when, in the absence of a valid medical lien or assignment, a client instructs a lawyer to disregard a “letter of protection” or some other specific representation to a medical provider that it will be compensated, in whole or in part, from settlement proceeds or a liquidated judgment. This opinion clarifies when a lawyer may withhold settlement funds from a client in this situation. To the extent that this opinion is inconsistent with previous opinions of the Ethics Committee, the prior opinions are overruled.

When a lawyer makes a representation to a third party with the knowledge and authorization of a client, the representation should be honored. See Rule 4.1 which prohibits a lawyer, in the course of representing a client, from knowingly making a false statement of material fact or law to a third party. However, between the time that a medical provider is told that it will be paid and the time that settlement or judgment proceeds are received, a dispute may arise between the client and the medical provider over the medical bill, or the client may decide to defer payment of the medical provider and instruct the lawyer not to pay the medical provider. In the absence of a liquidated medical lien against the funds, the lawyer may not unilaterally decide whether the funds rightfully belong to the medical provider or to the client. Therefore, the lawyer may hold the portion of proceeds allegedly owed to the medical provider in her trust account until the impasse between the client and the provider is resolved by agreement of the parties, by court order, or by interpleading the funds to the court. See G.S. §1A-1, Rule 22. To insure that medical providers are not mislead, any “letter of protection” or other assurance of payment given to a medical provider must explain that the lawyer will hold disputed settlement funds in the trust account in the event the client subsequently instructs the lawyer not to pay the medical provider.

2001 Formal Ethics Opinion 12
October 19, 2001

Affixing Excess Tax Stamps on a Recorded Deed

Opinion rules that a closing lawyer may not counsel or assist a client to affix excess excise tax stamps on an instrument for registration with the register of deeds.

Inquiry #1:

The excise tax stamps affixed to a recorded instrument of conveyance or deed are based upon the sales price for the property reported to the register of deeds. See GS §105-228.32. Therefore, the purchase price for real property can be calculated from the tax stamps on the deed. Appraisers, developers, real estate agents, and lenders rely upon the tax stamps to evaluate the purchase price of real property. If excess tax stamps are affixed to a deed, the higher value reflected by the tax stamps may deceive third parties. For example, a developer sells a lot to a buyer for a certain purchase price but gives the buyer a credit at closing. The lawyer closing the transaction obtains tax stamps for the deed based upon the higher price recited in the purchase agreement even though the actual consideration paid by the buyer is less. To encourage sales of other lots in the development at inflated prices, the developer claims that he sold the lot for the inflated price reflected in the tax stamps.

May a lawyer who closes a real estate transaction have the register of deeds affix more tax stamps to the deed than are warranted by the actual consideration paid for the property?

Opinion #1:

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 8.4(c). Members of the public regularly rely upon the information about the price of real property that can be derived from tax stamps on recorded instruments. Therefore, a lawyer may not counsel or help a client to put excess tax stamps on an instrument when it is recorded with the register of deeds because such conduct involves dishonesty and misrepresentation. See also Rule 1.2(d) (prohibiting a lawyer from counseling a client to engage in conduct that the lawyer knows is fraudulent).

Inquiry #2:

May a lawyer draft for a client a purchase agreement for real property
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 record 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 repre-
sentenced 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 nonprofit 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 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 subse-

quentely 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. (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.
Collecting Contingent Fee and Court-Awarded Attorney Fee

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, will he receive more from the representation than the Plaintiff will receive from the damage award. Is this unethical?

Opinion #2:

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.

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:
Lawyer 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 2.3 (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.

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**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 amicably, 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 amicable 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.

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**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 deceased’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.

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**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 law, 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; Satter v. Puser, 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).

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### 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. 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. 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.

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### 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 sub-
contractor 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 representation 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 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 Rule 4.2. 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 level"?

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. §§8-89-5(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 workplace 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 lawyer to enter into a partnership or other relationship with a nonlawyer to provide 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 with-
out 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 the 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 materially limited by Attorney's responsibilities to the other client, Attorney must notify the other client of 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 Attorney'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. However, only the SSA’s federal district court and the Federal Rules of Civil Procedure govern the representation of the claimant before the SSA by nonlawyer representatives.

