

Title 27 of the North Carolina Administrative Code

The North Carolina State Bar

Chapter 2

Rules of Professional Conduct

Preamble and Scope

0.1 Preamble: A Lawyer's Professional Responsibilities	9-2
0.2 Scope	9-3

Terminology

Rule 1.0: Terminology	9-4
---------------------------------	-----

Client-Lawyer Relationship

Rule 1.1: Competence	9-5
Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer	9-6
Rule 1.3: Diligence	9-8
Rule 1.4: Communication	9-9
Rule 1.5: Fees	9-10
Rule 1.6: Confidentiality of Information	9-13
Rule 1.7: Conflict of Interest: Current Clients	9-17
Rule 1.8: Conflict of Interest: Current Clients: Specific Rules	9-24
Rule 1.9: Duties to Former Clients	9-27
Rule 1.10: Imputation of Conflicts of Interest: General Rule	9-28
Rule 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees	9-30
Rule 1.12: Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral	9-31
Rule 1.13: Organization as Client	9-31
Rule 1.14: Client with Diminished Capacity	9-33
Rule 1.15: Safekeeping Property	9-34
Rule 1.15-1: Definitions	9-34
Rule 1.15-2: General Rules	9-34
Rule 1.15-3: Records and Accountings	9-36
Rule 1.15-4: Trust Account Management in a Multi-Member Firm	9-37
Rule 1.16: Declining or Terminating Representation	9-41
Rule 1.17: Sale of Law Practice	9-43
Rule 1.18: Duties to Prospective Client	9-44
Rule 1.19: Sexual Conduct with Clients Prohibited	9-45

Counselor

Rule 2.1: Advisor	9-46
Rule 2.2: Reserved	9-47
Rule 2.3: Evaluation for Use by Third Persons	9-47
Rule 2.4: Lawyer Serving as Third-Party Neutral	9-47

Advocate

Rule 3.1: Meritorious Claims and Contentions	9-48
Rule 3.2: Expediting Litigation	9-48
Rule 3.3: Candor Toward the Tribunal	9-48
Rule 3.4: Fairness to Opposing Party and Counsel	9-50

Rule 3.5: Impartiality and Decorum of the Tribunal	9-51
Rule 3.6: Trial Publicity	9-53
Rule 3.7: Lawyer as Witness	9-54
Rule 3.8: Special Responsibilities of a Prosecutor	9-55

Transactions with Persons Other Than Clients

Rule 4.1: Truthfulness in Statements to Others	9-56
Rule 4.2: Communication with Person Represented by Counsel	9-57
Rule 4.3: Dealing with Unrepresented Person	9-58
Rule 4.4: Respect for Rights of Third Persons	9-59

Law Firms and Associations

Rule 5.1: Responsibilities of Principals, Managers, and Supervisory Lawyers	9-60
Rule 5.2: Responsibilities of a Subordinate Lawyer	9-61
Rule 5.3: Responsibilities Regarding Nonlawyer Assistance	9-61
Rule 5.4: Professional Independence of a Lawyer	9-62
Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law	9-63
Rule 5.6: Restrictions on Right to Practice	9-66
Rule 5.7: Responsibilities Regarding Law-Related Services	9-67

Public Service

Rule 6.1: Voluntary Pro Bono Publico Service	9-67
Rule 6.2: Reserved	9-68
Rule 6.3: Membership in Legal Services Organization	9-68
Rule 6.4: Law Reform Activities Affecting Client Interests	9-69
Rule 6.5: Limited Legal Services Programs	9-69
Rule 6.6: Action as a Public Official	9-69

Information About Legal Services

Rule 7.1: Communications Concerning a Lawyer's Services	9-70
Rule 7.2: Advertising	9-72
Rule 7.3: Direct Contact with Potential Clients	9-73
Rule 7.4: Intermediary Organizations	9-75
Rule 7.5: Reserved	9-75
Rule 7.6: Reserved	9-75

Maintaining the Integrity of the Profession

Rule 8.1: Bar Admission and Disciplinary Matters	9-75
Rule 8.2: Judicial and Legal Officials	9-76
Rule 8.3: Reporting Professional Misconduct	9-76
Rule 8.4: Misconduct	9-77
Rule 8.5: Disciplinary Authority; Choice of Law	9-79
Rule 8.6: Information about a Possible Wrongful Conviction	9-79

Rules Index	9-80
-----------------------	------

Editor's Note

The complete text of the Rules Professional Conduct and all of the comments thereto, as approved by the North Carolina Supreme Court, follow. Correlation tables appear in Additional Resources at the end of the *Handbook*. These tables cross-reference the 1997 and 2003 versions of the Rules with the comparable provisions of the superseded 1985 Rules of Professional Conduct (in effect from January 1, 1986, to July 23, 1997) and 1973 Code of Professional Conduct (in effect from April 30, 1974, to December 31, 1985).

A "History Note" after each Rule sets forth the statutory authority for the Rule. The date of original approval of the Rule by the North Carolina Supreme Court is identified as the "Adopted" date. Note that the Rules of Professional Conduct were comprehensively reorganized and renumbered in 1997; therefore, most of the Rules show July 24, 1997, as the date of adoption by the Supreme Court. The dates upon which amendments to a Rule were approved by the Supreme Court are listed after "Amendments Approved by the Supreme Court."

The History Note for each Rule is followed by annotations of ethics opinions of the State Bar that apply or interpret the Rule. In the annotations, the terms "CPR" and "RPC" designate formal ethics opinions adopted under the superseded 1973 Code of Professional Responsibility and 1985 Rules of Professional Conduct, respectively. These opinions still provide guidance on issues of professional conduct except to the extent that a particular opinion is overruled by a subsequent opinion or by a provision of the current Rules of Professional Conduct. Ethics opinions rendered invalid by subsequent opinion or by the current Rules are generally not annotated. (A CPR opinion may be obtained by calling the ethics department at the State Bar.) An ethics opinion promulgated under the 1997 Rules and thereafter is designated as a "Formal Ethics Opinion."

The primary source material for the comprehensive revisions to the Rules undertaken in both 1997 and 2003 was the ABA Model Rules of Professional Conduct. The comment to Rule 1.19 draws heavily from the text of ABA Formal Opinion 92-364, "Sexual Relations with Clients," adopted by the ABA Standing Committee on Ethics and Professional Responsibility on July 6, 1992. Appreciation is expressed to the ABA and to other state bars and regulatory agencies for assistance and materials.

0.1 PREAMBLE: A LAWYER'S PROFESSIONAL RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. *See, e.g.*, Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. *See* Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and

public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold the legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who, because of economic or social barriers, cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] A lawyer should render public interest legal service and provide civic leadership. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, society, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

[8] The legal profession is a group of people united in a learned calling for the public good. At their best, lawyers assure the availability of legal services to all, regardless of ability to pay, and as leaders of their communities, states, and nation, lawyers use their education and experience to improve society. It is the basic responsibility of each lawyer to provide community service, community leadership, and public interest legal services without fee, or at a substantially reduced fee, in such areas as poverty law, civil rights, public rights law, charitable organization representation, and the administration of justice.

[9] The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer. Personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in, or otherwise support, the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, the profession and government instituted additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs were developed, and programs will be developed by the profession and the government. Every lawyer should support all proper efforts to meet this need for legal services.

[10] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

[11] A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and, at the same time, assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[12] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of

sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[13] Although a matter is hotly contested by the parties, a lawyer should treat opposing counsel with courtesy and respect. The legal dispute of the client must never become the lawyer's personal dispute with opposing counsel. A lawyer, moreover, should provide zealous but honorable representation without resorting to unfair or offensive tactics. The legal system provides a civilized mechanism for resolving disputes, but only if the lawyers themselves behave with dignity. A lawyer's word to another lawyer should be the lawyer's bond. As professional colleagues, lawyers should encourage and counsel new lawyers by providing advice and mentoring; foster civility among members of the bar by acceding to reasonable requests that do not prejudice the interests of the client; and counsel and assist peers who fail to fulfill their professional duties because of substance abuse, depression, or other personal difficulties.

[14] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[15] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for the abuse of legal authority is more readily challenged by a self-regulated profession.

[16] The legal profession's relative autonomy carries with it a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[17] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; November 16, 2006

ETHICS OPINION NOTES

2008 FEO 2. Opinion holds that a lawyer is not prohibited from advising a school board sitting in an adjudicative capacity in a disciplinary or employment proceeding while another lawyer from the same firm represents the administration; however, such dual representation is harmful to the public's perception of the fairness of the proceeding and should be avoided.

2008 FEO 3. Opinion rules a lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

0.2 SCOPE

[1] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act, or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disci-

plinary, and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[2] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[3] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[4] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

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

[6] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

[7] Violation of a Rule should not give rise itself to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a Rule.

[8] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative. Research notes were prepared to compare counterparts in the original Rules of Professional Conduct (adopted 1985, as amended) and to provide selected references to other authorities. The

notes have not been adopted, do not constitute part of the Rules, and are not intended to affect the application or interpretation of the Rules and Comments.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; February 5, 2004

ETHICS OPINION NOTES

2006 FEO 14. When a lawyer charges a fee for a consultation, and the lawyer accepts payment, there is a client-lawyer relationship for the purposes of the Rules of Professional Conduct.

2010 FEO 1. A lawyer may not appear in court for a party who has not authorized the representation and with whom the lawyer has not established a client-lawyer relationship unless allowed by statute, court order, or subsequent case law.

2017 FEO 5. An agreement between law firms engaged in merger negotiations not to solicit or hire lawyers from the other firm for a relatively short period of time after expiration of the term of the agreement is permissible because it is a de minimis restriction on lawyer mobility that does not impair client choice and is reasonable under the circumstances.

RULE 1.0: TERMINOLOGY

(a) “Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

(b) “Confidential information” denotes information described in Rule 1.6.

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

(d) “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation, government entity, or other organization.

(e) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of North Carolina and has a purpose to deceive.

(f) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate to the circumstances.

(g) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(h) “Principal” denotes a member of a partnership for the practice of law, a shareholder in a law firm organized as a professional corporation, a member of an association authorized to practice law, or a lawyer having management authority over the legal department of a company, organization, or government entity.

(i) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(j) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(k) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

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

(m) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(n) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. The term encompasses any proceeding conducted in the course of a trial or litigation, or conducted pursuant to the tribunal’s rules of

civil or criminal procedure or other relevant rules of the tribunal, such as a deposition, arbitration, or mediation. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, may render a binding legal judgment directly affecting a party’s interests in a particular matter.

(o) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, and any data embedded therein (commonly referred to as metadata), including handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client’s informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (d) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct that is characterized as such under the substantive or procedural law of North Carolina and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. *See, e.g.*, Rules 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages

and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (o) and (c). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (o).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 2, 2014; March 5, 2015; September 22, 2016

ETHICS OPINION NOTES

2008 FEO 2. A lawyer is not prohibited from advising a school board sitting in an adjudicative capacity in a disciplinary or employment proceeding while another lawyer from the same firm represents the administration; however, such dual representation is harmful to the public's perception of the fairness of the proceeding and should be avoided. (Discusses "screened.")

2009 FEO 11. In order to obtain informed consent to a conflict, a lawyer must provide enough information for his client to make an informed decision, such as why the interests are adverse, how the representation may be affected, what risks are involved, and what other options are available.

2010 FEO 12. If a screen is implemented prior to any participation by a new associate in a matter the associate worked on at another firm, and prior to the communication of any confidential information, the purpose for the screening

procedure will have been effectuated.

2011 FEO 14. A lawyer must obtain client consent, confirmed in writing, before outsourcing its transcription and typing needs to a company located in a foreign jurisdiction. (Discusses "Confirmed in Writing.")

2012 FEO 4. A lawyer who represented an organization while employed with another firm must be screened from participation in any matter, or any matter substantially related thereto, in which she previously represented the organization, and from any matter against the organization if she acquired confidential information of the organization that is relevant to the matter and which has not become generally known. (Discusses "screened.")

2013 FEO 4. Opinion examines the ethical duties of a lawyer representing both the buyer and the seller on the purchase of a foreclosure property and the lawyer's duties when the representation is limited to the seller. (Term examined: "informed consent.")

2013 FEO 8. Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer. (Term examined: "firm.")

2021 FEO 1. Opinion discusses requirements for informed consent in the context of lawyer representing multiple parties in contemporaneous real estate closings.

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).

Retaining or Contracting with Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. *See also* Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee division), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience, and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. *See* Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

Distinguishing Professional Negligence

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

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

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 2, 2014

ETHICS OPINION NOTES

RPC 198. Opinion explores the ethical responsibilities of stand-by defense counsel who are instructed to take over the defense in a capital murder case without an opportunity to prepare.

RPC 199. Opinion addresses the ethical responsibilities of a lawyer appointed to represent a criminal defendant in a capital case who, in good faith, believes he lacks the experience and ability to represent the defendant competently.

RPC 216. A lawyer may use the services of a nonlawyer independent contrac-

tor to search a title provided the nonlawyer is properly supervised by the lawyer.

99 FEO 12. When a lawyer appears with a debtor at a meeting of creditors in a bankruptcy proceeding as a favor to the debtor's lawyer, the lawyer is representing the debtor and all of the ethical obligations attendant to legal representation apply.

2002 FEO 5. Whether electronic mail should be retained as a part of a client's file is a legal decision to be made by the lawyer.

2007 FEO 12. A lawyer may outsource limited legal support services to foreign assistants provided the lawyer properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client's advanced informed consent.

2008 FEO 14. It is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract, or pleading excerpts from a legal brief, contract, or pleading written by another lawyer and placed into the public domain.

2009 FEO 17. Whether a lawyer rendering a title opinion to a title insurer should tack to an owner's policy of title insurance or a mortgagee's policy is a question of standard of care and outside the purview of the Ethics Committee.

2011 FEO 10. A lawyer may advertise on a website that offers daily discounts to consumers where the website company's compensation is a percentage of the amount paid to the lawyer if certain disclosures are made and certain conditions are satisfied.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2013 FEO 8. Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

2014 FEO 5. A lawyer must advise a civil litigation client about the legal ramifications of the client's postings on social media as necessary to represent the client competently. The lawyer may advise the client to remove postings on social media if the removal is done in compliance with the rules and law on preservation and spoliation of evidence.

2015 FEO 4. Opinion analyzes a lawyer's professional responsibilities when she discovers that she made an error that may adversely impact the client's case.

2020 FEO 5. Opinion rules that lawyer serving as a settlement agent in real property transaction has a duty to stay informed regarding the potential risks associated with the transfer of funds in connection with the transaction and must implement reasonable measure to minimize the risks.

2021 FEO 2. Opinion discusses a lawyer's professional responsibility to safeguard entrusted funds by identifying and avoiding purported transactions involving counterfeit checks.

2023 FEO 1. Opinion clarifies a lawyer's professional responsibility when closing and/or selling a law practice and when handling aged client files.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(1) A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(2) A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of a client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(3) In the representation of a client, a lawyer may exercise his or her professional judgment to waive or fail to assert a right or position of the client.

(b) A lawyer's representation of a client, including representation by

appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation. Lawyers are encouraged to treat opposing counsel with courtesy and to cooperate with opposing counsel when it will not prevent or unduly hinder the pursuit of the objective of the representation. To this end, a lawyer may waive a right or fail to assert a position of a client without first obtaining the client's consent. For example, a lawyer may consent to an extension of time for the opposing party to file pleadings or discovery without obtaining the client's consent.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer

regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] Although paragraph (c) does not require that the client's informed consent to a limited representation be in writing, a specification of the scope of representation will normally be a necessary part of any written communication of the rate or basis of the lawyer's fee. See Rule 1.0(f) for the definition of "informed consent."

[9] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[10] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. There is also a distinction between giving a client legitimate advice about asset protection and assisting in the illegal or fraudulent conveyance of assets.

[11] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. See Rule 4.1.

[12] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[13] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[14] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

CPR 110. An attorney may not advise client to seek a Dominican divorce

knowing that the client will return immediately to North Carolina and continue residence.

RPC 44. A closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

RPC 103. A lawyer for the insured and the insurer may not enter voluntary dismissal of the insured's counterclaim without the insured's consent.

RPC 114. Attorneys may give legal advice and drafting assistance to persons wishing to proceed *pro se* without appearing as counsel of record.

RPC 118. An attorney should not waive the statute of limitations without the client's consent.

RPC 129. Prosecutors and defense attorneys may negotiate plea agreements in which appellate and post-conviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct.

RPC 145. A lawyer may not include language in an employment agreement that divests the client of her exclusive authority to settle a civil case.

RPC 172. A lawyer retained by an insurer to defend its insured is not required to represent the insured on a compulsory counterclaim provided the lawyer apprises the insured of the counterclaim in sufficient time to retain separate counsel.

RPC 208. A lawyer should avoid offensive trial tactics and treat others with courtesy by attempting to ascertain the reason for the opposing party's failure to respond to a notice of hearing where there has been no prior lack of diligence or responsiveness on the part of opposing counsel.

RPC 212. A lawyer may contact an opposing lawyer who failed to file an answer on time to remind the other lawyer of the error and to give the other lawyer a last opportunity to file the pleading.

RPC 220. A lawyer should seek the court's permission to listen to a tape recording of a telephone conversation of his or her client made by a third party if listening to the tape recording would otherwise be a violation of the law.

RPC 223. When a lawyer's reasonable attempts to locate a client are unsuccessful, the client's disappearance constitutes a constructive discharge of the lawyer requiring the lawyer's withdrawal from the representation.

RPC 240. A lawyer may decline to represent a client on a property damage claim while agreeing to represent the client on a personal injury claim arising out of a motor vehicle accident provided the limited representation will not adversely affect the client's representation on the personal injury claim and the client consents after full disclosure.

RPC 252. A lawyer in receipt of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain from examining the materials and return them to the sender.

98 FEO 2. A lawyer may explain the effect of service of process to a client but may not advise a client to evade service of process.

99 FEO 12. When a lawyer appears with a debtor at a meeting of creditors in a bankruptcy proceeding as a favor to the debtor's lawyer, the lawyer is representing the debtor and all of the ethical obligations attendant to legal representation apply.

2002 FEO 1. In a petition to a court for an award of an attorney's fee, a lawyer must disclose that the client paid a discounted hourly rate for legal services as a result of the client's membership in a prepaid or group legal services plan.

2003 FEO 2. A lawyer must report a violation of the Rules of Professional Conduct as required by Rule 8.3(a) even if the lawyer's unethical conduct stems from mental impairment (including substance abuse).

2003 FEO 7. A lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

2003 FEO 16. A lawyer who is appointed to represent a parent in a proceeding to determine whether the parent's child is abused, neglected or dependent, must seek to withdraw if the client disappears without communicating her objectives for the representation, and, if the motion is denied, must refrain from advocating for a particular outcome.

2005 FEO 10. Opinion addresses ethical concerns raised by an internet-based or virtual law practice and the provision of unbundled legal services.

2008 FEO 3. A lawyer may assist a *pro se* litigant by drafting pleadings

and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2008 FEO 7. A closing lawyer shall not record and disburse when a seller has delivered the deed to the lawyer but the buyer instructs the lawyer to take no further action to close the transaction.

2010 FEO 1. A lawyer may not appear in court for a party who has not authorized the representation and with whom the lawyer has not established a client-lawyer relationship unless allowed by statute, court order, or subsequent case law.

2011 FEO 3. A criminal defense lawyer may advise an undocumented alien that deportation may result in avoidance of a criminal conviction and may file a notice of appeal to superior court although there is a possibility that client will be deported.

2012 FEO 5. A lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee's lawyer using the employer's business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages unless a court determines that the messages are not privileged.

2012 FEO 9. A lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2013 FEO 2. If after providing an incarcerated criminal client with a summary/explanation of the discovery materials in the client's file, the client requests access to any of the discovery materials, the lawyer must afford the client the opportunity to meaningfully review relevant discovery materials unless certain conditions exist.

2014 FEO 5. A lawyer must advise a civil litigation client about the legal ramifications of the client's postings on social media as necessary to represent the client competently. The lawyer may advise the client to remove postings on social media if the removal is done in compliance with the rules and law on preservation and spoliation of evidence.

2016 FEO 2. When advancing claims on behalf of a criminal defendant who filed a *pro se* Motion for Appropriate Relief, subsequently appointed defense counsel must correct erroneous claims and statements of law or facts set out in the previous *pro se* filing.

2019 FEO 2: A lawyer may not agree to terms in an ERISA plan agreement that usurp client's authority as to the representation.

2019 FEO 7. Opinion rules that a lawyer may agree to an "attorney eyes only" disclosure restriction if the lawyer determines that doing so is in the client's best interest and is in accordance with applicable law.

2021 FEO 4. Opinion rules that a lawyer may not take possession of photographs portraying a minor engaged in sexual activity.

2022 FEO 2. Opinion rules that a privately retained lawyer may provide limited representation to a criminal defendant who has been appointed counsel if the limitation is reasonable under the circumstances.

RULE 1.3: DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process

with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions. In extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a 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 warranting the imposition of professional discipline under the rule is characterized by the element of intent manifested when a lawyer knowingly or recklessly disregards his or her obligations. Breach of the duty of diligence sufficient to warrant professional discipline occurs when a lawyer consistently fails to carry out the obligations that the lawyer has assumed for his or her clients. A pattern of delay, procrastination, carelessness, and forgetfulness regarding client matters indicates a knowing or reckless disregard for the lawyer's professional duties. For example, a lawyer who habitually misses filing deadlines and court dates is not taking his or her professional responsibilities seriously. A pattern of negligent conduct is not excused by a burdensome case load or inadequate office procedures.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; September 28, 2017

ETHICS OPINION NOTES

RPC 48. Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

99 FEO 5. Whether the lawyer for a residential real estate closing must obtain

the cancellation of record of a prior deed of trust depends upon the agreement of the parties.

2013 FEO 8. Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

2014 FEO 5. A lawyer must advise a civil litigation client about the legal ramifications of the client's postings on social media as necessary to represent the client competently. The lawyer may advise the client to remove postings on social media if the removal is done in compliance with the rules and law on preservation and spoliation of evidence.

2021 FEO 2. Opinion discusses a lawyer's professional responsibility to safeguard entrusted funds by identifying and avoiding purported transactions involving counterfeit checks.

2021 FEO 6. Opinion addresses a law firm's ethical responsibilities as to a departing lawyer's email account.

2022 FEO 2. Opinion rules that a privately retained lawyer may provide limited representation to a criminal defendant who has been appointed counsel if the limitation is reasonable under the circumstances.

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. *See* Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should address with the client how the lawyer and the client will communicate, and should respond to or acknowledge client communications in a reasonable and timely manner.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(f).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. *See* Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. *See* Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 2, 2014

ETHICS OPINION NOTES

RPC 48. Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

RPC 91. An attorney employed by the insurer to represent the insured and its own interests may not send the insurer a letter on behalf of the insured demanding settlement within the policy limits but must inform insurer of insured's wishes.

RPC 92. An attorney representing both the insurer and the insured need not surrender to the insured copies of all correspondence concerning the case between herself and the insurer.

RPC 99. A lawyer may tack onto an existing title insurance policy if such is disclosed to the client prior to undertaking the representation.

RPC 111. An attorney retained by a liability insurer to defend its insured may not advise insured or insurer regarding the plaintiff's offer to limit the insured's liability in exchange for consent to an amendment of the complaint to add a punitive damages claim but must communicate the proposal to both clients.

RPC 112. An attorney retained by an insurer to defend its insured may not advise insurer or insured regarding the plaintiff's offer to limit the insured's liability in exchange for an admission of liability but must communicate the proposal to both clients.

RPC 129. Prosecution and defense attorneys may negotiate plea agreements in which appellate and post-conviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct. Defense attorney must explain the consequences to the client.

RPC 156. An attorney who has been retained by an insurance company to represent an insured must inform and advise the insured to the degree necessary

for the insured to make informed decisions about future representation when the insurance company pays its entire coverage and is released from further liability or obligation to participate in the defense under the provisions of N.C.G.S. 20-279.21(b)(4).

RPC 172. A lawyer retained by an insurer to defend its insured is not required to represent the insured on a compulsory counterclaim provided the lawyer apprises the insured of the counterclaim in sufficient time to retain separate counsel.

99 FEO 12. When a lawyer appears with a debtor at a meeting of creditors in a bankruptcy proceeding as a favor to the debtor's lawyer, the lawyer is representing the debtor and all of the ethical obligations attendant to legal representation apply.

2006 FEO 1. A lawyer who represents the employer and its workers' compensation carrier must share the case evaluation, litigation plan, and other information with both clients unless the clients give informed consent to withhold such information.

2007 FEO 12. A lawyer may outsource limited legal support services to a foreign lawyer or a nonlawyer (collectively "foreign assistants") provided the lawyer properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client's advanced informed consent.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2013 FEO 2. If after providing a criminal client with a summary/explanation of the discovery materials in the client's file, the client requests access to the entire file, the lawyer must afford the client the opportunity to meaningfully review all of the relevant discovery materials unless the lawyer believes it is in the best interest of the client's legal defense not to do so.

2013 FEO 8. Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

2015 FEO 4. Opinion analyzes a lawyer's professional responsibilities when she discovers that she made an error that may adversely impact the client's case.

2019 FEO 7. Opinion rules that a lawyer may agree to an "attorney eyes only" disclosure restriction if the lawyer determines that doing so is in the client's best interest and is in accordance with applicable law.

2020 FEO 5. Opinion rules that lawyer acting as a settlement agent in a real property transaction has a duty to inform buyer about the potential risks associated with the transfer of funds in connection with the transaction and inform buyer how lawyer intends to avoid the risks.

2021 FEO 6. Opinion addresses a law firm's ethical responsibilities as to a departing lawyer's email account.

2022 FEO 2. Opinion rules that a privately retained lawyer may provide limited representation to a criminal defendant who has been appointed counsel if the limitation is reasonable under the circumstances.

RULE 1.5: FEES

(a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the scope of the representation and the basis or rate of the fee and expenses for which the

client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) a contingent fee for representing a defendant in a criminal case; however, a lawyer may charge and collect a contingent fee for representation in a criminal or civil asset forfeiture proceeding if not otherwise prohibited by law; or
(2) a contingent fee in a civil case in which such a fee is prohibited by law.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
(3) the total fee is reasonable.

(f) Any lawyer having a dispute with a client regarding a fee for legal services must:

(1) at least 30 days prior to initiating legal proceedings to collect a disputed fee, notify his or her client in writing of the existence of the North Carolina State Bar's program of fee dispute resolution; the notice shall state that if the client does not file a petition for resolution of the disputed fee with the State Bar within 30 days of the lawyer's notification, the lawyer may initiate legal proceedings to collect the disputed fee; and
(2) participate in good faith in the fee dispute resolution process if the client submits a proper request. Good faith participation requires the lawyer to respond timely to all requests for information from the fee dispute resolution facilitator.

Comment

Appropriate Fees and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are not clearly excessive under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must not be clearly excessive. A lawyer may seek reimbursement for expenses for in-house services, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, an understanding will have ordinarily evolved concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, a written understanding as to fees and expenses should be promptly established. Generally, furnishing the client with a simple memorandum or copy of the lawyer's customary fee arrangements will suffice, provided that the writing states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is clearly excessive, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circum-

stances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. *See* Rule 1.16(d). This does not apply when the advance payment is a true retainer to reserve services rather than an advance to secure the payment of fees yet to be earned. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, provided this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] Once a fee agreement has been reached between attorney and client, the attorney has an ethical obligation to fulfill the contract and represent the client's best interests regardless of whether the lawyer has struck an unfavorable bargain. An attorney may seek to renegotiate the fee agreement in light of changed circumstances or for other good cause, but the attorney may not abandon or threaten to abandon the client to cut the attorney's losses or to coerce an additional or higher fee. Any fee contract made or remade during the existence of the attorney-client relationship must be reasonable and freely and fairly made by the client having full knowledge of all material circumstances incident to the agreement. If a dispute later arises concerning the fee, the burden of proving reasonableness and fairness will be upon the lawyer.

[6] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[7] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[8] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. A lawyer may divide a fee with an out-of-state lawyer who refers a matter to the lawyer if the conditions of paragraph (e) are satisfied. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. *See* Rule 1.1.

[9] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[10] Participation in the fee dispute resolution program of the North Carolina State Bar is mandatory when a client requests resolution of a disputed

fee. A lawyer's obligation to respond timely to all requests for information from the fee dispute resolution facilitator continues even if the lawyer and the client reach a resolution of the dispute while the fee dispute petition is pending. Before filing an action to collect a disputed fee, the client must be advised of the fee dispute resolution program. Notification must occur not only when there is a specific issue in dispute, but also when the client simply fails to pay. However, when the client expressly acknowledges liability for the specific amount of the bill and states that he or she cannot presently pay the bill, the fee is not disputed and notification of the client is not required. If the address of the client is unknown, the lawyer must use reasonable efforts to acquire the current address of the client. Notification is not required in those instances where the State Bar does not have jurisdiction over the fee dispute as set forth in 27 N.C.A.C. 1D, .0702.

[11] If fee dispute resolution is requested by a client, the lawyer must participate in the resolution process in good faith. The State Bar program of fee dispute resolution uses mediation to resolve fee disputes as an alternative to litigation. The lawyer must cooperate with the person who is charged with investigating the dispute and with the person(s) appointed to mediate the dispute. Further information on the fee dispute resolution program can be found at 27 N.C.A.C. 1D, .0700, *et. seq.* The lawyer should fully set forth his or her position and support that position by appropriate documentation.

[12] A lawyer may petition a tribunal for a legal fee if allowed by applicable law or, subject to the requirements for fee dispute resolution set forth in Rule 1.5(f), may bring an action against a client to collect a fee. The tribunal's determination of the merit of the petition or the claim is reached by an application of law to fact and not by the application of this Rule. Therefore, a tribunal's reduction or denial of a petition or claim for a fee is not evidence that the fee request violates this Rule and is not admissible in a disciplinary proceeding brought under this Rule.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; September 25, 2019

ETHICS OPINION NOTES

CPR 11. An attorney may accept an interest in land as a fee for title examination and representation in an action to clear title.

CPR 37. An attorney may charge interest on delinquent accounts.

CPR 47. A Legal Aid Society may receive fees awarded by the court.

CPR 54. An attorney may submit a fee schedule to a savings and loan association.

CPR 79. An attorney serving as a trustee in bankruptcy or as a fiduciary in state proceedings may receive legal fees for acting as his own attorney.

CPR 129. An attorney may accept payment of legal fees by credit card.

CPR 312. Contingent fees may be charged in equitable distribution cases.

CPR 375. An attorney may agree for his fee to be the interest earned on an amount escrowed at a loan closing to guarantee completion of repairs.

RPC 2. Contingent fees may be charged to collect liquidated amounts of past due child support.

RPC 7. An attorney may employ a collection agency to collect a past due fee so long as the fee agreement out of which the account arose was permitted by law and by the Rules of Professional Conduct; the lawyer, at the time the underlying fee agreement was made, did not believe, and had no reason to believe, that he was undertaking to represent a client who was unable to afford his services; the legal services giving rise to the fee out of which the account arose have been completed so that the lawyer has no further responsibilities as the client's attorney; there is no genuine dispute between the lawyer and the client about the existence, amount, or delinquent status of the indebtedness; and the lawyer does not believe, and has no reason to believe, that the agency which he employs will use any illegal means to collect the account.

RPC 35. An attorney may not charge an elevated contingent fee to collect "med-pay" or any other claim with respect to which liability is clear and there is no real dispute as to the amount due.

RPC 50. A lawyer may charge nonrefundable retainers that are reasonable in amount. (*But see* 2000 FEO 5)

RPC 52. Opinion describes circumstances under which a lawyer who has been appointed to represent an indigent person may accept payment directly

from the client.

RPC 106. Opinion discusses circumstances under which a refund of a pre-paid fee is required.

RPC 107. A lawyer and her client may agree to employ alternative dispute resolution procedures to resolve disputes between themselves about legal fees.

RPC 141. An attorney's contingent fee in a case resolved by a structured settlement should, if paid in a lump sum, be calculated in terms of the settlement's present value.

RPC 148. A lawyer may not split a fee with another lawyer who does not practice in her law firm unless the division is based upon the work done by each lawyer or the client consents in writing, the fee is reasonable, and responsibility is joint.

RPC 155. An attorney may charge a contingent fee to collect delinquent child support.

RPC 158. A sum of money paid to a lawyer in advance to secure payment of a fee which is yet to be earned and to which the lawyer is not entitled must be deposited in the lawyer's trust account.

RPC 166. A lawyer may seek to renegotiate a fee agreement with a client provided he does not abandon or threaten to abandon his client to cut his losses or to coerce a higher fee.

RPC 174. A legal fee for the collection of "med-pay" which is based upon the amount collected is unreasonable.

RPC 190. A lawyer who agreed to bill a client on the basis of hours expended may not bill the client on the same basis for reused work product.

RPC 196. A law firm may not charge a clearly excessive fee for legal representation even if the legal fee may be recovered from an opposing party.

RPC 205. A lawyer may receive a fee for referring a case to another lawyer provided that, by written agreement with the client, both lawyers assume responsibility for the representation and the total fee is reasonable.

RPC 222. Prior to the completion of legal services for a client, a lawyer may not obtain a confession of judgment from a client to secure a fee.

RPC 231. A lawyer may not collect a contingent fee on the reimbursement paid to the client's medical insurance provider in addition to a contingent fee on the gross recovery if the total fee received by the lawyer is clearly excessive.

RPC 235. A lawyer may charge a client an hourly rate, or a flat rate, for his or her services plus a contingent fee on the client's recovery provided the ultimate fee paid by the client is not clearly excessive and the client is given an honest assessment of the potential for recovery.

RPC 247. Opinion provides guidelines for receipt of payment of earned and unearned fees by electronic transfers.

97 FEO 4. Opinion provides that flat fees may be collected at the beginning of a representation, treated as presently owed to the lawyer, and deposited into the lawyer's general operating account or paid to the lawyer but that if a collected fee is clearly excessive under the circumstances of the representation a refund to the client of some or all of the fee is required.

