THE RESPONSIBILITIES OF THE ATTORNEY GUARDIAN AD LITEM

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"The lawyer's position in such cases is an unavoidably difficult one."

Rule 1.14, Comment 8, Revised Rules of Professional Conduct

NCGS **§ 35A-1107. Right to counsel or guardian ad litem.** *[emphasis added]*

(a) The respondent is entitled to be represented by counsel of his own choice or by an appointed guardian ad litem. Upon filing of the petition, an attorney shall be appointed as guardian ad litem to **represent the respondent** unless the respondent retains his own counsel, in which event the guardian ad litem may be discharged. Appointment and discharge of an appointed guardian ad litem shall be in accordance with rules adopted by the Office of Indigent Defense Services.

(b) An attorney appointed as a guardian ad litem under this section shall represent the respondent until the petition is dismissed or until a guardian is appointed under Subchapter II of this Chapter. After being appointed, the guardian ad litem shall **personally visit** the respondent as soon as possible and shall make every reasonable effort to **determine the respondent's wishes** regarding the incompetency proceeding and any proposed guardianship. The guardian ad litem shall **present to the clerk the respondent's express wishes at all relevant stages** of the proceedings. The guardian ad litem also **may make recommendations to the clerk concerning the respondent's best interests** if those interests differ from the respondent's express wishes. In appropriate cases, the guardian ad litem shall **consider the possibility of a limited guardianship** and shall make recommendations to the clerk concerning the rights, powers, and privileges that the respondent should retain under a limited guardianship.

(1987, c. 550, s. 1; 2000-144, s. 33; 2003-236, s. 3.)

I.) Two Roles of GAL:

A. Representation of Respondent as the Attorney Advocate

B. Recommendations to the Court

II.) Representation of Respondent as the Attorney Advocate – Expressing the Respondent's Wishes

A. MUST put forth the Respondent's wishes per *NCGS 35A-1107(B).*

B. You are the Respondent's attorney. Be a zealous advocate!
   i. Exercise Reasonable diligence and promptness in representing a client. – *Rule 1.3*
   ii. Have a goal and a strategy as you would with any other case.
   iii. Use evidence and argument to paint a picture for the court of the Ward's life and circumstances.
   iv. Attorney should notify client of right to appeal.

C. Rules of the Commission on Indigent Defense Services apply
   i. Must continue to represent the Respondent until the entry of appeal to the appellate division or the expiration of time for appeal. *IDS Rule 1.7(a).*

D. The Rules of Professional Conduct and Ethics Opinions apply.
   i. Diligence – *Rule 1.3*
   ii. Confidentiality of Information – *Rule 1.6*
   iii. Scope of Representation and Allocation of Authority Between Client and Lawyer – *Rule 1.2*
   iv. Client with Diminished Capacity – *1.14*
   v. Communications With persons Other Than Client s – *Rule 42*

vi. Communication – *Rule 1.4*

vii. Impartiality and Decorum of the Tribunal – *Rule 3.5*

viii. Candor to the Tribunal – *Rule 3.3*

ix. Ex Parte Communicate with Judge - *RPC 237*

x. Ex Parte Communication with A Judge Regarding a Scheduling or Administrative Matter – *97FEO3*

xi. Ex Parte Submission of Proposed Order to Judge - *97FEO5*

xii. Ex Parte Communication With A Judge - *98FEO12*

xiii. Loyalty to Client and Conflicts of Interest – *Rule 1.7 through 1.10*

xiv. Representing a Client of Questionable Competence – *RPC 157*

xv. Competency in Legal Representation – *Rule 1.1*

xvi. Terminating Legal Representation – *Rule 1.16*

xvii. Undertaking Evaluations For Use By Third Parties – *Rule 2.3*

xviii. The Assertion of Nonmeritous Claims or Defenses – *Rule 3.1*

xix. Dilatory Practices and Delaying Litigation – *Rule 3.2*

xx. Fairness to Opposing Counsel – *Rule 3.4*

xxi. Testifying as a Witness At Trial – *Rule 3.7*

xxii. Making False Statements of Law or Fact to Others – *Rule 4.1*

xxiii. Respect for Rights of Others – *Rule 4.4*

xxiv. Dishonesty, Fraud, Deceit, Misrepresentation and Conduct Prejudicial to the Administration of Justice – *Rule 8.4*

xxv. Client's health information must be protected – *06FEO10*

xxvi. An attorney cannot voluntarily disclose the client's criminal record – *RPC33*

xxvii. An attorney cannot reveal confidential information related to client's contagious disease – *RPC 117*

xxviii. An attorney can resist competency proceeding as long as resistance is not frivolous – *98FEO16*

E. Confidentiality of Information - Communications with attorney advocate are confidential, unless there is informed consent per *Rule 1.6*. Communications include not only "matters communicated in confidence by the client but also to all

information acquired during the representation, whatever the source." *Ruled 1.6, Comment 3.*

i. Exception → "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." *Rule 1.6, Comment 6.*

1. Note this provision is specific to bodily harm, not financial harm.

ii. Exception → "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." *Ruled 1.6, Comment 5.*

iii. Exception → if a 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." *Rule 1.6, Comment 15*

F. Client with Diminished Capacity – *Rule 1.14*

i. Try to maintain the attorney-client relationship as normal as possible - *Rule 1.14, Comment 10.*

ii. Attorney must abide by the client's decisions per *Rule 1.2*. But with diminished capacity this is difficult. Per *Rule 1.2, Comment 4*, "In a case which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decision is to be guided by reference to Rule 1.14."