A claimant’s representative may obtain certain records from Employer, to subpoena witnesses, or in settlement negotiations.

Inevitably, some nonlawyer representatives die or decide to stop representing 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 client 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).
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."

Opinion #3:
Physician. Physician may refuse to offer up to the policy limit to settle the claim, as demanded by the client, if he recognizes that the Insurance Company settled for an amount between $500,000 and $750,000. If Attorney demands settlement in this range, he recognizes that the Insurance Company will not settle for an amount between $500,000 and $750,000. If Attorney recommends settlement in this range if the jury returns a liability verdict against Physician; and (3) the exposure and has made a demand on the insurance company that the case be settled for an amount between $500,000 and $750,000.

Opinion #4:
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 for the case. Physician has a professional liability policy with a limit of $1,000,000 per claim. Plaintiff brings an action against Defendant. Upon further review of the facts, Attorney discovers that the Plaintiff is a minor and that the case should be settled for an amount between $900,000 and $1,200,000.

Opinion #5:
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 medical expenses, Attorney should advise Client of this and may withhold the funds to pay medical liens as provided in 2001 Formal Ethics Opinion 11.

Opinion #6:
When the check for the legal fee is received by Attorney X, where should it be deposited?

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.

Opinion #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 for the case. Physician has requested 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.

Opinion #2:
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.

Opinion #3:
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 #4:
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 that 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 other-
wise 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
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 contact 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:

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.
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 participate in an on-line legal directory provided the information about the lawyer in the directory is truthful. RPC 241. A lawyer may 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 pays 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 non-lawyer 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.

Opinion #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 service 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 in letters sent to accident victims?
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 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 discards 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,
Opinions: 10-152

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(c) 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.

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 8 which holds that a lawyer for a plaintiff may not prepare the answer to a complaint for an unrepresented adverse party to file so as to take away the lawyer's ability to 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 client to the prior inquiries change?

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 no 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, particularly 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, 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 profession corporations—and, therefore, 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). 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 representation 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 related1 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 Firm2 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).

Opinions: 10-154
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 than 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 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.

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May the defense lawyer threaten to report the plaintiff or a witness to immigration authorities to induce the plaintiff to capitate 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 undocumented 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.
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.
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 discloses 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).

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[.]
*See* 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 spe-
cific 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.

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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 non-lawyer/claimant’s representative for the prior representation of a claimant). This opinion differs from this opinion and Rule 4.2(b), it is hereby overruled.

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, 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.

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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. § 109(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. § 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.

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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 charita-
ble 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.

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**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.E.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

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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

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?

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 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 specific tasks, 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 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 specific tasks, and the extent to which he or she uses the services of a lawyer.

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 agree-
ment 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 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 compiled a list of state ethics opinions addressing limited scope representation. See www.abanet.org/legalservices/delivery/del unbund.html

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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:

![Image](https://via.placeholder.com/150)

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, 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:
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, the fee will be paid to the client. 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).

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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 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 account. Consequently, those portions of the minimum fees that were not earned by 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.

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

Inquiry:
Is the URL for a law firm website sufficiently descriptive and not misleading in that the user is not disappointed in the information obtained on the website?

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. Nonetheless, 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 is false or misleading. 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 belonging to a lawyer or a law firm.

2006 Formal Ethics Opinion 1
April 21, 2006
Withholding Information from Employer at Direction of Workers’ Compensation Carrier in Joint Representation

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 employer 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 2006 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 finance 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 hereinafter 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 impair 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.

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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 fully able 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 A 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 fair 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 #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 ensure 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 pro-
viding and reviewing 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 make a difference 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 Services Plan**

**Opinion:**
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 services 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 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 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 service 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 arrange 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.

At least on 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 at auction. May Attorney A, who is the appointed commissioner, submit a bid on her own account at a tax foreclosure sale? What about Attorney A’s paralegal?

**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 taxpayers. 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.

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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 courthouse 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 heed 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.

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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 meet-

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ing, 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 presentations 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.

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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.