98 FEO 3. Subject to the requirements of law, a lawyer may add a finance charge to a client's account if the client fails to pay the balance when due as agreed with the client.

98 FEO 9. A lawyer may charge a client the actual cost of retrieving a closed client file from storage, subject to certain conditions, provided the lawyer does not withhold the file to extract payment.

98 FEO 14. A lawyer may participate in the solicitation of funds from third parties to pay the legal fees of a client provided there is disclosure to contributors and the funds are administered honestly.

99 FEO 1. A lawyer may not accept a referral fee or solicitor's fee for referring a client to an investment advisor.

2000 FEO 5. A lawyer may not tell a client that any fee paid prior to the rendition of legal services is "nonrefundable" although, by agreement with the client, a lawyer may collect a flat fee for legal services to be rendered in the future and treat the fee as earned immediately upon receipt subject to certain conditions.

2000 FEO 7. A lawyer may not charge the client a legal fee for the time required to participate in the State Bar's fee dispute resolution program.

2002 FEO 4. A lawyer may collect a contingent fee and/or a court-awarded attorney fee if consistent with the fee agreement with the client but may not collect a clearly excessive total fee under any circumstance.

2005 FEO 11. Opinion examines the requirements for an interim account

used to pay the costs for real estate closings and also rules that the actual costs may be marked up by the lawyer provided there is full disclosure and the overcharges are not clearly excessive.

2005 FEO 12. Opinion explores a lawyer's obligation to return legal fees when a third party is the payor.

2005 FEO 13. A minimum fee that will be billed against at an hourly rate and is collected at the beginning of representation belongs to the client and must be deposited into the trust account until earned and, upon termination of representation, the unearned portion of the fee must be returned to the client.

2006 FEO 2. A lawyer may only refer a client to a financing company if certain conditions are met.

2006 FEO 12. Opinion explores the circumstances under which a lawyer may obtain litigation funding from a financing company.

2006 FEO 14. When a lawyer charges a fee for a consultation, and the lawyer accepts payment, there is a client-lawyer relationship for the purposes of the Rules of Professional Conduct.

2006 FEO 15. A lawyer may charge a reasonable dormancy fee against unclaimed funds if the client agrees in advance and the fee meets other statutory requirements.

2007 FEO 8. A lawyer may not charge a client for filing and presenting a motion to withdraw unless withdrawal advances the client's objectives for the representation or the charge is approved by the court when ruling on a petition for legal fees from a court-appointed lawyer.

2007 FEO 13. To insure honest billing predicated on hourly charges, the lawyer must establish a reasonable hourly rate for his services and for the services of his staff; disclose the basis for the amounts to be charged; avoid wasteful, unnecessary, or redundant procedures; and make certain that the total cost to the client is not clearly excessive.

2008 FEO 8. A provision in a law firm employment agreement for dividing legal fees received after a lawyer's departure from a firm must be reasonable and may not penalize or deter the withdrawing lawyer from taking clients with her.

2008 FEO 10. Opinion surveys prior ethics opinions on legal fees, sets forth the ethical requirements for the different types of fees paid in advance, authorizes minimum fees earned upon payment, and provides model fee provisions.

2010 FEO 4. A lawyer may accept barter dollars as payment for legal services but all advance payments of litigation expenses by a barter exchange client must be paid in cash or by check or credit card.

2010 FEO 6. If a lawyer associates another law firm in connection with a legal matter, the lawyer may receive a fee in proportion to the services he performs in the matter or he may receive a fee based on his assumption of joint responsibility for the representation.

2010 FEO 10. A law firm may charge a client for the expenses associated with a remote consultation, but may not charge a flat fee for the remote consultation irrespective of the actual cost to the firm.

2011 FEO 10. A lawyer may advertise on a website that offers daily discounts to consumers where the website company's compensation is a percentage of the amount paid to the lawyer if certain disclosures are made and certain conditions are satisfied.

2012 FEO 3. A lawyer may charge interest on a delinquent client account, without an advance agreement with the client, to the extent and in the manner permitted by law.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2012 FEO 12. An agreement for a departing lawyer to pay his former firm a percentage of any legal fee subsequently recovered from the continued representation of a contingent fee client by the departing lawyer does not violate Rule 5.6 if the agreement was negotiated by the departing lawyer and the firm after the departing lawyer announced his departure from the firm and the specific percentage is a reasonable resolution of the dispute over the division of future fees.

2013 FEO 3. Opinion examines a lawyer's responsibilities when charging and collecting from a client for the expenses of representation.

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

2015 FEO 4. Opinion analyzes a lawyer's professional responsibilities

when she discovers that she made an error that may adversely impact the client's case.

2018 FEO 4. A lawyer may offer clients on-site access to a financial brokerage company as a payment option for legal fees so long as the lawyer is satisfied that the financial arrangements offered by the company are legal, the lawyer receives no consideration from the company, and the lawyer does not recommend one payment option over another.

2018 FEO 6: Opinion rules that, with certain conditions, a lawyer may include in a client's fee agreement a provision allowing the lawyer's purchase of litigation cost protection insurance and requiring reimbursement of the insurance premium from the client's funds in the event of a settlement or favorable trial verdict.

2019 FEO 5. Opinion rules that a lawyer may receive virtual currency as a flat fee for legal services, provided the fee is not clearly excessive and the terms of Rule 1.8(a) are satisfied, but may not accept virtual currency as entrusted funds to be billed against or to be held for the benefit of the lawyer, the client, or any third party.

2021 FEO 3. Opinion rules that a closing lawyer representing buyer may not charge a fee to a separately represented seller unless seller consents to the fee or the services primarily benefit seller.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

- (1) to comply with the Rules of Professional Conduct, the law or court order;
- (2) to prevent the commission of a crime by the client;
- (3) to prevent reasonably certain death or bodily harm;
- (4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;
- (5) to secure legal advice about the lawyer's compliance with these Rules;
- (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (7) to comply with the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court; or
- (8) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(d) The duty of confidentiality described in this Rule encompasses information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered. For the purposes of this Rule, "client" refers to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client acquired during the lawyer's representation of the client. "Information acquired during the professional relationship with a client" does not encompass information acquired through legal research or other expansion of the lawyer's legal knowledge, even if acquired during the representation, as the client does not have any reasonable expectation of confidentiality

of such information. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information acquired during a lawyer's prior representation of a former client, and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients and Rule 8.6 for a lawyer's duty to disclose information to rectify a wrongful conviction.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information acquired during the representation. See Rule 1.0(f) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information acquired during the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. *See also* Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information acquired during the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information acquired during the representation of their clients, the confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime. Paragraph (b)(2) recognizes that a lawyer should be allowed to make a disclosure to avoid sacrificing the interests of the potential victim in favor of preserving the client's confidences when the client's purpose is wrongful. Similarly, paragraph (b)(3) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] A lawyer may have been innocently involved in past conduct by a client that was criminal or fraudulent. Even if the involvement was innocent, however, the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right, although not a professional duty, to rectify the situation. Exercising that right may require revealing information acquired during the representation. Paragraph (b)(4) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification.

[8] Although paragraph (b)(2) does not require the lawyer to reveal the client's anticipated misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. *See* Rule 1.2(d). *See also* Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[9] Paragraph (b)(4) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information acquired during the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(4) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[10] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[11] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(6) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[12] A lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[13] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information acquired during the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(1) permits the lawyer to make such disclosures as are necessary to comply with the law.

[14] Paragraph (b)(1) also permits compliance with a court order requiring a lawyer to disclose information relating to a client's representation. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client's representation, however, the lawyer must, absent informed consent of the client to do otherwise, assert on behalf of the client all nonfrivolous claims that the information sought is protected

against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal. *See* Rule 1.4. Unless review is sought, however, paragraph (b)(1) permits the lawyer to comply with the court's order.

[15] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[16] Paragraph (b) permits but does not require the disclosure of information acquired during a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. When practical, the lawyer should first seek to persuade the client to take suitable action, making it unnecessary for the lawyer to make any disclosure. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). *See* Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. *See* Rule 3.3(c).

Detection of Conflicts of Interest

[17] Paragraph (b)(8) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. *See* Rule 1.17, Comment [8]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[18] Any information disclosed pursuant to paragraph (b)(8) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(8) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(8). Paragraph (b)(8) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation. *See* Comment [5].

Acting Competently to Preserve Confidentiality

[19] Paragraph (c) requires a lawyer to act competently to safeguard information acquired during the representation of a client against unauthorized

access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *See* Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information acquired during the professional relationship with a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information to comply with other law—such as state and federal laws that govern data privacy, or that impose notification requirements upon the loss of, or unauthorized access to, electronic information—is beyond the scope of these Rules. For a lawyer's duties when sharing information with non-lawyers outside the lawyer's own firm, *see* Rule 5.3, Comments [3]-[4].

[20] When transmitting a communication that includes information acquired during the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the client's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[21] The duty of confidentiality continues after the client-lawyer relationship has terminated. *See* Rule 1.9(c)(2). *See* Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Lawyer's Assistance Program

[22] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers' or judges' assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek help through such programs. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance, which may then result in harm to their professional careers and injury to their clients and the public. The rule, therefore, requires that any information received by a lawyer on behalf of an approved lawyers' or judges' assistance program be regarded as confidential and protected from disclosure to the same extent as information received by a lawyer in any conventional client-lawyer relationship.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 2, 2014; March 16, 2017; November 2, 2022

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 attor-

ney employed by a fire insurer to depose insureds concerning claims is confidential and may not be disclosed without the insurer's consent.

RPC 12. An attorney may reveal confidential information to correct a mistake if disclosure is impliedly authorized by the client.

RPC 21. An attorney may send a demand letter to an adverse party without identifying the client by name.

RPC 23. An attorney does not need the consent of the client to file Form 1099 including confidential information with the IRS incident to a real estate transaction since such is required by law.

RPC 33. An attorney may not disclose confidential information concerning the client's identity and criminal record without the client's consent nor may an attorney misrepresent such information to the court. In response to a direct question from the court concerning such matters, an attorney may not misrepresent the defendant's criminal record but is under no ethical obligation to respond. If the client misrepresents his identity or record under oath, the attorney must ask the client to correct the misstatements. If the client refuses, the attorney must seek to withdraw. (*But see* Rule 3.3)

RPC 62. An attorney may disclose client confidences necessary to protect her reputation where a claim alleging malpractice is brought by a former client against the insurance company which employed the attorney to represent the former client.

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

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

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

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

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

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

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

RPC 179. A lawyer must comply with the client's request that the information regarding a settlement be kept confidential if the client enters into a 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 sub-

ject to the attorney-client privilege or otherwise confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain from examining the materials and return them to the sender.

98 FEO 5. A defense lawyer may remain silent while the prosecutor presents an inaccurate driving record to the court provided the lawyer and client did not criminally or fraudulently misrepresent the driving record to the prosecutor or the court, and further provided, that on application for a limited driving privilege, there is no misrepresentation to the court about the client's prior driving record.

98 FEO 10. An insurance defense lawyer may not disclose confidential information about an insured's representation in bills submitted to an independent audit company at the insurance carrier's request unless the insured consents.

98 FEO 16. A lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

98 FEO 18. A lawyer representing a minor owes the duty of confidentiality to the minor and may only disclose confidential information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation.

98 FEO 20. Subject to a statute prohibiting the withholding of the information, a lawyer's duty to disclose confidential client information to a bankruptcy court ends when the case is closed although the debtor's duty to report new property continues for 180 days after the date of filing the petition.

99 FEO 11. An insurance defense lawyer may not submit billing information to an independent audit company at the insurance carrier's request unless the insured's consent to the disclosure, obtained by the insurance carrier, was informed.

99 FEO 15. A lawyer with knowledge that a former client is defrauding a bankruptcy court may reveal the confidences of the former client if required by law or if necessary to rectify the fraud.

2000 FEO 11. A lawyer who was formerly in-house legal counsel for a corporation must obtain the permission of a court prior to disclosing confidential information of the corporation to support a personal claim for wrongful termination.

2002 FEO 7. Opinion clarifies RPC 206 by ruling that a lawyer may reveal the relevant confidential information of a deceased client in a will contest proceeding if the attorney/client privilege does not apply to the lawyer's testimony.

2003 FEO 9. A lawyer may participate in a settlement agreement that contains a provision limiting or prohibiting disclosure of information obtained during the representation even though the provision will effectively limit the lawyer's ability to represent future claimants.

2003 FEO 15. An attorney may provide an accounting of disbursements of sums recovered for a personal injury claimant as required by N.C.G.S. § 44-50.1.

2004 FEO 6. A lawyer may disclose confidential client information to collect a fee, including information necessary to support a claim that the corporate veil should be pierced, provided the claim is advanced in good faith.

2005 FEO 4. Absent consent to disclose from the parent, a lawyer may not reveal confidences received from a parent seeking representation of a minor.

2005 FEO 9. A lawyer for a publicly traded company does not violate the Rules of Professional Conduct if the lawyer "reports out" confidential information as permitted by SEC regulations.

2006 FEO 1. A lawyer who represents the employer and its workers' compensation carrier must share the case evaluation, litigation plan, and other information with both clients unless the clients give informed consent to withhold such information.

2006 FEO 10. A lawyer must use reasonable care under the circumstances to protect from disclosure a client's confidential health information and is encouraged, but not required, to use similar care with regard to health information of third parties.

2007 FEO 2. A lawyer may not take possession of a client's contraband if possession is itself a crime and, unless there is an exception allowing disclosure of confidential information, the lawyer may not disclose confidential information relative to the contraband.

2007 FEO 12. A lawyer may outsource limited legal support services to a foreign lawyer or a nonlawyer (collectively "foreign assistants") provided the lawyer

properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client's advanced informed consent.

2008 FEO 1. A lawyer representing an undocumented worker in a workers' compensation action has a duty to correct court documents containing false statements of material fact and is prohibited from introducing evidence in support of the proposition that an alias is the client's legal name.

2008 FEO 3. A lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2008 FEO 5. Client files may be stored on a website accessible by clients via the internet provided the confidentiality of all client information on the website is protected.

2008 FEO 13. Unless affected clients expressly consent to the disclosure of their confidential information, a lawyer may allow a title insurer to audit the lawyer's real estate trust account and reconciliation reports only if certain written assurances to protect client confidences are obtained from the title insurer, the audited account is only used for real estate closings and the audit is limited to certain records and to real estate transactions insured by the title insurer.

2009 FEO 1. A lawyer must use reasonable care to prevent the disclosure of confidential client information hidden in metadata when transmitting an electronic communication and a lawyer who receives an electronic communication from another party or another party's lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document.

2009 FEO 3. A lawyer has a professional obligation not to encourage or allow a nonlawyer employee to disclose confidences of a previous employer's clients for purposes of solicitation.

2009 FEO 8. A lawyer for a party to a partition proceeding may subsequently serve as a commissioner for the sale but not as a commissioner for the partitioning of the property.

2009 FEO 14. A lawyer participating in a real estate transaction may not place his client's title insurance with a title insurance agency in which the lawyer's spouse has any ownership interest.

2011 FEO 6. A law firm may contract with a vendor of software as a service provided the lawyer uses reasonable care to safeguard confidential client information.

2011 FEO 14. A lawyer must obtain client consent, confirmed in writing, before outsourcing its transcription and typing needs to a company located in a foreign jurisdiction.

2011 FEO 16. A criminal defense lawyer accused of ineffective assistance of counsel by a former client may share confidential client information with prosecutors to help establish a defense to the claim so long as the lawyer reasonably believes a response is necessary and the response is narrowly tailored to respond to the allegations.

2012 FEO 5. A lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee's lawyer using the employer's business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages unless a court determines that the messages are not privileged.

2012 FEO 9. A lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2013 FEO 5. A lawyer/trustee must explain his role in a foreclosure proceeding to any unrepresented party that is an unsophisticated consumer of legal services; if he fails to do so and that party discloses material confidential information, the lawyer may not represent the other party in a subsequent, related adversarial proceeding unless there is informed consent.

2013 FEO 12. Pursuant to an applicable exception to the duty of confidentiality, when a client terminates representation in a worker's compensation case, the subsequently hired lawyer may disclose the settlement terms to the

former lawyer to resolve a pre-litigation claim for fee division.

2014 FEO 1. Opinion encourages lawyers to become mentors to law students and new lawyers ("protégés") who are not employees of the mentor's firm and examines the application of the duty of confidentiality to client communications to which a protégé maybe privy.

2015 FEO 5. In post-conviction or appellate proceedings, a discharged lawyer may discuss a former client's case and turn over the former client's file to successor counsel if the former client consents or the disclosure is impliedly authorized.

2016 FEO 4. A lawyer may not disclose financial information obtained during the representation of a former client to assist the sheriff with the execution on a judgment for unpaid legal fees.

2020 FEO 1. Opinion rules that a lawyer may respond to a negative online review but may not disclose confidential information in the response.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(f) and (c).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph

(b). *See* Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. *See* Rule 1.9. *See also* Comments [5] and [29] to this Rule.

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The withdrawing lawyer must seek court approval where necessary and take steps to minimize harm to the clients. *See* Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. *See* Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client may be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent a seller of commercial real estate, a real estate developer and a commercial lender is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself preclude the representation or require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has dis-

cussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. *See* Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. *See also* Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. *See* Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. *See* Rule 1.19.

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. *See* Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. *See* Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(n)), such representation may be pre-

cluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. *See* Rule 1.0(f) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. *See* Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. *See* Rule 1.0(c). *See also* Rule 1.0(o) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. *See* Rule 1.0(c). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. *See* Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. *See* Comment [15]. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate represen-

tation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. *See* Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either

the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

I. GENERAL CONFLICTS

CPR 9. An attorney may not give a title opinion to an individual and then represent another person in a boundary dispute against that individual.

CPR 15. A lawyer/guardian may not give a title opinion to the purchaser of his ward's property.

CPR 46. Once it is determined that attorneys from same firm have undertaken to represent adverse parties, one must withdraw and the other may continue only with the consent of all involved.

CPR 55. An attorney appointed as examiner of title is not prohibited from representing petitioners or respondents in actions unrelated to the Torrens proceeding.

CPR 147. An attorney cannot defend an action brought by a former client when confidential information obtained during the prior representation would be relevant to the defense of the current action.

CPR 171. A part-time county attorney may not serve as guardian ad litem if official duties include advising Department of Social Services.

CPR 179. An attorney may not represent a municipality and a distributee of an estate suing the municipality.

CPR 216. An attorney may not serve as receiver and as attorney for a judgment creditor.

CPR 249. An attorney who owns an insurance agency may not represent claimants against persons insured by companies his agency represents.

CPR 255. An attorney who is employed by an insurer to defend its insureds on a regular basis represents the insurer and the insureds and, if a conflict develops between the insurer and an insured, the attorney has a duty to advise the insured to seek independent counsel. The attorney may represent a plaintiff against the insurer, but he or she should notify the insurer and have the informed consent of plaintiff.

CPR 281. An attorney may sue another attorney for malpractice on behalf of a client even though the attorney for the plaintiff owns stock in the defendant's liability insurance company.

CPR 286. An attorney may participate in a mediation service with marriage counselors but should not later represent either party in domestic litigation.

CPR 317. An attorney appointed to represent a state official or agency may not represent other clients in a suit against the same official or agency, another official or agency under the jurisdiction of that same official or agency or another official or agency with authority over the official or agency. Nor should an attorney represent one official or agency while representing other clients against another official or agency if both of the officials or agencies are under the jurisdiction of the same official or agency.

CPR 323. An attorney may not act as a friend and attempt to mediate a domestic problem and later represent the wife in domestic litigation.

CPR 344. An attorney for a school board is not automatically disqualified from representing criminal defendants despite the school board's interest in fines

and forfeitures.

RPC 18. An attorney may not simultaneously represent shareholders in a derivative action and the corporation's landlord on a claim for back rent.

RPC 22. An attorney may not represent the administratrix officially and personally where her interests in the two roles are in conflict without the consent of the heirs.

RPC 24. An attorney may not purchase his client's property at an execution sale on his own account.

RPC 28. An attorney may represent the estate of pilot and the estate of passenger in a wrongful death case against the airplane manufacturer if attorney is convinced that there was no pilot negligence and if the representatives of both estates consent.

RPC 54. A lawyer who represents a criminal defendant from whose possession property was seized may not without consent seek the property as a fine or forfeiture on behalf of the local school board.

RPC 55. A member of the Attorney General's staff may prosecute appeals of adverse Medicaid decisions against the Department of Human Resources, which is represented by another member of the Attorney General's staff.

RPC 56. A lawyer may represent a plaintiff against an insurance company's insured while defending other persons insured by the company in unrelated matters.

RPC 59. A lawyer may represent an insurer and its insured as co-plaintiffs in a declaratory judgment action.

RPC 60. Subject to general conflict of interest rules, a lawyer may represent police officers who are referred by a professional organization of which they are members on a case-by-case basis and also represent criminal defendants.

RPC 65. The public defender's office should be considered as a single law firm and staff attorneys may not represent codefendants with conflicting interests unless both consent and can be adequately represented.

RPC 72. An attorney hired by the Bureau of Indian Affairs to prosecute criminal charges before a tribal court may represent defendants in state or federal court despite the fact that the defendants have been arrested by members of the tribal police force.

RPC 73. Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants where a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.

Where an attorney advises a governing body, such as a county commission, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.

RPC 74. A firm which employs a paralegal is not disqualified from representing an interest adverse to that of a party represented by the firm for which the paralegal previously worked if the paralegal is screened from participation in the case.

RPC 91. An attorney employed by the insurer to represent the insured and its own interests may not send the insurer a letter on behalf of the insured demanding settlement within the policy limits.

RPC 92. An attorney representing both the insurer and the insured need not surrender to the insured copies of all correspondence concerning the case between herself and the insurer.

RPC 95. An assistant district attorney may prosecute cases while serving on the school board.

RPC 100. An attorney serving on a hospital ethics committee is not automatically disqualified from representing interests adverse to the hospital or its staff physicians.

RPC 102. A lawyer may not permit the employment of court reporting services to be influenced by the possibility that the lawyer's employees might receive premiums, prizes or other personal benefits.

RPC 103. A lawyer for the insured and the insurer may not enter voluntary dismissal of the insured's counterclaim without the insured's consent.

RPC 105. A public defender may represent criminal defendants while serving on the school board.

RPC 109. An attorney may not represent parents as guardians ad litem for their injured child and as individuals concerning their related tort claims after having received a joint settlement offer which is insufficient to fully satisfy all claims.

RPC 110. An attorney employed by an insurer to defend in the name of the defendant pursuant to underinsured motorist coverage may not communicate with that individual without the consent of another attorney employed to represent that individual by her liability insurer, and the attorney employed by the liability insurer may not take a position on behalf of the insurer which is adverse to the insured.

RPC 111. An attorney retained by a liability insurer to defend its insured may not advise insured or insurer regarding the plaintiff's offer to limit the insured's liability in exchange for consent to an amendment of the complaint to add a punitive damages claim.

RPC 112. An attorney retained by an insurer to defend its insured may not advise insurer or insured regarding the plaintiff's offer to limit the insured's liability in exchange for an admission of liability.

RPC 123. An attorney may represent parents and an independent guardian ad litem for their child concerning related tort claims under certain circumstances.

RPC 131. An attorney employed to represent a county in appellate matters may also sue the county's department of social services if the county and the plaintiffs consent.

RPC 140. There is no disqualifying conflict of interest where an attorney is retained by an insurer to represent an insured during the pendency of a declaratory judgment action relating to coverage in which the attorney is a nonparticipant.

RPC 151. Where an insurance company and its policyholder are both parties to an action, a lawyer who is a full-time employee of the insurance company may not represent both the insurance company and the policyholder because of the "diluted responsibility" to the policyholder created by the employment relationship between the lawyer and the insurance company.

RPC 154. An attorney may not represent the insured, her liability insurer and the same insurer relative to underinsured motorist coverage carried by the plaintiff.

RPC 160. A lawyer whose associate is a member of a hospital's board of trustees may not sue the hospital on behalf of a client. (*But see* 2002 FEO 2)

RPC 168. A lawyer may ask her client for a waiver of objection to a possible future representation presenting a conflict of interest if certain conditions are met.

RPC 170. A lawyer may jointly represent a personal injury victim and the medical insurance carrier that holds a subrogation agreement with the victim provided the victim consents and the lawyer withdraws upon the development of an actual conflict of interest.

RPC 177. A lawyer may represent the insured, his liability insurer, and the same insurer relative to underinsured motorist coverage carried by the plaintiff if the insurer waives its subrogation rights against the insured and the plaintiff executes a covenant not to enforce judgment.

RPC 207. A lawyer may represent an insured in a bad faith action against his insurer for failure to pay a liability claim brought by a claimant who is represented by the same lawyer.

RPC 228. A lawyer for a personal injury victim may not execute an agreement to indemnify the tortfeasor's liability insurance carrier against the unpaid liens of medical providers.

RPC 229. A lawyer who jointly represented a husband and wife in the preparation and execution of estate planning documents may not prepare a codicil to the will of one spouse without the knowledge of the other spouse if the codicil will affect adversely the interests of the other spouse or each spouse agreed not to change the estate plan without informing the other spouse.

RPC 251. A lawyer may represent multiple claimants in a personal injury case, even though the available insurance proceeds are insufficient to compensate all claimants fully, provided each claimant, or his or her legal representative, gives informed consent to the representation and the lawyer does not advocate against the interest of any client in the division of the insurance proceeds.

2000 FEO 2. A lawyer who represented a husband and wife in a joint Chapter 13 bankruptcy case may continue to represent one of the spouses after

the other spouse disappears or becomes unresponsive, unless the lawyer is aware of any fact or circumstance that would make the continued representation of the remaining spouse an actual conflict of interest with the prior representation of the other spouse.

2000 FEO 4. A lawyer may sign a statement acknowledging a finance company's interest in a client's recovery subject to certain conditions.

2000 FEO 9. Opinion explores the situations in which a lawyer who is also a CPA may provide legal services and accounting services from the same office.

2001 FEO 6. Opinion examines when a lawyer has a conflict of interest in representing various family members on claims for a deceased employee's workers' compensation death benefits.

2002 FEO 1. A lawyer may participate in a non-profit organization that promotes a cooperative method for resolving family law disputes although the client is required to make full disclosure and the lawyer is required to withdraw before court proceedings commence.

2002 FEO 3. A lawyer for an estate may seek removal of the personal representative if the personal representative's breach of fiduciary duties constitutes grounds for removal under the law.

2002 FEO 6. The lawyer for the plaintiff may not prepare the answer to a complaint for an unrepresented adverse party to file pro se.

2003 FEO 1. A lawyer must withdraw from joint representation of a general contractor and a surety if a position advanced on behalf of the general contractor is frivolous, for the purpose of delay or interferes with a legal duty owed by the surety to the claimant.

2003 FEO 7. A lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

2003 FEO 12. An insurance defense lawyer may give the insured and the insurance carrier an evaluation of a pending case, including settlement prospects, but may not give an opinion to the carrier on whether to decline to settle within policy limits and go to trial if the opinion is contrary to the wishes of the insured.

2005 FEO 1. A lawyer may not appear before a judge who is a family member without consent from all parties and, although consent is not required, the other members of the firm must disclose the relationship before appearing before the judge.

2005 FEO 7. An attorney may recommend that a prospective client use a computer in the attorney's office and the services of an Internet-based company to complete a required bankruptcy certification form.

2006 FEO 1. A lawyer who represents the employer and its workers' compensation carrier must share the case evaluation, litigation plan, and other information with both clients unless the clients give informed consent to withhold such information.

2006 FEO 2. A lawyer may only refer a client to a financing company if certain conditions are met.

2006 FEO 5. The county tax attorney may not bid at a tax foreclosure sale of real property.

2007 FEO 7. A lawyer may continue to represent a husband and wife in a Chapter 13 bankruptcy after they divorce provided the conditions on common representation set forth in Rule 1.7 are satisfied.

2007 FEO 10. A lawyer employed by a school board may serve as an administrative hearing officer with the informed consent of the board.

2007 FEO 11. A lawyer is not required to withdraw from representing one client if the other client revokes consent without good reason and an evaluation of the factors set out in comment [21] to Rule 1.7 and the Restatement (Third) of the Law Governing Lawyers indicates continued representation is favored.

2008 FEO 2. A lawyer is not prohibited from advising a school board sitting in an adjudicative capacity in a disciplinary or employment proceeding while another lawyer from the same firm represents the administration; however, such dual representation is harmful to the public's perception of the fairness of the proceeding and should be avoided.

2008 FEO 12. A lawyer may not initiate foreclosure on a deed of trust on a client's property while still representing the client.

2009 FEO 9. Opinion describes reasonable procedures for a computer-

based conflicts checking system.

2009 FEO 11. A lawyer may undertake the representation of a debtor in a Chapter 13 bankruptcy, although the lender is a current client, if the lawyer reasonably believes that he will be able to provide competent and diligent representation to the debtor in the bankruptcy action while protecting the lender's interests in those matters where the lawyer represents the lender and both clients give informed consent.

2009 FEO 12. A lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party provided the lawyer explains who he represents and does not give the unrepresented party legal advice; however, the lawyer may not prepare a waiver of exemptions for the adverse party.

2010 FEO 3. A lawyer who currently represents a police officer in an internal affairs investigation may not concurrently represent a person charged with a criminal offense if the police officer is one of the prosecuting witnesses and will be subject to cross-examination.

2010 FEO 12. A hiring law firm may ask an incoming law school graduate to provide sufficient information as to his prior legal experience so that the hiring law firm can identify potential conflicts of interest.

2010 FEO 13. A lawyer's self-interest in promoting his own financial services company must not distort his independent professional judgment in the provision of legal services to the client including referral of the client to the lawyer's own ancillary business.

2012 FEO 2. A lawyer-mediator may not draft a business contract for pro parties to mediation.

2012 FEO 9. A lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

2014 FEO 6. A lawyer who provides free brief consultations to members of a nonprofit organization must still screen for conflicts prior to conducting a consultation.

2014 FEO 10. A lawyer who handles adoptions as part of her or his law practice and also owns a financial interest in a for-profit adoption agency may, with informed consent, represent an adopting couple utilizing the services of the adoption agency but may not represent the biological parents.

2015 FEO 4. Opinion analyzes a lawyer's professional responsibilities when she discovers that she made an error that may adversely impact the client's case.

2016 FEO 3. A lawyer working for a private law firm may not negotiate for employment with another firm if the firm represents a party adverse to the lawyer's client unless both clients give informed consent.

2018 FEO 4. A lawyer may offer clients on-site access to a financial brokerage company as a payment option for legal fees so long as the lawyer is satisfied that the financial arrangements offered by the company are legal, the lawyer receives no consideration from the company, and the lawyer does not recommend one payment option over another.

2019 FEO 1: A lawyer may not jointly represent clients and prepare a separation agreement.

2019 FEO 3: Opinion rules that an ongoing sexual relationship between opposing counsel creates a conflict of interest in violation of Rule 1.7(a).

2021 FEO 1. Opinion rules that a lawyer may only represent multiple parties in contemporaneous real estate closings if lawyer can satisfy the requirements set out in Rule 1.7(b) regarding concurrent conflicts of interest.

2023 FEO 2. Opinion rules that a confidentiality clause contained in a settlement agreement that restricts a lawyer's ability to practice law violates Rule 5.6.

II. REAL PROPERTY CONFLICTS.

CPR 100. (*See also* RPC 210 and 97 FEO 8.) In the usual residential loan transaction:

(a) A lawyer may ethically represent both the borrower and the lender.

(b) If the lawyer intends not to represent both the borrower and the lender, he must give timely notice to the one he intends not to represent of this fact, so that the one not represented may secure separate and timely representation.

(c) If the lawyer does not give such notice, he shall be deemed to represent both the borrower and the lender.

(d) If the lawyer represents only the borrower, he may nevertheless ethically

provide the title and lien priority assurances required by the lender as a condition of the loan.

(e) The lawyer shall clearly state to his client(s), whether the borrower or the lender, or both, whom he represents and the general scope of his representation.

(f) If the lawyer does not represent both principals, and the one he does not represent retains another lawyer to represent him, both lawyers should fully cooperate with each other in serving the interests of their respective clients and in closing the loan promptly.

(g) If the lawyer represents both the borrower and the lender, he may be ethically barred from representing either one (without the consent of the other) if a controversy arises between the borrower and the lender before, during or after the closing.

It is not unethical for a lawyer representing the borrower and the lender (or either) in the usual residential loan transaction to prepare a deed from the seller to the buyer, collect the purchase price for the seller, or draft other documents (such as a second deed of trust and not secured thereby) as may be necessary to complete the transaction between the seller and the buyer in accordance with their agreement, and charge the seller therefor.

It is not unethical for the lawyer representing the borrower, the lender and the seller (or one or more of them) to provide the title insurer with an opinion on title sufficient to issue a mortgagee's title insurance policy, the premium for which is normally paid by the borrower.

CPR 137. An attorney/trustee in a foreclosure proceeding may not represent the lender when the foreclosure is contested by the borrower. (*But see* RPC 82.)

CPR 166. An attorney/trustee cannot ethically represent either the lender or the borrower in a role of advocacy at any state of the foreclosure proceeding. In the absence of controversy the trustee may present, on behalf of the lender, the evidence necessary to support the clerk's findings essential to a foreclosure order. Even if the proceeding is adversary, he may ethically perform for himself such legal services as are necessary to the performance of his fiduciary duties. (*See also* RPC 82.)

CPR 201. When an attorney/trustee learns that a foreclosure will be contested, he may resign as trustee and represent the lender. (*See also* RPC 82.)

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

CPR 264. After initiating foreclosure, an attorney/trustee may not represent the lender in defense of the borrower's suit for injunctive relief. (*See also* RPC 82.)

CPR 275. An attorney who is part owner of a mortgage brokerage firm may certify title to real property with respect to which the mortgage broker has arranged financing.

CPR 297. An attorney/trustee cannot represent a husband-debtor in a partition action against his wife-debtor, but he may resign as trustee and then represent the husband. (*See also* RPC 82.)