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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

Opinions: 10-170

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. 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. 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 disclo-
sure 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 communi-
cated in confidence by the client, but also to all information acquired during
the representation.” Therefore, health information obtained during the repre-
sentation 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 informa-
tion 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 inter-
ception, 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 exi-
genesis of the existing circumstances, will best maintain any confidential infor-
mation 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 pro-
tection 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 han-
dle 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-
mision, 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/privacysum-
   mary.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 instru-
ment, 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 com-
ensation 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 represen-
tation of the client is protected....

The situation described in this inquiry is distinguishable from a commer-
cial 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 signa-
tory 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 rep-
resentation. 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 inde-
pendent 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 expens-
es 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. 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.

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.

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 unclaimed 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 when 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 to 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 autodialed 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 keypad 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 communications 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 clearly 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 change if the person with whom Guardian Ad Litem Y communicates is not the one appearing as attorney in the subject matter?

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].

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.

Opinion #2:

May Attorney Doe grant to the PC the right to use Attorney Doe’s likeness under these terms?

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 the 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 advertising materials and marketing communications would be insufficient to overcome the public perception that Attorney Doe’s services are still available through the PC. This opinion does not prohibit generally the accurate and nondeceptive use of the likeness of a retired or deceased member of a firm in advertising, as long as the likeness includes a clear statement of the attorney’s status so as not to imply ongoing involvement with the firm.

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 1 statements 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 deceased 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 willingly 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 per-
sonal 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 confidentiality, 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 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 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.

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 variance petition, Lawyer A advises the council; he does not advise or represent the planning department or city administration.

Inquiry #2:

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:

Yes. See opinion #2.

Inquiry #4:

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:

Yes. 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:

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 refuse herself from participating in the hearing?

Opinion #5:

Yes. See Opinion #2.

Inquiry #6:

Inquiry #6: Lawyer X is an employee of City and provides legal advice and representation to the city council and to the administration of City. The administration informs Lawyer X that a nonlawyer employee of the planning department may appear on behalf of the planning department at every hearing on a variance 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 city council 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.

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 refuse herself from participating in the hearing?

Opinion #7:

Yes.

Inquiry #8:

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 person 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 under-standing 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
attaching. 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 [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.

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) 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.

Should Attorney A continue to represent Husband and Wife under these circumstances until an issue upon which they cannot agree arises?

**Opinion #1:**
Yes, the consent of each client must be confirmed in writing. 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 a 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 carrier 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. 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 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 profession-
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 ensure 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 A's email and responding; Attorney A 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 the expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after

(a) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
(b) the fee customarily charged in the locality for similar legal services;
(c) the amount involved and the results obtained; and
(d) the experience, reputation, and ability of the lawyer or lawyers performing the services.

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 is not properly considered the amount charged per hour for services rendered, the lawyer is expected to discharge a matter on summary judgment rather than proceed to trial if possible, so too is the lawyer expected to complete other projects to expedite the legal process. Model Rule 3.2. Just as a lawyer is expected to discharge a matter on summary judgment rather than 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

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.superalawyers.com/about/opinion_39.html) as a "very thorough quantitative and selective qualification 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 lawyer's 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 misled 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 verified 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 membership; and
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 60 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 represent 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 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

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 3.6(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.
before the board. The arrangement described in the inquiry, therefore, does not
advisor, represent the school board and not the student or employee appearing
same firm advises the board on the legal and procedural issues that arise during
lawyers in the firm unless it is a personal conflict of interest.
presentation of one or more clients may be materially limited by the lawyer's
perception of the integrity and fairness of the process.
dual representation. The opinion concludes there is no conflict of interests but
sibility relative to whether there is a conflict of interests created by this form of
appeal to the board while Lawyer B advises the board?
A represent the administration in a dismissal case against an employee in an
school system. An administrative hearing is held, with the board sitting in a
 quasi-judicial capacity, to determine whether the decision of the administration
school board.1

Roles of School Board Lawyers in Administrative Proceedings

Opinion holds that a lawyer is not prohibited from advising a school board sit-
ing 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 pro-
ceeding 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 employ-
ee 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 expert-
ise in education law. School Board retains Law Firm to provide all legal repre-
station 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 respon-
sibility 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 rep-
resentation 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 appear-
ing 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 administra-
ion 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 confi-
dence in the rule of law and the justice system because legal institutions in con-
stitutional democracy depend on popular participation and support to main-
tain 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 confi-
dence 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 recom-

mend 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 pend-
ing 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 profes-

sional matter through the timely imposition of procedures within a firm that are rea-
sonably adequate under the circumstances to protect information that the isolated lawyer
is obligated to protect under these Rules or other law.)