CPR 305. An attorney/trustee cannot represent the lender in bankruptcy court in seeking relief from an automatic stay in order to commence foreclosure. (*See also* RPC 82.)

RPC 3. An attorney/trustee is not prohibited from continuing to serve as trustee in a contested foreclosure if he represented the seller at the closing. (*See also* RPC 82.)

RPC 40. For the purposes of a real estate transaction, an attorney may, with proper notice to the borrower, represent only the lender, and the lender may prepare the closing documents. (*See also* RPC 41.)

RPC 44. A closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

RPC 46. An attorney acting as trustee in a foreclosure proceeding may not, while serving in that capacity, file a motion to have an automatic stay lifted in the debtor's bankruptcy proceeding. (*See also* RPC 82.)

RPC 49. Attorneys who own stock in a real estate company may refer clients to the company if such would be in the clients' best interest and there is full disclosure, and such attorneys may not close transactions brokered by the real estate firm.

RPC 64. A lawyer who served as a trustee may after foreclosure sue the former debtor on behalf of the purchaser. (*See also* RPC 82.)

RPC 78. A closing attorney cannot make conditional delivery of trustee account checks to real estate agent before depositing loan proceeds against which checks are to be drawn.

RPC 82. This opinion comprehensively revises the ethical responsibilities of the attorney-trustee.

RPC 83. The significance of an attorney's personal interest in property determines whether he or she has a conflict of interest sufficient to disqualify him or her from rendering a title opinion concerning that property.

RPC 86. Opinion discusses disbursement against uncollected funds, accounting for earnest money paid outside closing and representation of the seller. (*See also* RPC 191.)

RPC 88. A lawyer may close a real estate transaction brokered by a real estate firm which employs the attorney's secretary as a part-time real estate broker.

RPC 90. A lawyer who as a trustee initiated a foreclosure proceeding may resign as trustee after the foreclosure is contested and act as lender's counsel. (*See also* RPC 82.)

RPC 121. A borrower's lawyer may render a legal opinion to the lender.

RPC 185. A lawyer who owns any stock in a title insurance agency may not give title opinions to the title insurance company for which the title insurance agency issues policies.

RPC 188. A lawyer may close a real estate transaction brokered by the lawyer's spouse with the consent of the parties to the transaction.

RPC 201. Opinion explores the circumstances under which a lawyer who is also a real estate salesperson may close real estate transactions brokered by the real estate company with which he is affiliated.

RPC 210. Opinion examines the circumstances in which it is acceptable for a lawyer to represent the buyer, seller, and the lender in the closing of a residential real estate transaction.

RPC 248. A lawyer who owns stock in a mortgage brokerage corporation may not act as the settlement agent for a loan brokered by the corporation nor may the other lawyers in the firm certify title or act as settlement agent for the closing.

97 FEO 8. Opinion examines the circumstances in which it is acceptable for the lawyer who regularly represents a real estate developer to represent the buyer and the developer in the closing of a residential real estate transaction.

98 FEO 10. An insurance defense lawyer may not disclose confidential information about an insured's representation in bills submitted to an independent audit company at the insurance carrier's request unless the insured consents.

98 FEO 11. The fiduciary relationship that arises when a lawyer serves as an escrow agent demands that the lawyer be impartial to both the obligor and the obligee and, therefore, the lawyer may not act as advocate for either party against the other. Once the fiduciary duties of the escrow agent terminate, the lawyer may take a position adverse to the obligor or the obligee provided the lawyer is not otherwise disqualified.

99 FEO 1. A lawyer may not accept a referral fee or solicitor's fee for referring a client to an investment advisor.

99 FEO 8. A lawyer may represent all parties in a residential real estate closing and subsequently represent only one party in an escrow dispute provided the lawyer insures that the conditions for waiver of an objection to a possible future conflict of interest set forth in RPC 168 are satisfied.

2004 FEO 3. A lawyer may represent both the lender and the trustee on a deed of trust in a dispute with the borrower if the conditions for common representation can be satisfied.

2004 FEO 10. The lawyer for the buyer of residential real estate may prepare the deed without creating a client-lawyer relationship with the seller provided the lawyer makes specific disclosures to the seller and clarifies her role for the seller.

2006 FEO 3. A lawyer who represented the trustee or served as the trustee in a foreclosure proceeding at which the lender acquired the subject property may, under some circumstances, represent all parties on the closing of the sale of the property by the lender provided the lawyer concludes that his judgment will not be impaired by loyalty to the lender and there is full disclosure and informed consent.

2007 FEO 9. A closing lawyer must comply with the conditions placed upon the delivery of a deed by the seller, including recording the deed and disbursing proceeds, despite receiving contrary instructions from the buyer.

2008 FEO 7. A closing lawyer shall not record and disburse when a seller has delivered the deed to the lawyer but the buyer instructs the lawyer to take no further action to close the transaction.

2008 FEO 11. A lawyer may serve as the trustee in a foreclosure proceeding

while simultaneously representing the beneficiary of the deed of trust on unrelated matters and that the other lawyers in the firm may also continue to represent the beneficiary on unrelated matters.

2011 FEO 4. A lawyer may not agree to procure title insurance exclusively from a particular title insurance agency on every transaction referred to the lawyer by a person associated with the agency.

2011 FEO 5. A lawyer may not represent the beneficiary of the deed of trust in a contested foreclosure if the lawyer's spouse and paralegal own an interest in the closely-held corporate trustee.

2012 FEO 2. A lawyer-mediator may not draft a business contract for pro se parties to mediation.

2013 FEO 4. Opinion examines the ethical duties of a lawyer representing both the buyer and the seller on the purchase of a foreclosure property and the lawyer's duties when the representation is limited to the seller.

2013 FEO 5. A lawyer/trustee must explain his role in a foreclosure proceeding to any unrepresented party that is an unsophisticated consumer of legal services; if he fails to do so and that party discloses material confidential information, the lawyer may not represent the other party in a subsequent, related adversarial proceeding unless there is informed consent.

2013 FEO 14. Common representation in a commercial real estate loan closing is, in most instances, a "nonconsentable" conflict meaning that a lawyer may not ask the borrower and the lender to consent to common representation.

2014 FEO 2. A lawyer may not represent both the trustee and the secured creditor in a contested foreclosure proceeding.

2020 FEO 4. Opinion concludes a lawyer may not invest in a fund that provides litigation financing if the lawyer's practice accepts clients who obtain litigation financing.

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest directly adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional

judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses, provided the requirements of Rule 1.8(a) are satisfied; and

(2) contract with a client for a reasonable contingent fee in a civil case, except as prohibited by Rule 1.5.

(j) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i), that applies to any one of them shall apply to all of them.

Comment

Note: See Rule 1.19 for the prohibition on client-lawyer sexual relationships.

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(f) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the

requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1, 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client 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 (i).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pur-

sue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(f) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance

of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule permits a lawyer to acquire a lien to secure the lawyer's fee or expenses provided the requirements of Rule 1.7 are satisfied. Specifically, the lawyer must reasonably believe that the representation will not be adversely affected after taking into account the possibility that the acquisition of a proprietary interest in the client's cause of action or any res involved therein may cloud the lawyer's judgment and impair the lawyer's ability to function as an advocate. The lawyer must also disclose the risks involved prior to obtaining the client's consent. Prior to initiating a foreclosure on property subject to a lien securing a legal fee, the lawyer must notify the client of the right to require the lawyer to participate in the mandatory fee dispute resolution program. *See* Rule 1.5(f).

[17] The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Imputation of Prohibitions

[18] Under paragraph (j), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

CPR 11. An attorney may contract to receive an interest in real property as a contingent fee for legal representation in an action to clear title to the subject property.

CPR 135. It is not improper for a legal aid society to request clients to donate unused trust funds to the society.

CPR 157. An attorney handling a personal injury case may advance the cost of the client's medical examination if such is actually an expense of litigation for which the client remains ultimately liable. (*But see* Rule 1.8(e))

CPR 241. An attorney may practice law and sell insurance but must keep the law practice and the insurance business separate in all respects. The attorney should not sell insurance to clients for whom he has provided legal services involving estate planning.

CPR 291. An attorney who has procured a judgment for a client that has not been collected by the ninth year may purchase the judgment if the client does wish to renew it, but this practice is not encouraged.

CPR 346. An attorney may represent a defendant employee of a city and accept payment of his fee from the city even though the employee may cross-claim against city.

CPR 364. An attorney may not purchase a judgment even though the client needs money immediately.

RPC 11. Full disclosure and clients' consent are necessary only when married lawyers personally participate as counsel.

RPC 24. An attorney may not purchase his client's property at an execution sale on his own account.

RPC 76. A lawyer may advance his client's fine.

RPC 80. A lawyer may not lend money to a client who is represented in pending or contemplated litigation except to finance costs of litigation.

RPC 84. An attorney may not condition settlement of a civil dispute on an agreement not to report lawyer misconduct.

RPC 124. An attorney may not agree to bear the costs of federal class action litigation. *But see In re S.E. Hotel Properties Ltd. Partnership*, 151 F.R.D. 597 (W.D.N.C. 1993).

RPC 134. An attorney may not accept an assignment of her client's judgment while representing the client on appeal of the judgment.

RPC 167. A lawyer may accept compensation from a potentially adverse insurance carrier for representing a minor in the court approval of a personal injury settlement provided the lawyer is able to represent the minor's interests without regard to who is actually paying for his services.

RPC 173. A lawyer who represents a client on a criminal charge may not lend the client the money necessary to post bond.

RPC 186. A lawyer who represents a client in a pending domestic action may take a promissory note secured by a deed of trust as payment for the lawyer's fee even though the deed of trust is on real property that is or may be the subject of the domestic action.

RPC 187. A lawyer may not ask a client for authorization to instruct the clerk of court to forward the client's support payments to the lawyer in order to satisfy the client's legal fees.

RPC 238. A lawyer is subject to the Rules of Professional Conduct with respect to the provision of a law-related service, such as financial planning, if the law related service is provided in circumstances that are not distinct from the lawyer's provision of legal services to clients.

98 FEO 14. A lawyer may participate in the solicitation of funds from third parties to pay the legal fees of a client provided there is disclosure to contributors and the funds are administered honestly.

98 FEO 17. A lawyer may not comply with an insurance carrier's billing requirements and guidelines if they interfere with the lawyer's ability to exercise his or her independent professional judgment in the representation of the insured.

2001 FEO 7. Opinion prohibits a lawyer from advancing the cost of a rental car to a client even though the car will be used, on occasion, to transport the client to medical examinations.

2001 FEO 9. Although a lawyer may recommend the purchase a financial product to a legal client, the lawyer may not receive a commission for its sale.

2003 FEO 7. A lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

2005 FEO 12. Opinion explores a lawyer's obligation to return legal fees when a third party is the payor.

2006 FEO 11. Outside of the commercial or business context, a lawyer may not, at the request of a third party, prepare documents, such as a will or trust instrument, that purport to speak solely for principal without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

2006 FEO 12. Opinion explores the circumstances under which a lawyer may obtain litigation funding from a financing company.

2008 FEO 12. A lawyer may not initiate foreclosure on a deed of trust on a client's property while still representing the client.

2010 FEO 13. A lawyer may receive a fee or commission in exchange for providing financial services and products to a legal client so long as the lawyer complies with the ethical rules pertaining to the provision of law-related serv-

ices, business transactions with clients, and conflicts of interest.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2014 FEO 10. A lawyer who handles adoptions as part of her or his law practice and also owns a financial interest in a for-profit adoption agency may, with informed consent, represent an adopting couple utilizing the services of the adoption agency but may not represent the biological parents.

2015 FEO 3. A lawyer may not offer a computer tablet to a prospective client in a direct mail solicitation letter.

2018 FEO 6: Opinion rules that, with certain conditions, a lawyer may include in a client's fee agreement a provision allowing the lawyer's purchase of litigation cost protection insurance and requiring reimbursement of the insurance premium from the client's funds in the event of a settlement or favorable trial verdict.

2019 FEO 5. Opinion rules that a lawyer may receive virtual currency as a flat fee for legal services, provided the fee is not clearly excessive and the terms of Rule 1.8(a) are satisfied, but may not accept virtual currency as entrusted funds to be billed against or to be held for the benefit of the lawyer, the client, or any third party.

2020 FEO 2. Opinion permits advancing client's settlement proceeds under limited circumstances and subject to specific requirements, including compliance with Rule 1.8(a).

2020 FEO 4. Opinion rules that lawyer may not invest in a fund that provides litigation financing if the lawyer's practice accepts clients who obtain litigation financing.

2021 FEO 3. Opinion rules that a closing lawyer representing buyer may not charge a fee to a separately represented seller unless seller consents to the fee or the services primarily benefit seller.

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 is contained in the public record, was disclosed at a public hearing, or was otherwise publicly disseminated; ; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client. A lawyer may disclose information otherwise covered by Rule 1.6 that is contained in the public record, was disclosed at a public hearing, or was otherwise publicly disseminated unless the information would likely be embarrassing or detrimental to the client if disclosed.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a

matter represent one or more of the clients in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent or the continued representation of the client(s) is not materially adverse to the interests of the former clients. *See* Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the information learned by the lawyer to establish a substantial risk that the lawyer has information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. *See* Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have

general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. *See* Rules 1.6 and 1.9(c).

[8] The Rules of Professional Conduct are rules of reason and should be applied with a commonsense approach. Rule 0.2, Scope, cmt. [1]. To reveal is to make public something that was secret or hidden. *See* *Reveal*, *Merriam-Webster's Collegiate Dictionary* (10th ed. 1998). A lawyer cannot reveal that which has already been revealed via public disclosure. Accordingly, the prohibition on a lawyer revealing information pursuant to Rule 1.9(c)(2) does not extend to information that has been made public because public information by its nature is no longer capable of being revealed.

[9] Whether information is likely to be embarrassing or detrimental to a client if disclosed must be determined by the lawyer prior to the disclosure under Rule 1.9(c)(2). A lawyer should elevate a client's desire for his or her lawyer to not publicly discuss his or her case over the lawyer's desire to publicly speak about the case after the representation has ended. When it is unclear whether a lawyer's disclosure pursuant to Rule 1.9(c)(2) would be embarrassing or detrimental to the client, a lawyer should consult with the client about the potential disclosure and the resulting impact thereof.

[10] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). *See* Rule 1.0(f). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; November 2, 2022

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 pos-

sible future representation presenting a conflict of interest if certain conditions are met.

RPC 229. A lawyer who jointly represented a husband and wife in the preparation and execution of estate planning documents may not prepare a codicil to the will of one spouse without the knowledge of the other spouse if the codicil will affect adversely the interests of the other spouse or each spouse agreed not to change the estate plan without informing the other spouse.

RPC 244. Although a lawyer asks a prospective client to sign a form stating that no client-lawyer relationship will be created by reason of a free consultation with the lawyer, the lawyer may not subsequently disclaim the creation of a client-lawyer relationship and represent the opposing party.

RPC 246. Under certain circumstances, a lawyer may not represent a party whose interests are opposed to the interests of a prospective client if confidential information of the prospective client must be used in the representation.

2000 FEO 2. A lawyer who represented a husband and wife in a joint Chapter 13 bankruptcy case may continue to represent one of the spouses after the other spouse disappears or becomes unresponsive, unless the lawyer is aware of any fact or circumstance that would make the continued representation of the remaining spouse an actual conflict of interest with the prior representation of the other spouse.

2003 FEO 9. A lawyer may participate in a settlement agreement that contains a provision limiting or prohibiting disclosure of information obtained during the representation even though the provision will effectively limit the lawyer's ability to represent future claimants.

2003 FEO 14. Opinion rules that if a current representation requires cross-examination of a former client using confidential information gained in the prior representation, then a lawyer has a disqualifying conflict of interest.

2009 FEO 8. A lawyer for a party to a partition proceeding may subsequently serve as a commissioner for the sale but not as one of the commissioners for the partitioning of the property.

2010 FEO 3. If a Lawyer who formerly represented a police officer determines that he does not need to use any confidential information that is not generally known to effectively cross-examine the officer in a prospective client's criminal matter, the lawyer must still disclose the former lawyer-client relationship so that the prospective client can make an informed decision about the lawyer's representation.

2011 FEO 2. Factors to be taken into consideration when determining whether a former client's delay in objecting to a conflict constitutes a waiver.

2012 FEO 4. A lawyer who represented an organization while employed with another firm must be screened from participation in any matter, or any matter substantially related thereto, in which she previously represented the organization, and from any matter against the organization if she acquired confidential information of the organization that is relevant to the matter and which has not become generally known.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2015 FEO 8. A lawyer who previously represented a husband and wife in several matters may not represent one spouse in a subsequent domestic action against the other spouse without the consent of the other spouse unless, after thoughtful and thorough analysis of a number of factors relevant to the prior representations, the lawyer determines that there is no substantial relationship between the prior representations and the domestic matter.

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer, including a prohibition under Rule 6.6, and the prohibition does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not

currently represented by the firm, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.
- (c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
- (1) the personally disqualified lawyer is timely screened from any participation in the matter; and
 - (2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.
- (d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.
- (e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. *See* Rule 1.0(d). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. *See* Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. *See* Rules 1.0(l) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Where the conditions of paragraph (c) are met, imputation is removed,

and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.

[7] Requirements for screening procedures are stated in Rule 1.0(l). Paragraph (c)(2) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, nor does it specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] Rule 1.10(d) removes imputation with the informed consent of the affected client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(f).

[10] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11 (b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[11] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (j) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

CPR 96. When different attorneys in the same firm are employed to represent conflicting interests in related cases (estate in wrongful death case and criminal defendant in homicide case), both must withdraw.

CPR 158. An attorney whose partner represented the wife in domestic litigation which resulted in parties holding real property as co-tenants cannot subsequently represent the husband in a partition proceeding.

CPR 274. Attorneys who merely share office space are not automatically disqualified.

RPC 45. An attorney whose partner represented the adverse party prior to joining the firm is not disqualified unless the partner acquired confidential information material to the current dispute. (*But see* Rule 1.10(c))

RPC 49. Attorneys who own stock in a real estate company may refer clients to the company if such would be in the clients' best interest and there is full disclosure, but the attorneys and other members of their law firm may not close transactions brokered by the real estate firm.

RPC 55. A member of the Attorney General's staff may prosecute appeals of adverse Medicaid decisions against the Department of Human Resources, which is represented by another member of the Attorney General's staff.

RPC 65. The public defender's office should be considered as a single law firm and staff attorneys may not represent co-defendants with conflicting interests unless both consent and can be adequately represented.

RPC 73. Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants if a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.

Where an attorney advises a governing body, such as a county commission, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from represent-

ing 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 the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflicts of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(f) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10, however, is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) impose additional obligations on a lawyer who has served or is currently serving as an officer or employee of the government. They apply in situations where a lawyer is not adverse to a former client and are designed to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer’s professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client’s adversary obtainable only through the lawyer’s government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these

Rules. See Rule 1.13 Comment [9].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(l) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement nor do they specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely significantly to injure the client, a reasonable delay may be justified.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 6, 2004

ETHICS OPINION NOTES

CPR 208. A former U.S. attorney may represent criminal defendants and civil plaintiffs against the United States so long as he did not participate in substantially related matters while with the government.

CPR 245. A former assistant district attorney may not act as private prosecutor in a case he was handling before he left the district attorney's office.

CPR 306. A former district attorney who prepared bills of indictment and requests for extradition in a criminal case may not privately prosecute that case.

RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

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

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

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

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

Comment

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative 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 admin-

istrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(f) and (c). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(l). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement nor does it specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the client, a reasonable delay may be justified.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

CPR 113. An attorney may not represent either party in a domestic case after having signed a consent judgment in the matter as a judge.

RPC 138. A partner of a lawyer who represents a party to an arbitration should not act as an arbitrator. (*But see* Rule 1.12(c))

2007 FEO 10. A lawyer employed by a school board may serve as an administrative hearing officer with the informed consent of the board.

2010FEO 8. A lawyer who consults with both parties to a dispute relative to the lawyer's prospective service as a mediator may not subsequently represent one of the parties to the dispute.

2012 FEO 2. A lawyer-mediator may not draft a business contract for pro se parties to mediation.

RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may reveal such information outside the organization to the extent permitted by Rule 1.6 and may resign in accordance with Rule 1.16.

(d) Paragraph (c) shall not apply with respect to information relating to a

lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee, or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under these Rules, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Rule apply equally to unincorporated associations. "Other constituents" as used in this Rule means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization may be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is a violation of the law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(g), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the 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 conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3, or 4.1. If the lawyer reasonably believes that disclosure of information protected by Rule 1.6 is necessary to prevent the commission of a crime by an organizational client, for example, disclosure is permitted by Rule 1.6(b)(2). If the lawyer's services are being or have been used by an organizational client to further a crime or fraud by the organization, Rule 1.6(b)(4) permits the lawyer to disclose confidential information to prevent, mitigate, or rectify the consequences of such conduct. In such circumstances, Rule 1.2(d) may be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee, or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) and (c), or who withdraws in circumstances that require or permit the lawyer to take action under these Rules, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. *See* Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. *See* Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the

lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder, director, employee, member, or other constituent.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; March 2, 2006

ETHICS OPINION NOTES

CPR 154. Because the town attorney owes allegiance to the town and not to particular officials of the town, he must disclose to any inquiring member of the town's board of commissioners the subject of a town business meeting involving town officials and other interested persons despite contrary instructions from the mayor.

CPR 227. The retained attorney for a religious organization cannot represent citizens who want wills leaving property to the organization.

CPR 228. A retained attorney for a religious organization cannot represent employees of the organization in drawing wills.

CPR 235. An attorney may not offer to draw wills free for church members who agree to contribute a certain amount to the church.

CPR 271. An attorney who drafted a partnership agreement cannot later represent some of the partners against the partnership.

RPC 18. An attorney may not simultaneously represent shareholders in a derivative action and the corporation's landlord on a claim for back rent.

RPC 97. Counsel for a condominium association may represent the association against a unit owner.

97 FEO 7. After a corporation files a Chapter 7 bankruptcy petition and at the request of the bankruptcy trustee, a lawyer who previously represented the corporation may continue to represent the corporation's bankruptcy estate and the bankruptcy trustee in a civil action provided the lawyer understands that the trustee is responsible for making decisions about the representation and the representation is not adverse to a former client of the lawyer.

2005 FEO 9. A lawyer for a publicly traded company does not violate the Rules of Professional Conduct if the lawyer "reports out" confidential information as permitted by SEC regulations.

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. *See* Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the

client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

CPR 314. An attorney who believes his or her client is not competent to make a will may not prepare or preside over the execution of a will for that client.

RPC 157. A lawyer may seek the appointment of a guardian for a client the

lawyer believes to be incompetent over the client's objection if reasonably necessary to protect the client's interest.

RPC 163. A lawyer may seek the appointment of an independent guardian ad litem for a child whose guardian has an obvious conflict of interest in fulfilling his fiduciary duties to the child.

98 FEO 16. A lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

98 FEO 18. A lawyer representing a minor owes the duty of confidentiality to the minor and may only disclose confidential information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation.

2003 FEO 7. A lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

2006 FEO 11. Outside of the commercial or business context, a lawyer may not, at the request of a third party, prepare documents, such as a will or trust instrument, that purport to speak solely for principal without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

Rule 1.15: SAFEKEEPING PROPERTY

This rule has four subparts: Rule 1.15-1, Definitions; Rule 1.15-2, General Rules; Rule 1.15-3, Records and Accountings; and Rule 1.15-4, Trust Account Management in Multiple-Lawyer Firm. The subparts set forth the requirements for preserving client property, including the requirements for preserving client property in a lawyer's trust account. The comment for all four subparts as well as the annotations appear after the text for Rule 1.15-4.

Rule 1.15-1: DEFINITIONS

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

(a) "Administrative ledger" denotes a written or computerized register, maintained for lawyer or firm funds deposited into a general or dedicated trust account or fiduciary account pursuant to Rule 1.15-2(g)(1) that lists, in chronological order, every deposit into and each disbursement from the trust account or fiduciary account of such funds, and shows the current balance of funds after each such transaction.

(b) "Bank" denotes a bank or savings and loan association, or credit union chartered under North Carolina or federal law.

(c) "Client" denotes a person, firm, or other entity for whom a lawyer performs, or is engaged to perform, any legal services.

(d) "Client ledger" denotes a written or computerized register, maintained for each client (person or entity) whose funds are deposited into a trust account that lists, in chronological order, every deposit into and each disbursement from the trust account for the client, and shows the current balance of funds after each such transaction.

(e) "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.

(f) "Demand deposit" denotes any account from which deposited funds can be withdrawn at any time without notice to the depository institution.

(g) "Electronic transfer" denotes a paperless transfer of funds.

(h) "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.

(i) "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.

(j) "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.

(k) "Funds" denotes any form of money, including cash, payment instruments such as checks, money orders, or sales drafts, and receipts from electronic fund

transfers.

(l) “General ledger” denotes a written or computerized register, maintained for each general and dedicated trust account and each fiduciary account, that lists in chronological order every deposit into and each disbursement from the account, and shows the current balance of funds after each such transaction.

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

(n) “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.

(o) “Legal services” denotes services (other than professional fiduciary services) rendered by a lawyer in a client-lawyer relationship.

(p) “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.

(q) “Subsidiary ledger” denotes a client ledger or administrative ledger.

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

(s) “Trust funds” denotes funds belonging to someone other than the lawyer that are received by or placed under the control of the lawyer in connection with the performance of legal services.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: May 4, 2000; March 1, 2003; March 6, 2008; October 8, 2009; August 23, 2012; June 9, 2016; April 5, 2018; March 1, 2023

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) 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.

(g) Funds in Accounts. A trust or fiduciary account may only hold entrusted property. Third party funds that are not received by or placed under the control of the lawyer in connection with the performance of legal services or professional fiduciary services may not be deposited or maintained in a trust or fiduciary account. Additionally, no funds belonging to the lawyer shall be deposited or maintained in a trust account or fiduciary account of the lawyer except:

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

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

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

(i) Items Payable to Lawyer. Any item drawn on a trust account or fiduciary account for the payment of the lawyer’s fees or expenses shall be made payable to the lawyer and shall indicate on the item by client name, file number, or other identifying information the client from whose balance the item is drawn. Any item that does not include this information may not be used to withdraw funds from a trust account or a fiduciary account for payment of the lawyer’s fees or expenses.

(j) No Bearer Items. No item shall be drawn on a trust account or fiduciary account made payable to cash or bearer and no cash shall be withdrawn from a trust account or fiduciary account by any means.

(k) Debit Cards Prohibited. Use of a debit card to withdraw funds from a general or dedicated trust account or a fiduciary account is prohibited.

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

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

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

(o) Property Received as Security. Any entrusted property or document of title delivered to a lawyer as security for the payment of a fee or other obligation to the lawyer shall be held in trust in accordance with this Rule 1.15 and shall be clearly identified as property held as security and not as a completed transfer of beneficial ownership to the lawyer. This provision does not apply to property received by a lawyer on account of fees or other amounts owed to the lawyer at the time of receipt; however, such transfers are subject to the rules governing legal fees or business transactions between a lawyer and client.

(p) Duty to Report Misappropriation. A lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the Trust Account Compliance Counsel (TACC) in the North Carolina State Bar Office of Counsel. Discovery of intentional theft or fraud must be reported to the TACC immediately. When an accounting or bank error results in an unintentional and inadvertent use of one client’s trust funds to pay the obligations of another client, the event must be reported unless the misapplication is discovered and rectified on or before the next quarterly reconciliation required by Rule 1.15-3(d)(2). This rule requires disclosure of information otherwise protected by Rule 1.6 if necessary to report the misappropriation or misapplication..

(q) Interest on Deposited Funds. Under no circumstances shall the lawyer

be entitled to any interest earned on funds deposited in a trust account or fiduciary account. Except as authorized by Rule 1.15-3 of subchapter 1D of the Rules and Regulations of the North Carolina State Bar, any interest earned on a trust account or fiduciary account, less any amounts deducted for bank service charges and taxes, shall belong to the client or other person or entity entitled to the corresponding principal amount.

(r) Abandoned Property. If entrusted property is unclaimed, the lawyer shall make due inquiry of his or her personnel, records and other sources of information in an effort to determine the identity and location of the owner of the property. If that effort is successful, the entrusted property shall be promptly transferred to the person or entity to whom it belongs. If the effort is unsuccessful and the provisions of G.S. 116B-53 are satisfied, the property shall be deemed abandoned, and the lawyer shall comply with the requirements of Chapter 116B of the General Statutes concerning the escheat of abandoned property.

(s) Check Signing and Electronic Transfer Authority.

(1) Every trust account check must be signed by a lawyer, or by an employee who is not responsible for performing monthly or quarterly reconciliations and who is supervised by a lawyer.

(2) Every electronic transfer from a trust account must be initiated by a lawyer, or by an employee who is not responsible for performing monthly or quarterly reconciliations and who is supervised by a lawyer.

(3) Prior to exercising signature or electronic transfer authority, a lawyer or supervised employee shall take a one-hour trust account management continuing legal education (CLE) course approved by the State Bar for this purpose. The CLE course must be taken at least once for every law firm at which the lawyer or the supervised employee is given signature or transfer authority.

(4) Trust account checks may not be signed using signature stamps, preprinted signature lines on checks, or electronic signatures other than "digital signatures" as defined in 21 CFR 11.3(b)(5).

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; March 6, 2008; February 5, 2009; August 23, 2012; June 9, 2016; April 5, 2018; March 1, 2023

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-U's field in the MICR line of the check.

(b) Minimum Records for Accounts at Banks. The minimum records required for general trust accounts, dedicated trust accounts and fiduciary accounts maintained at a bank shall consist of the following:

(1) all records listing the source and date of receipt of any funds deposited in the account including, but not limited to, bank receipts, deposit slips and wire and electronic transfer confirmations, and, in the case of a general trust account, all records also listing the name of the client or other person to whom the funds belong;

(2) all canceled checks or other items drawn on the account, or digital images thereof furnished by the bank, showing the amount, date, and recipient of the disbursement, and, in the case of a general trust account, the client name, file number, or other identifying information of the client from whose balance each item is drawn, provided, that:

(A) digital images must be legible reproductions of the front and back of the original items with no more than six images per page and no images smaller than 1-3/16 x 3 inches; and

(B) the bank must maintain, for at least six years, the capacity to reproduce electronically additional or enlarged images of the original items or records related thereto upon request within a reasonable time;

(3) all instructions or authorizations to transfer, disburse, or withdraw funds from the trust account (including electronic transfers or debits), or a written or electronic record of any such transfer, disbursement, or withdrawal showing the amount, date, and recipient of the transfer or disbursement, and, in the case of a general trust account, also showing the name of the client or other person to whom the funds belong;

(4) all bank statements and other documents received from the bank with

respect to the trust account, including, but not limited to notices of return or dishonor of any item drawn on the account against insufficient funds;

(5) in the case of a general trust account, a ledger containing a record of receipts and disbursements for each person or entity from whom and for whom funds are received and showing the current balance of funds held in the trust account for each such person or entity; and

(6) any other records required by law to be maintained for the trust account.

(c) Minimum Records for Accounts at Other Financial Institutions. The minimum records required for dedicated trust accounts and fiduciary accounts at financial institutions other than a bank shall consist of the following:

(1) all records listing the source and date of receipt of all funds deposited in the account including, but not limited to, depository receipts, deposit slips, and wire and electronic transfer confirmations;

(2) a copy of all checks or other items drawn on the account, or digital images thereof furnished by the depository, showing the amount, date, and recipient of the disbursement, provided, that the images satisfy the requirements set forth in Rule 1.15-3(b)(2);

(3) all instructions or authorizations to transfer, disburse, or withdraw funds from the account (including electronic transfers or debits) or a written or electronic record of any such transfer, disbursement, or withdrawal showing the amount, date, and recipient of the transfer or disbursement;

(4) all statements and other documents received from the depository with respect to the account, including, but not limited to notices of return or dishonor of any item drawn on the account for insufficient funds; and

(5) any other records required by law to be maintained for the account.

(d) Reconciliations of General Trust Accounts.

(1) 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.

(2) Quarterly Reconciliations. For each general trust account, a reconciliation report shall be prepared at least quarterly. Each reconciliation report shall show all of the following balances and verify that they are identical:

(A) The balance that appears in the general ledger as of the reporting date;

(B) The total of all subsidiary ledger balances in the general trust account, determined by listing and totaling the positive balances in the individual client ledgers and the administrative ledger maintained for servicing the account, as of the reporting date; and

(C) The adjusted bank balance, determined by adding outstanding deposits and other credits to the ending balance in the monthly bank statement and subtracting outstanding checks and other deductions from the balance in the monthly statement.

(3) The lawyer shall review, sign, date, and retain a copy of the reconciliations of the general trust account for a period of six years in accordance with Rule 1.15-3(h).

(e) Reviews.

(1) Each month, for each general trust account, dedicated trust account, and fiduciary account, the lawyer shall review the bank statement and cancelled checks for the month covered by the bank statement.

(2) Each quarter, for each general trust account and dedicated trust account, the lawyer shall review the statement of costs and receipts, client ledger, and cancelled checks of a random sample of representative transactions completed during the quarter to verify that the disbursements were properly made. The transactions reviewed must involve multiple disbursements unless no such transactions are processed through the account, in which case a single disbursement is considered a transaction for the purpose of this paragraph. A sample of three representative transactions shall satisfy this requirement, but a larger sample may be advisable.

(3) Each quarter, for each fiduciary account, the lawyer shall engage in a review as described in Rule 1.15-3(e)(2); however, if the lawyer manages more than ten fiduciary accounts, the lawyer may perform reviews on a random sample of at least ten fiduciary accounts in lieu of performing reviews on all such accounts.

(4) The lawyer shall take the necessary steps to investigate, identify, and resolve within ten days any discrepancies discovered during the monthly and quarterly reviews.

(5) A report of each monthly and quarterly review, including a description

of the review, the transactions sampled, and any remedial action taken, shall be prepared. The lawyer shall sign, date, and retain a copy of the report and associated documentation for a period of six years in accordance with Rule 1.15-3(h).

(f) Accountings for Trust Funds. The lawyer shall render to the client a written accounting of the receipts and disbursements of all trust funds (i) upon the complete disbursement of the trust funds, (ii) at such other times as may be reasonably requested by the client, and (iii) at least annually if the funds are retained for a period of more than one year.

(g) Accountings for Fiduciary Property. Inventories and accountings of fiduciary funds and other entrusted property received in connection with professional fiduciary services shall be rendered to judicial officials or other persons as required by law. If an annual or more frequent accounting is not required by law, a written accounting of all transactions concerning the fiduciary funds and other entrusted property shall be rendered to the beneficial owners, or their representatives, at least annually and upon the termination of the lawyer's professional fiduciary services.

(h) 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.

(i) Retention of Records in Electronic Format. Records required by Rule 1.15-3 may be created, updated, and maintained electronically, provided:

(1) the records otherwise comply with Rule 1.15-3, to wit: electronically created reconciliations and reviews that are not printed must be reviewed by the lawyer and electronically signed using a "digital signature" as defined in 21 CFR 11.3(b)(5);

(2) printed and electronic copies of the records in industry-standard formats can be made on demand; and

(3) the records are regularly backed up by an appropriate storage device.

(j) 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.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 6, 2004; March 6, 2008; June 9, 2016; April 5, 2018; March 1, 2023

RULE 1.15-4: TRUST ACCOUNT MANAGEMENT IN A MULTI-MEMBER FIRM

(a) Trust Account Oversight Officer (TAOO). Lawyers in a law firm of two or more lawyers may designate a partner in the firm to serve as the trust account oversight officer (TAOO) for any general trust account into which more than one firm lawyer deposits trust funds. The TAOO and the partners of the firm, or those with comparable managerial authority (managing lawyers), shall agree in writing that the TAOO will oversee the administration of any such trust account in conformity with the requirements of Rule 1.15, including, specifically, the requirements of this Rule 1.15-4. More than one partner may be designated as a TAOO for a law firm.

(b) Limitations on Delegation. Designation of a TAOO does not relieve any lawyer in the law firm of responsibility for the following:

(1) oversight of the administration of any dedicated trust account or fiduciary account that is associated with a legal matter for which the lawyer is primary legal counsel or with the lawyer's performance of professional fiduciary services; and

(2) review of the disbursement sheets or statements of costs and receipts, client ledgers, and trust account balances for those legal matters for which the lawyer is primary legal counsel.

(c) Training of the TAOO.

(1) Within the six months prior to beginning service as a TAOO, a lawyer shall,

(A) read all subparts and comments to Rule 1.15, all formal ethics opinions of the North Carolina State Bar interpreting Rule 1.15, and the North Carolina State Bar Trust Account Handbook;

(B) complete one hour of accredited continuing legal education (CLE) on

trust account management approved by the State Bar for the purpose of training a lawyer to serve as a TAOO;

(C) complete two hours of training (live, online, or self-guided) presented by a qualified educational provider on one or more of the following topics: (i) financial fraud, (ii) safeguarding funds from embezzlement, (iii) risk assessment and management for bank accounts, (iv) information security and online banking, or (v) accounting basics; and

(D) become familiar with the law firm's accounting system for trust accounts.

(2) During each year of service as a TAOO, the designated lawyer shall attend one hour of accredited continuing legal education (CLE) on trust account management approved by the State Bar for the purpose of training a TAOO or one hour of training, presented by a qualified educational provider, on one or more of the subjects listed in paragraph (c)(1)(C).

(d) Designation and Annual Certification. The written agreement designating a lawyer as the TAOO described in paragraph (a) shall contain the following:

(1) A statement by the TAOO that the TAOO agrees to oversee the operation of the firm's general trust accounts in compliance with the requirements of all subparts of Rule 1.15, specifically including the mandatory oversight measures in paragraph (e) of this rule;

(2) Identification of the trust accounts that the TAOO will oversee;

(3) An acknowledgement that the TAOO has completed the training described in paragraph (c)(1) and a description of that training;

(4) A statement certifying that the TAOO understands the law firm's accounting system for trust accounts; and

(5) An acknowledgement that the lawyers in the firm remain professionally responsible for the operation of the firm's trust accounts in compliance with Rule 1.15.

Each year on the anniversary of the execution of the agreement, the TAOO and the managing lawyers shall execute a statement confirming the continuing designation of the lawyer as the TAOO, certifying compliance with the requirements of this rule, describing the training undertaken by the TAOO as required by paragraph (c)(2), and reciting the statements required by subparagraphs (d)(1), (2), (4), and (5). During the lawyer's tenure as TAOO and for six years thereafter, the agreement and all subsequent annual statements shall be maintained with the trust account records (see Rule 1.15-3(g)).

(e) Mandatory Oversight Measures. In addition to any other record keeping or accounting requirement set forth in Rule 1.15-2 and Rule 1.15-3, the firm shall adopt a written policy detailing the firm's trust account management procedures which shall annually be reviewed, updated, and signed by the TAOO and the managing lawyers. Each version of the policy shall be retained for the minimum record keeping period set forth in Rule 1.15-3(g).

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

Adopted by the Supreme Court: June 9, 2016

Comments to Rule 1.15 and All Subparts

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

Property Subject to these Rules

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

Client Property

[3] Every lawyer who receives funds belonging to a client must maintain a trust account. The general rule is that every receipt of money from a client or for a client, which will be used or delivered on the client's behalf, is held in trust

and should be placed in the trust account. All client money received by a lawyer, except that to which the lawyer is immediately entitled, must be deposited in a trust account, including funds for payment of future fees and expenses. Client funds must be promptly deposited into the trust account. Client funds must be deposited in a general trust account if there is no duty to invest on behalf of the client. Generally speaking, if a reasonably prudent person would conclude that the funds in question, either because they are nominal in amount or are to be held for a short time, could probably not earn sufficient interest to justify the cost of investing, the funds should be deposited in the general trust account. In determining whether there is a duty to invest, a lawyer shall exercise his or her professional judgment in good faith and shall consider the following:

- a) The amount of the funds to be deposited;
- b) The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;
- c) The rates of interest or yield at financial institutions where the funds are to be deposited;
- d) The cost of establishing and administering dedicated accounts for the client's benefit, including the service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the client's benefit;
- e) The capability of financial institutions, lawyers, or law firms to calculate and pay income to individual clients;
- f) Any other circumstances that affect the ability of the client's funds to earn a net return for the client.

When regularly reviewing the trust accounts, the lawyer shall determine whether changed circumstances require further action with respect to the funds of any client. The determination of whether a client's funds are nominal or short-term shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with an ethical impropriety or breach of professional conduct based on the good faith exercise of such judgment

[4] A law firm with offices in another state may send a North Carolina client's funds to a firm office in another state for centralized processing provided, however, the funds are promptly deposited into a trust account with a bank that has branch offices in North Carolina, and further provided, the funds are transported and held in a safe place until deposited into the trust account. If this procedure is followed, client consent to the transfer of the funds to an out-of-state office of the firm is not required. However, all such client funds are subject to the requirements of these rules. Funds delivered to the lawyer by the client for payment of future fees or expenses should never be used by the lawyer for personal purposes or subjected to the potential claims of the lawyer's creditors.

[5] This rule does not prohibit a lawyer who receives an instrument belonging wholly to a client or a third party from delivering the instrument to the appropriate recipient without first depositing the instrument in the lawyer's trust account.

Property from Professional Fiduciary Service

[6] The phrase "professional fiduciary service," as used in this rule, is service by a lawyer in any one of the various fiduciary roles undertaken by a lawyer that is not, of itself, the practice of law, but is frequently undertaken in conjunction with the practice of law. This includes service as a trustee, guardian, personal representative of an estate, attorney-in-fact, and escrow agent, as well as service in other fiduciary roles "customary to the practice of law."

[7] Property held by a lawyer performing a professional fiduciary service must also be segregated from the lawyer's personal property, properly labeled, and maintained in accordance with the applicable provisions of this rule.

[8] When property is entrusted to a lawyer in connection with a lawyer's representation of a client, this rule applies whether or not the lawyer is compensated for the representation. However, the rule does not apply to property received in connection with a lawyer's uncompensated service as a fiduciary such as a trustee or personal representative of an estate. (Of course, the lawyer's conduct may be governed by the law applicable to fiduciary obligations in general, including a fiduciary's obligation to keep the principal's funds or property separate from the fiduciary's personal funds or property, to avoid self-dealing, and to account for the funds or property accurately and promptly).

[9] Compensation distinguishes professional fiduciary service from a fidu-

ciary role that a lawyer undertakes as a family responsibility, as a courtesy to friends, or for charitable, religious or civic purposes. As used in this rule, "compensated services" means services for which the lawyer obtains or expects to obtain money or any other valuable consideration. The term does not refer to or include reimbursement for actual out-of-pocket expenses.

Property Excluded from Coverage of Rules

[10] This rule also does not apply when a lawyer is handling money for a business or for a religious, civic, or charitable organization as an officer, employee, or other official regardless of whether the lawyer is compensated for this service. Handling funds while serving in one of these roles does not constitute "professional fiduciary service," and such service is not "customary to the practice of law."

Burden of Proof

[11] When a lawyer is entrusted with property belonging to others and does not comply with these rules, the burden of proof is on the lawyer to establish the capacity in which the lawyer holds the funds and to demonstrate why these rules should not apply.

Prepaid Legal Fees

[12] Whether a fee that is prepaid by the client should be placed in the trust account depends upon the fee arrangement with the client. A retainer fee in its truest sense is a payment by the client for the reservation of the exclusive services of the lawyer, which is not used to pay for the legal services provided by the lawyer and, by agreement of the parties, is nonrefundable upon discharge of the lawyer. It is a payment to which the lawyer is immediately entitled and, therefore, should not be placed in the trust account. A "retainer," which is actually a deposit by the client of an advance payment of a fee to be billed on an hourly or some other basis, is not a payment to which the lawyer is immediately entitled. This is really a security deposit and should be placed in the trust account. As the lawyer earns the fee or bills against the deposit, the funds should be withdrawn from the account. Rule 1.16(d) requires the refund to the client of any part of a fee that is not earned by the lawyer at the time that the representation is terminated.

[13] Client or third-party funds on occasion pass through, or are originated by, intermediaries before deposit to a trust or fiduciary account. Such intermediaries include banks, credit card processors, litigation funding entities, and online marketing platforms. A lawyer may use an intermediary to collect a fee. However, the lawyer may not participate in or facilitate the collection of a fee by an intermediary that is unreliable or untrustworthy. Therefore, the lawyer has an obligation to make a reasonable investigation into the reliability, stability, and viability of an intermediary to determine whether reasonable measures are being taken to segregate and safeguard client funds against loss or theft and, should such funds be lost, that the intermediary has the resources to compensate the client. Absent other indicia of fraud (such as the use of non-industry standard methods for collection of credit card information), a lawyer's diligence obligation is satisfied if the intermediary collects client funds using a credit or debit card. Unearned fees, if collected by an intermediary, must be transferred to the lawyer's designated trust or fiduciary account within a reasonable period of time so as to minimize the risk of loss while the funds are in the possession of another, and to enable the collection of interest on the funds for the IOLTA program or the client as appropriate. See 27 N.C.A.C. 1B, Sect. .1300.

Abandoned Property

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

Disputed Funds

[15] A lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as the State Bar's program for fee dispute resolution. See Rule 1.5(f). The undisputed portion of the funds shall be promptly distributed.

[16] Third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on

funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claim is resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Responsibility for Records and Accountings

[17] It is the lawyer's responsibility to assure that complete and accurate records of the receipt and disbursement of entrusted property are maintained in accordance with this rule. The required record retention period of six years set forth in this rule does not preclude the State Bar from seeking records for a period prior to the retention period and, if obtained, from pursuing a disciplinary action based thereon if such action is not prohibited by law or other rules of the State Bar.

[18] The rules permit the retention of records in electronic form. A storage device is appropriate for backing up electronic records if it reasonably assures that the records will be recoverable despite the failure or destruction of the original storage device on which the records are stored. For a discussion of storage methods not solely under the control of the lawyer, see 2011 FEO 6.

[19] Many businesses are now converting paper checks to automated clearinghouse (ACH) debits to decrease costs and increase operating efficiencies. When a check is converted, the check is taken either at the point-of-sale or through the mail for payment, the account information is captured from the check, and an electronic transaction is created for payment through the ACH system. The original physical check is typically destroyed by the converting entity (although an image of the check may be stored for a certain period of time). If a check drawn on a trust account is converted to ACH, the lawyer will not receive either the physical check or a check image. The transaction will appear on the lawyer's trust account statement as an ACH debit with limited information about the payment (e.g., dollar amount, date processed, originator of the ACH debit).

[20] To prevent conversion of a check to ACH without authorization, a lawyer is required to use checks with an "Auxiliary On-U's field." A check will not be eligible for conversion to ACH if it contains an Auxiliary On-U's 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-U's field is included on the lawyer's trust account checks. Including an Auxiliary On-U's 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-U's field.

[21] Authorized ACH debits that are electronic transfers of funds (in which no checks are involved) are allowed provided the lawyer maintains a record of the transaction as required by Rule 1.15-3(b)(3) and (c)(3). The record, whether consisting of the instructions or authorization to debit the account, a record or receipt from the register of deeds or a financial institution, or the lawyer's independent record of the transaction, must show the amount, date, and recipient of the transfer or disbursement, and, in the case of a general trust account, also show the name of the client or other person to whom the funds belong.

[22] The lawyer is responsible for keeping a client, or any other person to whom the lawyer is accountable, advised of the status of entrusted property held by the lawyer. In addition, the lawyer must take steps to discover any unauthorized transactions involving trust funds as soon as possible. Therefore, it is essential that the lawyer regularly reconcile a general trust account. This means that, at least once a month, the lawyer must reconcile the current bank statement balance with the balance shown for the entire account in the lawyer's records, such as a check register or its equivalent, as of the date of the bank statement. At least once a quarter, the lawyer must reconcile the individual client balances shown on the lawyer's ledger with the current bank statement balance. Monthly reconciliation will help to uncover unauthorized ACH transactions promptly. The current bank balance is the balance obtained when subtracting outstanding checks and other withdrawals from the bank statement balance and adding out-

standing deposits to the bank statement balance. With regard to trust funds held in any trust account, there is also an affirmative duty to produce a written accounting for the client and to deliver it to the client, either at the conclusion of the transaction or periodically if funds are held for an appreciable period. Such accountings must be made at least annually or at more frequent intervals if reasonably requested by the client.

Bank Notice of Overdrafts

[23] A properly maintained trust account should not have any items presented against insufficient funds. However, even the best-maintained accounts are subject to inadvertent errors by the bank or the lawyer, which may be easily explained. The reporting requirement should not be burdensome and may help avoid a more serious problem.

Fraud Prevention Measures

[24] The mandatory monthly and quarterly reviews and oversight measures in Rule 1.15-3(i) facilitate early detection of internal theft and early detection and correction of errors. They are minimum fraud prevention measures necessary for the protection of funds on deposit in a firm trust or fiduciary account from theft by any person with access to the account. Internal theft from trust accounts by insiders at a law firm can only be timely detected if the records of the firm's trust accounts are routinely reviewed. For this reason, Rule 1.15-3(i)(1) requires monthly reviews of the bank statements and cancelled checks for all general, dedicated, and fiduciary accounts. In addition, Rule 1.15-3(i)(2) requires quarterly reviews of a random sample of three transactions for each trust account, dedicated trust account, and fiduciary account including examination of the statement of costs and receipts, client ledger, and cancelled checks for the transactions. Review of these documents will enable the lawyer to verify that the disbursements were made properly. Although not required by the rule, a larger sample than three transactions is advisable to increase the likelihood that internal theft will be detected.

[25] Another internal control to prevent fraud is found in Rule 1.15-2(s) which addresses the signature authority for trust account checks. The provision prohibits an employee who is responsible for performing the monthly or quarterly reconciliations for a trust account from being a signatory on a check for that account. Dividing the check signing and reconciliation responsibilities makes it more difficult for one employee to hide fraudulent transactions. Similarly, signature stamps, preprinted signature lines on checks, and electronic signatures are prohibited to prevent their use for fraudulent purposes.

[26] In addition to the recommendations in the North Carolina State Bar Trust Account Handbook (see the chapter on *Safeguarding Funds from Embezzlement*), the following fraud prevention measures are recommended:

- (1) Enrolling the trust account in an automated fraud detection program;
- (2) Implementation of security measures to prevent fraudulent wire transfers of funds;
- (3) Actively maintaining end-user security at the law firm through safety practices such as strong password policies and procedures, the use of encryption and security software, and periodic consultation with an information technology security professional to advise firm employees; and
- (4) Insuring that all staff members who assist with the management of the trust account receive training on and abide by the security measures adopted by the firm.

Lawyers should frequently evaluate whether additional fraud control measures are necessary and appropriate.

Duty to Report Misappropriation or Misapplication

[27] A lawyer is required by Rule 1.15-2(p) to report to the Trust Account Compliance Counsel of the North Carolina State Bar Office of Counsel if the lawyer knows or reasonably believes that entrusted property, including trust funds, has been misappropriated or misapplied. The rule requires the reporting of an unintentional misapplication of trust funds, such as the inadvertent use of one client's funds on deposit in a general trust account to pay the obligations of another client, unless the lawyer discovers and rectifies the error on or before the next scheduled quarterly reconciliation. A lawyer is required to report the conduct of lawyers and non-lawyers as well as the lawyer's own conduct. A report is required regardless of whether information leading to the discovery of the misappropriation or misapplication would otherwise be protected by Rule 1.6. If disclosure of confidential client information is necessary to comply with this rule, the lawyer's disclosure should be limited to the information that is

necessary to enable the State Bar to investigate. *See* Rule 1.6, cmt. [15].

Designation of a Trust Account Oversight Officer

[28] In a firm with two or more lawyers, personal oversight of all of the activities in the general trust accounts by all of the lawyers in the firm is often impractical. Nevertheless, any lawyer in the firm who deposits into a general trust account funds entrusted to the lawyer by or on behalf of a client is professionally responsible for the administration of the trust account in compliance with Rule 1.15 regardless of whether the lawyer directly participates in the administration of the trust account. Moreover, Rule 5.1 requires all lawyers with managerial or supervisory authority over the other lawyers in a firm to make reasonable efforts to ensure that the other lawyers conform to the Rules of Professional Conduct. Rule 1.15-4 provides a procedure for delegation of the oversight of the routine administration of a general trust account to a firm partner, shareholder, or member (see Rule 1.0(h)) in a manner that is professionally responsible. By identifying, training, and documenting the appointment of a trust account oversight officer (TAOO) for the law firm, the lawyers in a multiple-lawyer firm may responsibly delegate the routine administration of the firm's general trust accounts to a qualified lawyer. Delegation consistent with the requirements of Rule 1.15-4 is evidence of a lawyer's good faith effort to comply with Rule 5.1.

[29] Nevertheless, designation of a TAOO does not insulate from professional discipline a lawyer who personally engaged in dishonest or fraudulent conduct. Moreover, a lawyer having actual or constructive knowledge of dishonest or fraudulent conduct or the mismanagement of a trust account in violation of the Rules of Professional Conduct by any firm lawyer or employee remains subject to professional discipline if the lawyer fails to promptly take reasonable remedial action to avoid the consequences of such conduct including reporting the conduct as required by Rule 1.15-2(p) or Rule 8.3. *See also* Rule 5.1 and Rule 5.3.

Limitations on Delegation to TAOO

[30] Despite the designation of a TAOO pursuant to Rule 1.15-4, each lawyer in the firm remains professionally responsible for the trust account activity associated with the legal matters for which the lawyer provides representation. Therefore, for each legal matter for which the lawyer is primary counsel, the lawyer must review and approve any disbursement sheet or settlement statement, trust account entry in the client ledger, and trust account balance associated with the matter. Similarly, a lawyer who establishes a dedicated trust account or fiduciary account in connection with the representation of a client is professionally responsible for the administration of the dedicated trust account or fiduciary account in compliance with Rule 1.15.

Training for Service as a TAOO

[31] A qualified provider of the educational training programs for a TAOO described in Rule 1.15-4(c)(1)(C) need not be an accredited sponsor of continuing legal education programs (see 27 N.C.A.C. 1D, Rule .1520), but must be knowledgeable and reputable in the specific field and must offer educational materials as part of its usual course of business. Training may be completed via live presentations, online courses, or self-guided study. Self-guided study may consist of reading articles, presentation materials, or websites that have been created for the purpose of education in the areas of financial fraud, safeguarding funds from embezzlement, risk management for bank accounts, information security and on-line banking, or basic accounting.

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

Amendments Approved by the Supreme Court: March 1, 2003; March 6, 2008; June 9, 2016; March 27, 2019

ETHICS OPINION NOTES

CPR 358. An attorney may not use the "float" in his trust account to cover checks written against funds represented by a deposited but uncollected negotiable instrument. Disbursements may be made in advance of actual collection if the bank provisionally credits the trust account upon deposit of the instrument. (*See also* RPC 191.)

CPR 375. An attorney's fee may be the interest earned on escrowed funds if the client agrees.

RPC 4. A public defender who retains funds for an incarcerated defendant as a favor must deposit the funds in a trust account.

RPC 37. A law firm which has received money representing the refund of an appeal bond to a client owing substantial fees to the firm may not apply

the appeal bond refund to the fees unless an agreement with the client would authorize the firm to do so.

RPC 44. A closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

RPC 47. An attorney who receives from his or her client a small sum of money which is to be used to pay the cost of recording a deed must deposit that money in a trust account.

RPC 48. Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

RPC 51. Where a lawyer receives a lump sum payment in advance which is inclusive of the costs of litigation, the portion representing the costs must be deposited in the trust account.

RPC 66. An attorney serving as an escrow agent may not disburse in a manner not contemplated by the escrow agreement unless all parties agree.

RPC 69. A lawyer must obey the client's instruction not to pay medical providers from the proceeds of settlement in the absence of a valid physician's lien.

RPC 75. A lawyer may not pay his or her fee or the fee of a physician from funds held in trust for a client without the client's authority.

RPC 78. A closing attorney cannot make conditional delivery of trust account checks to real estate agent before depositing loan proceeds against which checks are to be drawn.

RPC 86. Opinion discusses disbursement against uncollected funds, accounting for earnest money paid outside closing, and representation of the seller. (*See also* RPC 191.)

RPC 89. Trust funds must be held at least five years after the last occurrence of certain prescribed events before they may be deemed abandoned.

RPC 96. Attorneys practicing in North Carolina who are affiliated with an interstate law firm may not permit trust funds belonging to their clients to be deposited in a trust account maintained outside North Carolina without written consent. (*See also* Rule 1.15-2(e))

RPC 125. An attorney may not pay a medical care provider from the proceeds of a settlement negotiated prior to the filing of suit over his client's objection unless the funds are subject to a valid lien.

RPC 149. An attorney may not donate a client's funds to a charity without the client's consent.

RPC 150. An attorney cannot permit a bank to link her trust and business accounts for the purpose of determining interest earned or charges assessed if such an arrangement causes the attorney to use client funds from the trust account to offset service charges assessed on the business account.

RPC 158. A sum of money paid to a lawyer in advance to secure payment of a fee which is yet to be earned and to which the lawyer is not entitled must be deposited in the lawyer's trust account.

RPC 191. A lawyer may make disbursements from his or her trust account in reliance upon the deposit of funds provisionally credited to the account if the funds are deposited in the form of instruments as specified in the Good Funds Settlement Act (Chap. 45A of N.C. Gen. Stat.).

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

RPC 226. When a law firm receives funds that are not identified as client funds, the firm must investigate the ownership of the funds and, if it is reasonable to conclude the funds do not belong to a client or a third party, the firm may conclude that the funds belong to the firm.

RPC 234. An inactive client file may be stored in an electronic format provided original documents with legal significance are preserved and the documents in the electronic file can be reproduced on paper.

RPC 247. Opinion provides guidelines for receipt of payment of earned and unearned fees by electronic transfers.

97 FEO 4. Opinion provides that flat fees may be collected at the beginning of a representation, treated as presently owed to the lawyer, and deposited into the lawyer's general operating account or paid to the lawyer but that if a collected fee is clearly excessive under the circumstances of the representation, a refund to the client of some or all of the fee is required.

97 FEO 9. Provided steps are taken to safeguard the client funds on deposit in a trust account, a lawyer may accept fees paid by credit card although the bank's agreement to process such charges authorizes the bank to

debit the lawyer's trust account in the event a credit card charge is disputed by a client.

98 FEO 11. Opinion rules that the fiduciary relationship that arises when a lawyer serves as an escrow agent demands that the lawyer be impartial to both the obligor and the obligee and, therefore, the lawyer may not act as advocate for either party against the other. Once the fiduciary duties of the escrow agent terminate, the lawyer may take a position adverse to the obligor or the obligee provided the lawyer is not otherwise disqualified.

98 FEO 14. A lawyer may participate in the solicitation of funds from third parties to pay the legal fees of a client provided there is disclosure to contributors and the funds are administered honestly.

98 FEO 15. Opinion rules that whether the year 2000 computer problem is being adequately addressed by a depository bank should be considered when selecting a depository bank for a trust account.

2000 FEO 4. A lawyer may sign a statement acknowledging a finance company's interest in a client's recovery subject to certain conditions.

2001 FEO 3. A lawyer may settle a tort claim by making disbursements from a trust account in reliance upon the deposit of funds provisionally credited to the account if the deposited 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 at an hourly rate and is collected at the beginning of representation belongs to the client and must be deposited into the trust account until earned and, upon termination of representation, the unearned portion of the fee must be returned to the client.

2006 FEO 8. A lawyer may disburse against deposited items in reliance upon a bank's funding schedule under certain circumstances.

2006 FEO 15. A lawyer may charge a reasonable dormancy fee against unclaimed funds if the client agrees in advance and the fee meets other statutory requirements.

2006 FEO 16. Under certain circumstances a lawyer may consider a dispute with a client over legal fees resolved and transfer funds from the trust account to his operating account to pay those fees.

2008 FEO 10. Opinion surveys prior ethics opinions on legal fees, sets forth the ethical requirements for the different types of fees paid in advance, authorizes minimum fees earned upon payment, and provides model fee provisions.

2008 FEO 13. Unless affected clients expressly consent to the disclosure of their confidential information, a lawyer may allow a title insurer to audit the lawyer's real estate trust account and reconciliation reports only if certain written assurances to protect client confidences are obtained from the title insurer, the audited account is only used for real estate closings and the audit is limited to certain records and to real estate transactions insured by the title insurer.

2009 FEO 4. A law firm may establish a credit card account that avoids commingling by depositing unearned fees into the law firm's trust account and earned fees into the law firm's operating account provided the problem of chargebacks is addressed.

2010 FEO 4. All advance payments of litigation expenses by a barter exchange client must be paid in cash or by check or credit card.

2011 FEO 6. A law firm may contract with a vendor of software as a service provided the lawyer uses reasonable care to safeguard confidential client information.

2011 FEO 7. A law firm may use on-line banking to manage its trust accounts provided the firm's managing lawyers are regularly educated on the

security risks and actively maintain end-user security.

2011 FEO 10. A lawyer may advertise on a website that offers daily discounts to consumers where the website company's compensation is a percentage of the amount paid to the lawyer if certain disclosures are made and certain conditions are satisfied.

2011 FEO 13. Client funds or the funds of a third party that are placed in the lawyer's control for the purpose of being safeguarded, managed or disbursed in connection with a transaction, but which were not designated or identified as funds for the payment of legal fees, may not be retained in the trust account, pursuant to Rule 1.15-2(g), as disputed funds to which the lawyer may be entitled.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2012 FEO 13. The partners and managerial lawyers remaining in a firm are responsible for the safekeeping and proper disposition of both the active and closed files of a suspended, disbarred, missing, or deceased member of the firm.

2013 FEO 3. Opinion examines a lawyer's responsibilities when charging and collecting from a client for the expenses of representation.

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

2013 FEO 13. A lawyer may disburse immediately against funds that are credited to the lawyer's trust account by automated clearinghouse (ACH) transfer and electronic funds transfer (EFT) despite the risk that an originator may initiate a reversal.

2015 FEO 6. When funds are stolen from a lawyer's trust account by a third party who is not employed or supervised by the lawyer, and the lawyer was managing the trust account in compliance with the Rules of Professional Conduct, the lawyer is not professionally responsible for replacing the funds stolen from the account.

2017 FEO 2: A lawyer representing an estate must maintain the checking account for the estate in accordance with Rule 1.15 consistent with the extent to which the lawyer has control over the account.

2017 FEO 4: A lawyer is prohibited from disbursing settlement funds pursuant to the client's directive if the funds are subject to a perfected lien.

2019 FEO 5. Opinion rules that a lawyer may receive virtual currency as a flat fee for legal services, provided the fee is not clearly excessive and the terms of Rule 1.8(a) are satisfied, but may not accept virtual currency as entrusted funds to be billed against or to be held for the benefit of the lawyer, the client, or any third party.

2020 FEO 5. Opinion rules a lawyer has a duty to inform client(s) in a real property transaction about potential scams.

2021 FEO 1. Opinion addresses restrictions on the use of entrusted funds and accountings lawyer must provide in the context of a lawyer representing multiple parties in contemporaneous real estate closings.

2021 FEO 2. Opinion discusses a lawyer's professional responsibility to safeguard entrusted funds by identifying and avoiding purported transactions involving counterfeit checks.

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of law or the Rules of Professional Conduct;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client; or
- (2) the client knowingly and freely assents to the termination of the representation; or

- (3) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; or
- (4) the client insists upon taking action that the lawyer considers repugnant, imprudent, or contrary to the advice and judgment of the lawyer, or with which the lawyer has a fundamental disagreement; or
- (5) the client has used the lawyer's services to perpetrate a crime or fraud; or
- (6) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; or
- (7) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (8) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; or
- (9) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. *See* Rules 1.2(c) and 6.5. *See also* Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably

necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Forfeiture by the client of a substantial financial investment in the representation may have such effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or imprudent or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

[10] The lawyer may never retain papers to secure a fee. Generally, anything in the file that would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and canceled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. The lawyer's personal notes and incomplete work product need not be released.

[11] A lawyer who represented an indigent on an appeal which has been concluded and who obtained a trial transcript furnished by the state for use in preparing the appeal, must turn over the transcript to the former client upon request, the transcript being property to which the former client is entitled.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

CPR 3. A client is entitled to his file upon withdrawal of his attorney.

CPR 24. Withdrawing partners and remaining partners should send clients a common announcement of the firm's dissolution so that the client may elect whom he wishes to handle his legal business.

CPR 61. It is improper for a senior member of a law firm who is employed to represent a client to refer a case to a junior partner or associate without the client's consent.

CPR 269. An attorney whose motion to withdraw from representation of a corporation is denied must continue to represent the corporation.

CPR 315. An attorney must give an indigent client the transcript provided by the state after disposition of the appeal.

CPR 322. After completion of custody litigation, an attorney must release a "home study" report to a client unless such is precluded by statute or court order.

RPC 8. An attorney employed by an insurer to represent an uninsured motorist may not withdraw after settlement between insurer and the claimant until the court gives permission and the attorney takes steps to minimize prejudice to his client.

RPC 48. Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

RPC 58. Another member of a lawyer's firm may substitute for the lawyer in defending a criminal case if there is no prejudice to the client and the client and the court consent.

RPC 79. A lawyer who advances the cost of obtaining medical records before deciding whether to accept a case may not condition the release of the records to the client upon reimbursement of the cost.

RPC 106. Opinion discusses circumstances under which a refund of a pre-paid fee is required.

RPC 153. In cases of multiple representation, a lawyer who has been discharged by one client must deliver to that client, as part of that client's file, information entrusted to the lawyer by the other client.

RPC 157. A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection if reasonably necessary to protect the client's interest.

RPC 158. Any portion of a sum of money paid by a client in advance to secure payment of a fee that is unearned at the time the lawyer is discharged must be refunded to the client.

RPC 169. A lawyer is not required to provide a former client with copies of title notes and may charge a former client for copies of documents from the client's file under certain circumstances.

RPC 178. Opinion examines the obligation to deliver the file to the client upon the termination of the representation when a lawyer represents multiple clients in a single matter.

RPC 223. When a lawyer's reasonable attempts to locate a client are unsuccessful, the client's disappearance constitutes a constructive discharge of the lawyer requiring the lawyer's withdrawal from the representation.

RPC 227. A former residential real estate client is not entitled to the lawyer's title notes or abstracts regardless of whether such information is stored in the client's file. However, a lawyer formerly associated with a firm may be entitled to examine the title notes made by the lawyer to provide further representation to the same client.

RPC 234. An inactive client file may be stored in an electronic format provided original documents with legal significance are preserved and the documents in the electronic file can be reproduced on paper.

RPC 245. A lawyer in possession of the legal file relating to the prior representation of co-parties in an action must provide the co-party the lawyer does not represent with access to the file and a reasonable opportunity to copy the contents of the file.

98 FEO 9. A lawyer may charge a client the actual cost of retrieving a closed client file from storage, subject to certain conditions, provided the lawyer does not withhold the file to extract payment.

2002 FEO 5. Opinion rules that whether electronic mail should be retained as a part of a client's file is a legal decision to be made by the lawyer.

2005 FEO 13. A minimum fee that will be billed against an hourly rate and is collected at the beginning of representation belongs to the client and must be deposited into the trust account until earned and, upon termination of representation, the unearned portion of the fee must be returned to the client.

2006 FEO 18. When representation is terminated by a client, a lawyer who advances the cost of a deposition and transcript may not condition release of the transcript to the client upon reimbursement of the cost.

2007 FEO 8. A lawyer may not charge a client for filing and presenting a motion to withdraw unless withdrawal advances the client's objectives for the representation or the charge is approved by the court when ruling on a petition for legal fees from a court-appointed lawyer.