Assisting a Pro Se Litigant

Opinion rules a lawyer may assist a pro se litigant by drafting pleadings and giv-
ing 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 repre-
sentation 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 undis-

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closed 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 & 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 Delo 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 extra-judicial 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.

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**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 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, hearing, 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 to 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 is 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 states 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 non-lawyer 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.

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**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:**
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.

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**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**

<table>
<thead>
<tr>
<th>Date</th>
<th>Firm</th>
<th>Associate</th>
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</thead>
<tbody>
<tr>
<td>On or Before</td>
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<td>0%</td>
</tr>
<tr>
<td>Transfer</td>
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</tr>
<tr>
<td>On or Before First</td>
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<td>20%</td>
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<tr>
<td>Anniversary of</td>
<td></td>
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</tr>
<tr>
<td>Transfer Date</td>
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<td>40%</td>
</tr>
<tr>
<td>On or Before Second</td>
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<td></td>
</tr>
<tr>
<td>Anniversary of</td>
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<td>50%</td>
</tr>
<tr>
<td>Transfer Date</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Opinions: 10-192
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, the new law firm pays to Corporation immediately out of any settlement, award, or verdict a portion of the attorney fee based on the following formula:

\[ 0.20 \times \text{attorney fee} + \left( \frac{a-b}{a} \right) \times \text{attorney fee} = \text{amount due to Corporation} \]

- Where 0.20 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.

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 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 (51:1203). 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 fees. 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, non-lawyer 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, non-lawyer 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 time frame 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
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 non-lawyer 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 non-lawyer 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 amicably 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] 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 “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 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, “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 [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.” “[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 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 sub-
ject 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 attorneys 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 proceedings are 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 inconsis-

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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 formally 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 on its review of the loan information.

2008 Formal Ethics Opinion 12
April 24, 2009
Prohibition on Taking a Security Interest in Marital Residence to Secure Legal Fee in Equitable Distribution Case

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 audit conducted 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 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 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. 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.

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.

Opinion #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 #4:

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.

Opinion #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 non-lawyer 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 quali-
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 treaties, 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 participate 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 foregoing 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...
tion 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 or embedded information about the document describing the document’s history, tracking and management 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. 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.

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. 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), 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 prescribe 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’n 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.”

Opinions: 10-203

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 counsel 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 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 Account which is offered by Affiniscape Merchant Solutions in association with Bank of America, N.A.

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 for purposes of solicitation.

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 #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 investigating 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 litigating 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 naive 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 represented 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.
3. See 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. §§51-399.4 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 the representation to serve as the commissioner for the sale.
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 non-lawyer to represent employers in unemployment hearings provided the non-lawyer 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. It 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 rela-
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
Ownership Interest

pensation may conflict with the lawyer's duty to close the transaction only if it involves a fact scenario substantially similar to the one currently presented to the Ethics Committee. The Ethics Committee has previously examined personal conflicts of interest that may arise when a lawyer is involved in the issuance of title insurance for a specific property. In such a scenario, the lawyer's personal interest in having the title insurance agency receive compensation from the client as a result of the closing of the transaction may conflict with the lawyer's duty to place the title insurance with a title insurance agency operated by the lawyer's spouse. The opinion provides that if a title agency, and, regardless of whether the ownership interest is disclosed to the client, owns a substantial interest, directly or indirectly, in a title insurance agency in which the lawyer's spouse has any ownership interest, there is a conflict of interest for a lawyer to perform title work with the title insurance agency in which Lawyer's spouse has an ownership interest. However, if the lawyer's personal interest is too great to be allowed even if the client wishes to consent. Therefore, the Ethics Committee concludes 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.