2009 FEO 8. After the entry of the order of sale in a partition proceeding, and before seeking the permission of the clerk to withdraw from the representation to serve as the commissioner for the sale, the lawyer must obtain the client's informed consent, confirmed in writing, to withdraw from the representation to serve as commissioner.

2010 FEO 1. A lawyer may appear in a lawsuit on behalf of an insured whose whereabouts are unknown if the insured has authorized the representation. However, if the insured cannot thereafter be located, the lawyer may have to file a motion to withdraw.

2013 FEO 8. Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

2013 FEO 15. Records relative to a client's matter that would be helpful to subsequent legal counsel must be provided to the client upon the termination of the representation and may be provided in an electronic format if readily accessible to the client without undue expense.

2015 FEO 5. In post-conviction or appellate proceedings, a discharged

lawyer may discuss a former client's case and turn over the former client's file to successor counsel if the former client consents or the disclosure is impliedly authorized.

2021 FEO 6. Opinion addresses a law firm's ethical responsibilities as to a departing lawyer's email account.

2023 FEO 1. Opinion clarifies a lawyer's professional responsibility when closing and/or selling a law practice and when handling aged client files.

RULE 1.17: SALE OF LAW PRACTICE

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, from an office that is within a one-hundred (100) mile radius of the purchased law practice, except the seller may continue to practice law with the purchaser and may provide legal representation at no charge to indigent persons or to members of the seller's family;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) Written notice is sent to each of the seller's clients regarding:

(1) the proposed sale, including the identity of the purchaser;

(2) the client's right to retain other counsel and to take possession of the client's files prior to the sale or at any time thereafter; and

(3) the fact that the client's consent to the transfer of the client's files and legal representation to the purchaser will be presumed if the client does not take any action or does not otherwise object within thirty (30) days of receipt of the notice.

(d) If the seller or the purchaser identifies a conflict of interest that 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 principals of law firms. *See* Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as an independent contract lawyer or an employee for the practice. Permitting the seller to continue to work for the practice will assist in the smooth transition of cases and will provide mentor-

ing to new lawyers. The requirement that the seller cease private practice also does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business. Similarly, the Rule allows the seller to provide *pro bono* representation to indigent persons on his own initiative and to provide legal representation to family members without charge. *See also* 98 Formal Ethics Opinion 6 (1998)(requirements in rule relative to sale of law practice to lawyer who is stranger to the firm do not apply to the sale of law practice to lawyer who is a current employee of firm).

[4] The Rule permits a sale attendant upon discontinuing the private practice of law from an office that is within a one-hundred (100) mile radius of the purchased practice. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another part of North Carolina or to another state.

Sale of Entire Practice or Entire Area of Practice

[5] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than the entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[6] Written notice of the proposed sale must be sent to all clients who are currently represented by the seller and to all former clients whose files will be transferred to the purchaser. Although it is not required by this rule, the placement of a notice of the proposed sale in a local newspaper of general circulation would supplement the effort to provide notice to clients as required by paragraph (c) of the rule.

[7] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered *in camera*.

[8] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. *See* Rule 1.6(b)(8). Providing the purchaser access to detailed information relating to the representation, such as the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 30 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[9] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice. The notice to clients must advise clients that they have a right to retain a lawyer other than the purchaser. In addition, the notice must inform clients that their right to counsel of their choice continues after the sale even though they consent to the transfer of the representation to the purchaser.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence

in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (*see* Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (*see* Rule 1.7 regarding conflicts and Rule 1.0(f) for the definition of informed consent); and the obligation to protect information relating to the representation (*see* Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (*see* Rule 1.16).

[13] After purchase, the law practice may retain the same name subject to the requirements of Rule 7.5. The seller's retirement or discontinuation of affiliation with the law practice must be indicated on letterhead and other communications as necessary to avoid misleading the public as to the seller's relationship to the law practice. If the seller becomes an independent contract lawyer or employee of the practice, the letterhead and other communications must indicate that the seller is no longer the owner of the firm; an "of counsel" designation would be sufficient to do so.

Applicability of the Rule

[14] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[15] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[16] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; November 16, 2006; October 2, 2014; September 22, 2016

ETHICS OPINION NOTES

98 FEO 6. Opinion rules that the requirements set forth in Rule 1.17 relative to the sale of a law practice to a lawyer who is a stranger to the firm do not apply to the sale of a law practice to lawyers who are current employees of the firm.

2023 FEO 1. Opinion clarifies a lawyer's professional responsibility when closing and/or selling a law practice and when handling aged client files.

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(1) the disqualified lawyer is timely screened from any participation in the matter; and

(2) written notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the

lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In such a situation, to avoid the creation of a duty to the person under this Rule, a lawyer has an affirmative obligation to warn the person that a communication with the lawyer will not create a client-lawyer relationship and information conveyed to the lawyer will not be confidential or privileged. *See also* Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person is communicating information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. *See* Rule 1.0(f) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. *See* Rule 1.0(l) (requirements for screening procedures). Paragraph (d)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement nor does it specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the client, a reasonable delay may be justified.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, *see* Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, *see* Rule 1.15. For the special considerations when a prospective client has diminished capacity, *see* Rule 1.14.

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

Adopted by the Supreme Court: March 1, 2003

Amendments Approved by the Supreme Court: October 2, 2014

ETHICS OPINION NOTES

RPC 168. A lawyer may ask her client for a waiver of objection to a possible future representation presenting a conflict of interest if certain conditions are met.

RPC 244. Opinion rules that although a lawyer asks a prospective client to sign a form stating that no client-lawyer relationship will be created by reason of a free consultation with the lawyer, the lawyer may not subsequently disclaim the creation of a client-lawyer relationship and represent the opposing party.

RPC 246. Opinion rules that, under certain circumstances, a lawyer may not represent a party whose interests are opposed to the interests of a prospective client if confidential information of the prospective client must be used in the representation.

2003 FEO 8. Opinion interprets various provisions of Rule 1.18.

2006 FEO 14. Opinion rules that when a lawyer charges a fee for a consultation, and the lawyer accepts payment, there is a client-lawyer relationship for the purposes of the Rules of Professional Conduct.

2011 FEO 8. Guidelines for the use of live chat support services on law firm websites.

2011 FEO 10. A lawyer may advertise on a website that offers daily discounts to consumers where the website company's compensation is a percentage of the amount paid to the lawyer if certain disclosures are made and certain conditions are satisfied.

2020 FEO 1. Opinion rules that a lawyer may respond to a negative online review but may not disclose confidential information in the response.

Rule 1.19: SEXUAL CONDUCT WITH CLIENTS PROHIBITED

(a) A lawyer shall not have engage in sexual activity with a client. For purposes of this Rule, "sexual activity" means:

- (1) sexual intercourse; or
- (2) any touching of a person or causing such person to touch the lawyer for the purpose of arousing or gratifying the sexual desire of either party.

(b) A lawyer shall not engage in sexual communications with a client. For purposes of this Rule, "sexual communications" means:

- (1) requesting or actively participating in sexually explicit conversation; or
- (2) requesting or transmitting messages, images, audio, video, or other content that contain nudity or sexually explicit material.

Communications that contain nudity or sexually explicit content but are relevant to the client's legal matter and are made in furtherance of the representation are not "sexual communications" for purposes of this Rule.

(c) A lawyer shall not request, require, or demand sexual activity or sexual communications with a client incident to or as a condition of any professional representation.

(d) Scope.

(1) The prohibitions in this Rule apply to:

- (A) current clients;
- (B) an individual or a representative of an organization who is consulting with a lawyer about the possibility of forming a client-lawyer relationship, until the lawyer declines the representation; and
- (C) representatives of a current client with whom the lawyer is authorized to communicate regarding the representation.

(2) Paragraph (a) shall not apply if a consensual sexual relationship existed between the lawyer and the person identified in (d)(1) before the legal representation or consultation commenced.

(3) Paragraph (b) shall not apply if the lawyer and the person identified in (d)(1) consensually engaged in sexual communications before the legal representation or consultation commenced.

(4) For purposes of this rule, "lawyer" means any lawyer who assists in the representation of the client but does not include other lawyers in a firm who provide no such assistance.

Comment

[1] Rule 1.7, the general rule on conflict of interest, has always prohibited a lawyer from representing a client when the lawyer's ability competently to represent the client may be impaired by the lawyer's other personal or professional commitments. Under the general rule on conflicts and the rule on prohibited transactions (Rule 1.8), relationships with clients, whether personal or financial, that affect a lawyer's ability to exercise his or her independent professional judgment on behalf of a client are closely scrutinized. The rules on conflict of interest have always prohibited the representation of a client if a sexual relationship with the client presents a significant danger to the lawyer's ability to represent the client adequately. The present rule clarifies that sexual conduct with a client is damaging to the client-lawyer relationship and creates an impermissible conflict of interest that cannot be ameliorated by the consent of the client.

Exploitation of the Lawyer's Fiduciary Position

[2] The relationship between a lawyer and client is a fiduciary relationship in which the lawyer occupies the highest position of trust and confidence. The relationship is also inherently unequal. The client comes to a lawyer with a problem and puts his or her faith in the lawyer's special knowledge, skills, and ability to solve the client's problem. The same factors that led the client to place his or her trust and reliance in the lawyer also have the potential to place the lawyer in a position of dominance and the client in a position of vulnerability.

[3] Sexual conduct 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 sexual conduct 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 sexual conduct 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. Sexual conduct 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. Sexual conduct 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 on sexual conduct with a client applies regardless of whether it prejudices the client and regardless of whether the conduct is consensual.

Prior Consensual Relationship

[6] Sexual conduct that predates the client-lawyer relationship is not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are not present when the sexual conduct 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 engaged in sexual conduct. The potential impairment of the lawyer's ability to exercise independent professional judgment on behalf of the client with whom he or she is engaging in a sexual conduct is specific to that lawyer's representation of the client and is unlikely to affect the ability of other members of the firm to competently and dispassionately represent the client.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; November 2, 2022

Rule 2.1: ADVISOR

In representing a client, a lawyer shall exercise independent, professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but also to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations such as cost or effects on other people are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

2011 FEO 4. A lawyer may not agree to procure title insurance exclusively from a particular title insurance agency on every transaction referred to the lawyer by a person associated with the agency.

2022 FEO 2. Opinion rules that a privately retained lawyer may provide limited representation to a criminal defendant who has been appointed counsel if the limitation is reasonable under the circumstances.

Rule 2.2: RESERVED

Adopted by the Supreme Court: July 24, 1997; Revoked March 1, 2003

RULE 2.3: EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

- (1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and
- (2) the client so requests or the client consents after consultation

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Comment

Definition

[1] An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to Third Person

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are

material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Financial Auditors' Requests for Information

[5] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

RULE 2.4: LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission and the North Carolina Canons of Ethics for Arbitrators.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-res-

olution process takes place before a tribunal, as in binding arbitration (*see* Rule 1.0(n)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court: March 1, 2003

RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim that otherwise would be prohibited by this Rule.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court: July 24, 1997
Amendments Approved by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

CPR 122. An attorney representing the defendant in divorce action, when advised by the client that parties have not been separated a year, must file an answer denying the allegation of separation even though the client does not wish to contest the divorce.

CPR 321. It is improper for an attorney to file motions and pleadings for the mere purpose of delay.

2003 FEO 13. An attorney may file a time-barred claim on behalf of a client, even when the defendant is unavailable and can only be served by publication.

2006 FEO 9. If the lawyer concludes that pursuit of a lawsuit filed against a defendant is frivolous, but the GAL for the minor client insists on continuing the litigation, the lawyer must either move to withdraw from the representation or seek to have the GAL removed.

2008 FEO 3. A lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2008 FEO 4. A lawyer may issue a subpoena in compliance with Rule 45 of the Rules of Civil Procedure which authorizes a subpoena for the production of documents to the lawyer's office without the need to schedule a hearing, deposition or trial.

2008 FEO 17. A lawyer appointed to represent a parent at the trial of a juvenile case may file a notice of appeal to preserve the client's right to appeal although the lawyer does not believe that the appeal has merit.

2009 FEO 5. A lawyer may serve the opposing party with discovery requests that require the party to reveal her citizenship status, but the lawyer may not report the status to ICE unless required to do so by federal or state law.

2009 FEO 15. A prosecutor must dismiss a DWI charge when the prosecutor fails to appeal a court order suppressing evidence from the traffic stop thereby eliminating the evidence necessary to prove the charge.

2011 FEO 3. A criminal defense lawyer may advise an undocumented alien that deportation may result in avoidance of a criminal conviction and may file a notice of appeal to superior court although there is a possibility that client will be deported.

2013 FEO 1. Subject to conditions, a prosecutor may enter into an agreement to consent to vacating a conviction upon the convicted person's release of civil claims against the prosecutor, law enforcement authorities, or other public officials or entities.

2016 FEO 2. When advancing claims on behalf of a criminal defendant who filed a *pro se* Motion for Appropriate Relief, subsequently appointed defense counsel must correct erroneous claims and statements of law or facts set out in the previous *pro se* filing.

RULE 3.2: EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

History Note: Statutory Authority G.S. 84-23
Adopted by the Supreme Court: July 24, 1997
Amendments Approved by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

CPR 321. It is improper for an attorney to file motions and pleadings for the mere purpose of delay.

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an

informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. *See* Rule 1.0(n) for the definition of “tribunal.” It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client’s case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate’s duty of candor to the tribunal. Consequently, although a lawyer in an adjudicative proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of material fact or law or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer. *Compare* Rule 3.1. However, an assertion purporting to be on the lawyer’s own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. *See also* Rule 8.4(b), Comment.

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client’s wishes. This duty is premised on the lawyer’s obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness’s testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. *See* Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer’s knowledge that evidence is false, however, can be inferred from the circumstances. *See* Rule 1.0(g). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evi-

dence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer’s ability to discriminate in the quality of evidence and thus impair the lawyer’s effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client’s decision to testify. *See also* Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer’s client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer’s direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The lawyer’s action must also be 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 advocate’s proper course is to remonstrate with the client confidentially, advise the client of the lawyer’s duty of candor to the tribunal and seek the client’s cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate’s only option may be to make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client’s false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. *See* Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer’s advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer’s client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

[13] The general rule that an advocate must reveal the existence of perjury with respect to a material fact—even that of a client—applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer’s ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. These provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Duration of Obligation

[14] A practical time limit on the obligation to rectify false evidence or false statements of material fact or law has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obli-

gation. A proceeding has concluded within the meaning of this Rule when no matters in the proceeding are still pending before the tribunal or the proceeding has concluded pursuant to the rules of the tribunal such as when a final judgment in the proceeding is affirmed on appeal, a bankruptcy case is closed, or the time for review has passed.

Ex Parte Proceedings

[15] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any *ex parte* proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an *ex parte* proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[16] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

CPR 92. An attorney who knows that criminal clients gave arresting officers fictitious names should call upon the clients to disclose their true identities to the court and, if they refuse, seek to withdraw. (*See also* Rule 3.3(a)(3))

CPR 122. An attorney representing the defendant in divorce action, when advised by the client that parties have not been separated a year, must file an answer denying the allegation of separation even though the client does not wish to contest the divorce.

CPR 284. An attorney may seek alimony for a wife although he has evidence of the wife's adultery so long as he does not have to offer perjured testimony or other false evidence.

RPC 33. If an attorney's client testifies falsely regarding a material matter, such as his or her name or criminal record, the attorney must call upon the client to correct the testimony. If the client refuses, the attorney must seek to withdraw in accordance with the rules of the tribunal. (*See also* Rule 3.3(a)(3))

RPC 203. Dismissal of an action alone is not sufficient to rectify the perjury of a client in a deposition and the lawyer must demand that the client inform the opposing party of the falsity of the deposition testimony or, if the client refuses, withdraw from the representation. (*See also* Rule 3.3(a)(3))

98 FEO 1. A lawyer representing a client in a social security disability hearing is not required to inform the administrative law judge of material adverse facts known to the lawyer.

98 FEO 5. A defense lawyer may remain silent while the prosecutor presents an inaccurate driving record to the court provided the lawyer and client did not criminally or fraudulently misrepresent the driving record to the prosecutor or the court, and further provided, that on application for a limited driving privilege, there is no misrepresentation to the court about the client's prior driving record.

98 FEO 20. Subject to a statute prohibiting the withholding of the information, a lawyer's duty to disclose confidential client information to a bankruptcy court ends when the case is closed although the debtor's duty to report new property continues for 180 days after the date of filing the petition.

99 FEO 16. A lawyer may not participate in the presentation of a consent judgment to a court if the lawyer knows that the consent judgment is based

upon false information.

2001 FEO 1. In a petition to a court for an award of an attorney's fee, a lawyer must disclose that the client paid a discounted hourly rate for legal services as a result of the client's membership in a prepaid or group legal services plan.

2003 FEO 5. Opinion rules that neither a defense lawyer nor a prosecutor may participate in the misrepresentation of a criminal defendant's prior record level in a sentencing proceeding even if the judge is advised of the misrepresentation and does not object.

2008 FEO 1. A lawyer representing an undocumented worker in a workers' compensation action has a duty to correct court documents containing false statements of material fact and is prohibited from introducing evidence in support of the proposition that an alias is the client's legal name.

2008 FEO 3. A lawyer may assist a *pro se* litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2010 FEO 1. A lawyer may appear in a lawsuit on behalf of an insured whose whereabouts are unknown if the insured has authorized the representation. However, if the insured cannot thereafter be located, the lawyer may not mislead the court about the insured's absence.

2011 FEO 3. A criminal defense lawyer may advise an undocumented alien that deportation may result in avoidance of a criminal conviction and may file a notice of appeal to superior court although there is a possibility that client will be deported.

2011 FEO 12. A lawyer must notify the court when a clerk of court mistakenly dismisses a client's charges.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2016 FEO 2. When advancing claims on behalf of a criminal defendant who filed a *pro se* Motion for Appropriate Relief, subsequently appointed defense counsel must correct erroneous claims and statements of law or facts set out in the previous *pro se* filing.

2018 FEO 2: A lawyer has a duty to disclose to a tribunal adverse legal authority that is controlling as to that tribunal if the legal authority is known to the lawyer and is not disclosed by opposing counsel.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, counsel or assist a witness to hide or leave the jurisdiction for the purpose of being unavailable as a witness, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey or advise a client or any other person to disobey an obligation under the rules of a tribunal, except a lawyer acting in good faith may take appropriate steps to test the validity of such an obligation;

(d) in pretrial procedure,

(1) make a frivolous discovery request

(2) fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party, or

(3) fail to disclose evidence or information that the lawyer knew, or reasonably should have known, was subject to disclosure under applicable law, rules of procedure or evidence, or court opinions;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, ask an irrelevant question that is intended to degrade a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or a managerial employee or other agent of a

client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses, including lost income, or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Paragraph (c) permits a lawyer to take steps in good faith and within the framework of the law to test the validity of rules; however, the lawyer is not justified in consciously violating such rules and the lawyer should be diligent in the effort to guard against the unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that the lawyer believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless the lawyer believes that the statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing the witness; and a lawyer should not, by subterfuge, put before a jury matters which it cannot properly consider.

[5] Paragraph (d) makes it clear that a lawyer must be reasonably diligent in making inquiry of the client, or third party, about information or documents responsive to discovery requests or disclosure requirements arising from statutory law, rules of procedure, or caselaw. "Reasonably" is defined in Rule 0.1, *Terminology*, as meaning "conduct of a reasonably prudent and competent lawyer." Rule 0.1(i). When responding to a discovery request or disclosure requirement, a lawyer must act in good faith. The lawyer should impress upon the client the importance of making a thorough search of the client's records and responding honestly. If the lawyer has reason to believe that a client has not been forthcoming, the lawyer may not rely solely upon the client's assertion that the response is truthful or complete.

[6] To bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, and as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact and is prohibited by paragraph (e). However, a lawyer may argue, on an analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

[7] Paragraph (f) permits a lawyer to advise managerial employees of a client to refrain from giving information to another party because the statements of employees with managerial responsibility may be imputed to the

client. *See also* Rule 4.2.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 1, 2003; November 16, 2006

ETHICS OPINION NOTES

CPR 2. An attorney generally does not need the consent of the adverse party to talk to witnesses.

CPR 284. An attorney may seek alimony for a wife although he has evidence of the wife's adultery so long as he does not have to offer perjured testimony or other false evidence.

CPR 340. An attorney may represent a client with a malpractice claim even though the client has entered a contingent fee contract with a medical consultant for case evaluation, preparation and expert witness location, so long as the consultant does not present evidence and the compensation of the expert witness provided by the consultant is not contingent upon the outcome of the litigation.

RPC 225. The lawyer for a defendant in criminal and civil actions arising out of the same event may seek the cooperation of a crime victim on a plea agreement provided the settlement of the victim's civil claim against the defendant is not contingent upon the content of the testimony of the victim or the outcome of the case.

2008 FEO 15. Provided the agreement does not constitute the criminal offense of compounding a crime and is not otherwise illegal, and does not contemplate the fabrication, concealment, or destruction of evidence, a lawyer may participate in a settlement agreement of a civil claim that includes a non-reporting provision prohibiting the plaintiff from reporting the defendant's conduct to law enforcement authorities.

2009 FEO 7. A criminal defense lawyer or a prosecutor may not interview a child who is the alleged victim in a criminal case alleging physical or sexual abuse if the child is younger than the age of maturity as determined by the General Assembly for the purpose of an in-custody interrogation (currently age fourteen) unless the lawyer has the consent of a non-accused parent or guardian or a court order allows the lawyer to seek an interview with the child without such consent; a lawyer may interview a child who is this age or older without such consent or authorization provided the lawyer complies with Rule 4.3, reasonably determines that the child is sufficiently mature to understand the lawyer's role and purpose, and avoids any conduct designed to coerce or intimidate the child.

2014 FEO 5. A lawyer must advise a civil litigation client about the legal ramifications of the client's postings on social media as necessary to represent the client competently. The lawyer may advise the client to remove postings on social media if the removal is done in compliance with the rules and law on preservation and spoliation of evidence.

2022 FEO 5. Opinion rules that a lawyer may call as an expert witness a public adjuster who will collect a statutorily authorized contingency fee paid by the client.

2023 FEO 2. Opinion rules that a confidentiality clause contained in a settlement agreement that restricts a lawyer's ability to practice law violates Rule 5.6.

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) A lawyer representing a party in a matter pending before a tribunal shall not:

- (1) seek to influence a judge, juror, member of the jury venire, or other official by means prohibited by law;
- (2) communicate ex parte with a juror or member of the jury venire except as permitted by law;
- (3) unless authorized to do so by law or court order, communicate ex parte with the judge or other official regarding a matter pending before the judge or official;
- (4) engage in conduct intended to disrupt a tribunal, including:
 - (A) failing to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving opposing counsel timely notice of the intent not to comply;

(B) engaging in undignified or discourteous conduct that is degrading to a tribunal; or

(C) intentionally or habitually violating any established rule of procedure or evidence; or

(5) communicate with a juror or prospective juror after discharge of the jury if:

(A) the communication is prohibited by law or court order;

(B) the juror has made known to the lawyer a desire not to communicate; or

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

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

(c) A lawyer shall reveal promptly to the court improper conduct by a juror or a member of the jury venire, and improper conduct by another person toward a juror, a member of the jury venire, or the family members of a juror or a member of the jury venire.

(d) For purposes of this rule:

(1) *Ex parte* communication means a communication on behalf of a party to a matter pending before a tribunal that occurs in the absence of an opposing party, without notice to that party, and outside the record.

(2) A matter is “pending” before a particular tribunal when that tribunal has been selected to determine the matter or when it is reasonably foreseeable that the tribunal will be so selected.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the North Carolina Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of provisions. This rule also prohibits gifts of substantial value to judges or other officials of a tribunal and stating or implying an ability to influence improperly a public official.

[2] To safeguard the impartiality that is essential to the judicial process, jurors and members of the jury venire should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with members of the jury venire prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with a juror or a member of the jury venire about the case.

[3] After the jury has been discharged, a lawyer may communicate with a juror unless the communication is prohibited by law or court order. The lawyer must refrain from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases, and must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] Vexatious or harassing investigations of jurors or members of the jury venire seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on the lawyer’s behalf who conducts an investigation of jurors or members of the jury venire should act with circumspection and restraint.

[5] Communications with, or investigations of, members of the families of jurors or the families of members of the jury venire by a lawyer or by anyone on the lawyer’s behalf are subject to the restrictions imposed upon the lawyer with respect to the lawyer’s communications with, or investigations of, jurors or members of the jury venire.

[6] Because of the duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a juror, a prospective juror, or a member of the family of either should make a prompt report to the court regarding such conduct.

[7] The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, shall not give or lend anything of value to a judge, a hearing officer, or an official or employee of a tribunal under circumstances which might give the appearance that the gift or loan is made to influence official action.

[8] All litigants and lawyers should have access to tribunals on an equal

basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if unrepresented. Ordinarily, an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel or, if there is none, to the opposing party. A lawyer should not condone or lend himself or herself to private importunities by another with a judge or hearing officer on behalf of the lawyer or the client.

[9] The advocate’s function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge’s default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[10] As professionals, lawyers are expected to avoid disruptive, undignified, discourteous, and abusive behavior. Therefore, the prohibition against conduct intended to disrupt a tribunal applies to conduct that does not serve a legitimate goal of advocacy or a requirement of a procedural rule and includes angry outbursts, insults, slurs, personal attacks, and unfounded personal accusations as well as to threats, bullying, and other attempts to intimidate or humiliate judges, opposing counsel, litigants, witnesses, or court personnel. Zealous advocacy does not rely upon such tactics and is never a justification for such conduct. This conduct is prohibited both in open court and in ancillary proceedings conducted pursuant to the authority of the tribunal (e.g., depositions). *See* comment [11], Rule 1.0(n). Similarly, insults, slurs, threats, personal attacks, and groundless personal accusations made in documents filed with the tribunal are also prohibited by this Rule. “Conduct of this type breeds disrespect for the courts and for the legal profession. Dignity, decorum, and respect are essential ingredients in the proper conduct of a courtroom, and therefore in the proper administration of justice.” *Atty. Grievance Comm’n v. Alison*, 565 A.2d 660, 666 (Md. 1989). *See also* Rule 4.4(a) (prohibiting conduct that serves no substantial purpose other than to embarrass, delay, or burden a third person) and Rule 8.4(d) (prohibiting conduct prejudicial to the administration of justice).

[11] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition or mediation. *See* Rule 1.0(n).

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; March 5, 2015; April 5, 2018; March 27, 2019

ETHICS OPINION NOTES

CPR 16. A lawyer or group of lawyers may contribute to a judge’s campaign in a reasonable amount.

CPR 183. An attorney who represents a judge may not appear before the judge. (*But see* 97 FEO 1.)

CPR 225. It is permissible for an attorney to appear before his brother judge if the lawyer for the adverse party and his client consent.

CPR 226. Although an attorney may not appear before his brother judge without the consent of the parties, his partners and associates may.

CPR 283. The fact that a law firm’s secretary is the spouse of a magistrate does not disqualify members of the law firm from practicing criminal law before the magistrate.

CPR 318. The fact that an attorney’s spouse is a judge’s secretary does not disqualify the attorney from practicing before the judge.

CPR 337. After a jury trial, an attorney may communicate with jurors as to why they decided issues as they did and their opinions of the attorney’s performance, unless such is prohibited by court rule.

RPC 122. A member of the attorney general’s staff may not consult *ex parte* with a trial court judge if it is likely that that attorney or another attorney working in the same division of the attorney general’s office will represent the state in the appeal of the case.

RPC 214. A lawyer may not send a jury questionnaire directly to prospective members of the jury but, if the questionnaire is sent out by the court, such communications are not prohibited.

RPC 237. A lawyer may not communicate with the judge before whom a proceeding is pending to request an *ex parte* order unless opposing counsel is given adequate notice or unless authorized by law.

97 FEO 1. A lawyer may appear in court before a judge the lawyer represents in a personal matter provided there is disclosure of the representation and all parties and lawyers agree that the relationship between the lawyer and the judge is immaterial to the trial of the matter.

97 FEO 3. A lawyer may engage in an *ex parte* communication with a judge regarding a scheduling or administrative matter only if necessitated by the administration of justice or exigent circumstances and diligent efforts to notify opposing counsel have failed.

97 FEO 5. A lawyer must provide the opposing counsel with a copy of a proposed order at the same time that the lawyer submits the proposed order to the judge in an *ex parte* communication.

98 FEO 12. Opinion sets forth the disclosures a lawyer must make to the judge prior to engaging in an *ex parte* communication.

98 FEO 13. Opinion restricts informal written communications with a judge or judicial official relative to a pending matter.

98 FEO 20. Subject to a statute prohibiting the withholding of the information, a lawyer's duty to disclose confidential client information to a bankruptcy court ends when the case is closed although the debtor's duty to report new property continues for 180 days after the date of filing the petition.

2001 FEO 15. A lawyer may not communicate *ex parte* with a judge in reliance upon the communication being "permitted by law" unless there is a statute or case law specifically and clearly authorizing such communications or proper notice is given to the adverse party or counsel. (Note: Judicial Standards Commission does not consider communications made *ex parte* pursuant to G.S. 15A-534.1 to be improper.)

2003 FEO 17. An attorney may only provide a judge with additional authority post-hearing if the communication is permitted by the rules of the tribunal and a copy of the writing is furnished simultaneously to opposing counsel.

2014 FEO 8. A lawyer may accept an invitation from a judge to be a "connection" on a professional networking website, and may endorse a judge. However, a lawyer may not accept a legal skill or expertise endorsement or a recommendation from a judge.

2019 FEO 4. Opinion discusses the permissibility of various types of communications between lawyers and judges.

RULE 3.6: TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) the information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (A) the identity, residence, occupation and family status of the accused;
 - (B) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (C) the fact, time and place of arrest; and
 - (D) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is reasonably necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e) The foregoing provisions of Rule 3.6 do not preclude a lawyer from replying to charges of misconduct publicly made against the lawyer or from participating in the proceedings of legislative, administrative, or other investigative bodies.

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates. A lawyer who is subject to the rule must take reasonable measures to insure the compliance of nonlawyer assistants and may not employ agents to make statements the lawyer is prohibited from making. Rule 5.3 and Rule 8.4(a); see, e.g., Rule 3.8(f) (prosecutor's duty to exercise reasonable care to prevent persons assisting prosecutor or associated with prosecutor from making improper extrajudicial statements).

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a). Although paragraph (b)(2) allows extrajudicial statements about information in a public record, a lawyer may not use this safe harbor to justify, by means of filing pleadings or other public records, statements prohibited by paragraph (a). See also Rule 3.1.

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

- (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
- (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
- (3) the performance or results of any examination or test or the refusal or

failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others. Moreover, when there is sufficient prior notice, a lawyer is encouraged to seek judicial intervention to prevent improper extrajudicial statements that may be prejudicial to the client and thereby avoid the necessity of a public response.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 9, 2008

ETHICS OPINION NOTES

CPR 4. The rule restricting pretrial publicity does not apply when the case is on appeal.

98 FEO 4. Opinion examines the restrictions on a lawyer's public comments about a pending civil proceeding in which the lawyer is participating.

RULE 3.7: LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(f) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

CPR 18. An attorney may testify on behalf of his former client after he has withdrawn, even if he is to be reimbursed for expenses advanced while he was employed from any recovery.

CPR 93. A law firm may not continue to represent a husband charged with his wife's murder after the public defender who had represented a codefendant who had agreed to testify against the husband in the same case joins the firm.

CPR 162. An attorney may testify as to the value of his services, but may not testify as to his client's emotional condition.

CPR 212. An attorney who is sued may have his partner represent him

and may testify in his own behalf without his partner's having to withdraw.

CPR 350. An attorney may continue to serve as administrator C.T.A. even though his secretary may testify as a witness.

RPC 19. An attorney may represent a client even though his secretary must be called as a witness.

RPC 142. A lawyer may not represent an estate in litigation against a claimant where the lawyer's testimony may be necessary to resolve the validity of the claim.

2010 FEO 5. In a case involving international child support enforcement issues, the child support enforcement lawyer, who works in the North Carolina Attorney General's Office, may call another lawyer from the attorney general's staff to testify as an expert.

2011 FEO 1. Guidelines for the application of the prohibition in Rule 3.7 on a lawyer serving as both advocate and witness when the lawyer is the litigant.

2012 FEO 9. A lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

2012 FEO 15. Whether a lawyer is a "necessary witness" and thereby disqualified from acting as a client's advocate at a trial is an issue left up to the discretion of the tribunal.

2020 FEO 3. Opinion rules that Rule 3.7 does not prohibit a solo practitioner and owner of a PLLC from representing the PLLC and testifying in a dispute involving a former client.

2022 FEO 1. Opinion rules that an attorney appointed by the court as the guardian ad litem and the attorney advocate may not testify as a witness unless directed to do so by the court.

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

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

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) after reasonably diligent inquiry, make timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions including all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client, or participate in the application for the issuance of a search warrant to a lawyer for the seizure of information of a past or present client in connection with an investigation of someone other than the lawyer, unless:

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

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

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

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible evidence or information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall:

(1) if the conviction was obtained in the prosecutor's jurisdiction, promptly disclose that evidence or information to (i) the defendant or defendant's counsel of record if any, and (ii) the North Carolina Office of Indigent Defense Services or, in the case of a federal conviction, the federal public defender for the jurisdiction; or

(2) if the conviction was obtained in another jurisdiction, promptly disclose that evidence or information to the prosecutor's office in the jurisdiction of the conviction or to (i) the defendant or defendant's counsel of record if any, and (ii) the North Carolina Office of Indigent Defense Services or, in the case of a federal conviction, the federal public defender for the jurisdiction of conviction.

(h) A prosecutor who concludes in good faith that evidence or information is not subject to disclosure under paragraph (g) does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict or to uphold a conviction. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. See the ABA Standards of Criminal Justice Relating to the Prosecution Function. A systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] The prosecutor represents the sovereign and, therefore, should use restraint in the discretionary exercise of government powers, such as in the selection of cases to prosecute. During trial, the prosecutor is not only an advocate, but he or she also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all. In our system of criminal justice, the accused is to be given the benefit of all reasonable doubt. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence known to him or her that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.

[3] Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[4] Every prosecutor should be aware of the discovery requirements established by statutory law and case law. See, e.g., N.C. Gen. Stat. §15A-903 et. seq, *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. U.S.*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419 (1995). The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[5] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings, and search warrants for client information, to those situations in which there is a genuine need to intrude into the client-lawyer relationship. The provision applies only when someone other than the lawyer is the target of a criminal investigation.

[6] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements that a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[7] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are

associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[8] When a prosecutor knows of new, credible evidence or information creating a reasonable likelihood that a defendant did not commit an offense for which the defendant was convicted in the prosecutor's district, paragraph (g)(1) requires prompt disclosure to the defendant. However, if disclosure will harm the defendant's interests or the integrity of the evidence or information, disclosure should be made to the defendant's lawyer if any. Disclosure must be made to North Carolina Indigent Defense Services (NCIDS) or, if appropriate, the federal public defender, under all circumstances regardless of whether disclosure is also made to the defendant or the defendant's lawyer. If there is a good faith basis for not disclosing the evidence or information to the defendant, disclosure to NCIDS or the federal public defender and to any counsel of record satisfies this rule. If the conviction was obtained in another jurisdiction, paragraph (g)(2) allows the prosecutor promptly to disclose the evidence or information to the prosecutor's office in the jurisdiction of conviction in lieu of any other disclosure. The prosecutor in the jurisdiction of the conviction then has an independent duty of disclosure under paragraph (g)(1). In lieu of disclosure to the prosecutor's office in the jurisdiction of conviction, paragraph (g)(2) requires disclosure to the defendant or to the defendant's lawyer, if any, and to NCIDS or, if appropriate, the federal public defender.

[9] The word "new" as used in paragraph (g) means evidence or information unknown to a trial prosecutor at the time of the conviction or, if known to a trial prosecutor at the time of the conviction, never previously disclosed to the defendant or defendant's legal counsel. When analyzing new evidence or information, the prosecutor must evaluate the substance of the information received, and not solely the credibility of the source, to determine whether the evidence or information creates a reasonable likelihood that the defendant did not commit the offense.

[10] Nevertheless, a prosecutor who receives evidence or information relative to a conviction may disclose that evidence or information as directed in paragraph (g)(1) and (2) without examination to determine whether it is new, credible, or creates a reasonable likelihood that a convicted defendant did not commit an offense. A prosecutor who receives evidence or information subject to disclosure under paragraph (g) does not have a duty to undertake further investigation to determine whether the defendant is in fact innocent.

[11] A prosecutor's independent judgment, made in good faith, that the new evidence or information is not of such nature as to trigger the obligations of paragraph (g), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; November 16, 2006; March 16, 2017

ETHICS OPINION NOTES

RPC 129. Opinion rules that prosecutors and defense attorneys may negotiate plea agreements in which appellate and postconviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct.

RPC 152. Opinion rules that the prosecutor and the defense attorney must see that all material terms of a negotiated plea are disclosed in response to direct questions concerning such matters when pleas are entered in open court.

RPC 197. A prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.

RPC 204. It is prejudicial to the administration of justice for a prosecutor to offer special treatment to individuals charged with traffic offenses or minor crimes in exchange for a direct charitable contribution to the local school system.

RPC 243. It is prejudicial to the administration of justice for a prosecutor to threaten to use his discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant.

2011 FEO 16. A criminal defense lawyer accused of ineffective assistance of counsel by a former client may share confidential client information with prosecutors to help establish a defense to the claim so long as the lawyer reasonably believes a response is necessary and the response is narrowly tailored to respond to the allegations.

2013 FEO 1. Subject to conditions, a prosecutor may enter into an agreement to consent to vacating a conviction upon the convicted person's release of civil claims against the prosecutor, law enforcement authorities, or other public officials or entities.

2013 FEO 6. A state prosecutor does not violate the Rules of Professional Conduct by asking the court to enter an order for arrest when a defendant detained by ICE fails to appear in court on the defendant's scheduled court date.

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. Rule 1.6(b)(1) permits a lawyer to disclose information when required by law. Similarly, Rule 1.6(b)(4) permits a lawyer to disclose information when necessary to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; March 1, 2023

ETHICS OPINION NOTES

RPC 182. A lawyer must disclose to an adverse party with whom the lawyer is negotiating a settlement that the lawyer's client died.

RPC 236. A lawyer may not issue a subpoena containing misrepresentations as to the pendency of an action, the date or location of a hearing, or a lawyer's authority to obtain documentary evidence.

2008 FEO 3. A lawyer may assist a pro se litigant by drafting pleadings

and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2008 FEO 14. It is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract or pleading excerpts from a legal brief, contract or pleading written by another lawyer.

2018 FEO 5. Opinion rules that a lawyer may not use deception when seeking access to a person's restricted social network presence and may not instruct a third party to use deception.

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. It is not a violation of this rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy.

(b) Notwithstanding section (a) above, in representing a client who has a dispute with a government agency or body, a lawyer may communicate about the subject of the representation with the elected officials who have authority over such government agency or body even if the lawyer knows that the government agency or body is represented by another lawyer in the matter, but such communications may only occur under the following circumstances:

- (1) in writing, if a copy of the writing is promptly delivered to opposing counsel;
- (2) orally, upon adequate notice to opposing counsel; or
- (3) in the course of official proceedings.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule does not prohibit a lawyer who does not have a client relative to a particular matter from consulting with a person or entity who, though represented concerning the matter, seeks another opinion as to his or her legal situation. A lawyer from whom such an opinion is sought should, but is not required to, inform the first lawyer of his or her participation and advice.

[3] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[4] A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). However, parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client or, in the case of a government lawyer, investigatory personnel, concerning a communication that the client, or such investigatory personnel, is legally entitled to make. The Rule is not intended to discourage good faith efforts by individual parties to resolve their differences. Nor does the Rule prohibit a lawyer from encouraging a client to communicate with the opposing party with a view toward the resolution of the dispute.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. When a government agency or body is represented with regard to a particular matter, a lawyer may communicate with the elected government officials who have authority over that agency under the circumstances set forth in paragraph (b).

[6] Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through

investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[7] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[8] This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates. The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[9] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. It also prohibits communications with any constituent of the organization, regardless of position or level of authority, who is participating or participated substantially in the legal representation of the organization in a particular matter. Consent of the organization's lawyer is not required for communication with a former constituent unless the former constituent participated substantially in the legal representation of the organization in the matter. If an employee or agent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication would be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4, Comment [2].

[10] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(g). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[11] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

CPR 2. An attorney generally does not need the consent of the adverse party to talk to witnesses.

CPR 138. An attorney representing a party may not send copies of motions to another party he knows has counsel.

RPC 15. An attorney may interview a person with adverse interest who is unrepresented and make a demand or propose a settlement.

RPC 30. A district attorney may not communicate or cause another to communicate with a represented defendant without the defense lawyer's consent.

RPC 39. An attorney may not communicate settlement demands directly to an insurance company which has employed counsel to represent its insured unless that lawyer consents.

RPC 61. A defense attorney may interview a child who is the prosecuting witness in a molestation case without the knowledge or consent of the district attorney.

RPC 67. An attorney generally may interview a rank and file employee of an adverse corporate party without the knowledge or consent of the corporate party or its counsel.

RPC 81. A lawyer may interview an unrepresented former employee of an adverse corporate party without the permission of the corporation's lawyer. (*But see* 97 FEO 2)

RPC 87. A lawyer wishing to interview a witness who is not a party, but who is represented by counsel, must obtain the consent of the witness' lawyer.

RPC 93. Opinion concerns several situations in which an attorney who represents a criminal defendant wishes to interview other individuals who are represented by attorneys who will not agree to permit the attorney to interview their clients.

RPC 110. An attorney employed by an insurer to defend in the name of the defendant pursuant to underinsured motorist coverage may not communicate with that individual without the consent of another attorney employed to represent that individual by her liability insurer.

RPC 119. An attorney may acquiesce in a client's communication with an opposing party who is represented without the other attorney's consent, but may not actively encourage or participate in such communication.

RPC 128. A lawyer may not communicate with an adverse corporate party's house counsel, who appears in the case as a corporate manager, without the consent of the corporation's independent counsel.

RPC 132. A lawyer for a party adverse to the government may freely communicate with government officials concerning the matter until notified that the government is represented in the matter.

RPC 162. A lawyer may not communicate with the opposing party's nonparty treating physician about the physician's treatment of the opposing party unless the opposing party consents.

RPC 180. A lawyer may not passively listen while the opposing party's nonparty treating physician comments on his or her treatment of the opposing party unless the opposing party consents.

RPC 184. The lawyer for opposing party may communicate directly with the pathologist who performed an autopsy on plaintiff's decedent without the consent of the personal representative of the decedent's estate.

RPC 193. The attorney for the plaintiffs in a personal injury action arising out of a motor vehicle accident may interview the unrepresented defendant even though the uninsured motorist insurer, which had elected to defend the claim in the name of the defendant, is represented by an attorney in the matter.

RPC 202. An attorney may communicate in writing with the members of an elected body which is represented by a lawyer in a matter if the purpose of the communication is to request that the matter be placed on the public meeting agenda of the elected body and a copy of the written communication is given to the attorney for the elected body.

RPC 219. A lawyer may communicate with a custodian of public records, pursuant to the North Carolina Public Records Act, for the purpose of making a request to examine public records related to the representation although the custodian is an adverse party whose lawyer does not consent to the communication.

RPC 224. Employer's lawyer may not engage in direct communications with the treating physician for an employee with a workers' compensation claim.

RPC 233. A deputy attorney general attorney who represents the state on the appeal of a death sentence should send to the defense lawyer a copy of a letter the deputy attorney general received from the defendant.

RPC 249. A lawyer may not communicate with a child who is represented by a guardian ad litem and an attorney advocate unless the lawyer obtains the consent of the attorney advocate.

97 FEO 2. A lawyer may interview an unrepresented former employee of an adverse represented organization about the subject of the representation unless the former employee participated substantially in the legal representation of the organization in the matter.

97 FEO 10. A prosecutor may instruct a law enforcement officer to send an undercover officer into the prison cell of a represented criminal defendant to observe the defendant's communications with other inmates in the cell.

99 FEO 10. A government lawyer working on a fraud investigation may instruct an investigator to interview employees of the target organization provided the investigator does not interview an employee who participates in the legal representation of the organization or an officer or manager of the organization who has the authority to speak for and bind the organization. (*See also* comment [9] to Rule 4.2)

2002 FEO 8. A lawyer who is appointed the guardian ad litem for a minor plaintiff in a tort action and is represented in this capacity by legal counsel, must be treated by opposing counsel as a represented party and, therefore, direct contact with the guardian ad litem, without consent of counsel, is prohibited.

2003 FEO 2. Lawyer may not communicate directly with the opposing party although the opposing lawyer appears to be impaired by reason of substance abuse or mental impairment.

2003 FEO 4. A lawyer may not proffer evidence gained during a private investigator's verbal communication with an opposing party known to be represented by legal counsel unless the lawyer discloses the source of the evidence to the opposing lawyer and to the court prior to the proffer.

2004 FEO 4. A lawyer may ask questions of a deponent that were recommended by another lawyer, although the deponent is the defendant in the other lawyer's case, provided notice of the deposition is given to the deponent's lawyer.

2005 FEO 5. Opinion explores the extent to which a lawyer may communicate with employees or officials of a represented government entity.

2006 FEO 19. The prohibition against communications with represented persons does not apply to a lawyer acting solely as a guardian ad litem.

2009 FEO 7. A criminal defense lawyer or a prosecutor may not interview a child who is the alleged victim in a criminal case alleging physical or sexual abuse if the child is younger than the age of maturity as determined by the General Assembly for the purpose of an in-custody interrogation (currently age fourteen) unless the lawyer has the consent of a non-accused parent or guardian or a court order allows the lawyer to seek an interview with the child without such consent; a lawyer may interview a child who is this age or older without such consent or authorization provided the lawyer complies with Rule 4.3, reasonably determines that the child is sufficiently mature to understand the lawyer's role and purpose, and avoids any conduct designed to coerce or intimidate the child.

2010 FEO 5. A lawyer defending a non-custodial parent in a child support action brought by the lawyer for the county's child support enforcement program does not represent the parent and the lawyer's direct communications with the custodian do not violate Rule 4.2.

2011 FEO 15. Pursuant to the North Carolina Public Records Act, a lawyer may communicate with a government official for the purpose of identifying a custodian of public records and with the custodian of public records to make a request to examine public records related to the representation although the custodian is an adverse party, or an employee of an adverse party, whose lawyer does not consent to the communication.

2012 FEO 7. Consent from the lawyer for a represented person must be obtained before copying that person on electronic communications; however, the consent required by Rule 4.2 may be implied by the facts and circumstances surrounding the communication.

2012 FEO 9. A lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

2014 FEO 9. A private lawyer may supervise an investigation involving misrepresentation if done in pursuit of a public interest and certain conditions are satisfied.

2018 FEO 5. Opinion rules that a lawyer representing a client in a matter may view the public portion of a represented person's social network presence but may not request or direct another to request access to the restricted portion. A lawyer may request or accept information from a third party with access to the restricted portion.

2022 FEO 2. Opinion rules that a privately retained lawyer may provide limited representation to a criminal defendant who has been appointed counsel if the limitation is reasonable under the circumstances.

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(a) give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client; and

(b) state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. To avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

CPR 296. The attorney for the plaintiff in a domestic case may not make available to the defendant a form waiving the right to answer and other rights, nor may he allow his client to provide such a form to the defendant. (*But see* RPC 165)

RPC 15. An attorney may interview a person with adverse interest who is unrepresented and make a demand or propose a settlement.

RPC 61. A defense attorney may interview a child who is the prosecuting witness in a molestation case without the knowledge or consent of the district attorney.

RPC 165. An attorney may provide a confession of judgment or consent order to an unrepresented adverse party for execution by that party so long as the lawyer does not undertake to advise the adverse party or feign disinterestedness.

RPC 189. The district attorney's staff may not give legal advice about pleas to an unrepresented person charged with a traffic infraction.

RPC 193. The attorney for the plaintiffs in a personal injury action arising out of a motor vehicle accident may interview the unrepresented defendant even though the uninsured motorist insurer, which had elected to defend the claim in the name of the defendant, is represented by an attorney in the matter.

RPC 194. In a letter to an unrepresented prospective defendant in a personal injury action, the plaintiff's lawyer may not give legal advice nor may he create the impression that he is concerned about or protecting the interests of the unrepresented prospective defendant.

2002 FEO 6. The lawyer for the plaintiff may not prepare the answer to a complaint for an unrepresented adverse party to file pro se.

2003 FEO 7. A lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

2009 FEO 7. A criminal defense lawyer or a prosecutor may not interview a child who is the alleged victim in a criminal case alleging physical or sexual abuse if the child is younger than the age of maturity as determined by the General Assembly for the purpose of an in-custody interrogation (currently age fourteen) unless the lawyer has the consent of a non-accused parent or guardian

or a court order allows the lawyer to seek an interview with the child without such consent; a lawyer may interview a child who is this age or older without such consent or authorization provided the lawyer complies with Rule 4.3, reasonably determines that the child is sufficiently mature to understand the lawyer's role and purpose, and avoids any conduct designed to coerce or intimidate the child.

2009 FEO 12. A lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party provided the lawyer explains who he represents and does not give the unrepresented party legal advice; however, the lawyer may not prepare a waiver of exemptions for the adverse party.

2014 FEO 10. Communication between unrepresented birth parent and lawyer, who handles adoptions as part of law practice and owns a financial interest in a for-profit adoption agency, must be limited to providing or collecting information to be used to complete the forms required by the adoption agency.

2015 FEO 1. A lawyer may not prepare pleadings and other filings for an unrepresented opposing party in a civil proceeding currently pending before a tribunal if doing so is tantamount to giving legal advice to that person.

2015 FEO 2. When the original debt is \$100,000 or more, a lawyer for a lender may prepare and provide to an unrepresented borrower, owner, or guarantor a waiver of the right to notice of foreclosure and the right to a foreclosure hearing pursuant to N.C.G.S. § 45-21.16(f) if the lawyer explains the lawyer's role and does not give legal advice to any unrepresented person. However, a lawyer may not prepare such a waiver if the waiver is a part of a loan modification package for a mortgage secured by the borrower's primary residence.

2018 FEO 5. Opinion rules that a lawyer representing a client in a matter may view the public portion of an unrepresented person's social network presence; request access to the restricted portion using his true identity; and request or accept information from a third party with access to the restricted portion.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a writing relating to the representation of the lawyer's client and knows or reasonably should know that the writing was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Threats, bullying, harassment, insults, slurs, personal attacks, unfounded personal accusations generally serve no substantial purpose other than to embarrass, delay, or burden others and violate this rule. Conduct that serves no substantial purpose other than to intimidate, humiliate, or embarrass lawyers, litigants, witnesses, or other persons with whom a lawyer interacts while representing a client also violates this rule. *See also* Rule 3.5(a) (prohibiting conduct intended to disrupt a tribunal) and Rule 8.4(d) (prohibiting conduct prejudicial to the administration of justice).

[3] Paragraph (b) recognizes that lawyers sometimes receive writings that were mistakenly sent or produced by opposing parties or their lawyers. *See* Rule 1.0(o) for the definition of "writing," which includes electronic communications and metadata. A writing is inadvertently sent when it is accidentally transmitted, such as when an electronic communication or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a writing was sent inadvertently, then this rule requires the lawyer promptly to notify the sender in order to permit that person to take protective measures. This duty is imputed to all lawyers in a firm. Whether the lawyer who receives the writing is required to take additional steps, such as returning the writing, is a matter of law beyond

the scope of these rules, as is the question of whether the privileged status of a writing has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer. A lawyer who receives an electronic communication from the opposing party or the opposing party's lawyer must refrain from searching for or using confidential information found in the metadata embedded in the communication. *See* 2009 FEO 1.

[4] Some lawyers may choose to return a writing or delete electronically stored information unread, for example, when the lawyer learns before receiving the writing that it was inadvertently sent. Whether the lawyer is required to do so is a matter of law. When return of the writing is not required by law, the decision voluntarily to return such a writing or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. *See* Rules 1.2 and 1.4.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; August 18, 2005; October 2, 2014; March 5, 2015

ETHICS OPINION NOTES

RPC 181. A lawyer may not seek to disqualify another lawyer from representing the opposing party by instructing a client to consult with the other lawyer about the subject matter of the representation when the client has no intention of retaining the other lawyer.

RPC 252. A lawyer in receipt of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain from examining the materials and return them to the sender.

2007 FEO 1. A lawyer owes no ethical duty to the heirs of an estate that he represents in a wrongful death action except as set forth in Rule 4.4.

2009 FEO 1. A lawyer must use reasonable care to prevent the disclosure of confidential client information hidden in metadata when transmitting an electronic communication and a lawyer who receives an electronic communication from another party or another party's lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document.

2009 FEO 5. A lawyer may serve the opposing party with discovery requests that require the party to reveal her citizenship status, but the lawyer may not report the status to ICE unless required to do so by federal or state law.

2010 FEO 2. A lawyer may not serve an out of state health care provider with an unenforceable North Carolina subpoena and may not use documents produced pursuant to such a subpoena.

2011 FEO 16. A criminal defense lawyer accused of ineffective assistance of counsel by a former client may share confidential client information with prosecutors to help establish a defense to the claim so long as the lawyer reasonably believes a response is necessary and the response is narrowly tailored to respond to the allegations.

2012 FEO 5. A lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee's lawyer using the employer's business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages unless a court determines that the messages are not privileged.

2014 FEO 4. A lawyer may send a subpoena for medical records to an entity covered by HIPAA without providing the assurances necessary for the entity to comply with the subpoena as set out in 45 C.F.R. § 164.512(e)(ii).

2014 FEO 7. A lawyer may provide a foreign entity or individual with a North Carolina subpoena accompanied by a statement/letter explaining that the subpoena is not enforceable in the foreign jurisdiction, the recipient is not required to comply with the subpoena, and the subpoena is being provided solely for the recipient's records.

2015 FEO 1. A lawyer may not prepare pleadings and other filings for an unrepresented opposing party in a civil proceeding currently pending before a tribunal if doing so is tantamount to giving legal advice to that person.

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

(a) A principal in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority, shall make reasonable efforts to ensure that the firm or the organization has in effect measures giving reasonable assurance that all lawyers in the firm or the organization conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a principal or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

Comment

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm or legal department of an organization. *See* Rule 1.0(d). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm or organization.

[2] Paragraph (a) requires lawyers with managerial authority within a firm or organization to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm or organization will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's or organization's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm or organization, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated principal or special committee. *See* Rule 5.2. Firms and organizations, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm or organization can influence the conduct of all its members and the principals and managing lawyers may not assume that all lawyers associated with the firm or organization will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. *See also* Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a principal or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Principals and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a principal or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a principal or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent

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 supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a principal, associate or subordinate. Moreover, this Rule is not intended to establish a standard for vicarious criminal or civil liability for the acts of another lawyer. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. *See* Rule 5.2(a).

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; September 22, 2016

ETHICS OPINION NOTES

2012 FEO 13. The partners and managerial lawyers remaining in a firm are responsible for the safekeeping and proper disposition of both the active and closed files of a suspended, disbarred, missing, or deceased member of the firm.

2013 FEO 8. Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

2015 FEO 9. A lawyer who does not own equity in a law firm may be held out to the public by the designation "partner," "income partner," or "non-equity partner," provided the lawyer was officially promoted based upon legitimate criteria and the lawyer complies with the professional responsibilities arising from the designation.

RULE 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

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

Adopted by the Supreme Court: July 24, 1997

ETHICS OPINION NOTES

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE

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

(a) a principal, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or organization shall make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a principal or has comparable managerial authority in the law firm or organization in which the person is employed, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

Comment

[1] Paragraph (a) requires lawyers with managerial authority within a law firm or organization to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. *See* Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm or organization to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. *See* Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations and, depending upon the risk of unauthorized disclosure of confidential client information, should consider whether client consent is required. *See* Rule 1.1, cmt. [7]. The extent of this obligation will depend upon the circumstances, including the education, experience, and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. *See also* Rules 1.1 (competence),

1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. *See* Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

[5] A lawyer who discovers that a nonlawyer has wrongfully misappropriated money from the lawyer's trust account must inform the North Carolina State Bar pursuant to Rule 1.15-2(o).

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 2, 2014; September 24, 2015; September 22, 2016

ETHICS OPINION NOTES

CPR 163. An attorney may use a secretarial agency so long as reasonable care is used to protect confidentiality.

CPR 182. A layman may be employed to interview and represent social security claimants if the clients consent after disclosure of the layman's non-professional status.

CPR 253. A paralegal employed by a law firm may have a business card with the firm's identification.

CPR 262. A law firm's office manager may have a business card with the firm's identification.

CPR 334. An attorney's secretary may also work for private investigator. The attorney must take care that client confidences are not compromised.

RPC 29. An attorney may not rely upon title information from an abstract firm unless he supervised the nonlawyer who did the work.

RPC 70. A legal assistant may communicate and negotiate with a claims adjuster if directly supervised by the attorney for whom he or she works.

RPC 74. A firm which employs a paralegal is not disqualified from representing an interest adverse to that of a party represented by the firm for which the paralegal previously worked if the paralegal is screened from participation in the case.

RPC 102. A lawyer may not permit the employment of court reporting services to be influenced by the possibility that the lawyer's employees might receive premiums, prizes or other personal benefits.

RPC 139. An attorney, having undertaken to represent adoptive parents, may sign and file adoption petition prepared by social services organization under her direct supervision.

RPC 152. District attorney is responsible for plea negotiating practices of lay assistant under her supervision of which she has knowledge.

RPC 176. A lawyer who employs a paralegal is not disqualified from representing a party whose interests are adverse to that of a party represented by a lawyer for whom the paralegal previously worked.

RPC 183. A lawyer may not permit a legal assistant to examine or represent a witness at a deposition.

RPC 216. A lawyer may use the services of a nonlawyer independent contractor to search a title provided the nonlawyer is properly supervised by the lawyer.

RPC 238. A lawyer is subject to the Rules of Professional Conduct with respect to the provision of a law-related service, such as financial planning, if the law-related service is provided in circumstances that are not distinct from the lawyer's provision of legal services to clients.

99 FEO 6. Opinion examines the ownership of a title insurance agency by lawyers in North and South Carolina as well as the supervision of an independent paralegal.

2000 FEO 10. A lawyer may have a nonlawyer employee deliver a message to a court holding calendar call, if the lawyer is unable to attend due to a scheduling conflict with another court or for another legitimate reason.

2002 FEO 9. A nonlawyer assistant supervised by a lawyer may identify to the client who is a party to such a transaction the documents to be executed with

respect to the transaction, direct the client as to the correct place on each document to sign, and handle the disbursement of proceeds for a residential real estate transaction, even though the supervising lawyer is not physically present.

2004 FEO 13. A lawyer may form a professional corporation for the practice of law and the professional corporation may enter into a law partnership with another such professional corporation.

2005 FEO 2. A law firm that employs a nonlawyer to represent Social Security claimants must so disclose in any advertising for this service and to prospective clients.

2005 FEO 6. The compensation of a nonlawyer law firm employee who represents Social Security disability claimants before the Social Security Administration may be based upon the income generated by such representation.

2006 FEO 13. If warranted by exigent circumstances, a lawyer may allow a paralegal to sign his name to court documents so long as it does not violate any law and the lawyer provides the appropriate level of supervision.

2007 FEO 12. A lawyer may outsource limited legal support services foreign assistants provided the lawyer properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client's advanced informed consent.

2009 FEO 10. A lawyer must provide appropriate supervision to a non-lawyer appearing pursuant to N.C. Gen. Stat. §96-17(b) on behalf of a claimant or an employer in an unemployment hearing.

2011 FEO 14. A lawyer must obtain client consent, confirmed in writing, before outsourcing its transcription and typing needs to a company located in a foreign jurisdiction.

2012 FEO 11. A law firm may send a nonlawyer field representative to meet with a prospective client and obtain a representation contract if a lawyer at the firm has reviewed sufficient information from the prospective client to determine that an offer of representation is appropriate.

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER

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

- (1) an agreement by a lawyer with the lawyer's firm, principal, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
- (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
- (3) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer or a disbarred lawyer may pay to the estate of the deceased lawyer or to the disbarred lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer or the disbarred lawyer;
- (4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement; and
- (5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter; and
- (6) a lawyer or law firm may pay a portion of a legal fee to a credit card processor, group advertising provider, or online marketing platform if the amount paid is for payment processing or for administrative or marketing services, and there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, engages, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

- (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or
- (2) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] A determination under paragraph (a)(6) of this rule as to whether an advertising provider or online marketing platform (jointly "platform") will interfere with the independent professional judgment of a lawyer requires consideration of a number of factors. These factors include, but are not limited to, the following: (a) the percentage of the fee or the amount the platform charges the lawyer; (b) the percentage of the fee or the amount that the lawyer receives from clients obtained through the platform; (c) representations made to prospective clients and to clients by the platform; (d) whether the platform communicates directly with clients and to what degree; and (e) the nature of the relationship between the lawyer and the platform. A relationship wherein the platform, rather than the lawyer, is in charge of communications with a client indicates interference with the lawyer's professional judgment. The lawyer should have unfettered discretion as to whether to accept clients from the platform, the nature and extent of the legal services the lawyer provides to clients obtained through the platform, and whether to participate or continue participating in the platform. The lawyer may not permit the platform to direct or control the lawyer's legal services and may not assist the platform to engage in the practice of law, in violation of Rule 5.5(a).

[3] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. *See also* Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

[4] Although a nonlawyer may serve as a director or officer of a professional corporation organized to practice law if permitted by law, such a nonlawyer director or officer may not have the authority to direct or control the conduct of the lawyers who practice with the firm.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; September 22, 2016; March 27, 2019

ETHICS OPINION NOTES

CPR 239. A law firm may set up a profit-sharing plan for firm members and lay employees.

CPR 289. It is improper for an attorney to agree to share a legal fee with a paralegal.

CPR 343. A succeeding attorney may share fees with a disbarred lawyer for services rendered prior to disbarment.

RPC 38. Attorneys in North Carolina may use an attorney placement service which places independent attorneys with other attorneys or firms on a temporary contract basis for a placement fee.

RPC 104. Associate attorneys may be leased back to their firms.

RPC 147. An attorney may not pay a percentage of fees to a paralegal as a bonus.

98 FEO 17. A lawyer may not comply with an insurance carrier's billing requirements and guidelines if they interfere with the lawyer's ability to exercise his or her independent professional judgment in the representation of the insured.

2000 FEO 9. Opinion explores the situations in which a lawyer who is also a CPA may provide legal services and accounting services from the same office.

2001 FEO 2. There is no prohibition on a law firm entering into a contract with a management firm to administer the firm provided the lawyers in the firm can fulfill their ethical duties including the duty to exercise independ-

ent 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 non-lawyer/ claimant's representative for the prior representation of a claimant.

2004 FEO 13. A lawyer may form a professional corporation for the practice of law and the professional corporation may enter into a law partnership with another such professional corporation.

2005 FEO 6. The compensation of a nonlawyer law firm employee who represents Social Security disability claimants before the Social Security Administration may be based upon the income generated by such representation.

2006 FEO 4. A lawyer may not participate in a prepaid legal services plan unless all the conditions for participation are met and participation does not otherwise result in a violation of the Rules of Professional Conduct.

2006 FEO 11. Outside of the commercial or business context, a lawyer may not, at the request of a third party, prepare documents, such as a will or trust instrument, that purport to speak solely for principal without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

2010 FEO 4. Paying a percentage fee to a barter exchange manager is a surcharge on the transaction and is not fee sharing with a nonlawyer.

2011 FEO 4. A lawyer may not agree to procure title insurance exclusively from a particular title insurance agency on every transaction referred to the lawyer by a person associated with the agency.

2011 FEO 10. A lawyer may advertise on a website that offers daily discounts to consumers where the website company's compensation is a percentage of the amount paid to the lawyer if certain disclosures are made and certain conditions are satisfied.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2013 FEO 7. A law firm may not share a fee from a tax appeal with a non-lawyer tax representative unless such nonlawyer representatives are legally permitted by the tax authorities to represent claimants and to be awarded fees for such representation.

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction if the lawyer's conduct is in accordance with these Rules and:

(1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized;

(2) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction

in which the lawyer is admitted to practice and the lawyer's services are not services for which pro hac vice admission is required;

(3) the lawyer acts with respect to a matter that is in or is reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the lawyer's services arise out of or are reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission is required; or

(4) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation and the lawyer is admitted pro hac vice or the lawyer's services are not services for which pro hac vice admission is required.

(d) A lawyer admitted to practice in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, does not engage in the unauthorized practice of law in this jurisdiction and may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law if the lawyer's conduct is in accordance with these Rules and:

(1) the lawyer provides legal services to the lawyer's employer or its organizational affiliates; the services are not services for which pro hac vice admission is required; and, when the services are performed by a foreign lawyer and require advice on the law of this or another US jurisdiction or of the United States, such advice is based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) the lawyer is providing services limited to federal law, international law, the law of a foreign jurisdiction or the law of the jurisdiction in which the lawyer is admitted to practice, or the lawyer is providing services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) A lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction and may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law if the lawyer's conduct is in accordance with these Rules, the lawyer is the subject of a pending application for admission to the North Carolina State Bar by comity, having never previously been denied admission to the North Carolina State Bar for any reason, and the lawyer satisfies the following conditions:

(1) is licensed to practice law in a state with which North Carolina has comity in regard to admission to practice law;

(2) is a member in good standing in every jurisdiction in which the lawyer is licensed to practice law;

(3) has satisfied the educational and experiential requirements prerequisite to comity admission to the North Carolina State Bar;

(4) is domiciled in North Carolina;

(5) has established a professional relationship with a North Carolina law firm and is actively supervised by at least one licensed North Carolina attorney affiliated with that law firm; and

(6) gives written notice to the secretary of the North Carolina State Bar that the lawyer intends to begin the practice of law pursuant to this provision, provides the secretary with a copy of the lawyer's application for admission to the State Bar, and agrees that the lawyer is subject to these rules and the disciplinary jurisdiction of the North Carolina State Bar. A lawyer acting pursuant to this provision may not provide services for which pro hac vice admission is required, and shall be ineligible to practice law in this jurisdiction immediately upon being advised that the lawyer's application for comity admission has been denied.

(f) A lawyer shall not assist another person in the unauthorized practice of law.

(g) A lawyer or law firm shall not employ a disbarred or suspended lawyer as a law clerk or legal assistant if that individual was associated with such lawyer or law firm at any time on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

(h) A lawyer or law firm employing a disbarred or suspended lawyer as a law clerk or legal assistant shall not represent any client represented by the disbarred or suspended lawyer or by any lawyer with whom the disbarred or suspended

lawyer practiced during the period on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

(i) For the purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. The practice of law in violation of lawyer-licensing standards of another jurisdiction constitutes a violation of these Rules. This Rule does not restrict the ability of lawyers authorized by federal statute or other federal law to represent the interests of the United States or other persons in any jurisdiction.

[2] There are occasions in which lawyers admitted to practice in another United States jurisdiction, but not in North Carolina, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in North Carolina under circumstances that do not create an unreasonable risk to the interests of their clients, the courts, or the public. Paragraphs (c), (d), and (e) identify seven situations in which the lawyer may engage in such conduct without fear of violating this Rule. All such conduct is subject to the duty of competent representation. *See* Rule 1.1. Rule 5.5 does not address the question of whether other conduct constitutes the unauthorized practice of law. The fact that conduct is not included or described in this Rule is not intended to imply that such conduct is the unauthorized practice of law. With the exception of paragraphs (d) and (e), this Rule does not authorize a US or foreign lawyer to establish an office or other systematic and continuous presence in North Carolina without being admitted to practice here. Presence may be systematic and continuous even if the lawyer is not physically present in this jurisdiction. A lawyer not admitted to practice in North Carolina must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in North Carolina. *See also* Rules 7.1(a) and 7.5(b). However, a lawyer admitted to practice in another jurisdiction who is principal, shareholder, or employee of an interstate or international law firm that is registered with the North Carolina State Bar pursuant to 27 N.C.A.C. 1E, Section .0200, may practice, subject to the limitations of this Rule, in the North Carolina offices of such law firm.