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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 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 vigor 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 suppressing the evidence 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-calendered.

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.

Opinions: 10-210
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 withdraw 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 services. 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 firms 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 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’).

Opinion #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 from a real estate 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. Shoemake, 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.”).
Involving dishonesty, fraud, deceit, or misrepresentation).

As to the lawyer’s authority to require the production of such documents. See Rule 1.2, cmt. [1] (Client has “the ultimate authority to determine the purposes to be served by legal representation”); 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.”).

Would the response to Inquiry #1 be different if Insurance received notice of the lawsuit and specifically authorized the representation before disappearing?

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 representation”); 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.”).

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?

This is a question of law that is not resolved by the existing case law and is outside the purview of the Ethics Committee.

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?

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.

Opinion #4:

If Lawyer must cross-examine Officer in Defendant’s criminal matter, the 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.

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?

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 jeopardy to the case by foreclosing 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].

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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.

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**2010 Formal Ethics Opinion 4**

**November 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]
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 nonlimitation 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 membership 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. 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 non-lawyers: (1) to avoid the possibility of a non-lawyer 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 non-lawyer 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 next 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 bring 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, Chapter 110, Article 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 programs are 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. Stevens 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 #1:
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).

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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 lawyer 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(c).

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

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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 Inquiries #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).

Opinion #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?

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.

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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); Pet. 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 letterhead must contain information on how to obtain the membership standards for the Million Dollar Advocates Forum; and (3) the letterhead 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

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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.

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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?
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 take "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 financial 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 A 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, 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).

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. Sans, 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.

Opinion: #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.7 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

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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 FE0 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 apponts 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 exclusive-
ly 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 lawyer by someone associated with the insurance company on every transaction referred to Attorney by Referring Party. May Attorney agree to such a referral arrangement with Title Insurance Agency?

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 manner 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 firms waste paper be shredded if lawyer ascertain that persons or entities responsible for the disposal employ procedures that effectively minimize the risk of inadvertent or unauthorized 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 affected 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.

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.

- 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/ ltc/ftydocs/saas.html.
2. Id.
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 in 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 Services 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's 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 "yes" 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 chooses.” 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 relationship 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

**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 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:**

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

**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 con-
founded 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 the offer 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 legal services. The payment received by the lawyer from the website company is a fee for the service being offered. 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.

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 that 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 designated time (before the “expiration date”), one might consider the advancement 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.

A lawyer must consult with each prospective client to determine what services the prospective client actually requires. If the client declines the proposed legal 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 legal services 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.
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 E1 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 from the clerk enabling the payment of attorney’s fees by an estate. 4

[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.

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.


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 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:

[Consideration . . . should be given to the legal landscape of the nation to which the services are being outsourced, particularly the extent that per-
sonal 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. 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:

[during 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:

[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.

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 Act2 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).

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

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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.

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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.

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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., 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 the 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:

“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... 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:

‘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.

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:

[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.

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 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 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: 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; 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 contend- ed that there is a substantial risk that Attorney J will have specific confidential

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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 Employee’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.

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.

Opinion #2:

May Attorney A tell Employer to review the records for its email system to retrieve any personal email messages sent or received by Employer 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.”)

Opinion #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, including North Carolina, 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) (considering whether employee has objectively reasonable expectation of privacy in email sent to 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) does 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.

Opinion #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...
in the absence of a law authorizing disclosure. As observed by the Standing

11-460 (2011), and found that notification is only allowed with client consent
under the Rules of Civil Procedure.

In the current situation, Rule 1.6(b)(1) only allows the lawyer to disclose confidential client infor-

mation, Rule 1.6(a). In the current 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 dis-

close 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 situa-

tion, 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 sit-

uation, the emails were not “inadvertently sent.”

The ABA Standing Committee on Ethics and Professional Responsibility

(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 rul-
ing as to the admissibility of the employee’s attorney-client communica-
tions 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 protect-
ed. 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 mis-

representation. 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 per-

sonal 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 Employer’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 pub-

lic records laws frequently are required to review emails of government employ-

ees 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 this rule. 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 govern-

ment 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: Conversion v.