[3] Paragraphs (c), (d), and (e) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory, or commonwealth of the United States and, where noted, any foreign jurisdiction. The word "admitted" in paragraphs (c), (d)(2), and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice because, for example, the lawyer is on inactive status.

[4] Paragraphs (c), (d), and (e) do not authorize communications advertising legal services in North Carolina by lawyers who are admitted to practice in other jurisdictions. Nothing in these paragraphs authorizes a lawyer not licensed in this jurisdiction to solicit clients in North Carolina. Whether and how lawyers may communicate the availability of their services in this jurisdiction are governed by Rules 7.1-7.5.

[5] Lawyers not admitted to practice generally in North Carolina may be authorized by law or order of a tribunal or an administrative agency to appear before a the tribunal or agency. Such authority may be granted pursuant to formal rules or law governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(1), a lawyer does not violate this Rule when the lawyer appears before such a tribunal or agency. Nor does a lawyer violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing, such as factual investigations and discovery conducted in connection with a litigation or administrative proceeding, in which an out-of-state lawyer has been admitted or in which the lawyer reasonably expects to be admitted.

[6] Paragraph (c)(2) recognizes that the complexity of many matters requires that a lawyer whose representation of a client consists primarily of conduct in a jurisdiction in which the lawyer is admitted to practice, also be permitted to act

on the client's behalf in other jurisdictions in matters arising out of or otherwise reasonably related to the lawyer's representation of the client. This conduct may involve negotiations with private parties, as well as negotiations with government officers or employees, and participation in alternative dispute-resolution procedures. This provision also applies when a lawyer is conducting witness interviews or other activities in this jurisdiction in preparation for a litigation or other proceeding that will occur in another jurisdiction where the lawyer is either admitted generally or expects to be admitted *pro hac vice*.

[7] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in North Carolina if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, and if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[8] Paragraph (c)(4) recognizes that association with a lawyer licensed to practice in North Carolina is likely to protect the interests of both clients and the public. The lawyer admitted to practice in North Carolina, however, may not serve merely as a conduit for an out-of-state lawyer but must actively participate in and share actual responsibility for the representation of the client. If the admitted lawyer's involvement is merely *pro forma*, then both lawyers are subject to discipline under this Rule.

[9] Paragraphs (d) and (e) identify three circumstances in which a lawyer who is admitted to practice in another jurisdiction, or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may establish an office or other systematic and continuous presence in North Carolina for the practice of law. Except as provided in these paragraphs, a lawyer who is admitted to practice law in another jurisdiction and who desires to establish an office or other systematic or continuous presence in North Carolina must be admitted to practice law generally in North Carolina.

[10] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers, and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[11] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation, or judicial precedent.

[12] Paragraph (e) permits a lawyer who is awaiting admission by comity to practice on a provisional and limited basis if certain requirements are met. As used in this paragraph, the term "professional relationship" refers to an employment or partnership arrangement.

[13] The definition of the practice of law is established by N.C.G.S. §84-2.1. Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (d) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. *See* Rule 5.3.

[14] Lawyers may also provide professional advice and instruction to 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*. However, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[15] Paragraphs (g) and (h) clarify the limitations on employment of a disbarred or suspended lawyer. In the absence of statutory prohibitions or specific conditions placed on a disbarred or suspended lawyer in the order revoking or

suspending the license, such individual may be hired to perform the services of a law clerk or legal assistant by a law firm with which he or she was not affiliated at the time of or after the acts resulting in discipline. Such employment is, however, subject to certain restrictions. A licensed lawyer in the firm must take full responsibility for, and employ independent judgment in, adopting any research, investigative results, briefs, pleadings, or other documents or instruments drafted by such individual. The individual may not directly advise clients or communicate in person or in writing in such a way as to imply that he or she is acting as a lawyer or in any way in which he or she seems to assume responsibility for a client's legal matters. The disbarred or suspended lawyer should have no communications or dealings with, or on behalf of, clients represented by such disbarred or suspended lawyer or by any individual or group of individuals with whom he or she practiced during the period on or after the date of the acts which resulted in discipline through and including the effective date of the discipline. Further, the employing lawyer or law firm should perform no services for clients represented by the disbarred or suspended lawyer during such period. Care should be taken to ensure that clients fully understand that the disbarred or suspended lawyer is not acting as a lawyer, but merely as a law clerk or law employee. Under some circumstances, as where the individual may be known to clients or in the community, it may be necessary to make an affirmative statement or disclosure concerning the disbarred or suspended lawyer's status with the law firm. Additionally, a disbarred or suspended lawyer should be paid on some fixed basis, such as a straight salary or hourly rate, rather than on the basis of fees generated or received in connection with particular matters on which he or she works. Under these circumstances, a law firm employing a disbarred or suspended lawyer would not be acting unethically and would not be assisting a nonlawyer in the unauthorized practice of law.

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

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; November 16, 2006; October 2, 2014; September 24, 2015; September 22, 2016

ETHICS OPINION NOTES

CPR 19. House counsel for an insurance company may not represent an insured in prosecuting a subrogation claim.

CPR 325. House counsel of a savings and loan association may not represent a subsidiary of the savings and loan association acting as trustee for a deed of trust in foreclosure.

CPR 326. House counsel for an insurance company may not represent the insured in defense of a third party claim or in prosecution of a subrogation claim.

RPC 9. House counsel for a mortgage bank which originates loans but has no proprietary interest of its own may not represent borrowers or lenders in closing loans originated by his employer.

RPC 40. For the purposes of a real estate transaction, an attorney may, with proper notice to the borrower, represent only the lender, and the lender may prepare the closing documents. *See also* RPC 41.

RPC 114. Attorneys may give legal advice and drafting assistance to persons wishing to proceed *pro se* without appearing as counsel of record.

RPC 139. A lawyer may not sign an adoption petition prepared by an adoption agency as an accommodation to that agency without undertaking professional responsibility for the adoption proceeding.

RPC 151. Although a corporate insurer acting through its employees cannot practice law and appear on behalf of others, a lawyer who is a full-time employee of an insurance company may represent the company in an action where the company is a named party.

RPC 216. A lawyer may use the services of a nonlawyer independent con-

tractor to search a title provided the nonlawyer is properly supervised by the lawyer.

98 FEO 7. A law firm may employ a disbarred lawyer as a paralegal provided the firm accepts no new clients who were clients of the disbarred lawyer's former firm during the period of misconduct; however, a disbarred lawyer may not work as a paralegal at a firm where he was employed as a lawyer during the period of misconduct.

98 FEO 8. A lawyer may not participate in a closing or sign a preliminary title opinion if, after reasonable inquiry, the lawyer believes that the title abstract or opinion was prepared by a nonlawyer without supervision by a licensed North Carolina lawyer.

99 FEO 6. Opinion examines the ownership of a title insurance agency by lawyers in North and South Carolina as well as the supervision of an independent paralegal.

2000 FEO 9. Opinion explores the situations in which a lawyer who is also a CPA may provide legal services and accounting services from the same office.

2000 FEO 10. A lawyer may have a nonlawyer employee deliver a message to a court holding calendar call, if the lawyer is unable to attend due to a scheduling conflict with another court or for another legitimate reason.

2002 FEO 9. A nonlawyer assistant supervised by a lawyer may identify to the client who is a party to such a transaction the documents to be executed with respect to the transaction, direct the client as to the correct place on each document to sign, and handle the disbursement of proceeds for a residential real estate transaction, even though the supervising lawyer is not physically present.

2006 FEO 13. If warranted by exigent circumstances, a lawyer may allow a paralegal to sign his name to court documents so long as it does not violate any law and the lawyer provides the appropriate level of supervision.

2007 FEO 3. Opinion explains the duties of a lawyer who represents a local government and of a lawyer who is elected to the governing body of the local government relative to a nonlawyer appearing in a representative capacity for a party at a zoning variance and other quasi-judicial hearings before the government body.

2007 FEO 12. A lawyer may outsource limited legal support services to foreign assistants provided the lawyer properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client's advanced informed consent.

2008 FEO 6. A lawyer may hire a nonlawyer independent contractor to organize and speak at educational seminars so long as the nonlawyer does not give legal advice.

2009 FEO 2. A closing lawyer who reasonably believes that a title company engaged in the unauthorized practice of law when preparing a deed must report the lawyer who assisted the title company but may close the transaction if the client consents and doing so is in the client's interest.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2012 FEO 11. A law firm may send a nonlawyer field representative to meet with a prospective client and obtain a representation contract if a lawyer at the firm has reviewed sufficient information from the prospective client to determine that an offer of representation is appropriate.

2013 FEO 9. Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

Authorized Practice Advisory Opinion 2002-1. The North Carolina State Bar has been requested to interpret the North Carolina unauthorized practice of law statutes (N.C. Gen. Stat. §§84-2.1 to 84-5) as they apply to residential real estate transactions. The State Bar issues the following authorized practice of law advisory opinion pursuant to N.C. Gen. Stat. §84-37(f) after careful consideration and investigation. This opinion supersedes any prior opinions and decisions of any standing committee of the State Bar interpreting the unauthorized practice of law statutes to the extent those opinions and decisions are inconsistent with the conclusions expressed herein.

Authorized Practice Advisory Opinion 2006-1. Opinion rules that land use professionals who are not lawyers may testify as to factual matters and as

experts at quasi-judicial proceedings before planning boards, boards of adjustment, and other government bodies, but the introduction of evidence and advocacy on behalf of parties at such proceedings is the practice of law that may be performed only by a licensed lawyer.

RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

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

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

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

[3] This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17. The Rule also does not prohibit restrictions on a lawyer's right to practice that are included in a plea agreement or other settlement of a criminal matter or the resolution of a disciplinary proceeding where the accused is a lawyer.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; September 24, 2015

ETHICS OPINION NOTES

RPC 13. A retirement agreement may require a lawyer to accept inactive status as a member of the State Bar as a condition of payment of retirement benefits.

RPC 179. A lawyer may not offer or enter into a settlement agreement that contains a provision barring the lawyer who represents the settling party from representing other claimants against the opposing party.

2001 FEO 10. Opinion prohibits a lawyer from entering into an employment agreement with a law firm that includes a provision reducing the amount of deferred compensation the lawyer will receive if the lawyer leaves the firm before retirement to engage in the private practice of law within a 50-mile radius of the firm's offices.

2003 FEO 9. A lawyer may participate in a settlement agreement that contains a provision limiting or prohibiting disclosure of information obtained during the representation even though the provision will effectively limit the lawyer's ability to represent future claimants.

2007 FEO 6. A partnership, shareholders, or other similar agreement may include a repurchase or buy-out provision that takes into account the loss in firm value generated by the lawyer's departure provided the provision is fair and is not based solely upon loss in value due to the loss of client billings.

2008 FEO 8. A provision in a law firm employment agreement for dividing legal fees received after a lawyer's departure from a firm must be reasonable and may not penalize or deter the withdrawing lawyer from taking clients with her.

2012 FEO 12. An agreement for a departing lawyer to pay his former firm a percentage of any legal fee subsequently recovered from the continued representation of a contingent fee client by the departing lawyer does not violate Rule 5.6 if the agreement was negotiated by the departing lawyer and the firm after the departing lawyer announced his departure from the firm and the specific percentage is a reasonable resolution of the dispute over the division of future fees.

2017 FEO 5. An agreement between law firms engaged in merger negotiations not to solicit or hire lawyers from the other firm for a relatively short period of time after expiration of the term of the agreement is permissible because it is a de minimis restriction on lawyer mobility that does not impair client choice and is reasonable under the circumstances.

2023 FEO 2. Opinion rules that a confidentiality clause contained in a set-

dement agreement that restricts a lawyer's ability to practice law violates Rule 5.6.

RULE 5.7: RESPONSIBILITIES REGARDING LAW- RELATED SERVICES

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

[1] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[2] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[3] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. *See, e.g.*, Rule 8.4.

[4] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in Rule 5.7(a)(1).

[5] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[6] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[7] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before enter-

ing into an agreement for provision of or providing law-related services, and preferably should be in writing.

[8] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[9] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and scrupulously to adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. *See also* Rule 8.4 (Misconduct).

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

Adopted by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

RPC 238. A lawyer is subject to the Rules of Professional Conduct with respect to the provision of a law related service, such as financial planning, if the law related service is provided in circumstances that are not distinct from the lawyer's provision of legal services to clients.

2000 FEO 9. Opinion explores the situations in which a lawyer who is also a CPA may provide legal services and accounting services from the same office.

2001 FEO 9. Opinion rules that, although a lawyer may recommend the purchase of a financial product to a legal client, the lawyer may not receive a commission for its sale.

2010 FEO 13. A lawyer may receive a fee or commission in exchange for providing financial services and products to a legal client so long as the lawyer complies with the ethical rules pertaining to the provision of law-related services, business transactions with clients, and conflicts of interest.

2014 FEO 10. A lawyer who handles adoptions as part of her or his law practice and also owns a financial interest in a for-profit adoption agency may, with informed consent, represent an adopting couple utilizing the services of the adoption agency but may not represent the biological parents.

RULE 6.1: VOLUNTARY PRO BONO PUBLICO SERVICE

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

- (1) persons of limited means;
 - (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; or
 - (3) individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate
- (b) provide any additional services through:
- (1) the delivery of legal services described in paragraph (a) at a substantially reduced fee; or
 - (2) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Comment

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The North Carolina State Bar urges all lawyers to provide a minimum of 50 hours of pro bono services annually. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] The critical need for legal services among persons of limited means is recognized in paragraphs (a)(1) and (2) of the Rule. Legal services to persons of limited means consists of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but, nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraph (a). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations described in paragraphs (a)(2) and (3).

[5] Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1), (2), and (3), and (b) (1). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b)(2). Such lawyers and judges are not expected to undertake the reporting outlined in paragraph twelve of this Comment.

[6] Paragraph (a)(3) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. Examples of the types of issues that may be addressed under this para-

graph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(1) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(2) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees; serving on boards of pro bono or legal services programs; taking part in Law Day activities; acting as a continuing legal education instructor, a mediator or an arbitrator; and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[10] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[11] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

[12] Lawyers are encouraged to report pro bono legal services to Legal Aid of North Carolina, the North Carolina Equal Access to Justice Commission, or other similar agency as appropriate in order that such service might be recognized and serve as an inspiration to others.

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

Adopted by the Supreme Court: January 28, 2010

ETHICS OPINION NOTES

2014 FEO 3. Opinion encourages government lawyers to engage in pro bono representation unless prohibited by law from doing so.

RULE 6.2: RESERVED

RULE 6.3: MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

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

Adopted by the Supreme Court: July 24, 1997

ETHICS OPINION NOTES

CPR 68. An attorney may serve on the board of a legal aid society and rep-

resent a client against a party represented by a legal aid lawyer.

RULE 6.4: LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Comment

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. *See also* Rule 1.2(b). For example, a lawyer concentrating in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

RULE 6.5: LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Comment

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. *See, e.g.*, Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. *See* Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of

conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

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

Adopted by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

2008 FEO 3. A lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2014 FEO 6. A lawyer who provides free brief consultations to members of a nonprofit organization must still screen for conflicts prior to conducting a consultation.

RULE 6.6: ACTION AS A PUBLIC OFFICIAL

A lawyer who holds public office shall not:

(a) use his or her public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or herself or for a client under circumstances where the lawyer knows, or it is obvious, that such action is not in the public interest;

(b) use his or her public position to influence, or attempt to influence, a tribunal to act in favor of himself or herself or his or her client; or

(c) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

Comment

[1] Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part time, should not engage in activities in which the lawyer's personal or professional interests are or foreseeably may be in conflict with his or her official duties.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

ETHICS OPINION NOTES

CPR 177. An attorney on the county board of health may not represent a client before such board, but he may resign and represent the client if he acquired no relevant confidential information while on the board.

CPR 189. An attorney member of the city council with control over the police department may not represent a criminal defendant when a police officer is a prosecuting witness.

CPR 231. An attorney-legislator may represent a criminal defendant when a State highway patrolman is the prosecuting witness.

CPR 233. An attorney member of the city council with control over the police department may not represent a criminal defendant when a police officer is a prosecuting witness even if he withdraws from consideration of the budget.

CPR 263. An emergency judge may not practice law.

CPR 290. An attorney who serves as a member of a county or municipal governing board, or State or federal legislative body, or any entity thereunder, or committee thereof, shall not hear or consider any matter coming before that governing body or entity in which that member or his firm has any direct or indirect interest.

Pursuant to such prohibition, it shall be unethical for that member to

attempt to influence in any way, publicly or privately, the actions or decisions of the governing body or entity or its staff with respect to any matter on which his partner or associate is appearing.

If an attorney or his employee serves as a member of a county or municipal governing board, or State or federal legislative body of any entity thereunder, or committee thereof, it shall be unethical for his partner, associate or employer to represent such governing body or entity.

It is not unethical as such for an attorney whose spouse or relative is on any county or municipal governing board, or State or federal legislative body, or any entity thereunder, or committee thereof, to appear before or represent that governing body or entity. However, it is unethical for an attorney to use his relationship to a member of any governing board to gain (or retain) employment or obtain favorable decisions. (*But see* RPC 130)

CPR 327. An attorney who serves on per diem basis as a hearing examiner for a public agency may not participate in hearings on behalf of clients before other examiners. His partners and associates may not appear before him, but may appear before other hearing examiners. If the attorney-examiner is appointed to the full board he may not appear before the board under any conditions. His partners should abide by CPR 290.

CPR 335. An attorney-magistrate may privately practice law. He may not appear in any criminal case, in any civil case originating in the small claims court in his county, or in any case with which he had any connection as a magistrate.

CPR 360. An attorney may counsel a quasi-judicial board and also act as a hearing examiner rendering decisions appealable to the same board during the same time span, but may not act in both capacities in the same case.

RPC 53. A lawyer may sue a municipality although his partner serves as a member of its governing body.

RPC 63. An attorney may represent the school board while serving as a county commissioner with certain restrictions.

RPC 73. Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants where a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.

Where an attorney advises a governing body, such as a county commission, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.

RPC 95. An assistant district attorney may prosecute cases while serving on the school board.

RPC 105. A public defender may represent criminal defendants while serving on the school board.

RPC 130. An attorney may accept employment on behalf of a governing board upon which his or her partner sits if such is otherwise lawful.

RPC 160. A lawyer whose associate is a member of a hospital's board of trustees may not sue the hospital on behalf of a client.

2002 FEO 2. A lawyer may represent a party suing a public body or non-profit 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 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 contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. Such communications include but are not limited to a statement that is likely to create an unjustified expectation about results the lawyer can achieve; a statement that states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or a statement that compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Comment

False and Misleading Communications

[1] This Rule governs all communications about a lawyer's services, including advertising. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Misleading truthful statements 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. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] A communication 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 claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Firm Names, Letterheads, and Professional Designations

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current principals or by the names of deceased or retired principals where there has been a succession in the firm's identity. The name of a retired principal may be used in the name of a law firm only if the principal has ceased the practice of law. A lawyer or law firm also may be designated by a trade name, a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased or retired lawyer who was not a former principal of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public or charitable legal services organization may be required to avoid a misleading implication.

[6] 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.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(d), because to do so would be false and misleading. It is also misleading to use a designation such as "Smith and Associates" for a solo practice.

[8] 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 exclusively limited to areas that do not require a North Carolina law license. The lawyer's name may be included in the firm letterhead, provided all communications by such lawyer on behalf of the firm indicate the jurisdiction in which the lawyer is licensed as well as the fact that the lawyer is not licensed in North Carolina.

[9] 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. Admin. Code 1E.0200 et seq.

Dramatizations

[10] Dramatizations of fictional cases in video advertisements are potentially misleading. See 2010 FEO 9, RPC 164. A communication by a lawyer that contains a dramatization depicting a fictional situation is not misleading if 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.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 2, 2014; April 21, 2021

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.

2012 FEO 6. A law firm may use a leased time-shared office address or a post office address to satisfy the address disclosure requirement for advertising communications in Rule 7.2(c) so long as certain requirements are met.

2012 FEO 8. A lawyer may ask a former client for a recommendation to be posted on the lawyer's profile on a professional networking website and may accept a recommendation if certain conditions are met.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2014 FEO 8. A lawyer may accept an invitation from a judge to be a "connection" on a professional networking website, and may endorse a judge. However, a lawyer may not accept a legal skill or expertise endorsement or a recommendation from a judge.

2015 FEO 3. A lawyer may not offer a computer tablet to a prospective

client in a direct mail solicitation letter.

2015 FEO 9. A lawyer who does not own equity in a law firm may be held out to the public by the designation “partner,” “income partner,” or “non-equity partner,” provided the lawyer was officially promoted based upon legitimate criteria and the lawyer complies with the professional responsibilities arising from the designation.

2017 FEO 1: A lawyer may advertise through a text message service that allows the user to initiate live telephone communication.

2017 FEO 3: A billboard advertisement need not contain the lawyer’s name, firm name, or the firm’s office address if the URL address on the advertisement lands on the lawyer’s website where such information can be easily found. The opinion applies to all forms of legal advertisement.

2018 FEO 1: Opinion explains when a lawyer may participate in an online rating system and a lawyer’s professional responsibility for the content posted on a profile on a website directory.

2018 FEO 3: The name of a lawyer who is under an active suspension must be removed from the firm name.

2018 FEO 8. Opinion rules that a lawyer may advertise membership in an organization that bestows a laudatory designation on the lawyer subject to certain conditions, including that the lawyer does not pay for the designation or inclusion; the lawyer ascertains that the organization made adequate inquiry into the lawyer’s qualifications; and any advertisement of the designation includes an explanation of the standards for the designation and a disclaimer when the designation may create unjustified expectations.

2019 FEO 6. Opinion rules that a lawyer may not offer incentives in exchange for activity on his social media account if the social media platform broadcasts or displays users’ interactions with the account to other users of the platform.

2020 FEO 2. Lawyer may not advertise that lawyer may advance client’s portion of settlement proceeds prior to the proceeds clearing lawyer’s trust account.

RULE 7.2: COMMUNICATIONS CONCERNING A LAWYER’S SERVICES: SPECIFIC RULES

(a) A lawyer may communicate information regarding the lawyer’s services through any media.

(b) A lawyer shall not compensate, give, or promise 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 an intermediary organization that complies with Rule 7.4, or a prepaid legal services plan that complies with 27 N.C. Admin. Code 1E.0301 et seq.;
- (3) pay for a law practice in accordance with Rule 1.17; and
- (4) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.

(c) A lawyer shall not state that the lawyer specializes or is a specialist in a field of practice unless:

- (1) the lawyer is certified as a specialist in the field of practice by:
 - (A) the North Carolina State Bar;
 - (B) an organization that is accredited by the North Carolina State Bar; or
 - (C) an organization that is accredited by the American Bar Association under procedures and criteria endorsed by the North Carolina State Bar; and
- (2) the name of the certifying organization is clearly identified in the communication.

(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

Comment

[1] This Rule permits public dissemination of information concerning a lawyer’s or law firm’s name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer’s fees are determined, including prices for specific services and payment

and credit arrangements; a lawyer’s foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for recommending the lawyer’s services. A communication contains a recommendation if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible “recommendations.”

[3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons, and website designers.

[4] Paragraph (b)(4) permits a lawyer to give nominal gifts as an expression of appreciation to a person for recommending the lawyer’s services or referring a prospective client. The gift may not be more than a token item as might be given for holidays or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement, or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

Paying Lead Generators

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator’s communications are consistent with Rule 7.1 (communications concerning a lawyer’s services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral. See comment [2] (definition of “recommendation”). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

Referrals from Intermediary Organizations and Prepaid Legal Service Plans

[6] A lawyer who accepts assignments or referrals from a prepaid legal service plan or referrals from an intermediary organization must act reasonably to assure that the activities of the plan or organization are compatible with the lawyer’s professional obligations. See Rule 5.3, Rule 7.3, and Rule 7.4. A prepaid legal service plan assists people who seek to secure legal representation. Intermediary organizations, including lawyer referral services, are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Prepaid legal service plans and intermediary organizations may communicate with the public, but such communication must be in conformity with these Rules; notably, such communication must not be false or misleading.

Specialty Certification

[7] 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 ensure 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 ensure 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.

[8] 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.”

Contact Information

[9] This Rule requires that any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address, or a physical office location.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 2, 2014; September 28, 2017; April 21, 2021

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 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.

RPC 94. A private lawyer referral service must have more than one participating lawyer and all participants must share in the cost of operating the referral service. (*But see* Rule 7.2 (d)(2).)

RPC 115. A lawyer may sponsor truthful legal information which is provided by telephone to members of the public.

RPC 135. An attorney may not participate in a private lawyer referral service unless all advertisements of the service state that a list of all participating lawyers will be mailed free of charge to members of the public upon request and indicate that the service is not operated or endorsed by any public agency or any disinterested organization. (*But see* Rule 7.2(d)(2).)

RPC 161. A television commercial for legal services which fails to mention that bankruptcy is the debt relief described in the commercial and describes results obtained for others is misleading.

RPC 239. A lawyer may display truthful information about the lawyer’s legal services on a World Wide Web site accessed via the Internet.

RPC 241. A lawyer may participate in a directory of lawyers on the Internet if the information about the lawyer in the directory is truthful.

2004 FEO 1. A lawyer may participate in an on-line service that is similar to both a lawyer referral service and a legal directory provided there is no fee sharing with the service and all communications about the lawyer and the

service are truthful.

2004 FEO 2. An attorney may not offer promotional merchandise in a targeted direct mail solicitation letter as an inducement to call the attorney’s office.

2005 FEO 10. Opinion addresses ethical concerns raised by an internet-based or virtual law practice and the provision of unbundled legal services.

2006 FEO 7. A lawyer may be a member of a for-profit networking organization provided the lawyer does not distribute business cards and is not required to make referrals to other members.

2007 FEO 4. Opinion provides guidance on miscellaneous issues relative to client seminars and solicitation, gifts to clients and others following referrals, distribution of business cards, and client endorsements.

2010 FEO 4. A barter exchange that provides a complete, impartial list of all participating lawyers, does not purport to recommend or select a lawyer for an exchange member seeking legal services, and does not restrict the number of participating lawyers is not a lawyer referral service.

2011 FEO 4. A lawyer may not agree to procure title insurance exclusively from a particular title insurance agency on every transaction referred to the lawyer by a person associated with the agency.

2011 FEO 10. A lawyer may advertise on a website that offers daily discounts to consumers where the website company’s compensation is a percentage of the amount paid to the lawyer if certain disclosures are made and certain conditions are satisfied.

2012 FEO 6. A law firm may use a leased time-shared office address or a post office address to satisfy the address disclosure requirement for advertising communications in Rule 7.2(c) so long as certain requirements are met.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2012 FEO 14. The advertising content displayed on certain gift or promotional items does not have to include an office address.

2013 FEO 10. With certain disclosures, a lawyer may participate in an online group legal advertising service that gives a participating lawyer exclusive rights to contacts arising from a particular territory.

2017 FEO 1: A lawyer may advertise through a text message service that allows the user to initiate live telephone communication.

2017 FEO 3: A billboard advertisement need not contain the lawyer’s name, firm name, or the firm’s office address if the URL address on the advertisement lands on the lawyer’s website where such information can be easily found. The opinion applies to all forms of legal advertisement.

2018 FEO 1: Opinion explains when a lawyer may participate in an online rating system and a lawyer’s professional responsibility for the content posted on a profile on a website directory.

2018 FEO 7: Opinion rules that, subject to certain conditions, a lawyer may participate in an online service for soliciting client reviews that collects and posts positive reviews to increase the lawyer’s ranking on internet search engines.

2019 FEO 6. Opinion rules that a lawyer may not offer incentives in exchange for activity on his social media account if the social media platform broadcasts or displays users’ interactions with the account to other users of the platform.

2022 FEO 3. Opinion rules that a lawyer may be included in an allied professional’s list of recommended lawyers under certain conditions.

RULE 7.3: SOLICITATION OF CLIENTS

(a) “Solicitation” or “solicit” denotes a communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain, unless the contact is with a:

- (1) lawyer;
 - (2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or
 - (3) person who routinely uses for business purposes the type of legal services offered by the lawyer.
- (c) A lawyer shall not solicit professional employment even when not oth-

erwise prohibited by paragraph (a), if:

- (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation involves coercion, duress, or harassment.
- (d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid legal service plan in compliance with 27 N.C. Admin. Code 1E.0301 et seq. that uses live person-to-person contact to enroll members or sell subscriptions for the plan to persons who are not known to need legal services in a particular matter covered by the plan, provided that, after reasonable investigation, the lawyer must have a good faith belief that the plan is being operated in compliance with 27 N.C. Admin. Code 1E.0301 et seq., and the lawyer's participation in the plan does not otherwise violate the Rules of Professional Conduct.

Comment

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages, or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services by live person-to-person contact. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] This potential for overreaching inherent in live person-to-person justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business, or professional 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 or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment, or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[6] A solicitation that contains false or misleading information within the

meaning of Rule 7.1, which involves coercion, duress, or harassment within the meaning of Rule 7.3(c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited.

Contact to Establish Prepaid Legal Service Plan

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

Contact to Enroll Members in Prepaid Legal Service Plan

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll 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 (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person 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 must 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 27 N.C. Admin. Code 1E.0301 et seq., as well as Rules 7.1, 7.2 and 7.3(c).

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 6, 2004; November 16, 2006; August 23, 2007; August 25, 2011; October 2, 2014; September 28, 2017; April 21, 2021

ETHICS OPINION NOTES

CPR 52. It is proper to notify former clients of changes in the law that could affect their wills.

CPR 104. Attorneys may request lenders and title insurance companies to place them on approved lists.

CPR 191. It is improper for an attorney to belong to a "Tip Club" in which members agree to refer business to each other.

CPR 258. In response to a request, an attorney may submit a bid for legal work to the FHA.

CPR 352. It is not improper for an attorney to inform a client with a personal injury claim that the spouse may also have a claim and that the attorney is willing to handle the claim.

RPC 20. An attorney may not use an intermediary to arrange meetings between prospective business clients and the attorney for the purpose of soliciting legal business, nor may an attorney make "cold calls" upon prospective business clients.

RPC 57. A lawyer may agree to be on a list of attorneys approved to handle all of a lender's title work.

RPC 71. An attorney may not accept legal employment by a prepaid legal service plan owned by the attorney's wife or another member of the attorney's immediate family, if the plan will market its services by in-person solicitation.

RPC 98. The opinion construes the term "professional relationship" and explores the circumstances under which solicitation of persons or organizations with whom a lawyer has had business and professional dealings is per-

missible. Targeted print advertising is also discussed.

RPC 115. A lawyer may sponsor truthful legal information which is provided by telephone to members of the public.

RPC 146. A law firm may invite existing clients to a social function hosted by the law firm prior to a bid letting for contracts and may host a social function for nonclients who attend the bid letting as long as the law firm does not solicit employment from the nonclients.

RPC 161. The recorded message which is heard when a television viewer dials a telephone number broadcast during a television advertisement for legal services must include the statement "this is an advertisement for legal services" at the beginning and ending of the recorded message.

RPC 200. The lawyers remaining with a firm may contact by phone or in person clients whose legal matters were handled exclusively by a lawyer who has left the firm.

RPC 242. A lawyer may send a letter describing his services to the incorporators of a new business provided the words "This is an advertisement for legal services" are included in the communication.

97 FEO 6. The omission of the lawyer's address from a targeted direct mail letter is a material misrepresentation.

2000 FEO 3. A lawyer may respond to an inquiry posted on a web page message board provided there are certain disclosures.

2004 FEO 2. An attorney may not offer promotional merchandise in a targeted direct mail solicitation letter as an inducement to call the attorney's office.

2004 FEO 5. A solicitation letter to prospective members of a class action must contain the words "This is an advertisement for legal services" pursuant to Rule 7.3(c).

2006 FEO 4. A lawyer may not participate in a prepaid legal services plan unless all the conditions for participation are met and participation does not otherwise result in a violation of the Rules of Professional Conduct.

2006 FEO 6. A lawyer may put extraneous statements on the envelope of a solicitation letter provided the statements do not mislead the recipient and the font used for the statements is smaller than the font used for the advertising disclaimer required by Rule 7.3(c).

2006 FEO 7. A lawyer may be a member of a for-profit networking organization provided the lawyer does not distribute business cards and is not required to make referrals to other members.

2007 FEO 4. Opinion provides guidance on miscellaneous issues relative to client seminars and solicitation, gifts to clients and others following referrals, distribution of business cards, and client endorsements.

2007 FEO 15. Opinion provides clarification of the technical requirements for targeted direct mail letters set forth in Rule 7.3(c) of the Rules of Professional Conduct.

2008 FEO 6. A lawyer may hire a nonlawyer independent contractor to organize and speak at educational seminars so long as the nonlawyer does not give legal advice.

2009 FEO 3. A lawyer has a professional obligation not to encourage or allow a nonlawyer employee to disclose confidences of a previous employer's clients for purposes of solicitation.

2011 FEO 8. Guidelines for the use of live chat support services on law firm websites.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2015 FEO 3. A lawyer may not offer a computer tablet to a prospective client in a direct mail solicitation letter.

2015 FEO 7. The business relationships with health care professionals created by a lawyer previously employed as a health care consultant constitute prior professional relationships within the meaning of Rule 7.3(a) thus permitting the lawyer to directly solicit legal employment by in-person, live telephone, or real-time electronic contact with the health care professionals.

2017 FEO 1: A lawyer may advertise through a text message service that allows the user to initiate live telephone communication.

2022 FEO 3. Opinion rules that a lawyer may be included in an allied professional's list of recommended lawyers under certain conditions.

RULE 7.4: INTERMEDIARY ORGANIZATIONS

(a) An intermediary organization is a lawyer referral service, lawyer advertising cooperative, lawyer matching service, online marketing platform, or other similar organization that engages in referring consumers of legal services to lawyers or facilitating the creation of lawyer-client relationships between consumers of legal services and lawyers willing to provide assistance. A tribunal or similar government agency that appoints or assigns lawyers to represent parties before the tribunal or government agency is not an intermediary organization under this Rule.

(b) Before and while participating in an intermediary organization, the lawyer shall make reasonable efforts to ensure that the intermediary organization's conduct complies with the professional obligations of the lawyer, including the following conditions:

(1) The intermediary organization does not direct or regulate the lawyer's professional judgment in rendering legal services to the client;

(2) The intermediary organization, including its agents and employees, does not engage in improper solicitation pursuant to Rule 7.3;

(3) The intermediary organization makes the criteria for inclusion available to prospective clients, including any payment made or arranged by the lawyer(s) participating in the service and any fee charged to the client for use of the service, at the outset of the client's interaction with the intermediary organization;

(4) The function of the referral arrangement between lawyer and intermediary organization is fully disclosed to the client at the outset of the client's interaction with the lawyer;

(5) The intermediary organization does not require the lawyer to pay more than a reasonable sum representing a proportional share of the organization's administrative and advertising costs, including sums paid in accordance with Rule 5.4(a)(6); and

(6) The intermediary organization is not owned or directed by the lawyer, a law firm with which the lawyer is associated, or a lawyer with whom the lawyer is associated in a firm.

(c) If a lawyer discovers an intermediary organization's noncompliance with Rule 7.4(b)(1) – (6), the lawyer shall either withdraw from participation or seek to correct the noncompliance. If the intermediary organization fails to correct the noncompliance, the lawyer must withdraw from participation.

Comment

[1] 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.S. 84-23

Adopted by the Supreme Court: April 21, 2021

RULE 7.5: RESERVED

RULE 7.6: RESERVED

RULE 8.1: BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus,

it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware. It should also be noted that N.C.G.S. §84-28(b)(3) defines failure to answer a formal inquiry of the North Carolina State Bar as misconduct for which discipline is appropriate.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of the North Carolina Constitution. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

RULE 8.2: JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, or other adjudicatory officer or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against such unjust criticism.

[4] While a lawyer as a citizen has a right to criticize such officials publicly, the lawyer should be certain of the merit of the complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the North Carolina Judicial Standards Commission or other appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(d) A lawyer who is disciplined in any state or federal court for a violation of the Rules of Professional Conduct in effect in such state or federal court shall inform the secretary of the North Carolina State Bar of such action in writing no later than 30 days after entry of the order of discipline.

(e) A lawyer who is serving as a mediator and who is subject to the North Carolina Supreme Court Standards of Professional Conduct for Mediators (the Standards) is not required to disclose information learned during a mediation if the Standards do not allow disclosure. If disclosure is allowed by the Standards, the lawyer is required to report professional misconduct consistent with the duty to report set forth in paragraph (a).

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense. A lawyer is not generally required by this rule to report the lawyer's own professional misconduct; however, to advance the goals of self-regulation, lawyers are encouraged to report their own misconduct to the North Carolina State Bar or to a court if the misconduct would otherwise be reportable under this rule. Nevertheless, Rule 1.15-2(p) *requires* a lawyer to report the misappropriation or misapplication of entrusted property, including trust funds, to the North Carolina State Bar regardless of whether the lawyer is reporting the lawyer's own conduct or that of another person.

[2] Although the North Carolina State Bar is always an appropriate place to report a violation of the Rules of Professional Conduct, the courts of North Carolina have concurrent jurisdiction over the conduct of the lawyers who appear before them. Therefore, a lawyer's duty to report may be satisfied by reporting to the presiding judge the misconduct of any lawyer who is representing a client before the court. The court's authority to impose discipline on a lawyer found to have engaged in misconduct extends beyond the usual sanctions imposed in an order entered pursuant to Rule 11 of the North Carolina Rules of Civil Procedure.

[3] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[4] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the North Carolina State Bar unless some other agency or court is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[5] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[6] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers' or judges' assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. For this reason, Rule 1.6 (c) includes in the definition of confidential information any information regarding a lawyer or judge seeking assistance that is received by a lawyer acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court. Because such information is protected from disclosure by Rule 1.6, a lawyer is exempt from the reporting requirements of paragraphs (a) and (b) with respect to such information. On the other hand, a lawyer who receives such information would nevertheless be required to comply with the Rule 8.3 reporting provisions to report misconduct if the impaired lawyer or judge indicates an intent to engage in illegal activity; for example, conversion of client funds to his or her use.

[7] The North Carolina Supreme Court has adopted Standards of Professional Conduct for Mediators (the Standards) to regulate the conduct of certified mediators and mediators in court-ordered mediations. Mediators governed by the Standards are required to keep confidential the statements and conduct of the parties and other participants in the mediation, with limited exceptions, to encourage the candor that is critical to the successful resolution of legal disputes. Paragraph (e) recognizes the concurrent regulatory function of the Standards and protects the confidentiality of the mediation process. Nevertheless, if the Standards allow disclosure, a lawyer serving as a mediator who learns of or observes conduct by a lawyer that is a violation of the Rules of Professional Conduct is required to report consistent with the duty set forth in paragraph (a) of this Rule. In the event a lawyer serving as a mediator is confronted with professional misconduct by a lawyer participating in a mediation that may not be disclosed pursuant to the Standards, the lawyer/mediator should consider withdrawing from the mediation or taking such other action as may be required by the Standards. See, e.g., N.C. Dispute Resolution Commission Advisory Opinion 10-16 (February 26, 2010).

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 7, 2010; June 9, 2016

ETHICS OPINION NOTES

CPR 342. An attorney is not obligated to report violations of the law committed by nonlawyers.

RPC 17. An attorney who acquires knowledge of apparent misconduct must report the matter to the State Bar.

RPC 84. An attorney may not condition settlement of a civil dispute on an agreement not to report lawyer misconduct.

RPC 127. An attorney must report information to the State Bar concerning another attorney's disbursement of conditionally delivered settlement proceeds without satisfying all conditions precedent if the disbursement was made in knowing disregard of such conditions and if such information is not confidential.

RPC 243. Opinion analyzes whether conduct "raises a substantial question" as to a lawyer's honesty, trustworthiness, or fitness so as to require reporting to the State Bar.

2001 FEO 5. Disclosures made during a LAP support group meeting are confidential and not reportable to the State Bar under Rule 8.3.

2003 FEO 2. A lawyer must report a violation of the Rules of Professional Conduct as required by Rule 8.3(a) even if the lawyer's unethical conduct stems from mental impairment (including substance abuse).

2009 FEO 2. A closing lawyer who reasonably believes that a title company engaged in the unauthorized practice of law when preparing a deed must report the lawyer who assisted the title company but may close the transaction if the client consents and doing so is in the client's interest.

2011 FEO 4. A lawyer may not agree to procure title insurance exclusively from a particular title insurance agency on every transaction referred to the lawyer by a person associated with the agency.

2013 FEO 8. Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client or, in the case of a government lawyer, investigatory personnel, of action the client, or such investigatory personnel, is lawfully entitled to take.

[2] Many kinds of illegal conduct reflect adversely on a lawyer's fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation. A lawyer's dishonesty, fraud, deceit, or misrepresentation is not mitigated by virtue of the fact that the victim may be the lawyer's partner or law firm. A lawyer who steals funds, for instance, is guilty of a serious disciplinary violation regardless of whether the victim is the lawyer's employer, partner, law firm, client, or a third party.

[3] The purpose of professional discipline for misconduct is not punishment, but to protect the public, the courts, and the legal profession. Lawyer discipline affects only the lawyer's license to practice law. It does not result in incarceration. For this reason, to establish a violation of paragraph (b), the burden of proof is the same as for any other violation of the Rules of Professional Conduct: it must be shown by clear, cogent, and convincing evidence that the lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Conviction of a crime is conclusive evidence that the lawyer committed a criminal act although, to establish a violation of paragraph (b), it must be shown that the criminal act reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. If it is established by clear, cogent, and convincing evidence that a lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, the lawyer may be disciplined for a violation of paragraph (b) although the lawyer is never prosecuted or is acquitted or pardoned for the underlying criminal act.

[4] A showing of actual prejudice to the administration of justice is not required to establish a violation of paragraph (d). Rather, it must only be shown that the act had a reasonable likelihood of prejudicing the administration of justice. For example, in *State Bar v. DuMont*, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified on other grounds, 304 N.C. 627, 286 S.E.2d 89 (1982), the defendant was disciplined for advising a witness to give false testimony in a deposition even though the witness corrected his statement prior to trial. Conduct warranting the imposition of professional discipline under paragraph (d) is characterized by the element of intent or some other aggravating circumstance. The phrase "conduct prejudicial to the administration of justice" in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings. In *State Bar v. Jerry Wilson*, 82 DHC 1, for example, a lawyer was disciplined for conduct prejudicial to the administration of justice after forging another individual's name to a guarantee agreement, inducing his wife to notarize the forged agreement, and using the agreement to obtain funds.

[5] Threats, bullying, harassment, and other conduct serving no substantial purpose other than to intimidate, humiliate, or embarrass anyone associated with the judicial process including judges, opposing counsel, litigants, witnesses, or court personnel violate the prohibition on conduct prejudicial to the administration of justice. When directed to opposing counsel, such conduct tends to impede opposing counsel's ability to represent his or her client effectively. Comments "by one lawyer tending to disparage the personality or performance of another...tend to reduce public trust and confidence in our courts and, in more extreme cases, directly interfere with the truth-finding function by distracting

judges and juries from the serious business at hand.” *State v. Rivera*, 350 N.C. 285, 291, 514 S.E.2d 720, 723 (1999). See Rule 3.5, cmt. [10] and Rule 4.4, cmt. [2].

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; March 5, 2015

ETHICS OPINION NOTES

CPR 110. An attorney may not advise a client to seek Dominican divorce knowing that the client will return immediately to North Carolina and continue residence.

CPR 168. An attorney may file personal bankruptcy.

CPR 188. An attorney may not draw deeds or other legal instruments based on land surveys made by unregistered land surveyors.

CPR 342. An attorney should not close a loan where the transaction is conditioned by the lender upon the placement of title insurance with a particular company.

CPR 369. An attorney may close a loan if the lender merely suggests rather than requires the placement of title insurance with a particular company.

RPC 127. An attorney may not deliberately release settlement proceeds which were conditionally delivered without satisfying all conditions precedent.

RPC 136. An attorney may notarize documents which are to be used in legal proceedings in which the attorney appears.

RPC 143. A lawyer who represents or has represented a member of the city council may represent another client before the council provided the lawyer does not attempt improperly to influence the council.

RPC 152. The prosecutor and the defense attorney must see that all material terms of a negotiated plea are disclosed in response to direct questions when the plea is entered in open court.

RPC 159. An attorney may not participate in the resolution of a civil dispute involving allegations against a psychotherapist of sexual involvement with a patient if the settlement is conditioned upon the agreement of the complaining party not to report the misconduct to the appropriate licensing board.

RPC 162. A lawyer may not communicate with the opposing party's non-party treating physician about the physician's treatment of the opposing party unless the opposing party consents.

RPC 171. A lawyer may tape record a conversation with an opposing lawyer without disclosure to the opposing lawyer.

RPC 180. A lawyer may not passively listen while the opposing party's non-party treating physician comments on his or her treatment of the opposing party unless the opposing party consents to the communication.

RPC 192. A lawyer may not listen to an illegal tape recording made by his client nor may he use the information on the illegal tape recording to advance his client's case.

RPC 197. A prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.

RPC 204. It is prejudicial to the administration of justice for a prosecutor to offer special treatment to individuals charged with traffic offenses or minor crimes in exchange for a direct charitable contribution to the local school system.

RPC 221. Absent a court order or law requiring delivery of physical evidence of a crime to the authorities, a lawyer for a criminal defendant may take possession of evidence that is not contraband to examine, test, or inspect the evidence. The lawyer must return inculpatory physical evidence that is not contraband to the source and advise the source of the legal consequences pertaining to the possession or destruction of the evidence.

RPC 236. A lawyer may not issue a subpoena containing misrepresentations

as to the pendency of an action, the date or location of a hearing, or a lawyer's authority to obtain documentary evidence.

RPC 243. It is prejudicial to the administration of justice for a prosecutor to threaten to use his discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant.

98 FEO 2. A lawyer may explain the effect of service of process to a client but may not advise a client to evade service of process.

98 FEO 19. Opinion provides guidelines for a lawyer representing a client with a civil claim that also constitutes a crime.

99 FEO 2. A defense lawyer may suggest that the records custodian of plaintiff's medical record deliver the medical record to the lawyer's office in lieu of an appearance at a noticed deposition provided the plaintiff's lawyer consents.

2000 FEO 8. A lawyer acting as a notary must follow the law when acknowledging a signature on a document.

2001 FEO 12. A closing lawyer may not counsel or assist a client to affix excess excise tax stamps on an instrument for registration with the register of deeds.

2003 FEO 5. Neither a defense lawyer nor a prosecutor may participate in the misrepresentation of a criminal defendant's prior record level in a sentencing proceeding even if the judge is advised of the misrepresentation and does not object.

2003 FEO 11. A departed lawyer must deal honestly with the members of her former firm when dividing a legal fee.

2005 FEO 3. A lawyer may not threaten to report an opposing party or a witness to immigration officials to gain an advantage in civil settlement negotiations.

2007 FEO 2. A lawyer may not take possession of a client's contraband if possession is itself a crime and, unless there is an exception allowing disclosure of confidential information, the lawyer may not disclose confidential information relative to the contraband.

2008 FEO 3. A lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2008 FEO 4. A lawyer may issue a subpoena in compliance with Rule 45 of the Rules of Civil Procedure which authorizes a subpoena for the production of documents to the lawyer's office without the need to schedule a hearing, deposition or trial.

2008 FEO 14. It is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract or pleading excerpts from a legal brief, contract or pleading written by another lawyer.

2008 FEO 15. Provided the agreement does not constitute the criminal offense of compounding a crime and is not otherwise illegal, and does not contemplate the fabrication, concealment, or destruction of evidence, a lawyer may participate in a settlement agreement of a civil claim that includes a non-reporting provision prohibiting the plaintiff from reporting the defendant's conduct to law enforcement authorities.

2010 FEO 2. A lawyer may not serve an out of state health care provider with an unenforceable North Carolina subpoena and may not use documents produced pursuant to such a subpoena.

2010 FEO 14. It is a violation of the Rules of Professional Conduct for a lawyer to select another lawyer's name as a keyword for use in an Internet search engine company's search-based advertising program.

2011 FEO 9. A lawyer may not allow a person who is not employed by or affiliated with the lawyer's firm to use firm letterhead.

2011 FEO 12. A lawyer must notify the court when a clerk of court mistakenly dismisses a client's charges.

2012 FEO 5. A lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee's lawyer using the employer's business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages unless a court determines that the messages are not privileged.

2012 FEO 10. A lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2014 FEO 7. A lawyer may provide a foreign entity or individual with a North Carolina subpoena accompanied by a statement/letter explaining that

the subpoena is not enforceable in the foreign jurisdiction, the recipient is not required to comply with the subpoena, and the subpoena is being provided solely for the recipient's records.

2014 FEO 8. A lawyer may accept an invitation from a judge to be a "connection" on a professional networking website, and may endorse a judge. However, a lawyer may not accept a legal skill or expertise endorsement or a recommendation from a judge.

2014 FEO 9. A private lawyer may supervise an investigation involving misrepresentation if done in pursuit of a public interest and certain conditions are satisfied.

2018 FEO 5. Opinion rules that a lawyer may not use deception when seeking access to a person's restricted social network presence and may not instruct a third party to use deception.

2019 FEO 4. Opinion discusses the permissibility of various types of communications between lawyers and judges.

2021 FEO 4. Opinion rules that a lawyer may not take possession of photographs portraying a minor engaged in sexual activity.

2023 FEO 2. Opinion rules that a confidentiality clause contained in a settlement agreement that restricts a lawyer's ability to practice law violates Rule 5.6.

RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) **Disciplinary Authority.** A lawyer admitted to practice in North Carolina is subject to the disciplinary authority of North Carolina, regardless of where the lawyer's conduct occurs. A lawyer not admitted in North Carolina is also subject to the disciplinary authority of North Carolina if the lawyer renders or offers to render any legal services in North Carolina. A lawyer may be subject to the disciplinary authority of both North Carolina and another jurisdiction for the same conduct.

(b) **Choice of Law.** In any exercise of the disciplinary authority of North Carolina, the rules of professional conduct to be applied shall be as follows:

- (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
- (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer is not subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

[1] It is longstanding law that conduct of a lawyer admitted to practice in North Carolina is subject to the disciplinary authority of North Carolina. Extension of the disciplinary authority of North Carolina to other lawyers who render or offer to render legal services in North Carolina is for the protection of the citizens of North Carolina.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct might involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing a safe harbor for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a

proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer is not subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

[6] If North Carolina and another admitting jurisdiction were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 2, 2014

RULE 8.6: INFORMATION ABOUT A POSSIBLE WRONGFUL CONVICTION

(a) Subject to paragraph (b), when a lawyer knows of credible evidence or information, including evidence or information otherwise protected by Rule 1.6, that creates a reasonable likelihood that a defendant did not commit the offense for which the defendant was convicted, the lawyer shall promptly disclose that evidence or information to the prosecutorial authority for the jurisdiction in which the defendant was convicted and to North Carolina Office of Indigent Defense Services or, if appropriate, the federal public defender for the district of conviction.

(b) Notwithstanding paragraph (a), a lawyer shall not disclose evidence or information if:

- (1) the evidence or information is protected from disclosure by law, court order, or 27 N.C. Admin. Code Ch. 1B §.0129;
- (2) disclosure would criminally implicate a current or former client or otherwise substantially prejudice a current or former client's interests; or
- (3) disclosure would violate the attorney-client privilege applicable to communications between the lawyer and a current or former client.

(c) A lawyer who in good faith concludes that information is not subject to disclosure under this rule does not violate the rule even if that conclusion is subsequently determined to be erroneous.

(d) This rule does not require disclosure if the lawyer knows an appropriate governmental authority, the convicted defendant, or the defendant's lawyer already possesses the information.

Comment

[1] The integrity of the adjudicative process faces perhaps no greater threat than when an innocent person is wrongly convicted and incarcerated. The special duties of a prosecutor with respect to disclosure of potentially exonerating post-conviction information are set forth in Rule 3.8(g) and (h). However, as noted in the comment to Rule 3.3, Candor Toward the

Tribunal, the special obligation to protect the integrity of the adjudicative process applies to all lawyers. Under Rule 3.3(b), this obligation may require a lawyer to disclose fraudulent testimony to a tribunal even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. Similarly, the need to rectify a wrongful conviction and prevent or end the incarceration of an innocent person justifies extending the duty to disclose potentially exculpatory information to all members of the North Carolina State Bar, regardless of practice area and limited only by paragraph (b). It also justifies the disclosure of information otherwise protected by Rule 1.6. For prosecutors, compliance with Rule 3.8(g) and (h) constitutes compliance with this rule.

[2] This rule may require a lawyer to disclose credible evidence or information, whether protected by Rule 1.6 or not, if the evidence or information creates a reasonable likelihood that a convicted defendant did not commit the offense for which the defendant was convicted. To determine whether disclosure is required, a lawyer must not only consider the credibility of the evidence or information and its source but must also evaluate the substance of the evidence or information to determine whether it creates a reasonable likelihood that the defendant did not commit the offense.

[3] The duty to disclose is qualified in paragraph (b) by legal obligations and client loyalty. A lawyer may not disclose evidence or information if prohibited by law, court order, or the administrative rule that makes the proceedings of the State Bar's Grievance Committee confidential (27 N.C. Admin. Code Ch. 1B §.0129). The latter prohibition insures a lawyer's response to a grievance does not inadvertently impose a duty to disclose on the lawyers in the State Bar Office of Counsel or on the State Bar Grievance Committee. In addition, paragraph (b) specifies that a lawyer may not disclose evidence or information if doing so would criminally implicate the lawyer's client or the evidence or information was received in a privileged communication between the client and the lawyer. Disclosure is also prohibited when it would result in substantial prejudice the client's interests. Substantial prejudice to a client's interests includes bodily harm, loss of liberty, or loss of a significant legal right or interest such as the right to effective assistance of counsel or the right against self-incrimination.

[4] When disclosure of information protected by Rule 1.6 is permitted, the lawyer should counsel the client confidentially, advising the client of the lawyer's duty to disclose and, if possible, seeking the client's cooperation.

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

Adopted by the Supreme Court: March 16, 2017

Index to Rules

- A**
- Accounting - Rule 1.15
 - Advancing funds to client - Rule 1.8
 - Advertising - Rule 7.1, Rule 7.2, Rule 7.3, Rule 7.4
 - Advisor - Rule 2.1
 - Aggregate settlement - Rule 1.8
 - Arbitrator (former) - Rule 1.12
 - Attorney-client privilege - Rule 1.6
 - Authority, between attorney and client - Rule 1.2
- B**
- Bar admission - Rule 8.1
 - Belief, defined - Rule 1.0
 - Bullying - Rule 3.5, Rule 4.4, Rule 8.4
 - Business transactions
 - With client - Rule 1.8
 - Law related services - Rule 5.7
- C**
- Candor - Rule 3.3
 - Client
 - Authority - Rule 1.2
 - Diminished capacity - Rule 1.14
 - Communications - Rule 1.4
 - Compensation from person other than the client - Rule 1.8, Rule 5.4
 - Confidentiality - Rule 1.6
 - Conflicts - see conflict of interest
 - File, entitlement to - Rule 1.16
 - Funds - Rule 1.5, Rule 1.15
 - Organizations - Rule 1.13
 - Property - Rule 1.15
 - Use of information - Rule 1.8
 - Communication
 - Concerning a lawyer's services - Rule 7.1, Rule 7.3
 - False statements to judicial or legal official - Rule 8.2
 - Inadvertently sent - Rule 4.4
 - Of fields of practice/specialization - Rule 7.1, Rule 7.2
 - Targeted/advertisement - Rule 7.3
 - With clients - Rule 1.4
 - With elected officials - Rule 4.2(b)
 - With jurors - Rule 3.5
 - With persons represented by counsel - Rule 4.2
 - With unrepresented persons - Rule 4.3
 - Competence - Rule 1.1
 - Concluding representation - Rule 1.3, Rule 1.16
 - Confidentiality
 - Client with diminished capacity - Rule 1.14(c)
 - Defined - Rule 1.0
 - Disclosure to detect conflicts - Rule 1.6
 - Disclosure required - Rule 3.3(c)
 - Former client - Rule 1.6, Rule 1.9
 - Generally - Rule 1.6
 - Mistaken receipt of confidential information - Rule 4.4(b)
 - Prospective client - Rule 1.18
 - Wrongful conviction, evidence of - Rule 3.8(g),(h); Rule 8.6
 - Conflict of Interest
 - Current client - Rule 1.7, Rule 1.8
 - Government officers and employees (present and former) - Rule 1.11
 - Imputation of conflict - Rule 1.9, Rule 1.10
 - Former client - Rule 1.9
 - Prospective client - Rule 1.18
 - Consultations - Rule 1.4, Rule 1.18
 - Contact with potential client - Rule 7.3
 - Costs and expenses of litigation - Rule 1.5, Rule 1.8
 - Covenants not to compete - Rule 5.6
 - Crime
 - Aiding criminal transaction(s) - Rule 1.2
 - Commission of - Rule 8.4
 - Discussing legal consequences of criminal act - Rule 1.2
 - Prevention of - Rule 1.6
- D**
- Declining representation - Rule 1.16
 - Diligence - Rule 1.3
 - Discharge from representation - Rule 1.16
 - Disciplinary matters
 - Charging fee for responding to - Rule 1.5(g)
 - Choice of law - Rule 8.5
 - Failure to respond - Rule 8.1
 - False statement in connection with - Rule 8.1
 - Disclosure - Rule 1.6, Rule 1.14, Rule 3.3
 - Disclosure of evidence of wrongful conviction - Rule 3.8, Rule 8.6
 - Discovery - Rule 3.4(d)
 - Dishonesty - Rule 3.3, Rule 4.1, Rule 8.1, Rule 8.4
 - Duty to report - Rule 8.3
- E**
- Electronic communications
 - In definition of "writing" - Rule 1.0 (o)
 - Entrusted property - Rule 1.15
 - Escheat - Rule 1.15
 - Evaluations - Rule 2.3
 - Evidence
 - Alteration/destruction of - Rule 3.4
 - Failure to disclose - Rule 3.4, Rule 3.8
 - Obstruction of access to - Rule 3.4(a)
 - Offering false evidence - Rule 3.3(a)(3), Rule 3.4(b)
 - Wrongful conviction, evidence of - Rule 3.8(g),(h); Rule 8.6
 - Ex parte communication - Rule 3.3, Rule 3.5
 - With judge - Rule 3.5(a)(3)
 - With juror - Rule 3.5(a)(2)
 - Ex parte proceedings, obligation to court - Rule 3.3(d)
 - Exculpatory information, disclosure of - Rule 3.8
 - Expediting litigation - Rule 3.2
 - Extrajudicial statements - Rule 3.6, Rule 3.8
- F**
- False statements - Rule 3.3, Rule 4.1, Rule 8.1
 - Fees
 - Charging for responding to disciplinary authority, client security fund or fee dispute resolution program - Rule 1.5(g)
 - Compensation from person other than client - Rule 1.8, Rule 5.4
 - Contingent fee - Rule 1.5(c), Rule 1.5(d)
 - Dispute over - Rule 1.5, Rule 1.15-2(a), Rule 1.15-2(g)
 - Division of - Rule 1.5
 - Excessive fee - Rule 1.5
 - Flat fee - Rule 1.5
 - Financial assistance to client - Rule 1.8
 - Fraud
 - Commission of - Rule 8.4
 - Defined - Rule 1.0

- Transactions by client - Rule 1.2(d), Rule 3.3(b)
 - Frivolous claims - Rule 3.1
- G**
- Gifts - Rule 1.8
 - Government agency, communication with elected officials - Rule 4.2(b)
 - Government employees (present and former) - Rule 1.11
 - Government official, influence over - Rule 8.4
- H**
- Harrasment - Rule 3.5, Rule 4.4, Rule 8.4
- I**
- Impartiality - Rule 3.5
 - Improper comments at trial - Rule 3.4(e)
 - Imputed disqualification - Rule 1.9, Rule 1.10, Rule 1.11
 - Independence of a lawyer - Rule 5.4
 - Influence judge, juror, or official - Rule 3.5(a)
 - Influence over government official - Rule 8.4
 - Inform, duty to - Rule 1.4
 - Informed consent
 - Confidentiality - Rule 1.6
 - Conflicts of interest - Rule 1.7, Rule 1.8, Rule 1.9
 - Defined - Rule 1.0
 - In writing - Rule 1.0, Rule 1.7
 - Informed decisions - Rule 1.4
 - Intentional prejudice to client - Rule 8.4
 - Interest on lawyers' trust account (IOLTA) - Rule 1.15
 - Intermediary organizations - Rule 7.4
 - Intimidation - Rule 3.5, Rule 4.4, Rule 8.4
- J**
- Judge (former) - Rule 1.12
 - Judicial officials - Rule 8.2
 - Assistance of judicial officer in misconduct - Rule 8.4
 - Candidates for judicial office - Rule 8.2
 - Obligations of former judicial officials - Rule 1.12
 - Statements about - Rule 8.2
 - Jurors - Rule 3.5(a)(2), Rule 3.5(a)(5), Rule 3.5(b), Rule 3.5(c)
- K**
- Knowingly, defined - Rule 1.0
 - Knowledge (legal) - Rule 1.1
- L**
- Law clerks - Rule 1.12
 - Law firms
 - Conflict of interest - Rule 1.7, Rule 1.8, Rule 1.9, Rule 1.10, Rule 1.11
 - Defined - Rule 1.0
 - Letterhead - Rule 7.1
 - Managers - Rule 5.1
 - Name - Rule 1.17, Rule 7.1
 - Partners - Rule 1.0, Rule 5.1
 - Sale - Rule 1.17
 - Trust Account Oversight Officer - Rule 1.15-4
 - Law reform activities - Rule 6.4
 - Law-related services - Rule 5.7
 - Lawyer's Assistance Program, disclosure to - Rule 1.6
 - Lawyer's liability - Rule 1.8
 - Lawyer's personal interest - Rule 1.7(a)(2)
 - Lawyer's service
 - Communications regarding - Rule 7.1
 - Interest of person paying for - Rule 1.7
 - Lead generating services - Rule 7.2
 - Legal services organization - Rule 6.3
 - Limitations
 - Of scope of representation - Rule 1.2
 - Limited legal services - Rule 6.5
 - Literary rights - Rule 1.8
- M**
- Malpractice - Rule 1.1, Rule 1.8
 - Managers - Rule 5.1
 - Media rights - Rule 1.8
 - Mediator
 - Former - Rule 1.12
 - Reporting Misconduct - Rule 8.3(e)
 - Meritorious claims - Rule 3.1
 - Metadata, in definition of "writing" - Rule 1.0, Rule 1.6, Rule 4.4
 - Misappropriation - Rule 1.15-2
 - Misconduct - Rule 8.4
 - Bullying, harassment, intimidation - Rule 8.4
 - Charging fee for responding to allegations of - Rule 1.5(g)
 - Dishonesty - Rule 8.4
 - Fraud - Rule 8.4
 - Misrepresentation - Rule 8.4
 - Prejudicial to the administration of justice - Rule 8.4
 - Reporting of - Rule 8.3
 - Misleading
 - Communication regarding services - Rule 7.1, Rule 7.3
 - Law firm name - Rule 7.1
 - Mistaken receipt of confidential information - Rule 4.4(b)
- N**
- Negligence (professional) - Rule 1.1
 - Neglect - Rule 1.3
 - Non-compete covenants - Rule 5.6
 - Nonlawyer assistants - Rule 5.3
- O**
- Opposing party/counsel
 - Acceding to reasonable requests - Rule 1.2
 - Fairness to - Rule 3.4
 - Organization as a client - Rule 1.13
 - Outsourcing - Rule 1.1, Rule 1.6, Rule 5.3
- P**
- Payment of fees - Rule 1.5
 - Plea bargain
 - Client's decision to enter - Rule 1.2
 - Representation of two or more clients - Rule 1.8
 - Potential client
 - Contact with - Rule 7.3
 - Duties to - Rule 1.18
 - Principal - Rule 1.0
 - Pro Bono Publico Service - Rule 6.1
 - Procrastination - Rule 1.3
 - Professional judgment - Rule 1.2
 - Prohibited representation - Rule 1.7, Rule 1.9, Rule 1.10, Rule 1.11
 - Promptness - Rule 1.3
 - Proprietary interest in litigation - Rule 1.8
 - Prosecutors - Rule 3.8
 - Prospective clients - Rule 1.18
 - Public officials - Rule 6.6
 - Public service - Rule 6.1
 - Publicity - Rule 3.6, Rule 3.8
- R**
- Reasonable, defined - Rule 1.0
 - Reconciliation of trust assets - Rule 1.15
 - Records on trust accounts - Rule 1.15-3
 - Referral services - Rule 7.2, Rule 7.4
 - Requests by client - Rule 1.4
 - Reporting misappropriation - Rule 1.15
 - Reporting misconduct - Rule 8.3
 - Representation, scope of - Rule 1.2
 - Respect for third persons - Rule 4.4
 - Restrictions on the right to practice - Rule 5.6

S

Safekeeping property - Rule 1.15-2
Sale of law practice - Rule 1.17
Screening (of lawyers) - Rule 1.0, Rule 1.10, Rule 1.18
Segregation of lawyer's funds - Rule 1.15
Self-dealing - Rule 1.7, Rule 1.8
Settlement
-Client's decision - Rule 1.2
-Representation of two or more clients - Rule 1.8
Sexual relations with a client - Rule 1.19
Skill - Rule 1.1
Solicitation of legal services - Rule 7.3
Specialization - Rule 7.1, Rule 7.2
Splitting fees
-With lawyer - Rule 1.5(e)
-With nonlawyer - Rule 5.4(a)
Subordinate lawyers - Rule 5.2
Substantial, defined - Rule 1.0
Supervisory lawyers - Rule 5.1

T

Technology, duty of competence as to - Rule 1.1
Termination of representation - Rule 1.3, Rule 1.8, Rule 1.16
Testify, client's decision to - Rule 1.2
Third-party neutrals - Rule 1.12, Rule 2.4
Third persons - Rule 4.4
Trade name - Rule 7.1
Trial publicity - Rule 3.6
Tribunal
-Candor toward - Rule 3.3, Rule 3.4
-Defined - Rule 1.0
-Disobedience of rules under - Rule 3.4(c)
-Disruption of - Rule 3.5(a)(4)
-Impartiality - Rule 3.5
Trust accounts - Rule 1.15
-Oversight officer, designating principle to serve as - Rule 1.15-4
Truthfulness - Rule 3.3, Rule 4.1

U

Unauthorized practice of law - Rule 5.5
Unjustified expectation of results, creating - Rule 7.1
Use of information relating to representation - Rule 1.6, Rule 1.8, Rule 1.9
Unrepresented persons - Rule 4.3

W

Waiver
-Of jury trial by client - Rule 1.2
-Of rights and/or legal positions - Rule 1.2
Website address - Rule 7.1
Withdrawal from representation - Rule 1.16
Withholding information - Rule 1.4, Rule 3.4
Witness
-Lawyer as - Rule 3.7
-Obstruction of - Rule 3.4(f)
Work load, attorney - Rule 1.3
Writing, defined - Rule 1.0
Wrongful conviction, disclosure of evidence of - Rule 3.8(g), Rule 8.6

Z

Zeal - Preamble, Rule 1.3