LEXIS 29387 (EDNY 2006); Carro v. Medical World Commns. Inc., 2006 US Dist.

LEXIS 29387 (EDNY 2006); Carro 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


(SD Fla. Sept. 23, 2009); Leventhal v. Knapek, 266 F.3d 64 (2d Cir. 2001); Mauk v. Glenayre Elecs., 280 F.3d 741 (7th Cir. 2002); Retstucia v. Bark Tech, 5 Mass.L.Rep. 712,


Center, Inc., 17 Misc.3d 934, 847 N.Y.S.2d 436 (NY Sup. Ct. 2007); Sims v. Lakeside


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 employee’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

Opinions 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 appoint-

ment. Depending upon the lease, ABC Company may also provide mail for-

warding and personalized call answering, ABC Company advertises that it pro-

vides 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 com-
munication about the lawyer or the lawyer's services. "It is a misleading commu-
nication for a law firm to infer that it has an office or a lawyer located in a com-
munity 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 com-
munity, 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 meet-
ning 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 com-
munity 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 adver-
tisement. 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 con-
cerned about her safety and privacy. She is considering using a leased office
address in her community, as described in Inquiry #1, to circumvent this prob-
lem, 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" require-
ment 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 num-
ber of lawyers working from home offices or operating virtual law practices has
increased. The requirement is no longer practical or necessary to avoid mis-
leading 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 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 web-
site 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 recommenda-

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 adver-
tising. 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 rec-
ommendation 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 iden-
tifies 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 appoint-
ed 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 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

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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 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. 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 these 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.” 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.” The former role is “client directed,” where the client’s objectives are central to the lawyer’s representation, and does not involve any adversarial role or advocate the client’s interests. The latter role is “advocate directed,” where the advocate’s judgment is substituted for that of the client with “the purpose of protecting a child’s best interests without being bound by the client’s directives or objectives.”

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 non-lawyer 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. 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 divorcing 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. 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.” 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.” 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 communications for the purposes of the representation without disclosing them.” 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.

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.”

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 non-lawyer 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. 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. 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.

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. If the court indicates that the lawyer is a court-appointed advisor, the lawyer should consider whether a non-lawyer 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)?
• Am I being appointed to provide independent legal representation to the child in a traditional client-lawyer relationship (the Child’s Attorney role)?
• Am I being appointed to provide independent legal representation to the child in a traditional client-lawyer relationship (the Child’s Attorney role)?
• Am I being appointed to provide independent legal representation to the child in a traditional client-lawyer relationship (the Child’s Attorney role)?
• Am I being appointed to provide independent legal representation to the child in a traditional client-lawyer relationship (the Child’s Attorney role)?

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;
• If appointed to be the Child’s Attorney, 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 (the court-appointed advisor)?
• If appointed to be the Child’s Attorney, will the court insist that the lawyer perform these functions, the lawyer may communicate with represented persons without the consent of their lawyers as would be otherwise required by Rule 4.2?
• If appointed to be the Child’s 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 appointed to be the Child’s 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?

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?

Conclusion:
Serving as a Child’s Attorney or a Best Interests Attorney in a contested cus-
tody 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."

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(a)(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 Lawyers, p. 2, (2011) [hereinafter “AAML Standards”].
5. ABA Standards, supra note 3, at 1.
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 muddied 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 at 15.
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.
25. AAML Standards, supra note 2, at 26-27.

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 to 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 clients 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 software, 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 into 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. 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.

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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.

Opinions: 10-241
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 based 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 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 lawyer’s firm’s name is also exempt from the address requirement.

2012 Formal Ethics Opinion 15
January 25, 2013

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).
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; preparing legal documents, such as deeds; preparing other documents, such as trust deeds, deeds of trust, lien waivers or affidavits; interpreting and explaining documents implicating parties’ legal rights, obligations, and options; 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 update of title for any intervening conveyances or liens since the preliminary update of title. 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, e.g., 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 (1980), 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. Prepares 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. Prepares or offers 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. Prepares 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. And, since N.C. Gen. Stat. § 84-10 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. 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 some other electronic 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 a 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 county and city 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. §§ 84.21 and 4.1.

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 cir-
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.
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