1. "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." *Rule 1.2, Comment 14.*

iii. Emergency Action to Protect Client with Diminished Capacity's Interest:

1. Risk of Substantial Harm: “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.” *Rule 1.14(b)*
2. Emergency legal action is permitted if there is a threat of imminent and irreparable harm, even if the client’s capacity prevents the establishment of an attorney-client relationship. Only act if you reasonably believe that there is no other attorney representing the Respondent. The purpose is to maintain the status quo or otherwise avoid imminent and irreparable harm. The attorney still has the same duties as is customary for lawyers. *Rule 1.14, Comment 9.*
3. Per *Rule 1.14, Comment 5* of the Revised Rules of Professional Conduct, the lawyer may “…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.”
4. Confidential information should be released ONLY to the extent reasonably necessary to protect the client’s interest.

G. Communication – *Rule 1.4*

i. The client must be kept "reasonably informed". The lawyer "shall explain the matter to the extent reasonably necessary to make informed decisions regarding the representation." But in some circumstances there may be justification in delaying informing the client. For example, when a doctor states the information would harm the client.

H. Conflicts of Interest: The same conflict of interest rules regarding current, former and prospective clients apply.

i. The question to ask, in general, is could the Respondent's position be compromised, attacked or impeached by the existence of the relationship or knowledge derived from the relationship.

ii. An adult to an incompetency proceeding may be incompetent and thus unable to sign any consent to a conflict. In that case, if the conflict is terminal, the GAL must withdrawal from the case.

I. Communications with Persons Represented by Counsel: GAL cannot communicate with represented parties, including <u>the respondent</u> (if there is an independent attorney), children, parents, caretakers, etc. unless there is consent from the other attorney. *Rule 4.2(a)* If you do not know, you can get a court order permitting the communication. *Rule 4.2, Comment 7.*

J. GAL Report: Put the GAL report in writing and send it to opposing counsel or unrepresented party prior to the hearing.

i. Unless an exception applies, ex parte communications with the court are prohibited. *RPC 237, 97FEO3, Rule 3.5(3)*

ii. If there is no opposing counsel, must forward report in writing to unrepresented parties per *Rule 3.5(a)(3).*

iii. Must deliver a copy to opposing counsel/party at the same time or prior to the time the written communication is delivered to the judge. *97FEO5.*

iv. Except, lawyer may engage in ex parte communications regarding scheduling or administration matter if necessary to administer justice or there are extenuating circumstances and the attorney made diligent efforts to notify opposing counsel. *97FEO3*

v. When ex parte communication is permitted, must follow certain rules:

1. The Gal must "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." *Rule 3.3(d); 97FEO5.*
2. The GAL must disclose: "(1) that the lawyer is about to engage in an ex parte communication; (2) why it is necessary to speak to the judge ex parte; (3) the authority (statute, caselaw or ethics rule or opinion) that permits the ex parte communication; and (4) the status of attempts to notify the opposing counsel or the opposing party if unrepresented. If these disclosures are made, the judge can decide whether an ex parte discussion with the lawyer is appropriate." *98FEO12*

vi. Communications that are not about a particular case are not ex parte since there are no other "parties" to be potentially harmed by the communication. But, if the general communication relates to an issue in a particular case, it may be considered ex parte.

III.) <u>Recommendations to the Court – Best Interest of Client</u>

A. There are rules that apply although the lawyer is acting in a non-professional capacity. *2004FEO11*.

i. Rules on Confidentiality may <u>not</u> apply when recommending the best interest of the respondent because purpose of privilege is to protect communications so attorney can represent the client's wishes, not the best interest. Should reveal potentially confidential information only the extent necessary to make the recommendation.

ii. Lawyer as Witness – *Rule 3.7*

B. “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 157.*

C. Disagreement between the client’s wishes and what the GAL feels is in the Respondent’s best interest:
    i. When a lawyer and client disagree about the means to be used to accomplish the client’s objectives, the attorney should “consult with the client and seek a mutually acceptable resolution to the disagreement.” *Rule 1.2, Comment 2*.
    ii. The GAL should attempt to reach middle ground between the client’s wishes and the GAL’s belief regarding the best interest of the client.

D. Limited Guardianships:
    i. Per *NCGS §35A-1107(B),* requires the GAL to “consider the possibility of a limited guardianship”. The limited guardianship may be middle ground:
    ii. “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.” *Rule 1.14, Comment 1.*
    iii. “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.” *Rule 1.14, Comment 5.*

E. Lawyer as A Witness – *Rule 3.7*:
    i. *Rule 3.7* states a lawyer cannot be a witness unless disqualification of the lawyer would work substantial hardship on the client as a Witness.
    ii. There are exceptions to this general rule: No prohibition on GAL from testifying as to the competency of the ward. *In re Farmer,* 60 N.C. App. 421, 299 S.E.2d 262, *disc. review denied,* 308 N.C. 191, 302 S.E.2d 243 (1981).

F. If Respondent has independent counsel and the GAL is not acting as attorney advocate:

i. Rules specific to the attorney client relationship do not apply, such as confidentiality (Rule 1.6), zealous advocacy (Rule 1.3), loyalty (Rule 1.7 through 1.10) or evaluations used for third persons (Rule 2.3).

ii. If the GAL is not acting as the attorney advocate, Rule 4.2 prohibiting communications with a represented party during the lawyer's representation of a client does not apply. *2006FEO19.*

iii. But, rules applicable to all attorneys do apply, including ethical duty of candor to the Court (Rule 3.3), fairness to opposing party and counsel (Rule 3.4), ex parte communications (Rule 3.5) and dishonesty, fraud, deceit, misrepresentation, and conduct prejudicial to the administration of justice (Rule 8.4).

Client-Lawyer Relationship

Rule 1.14 Client with Diminished Capacity

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. *See* Rule 1.2 (d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad

litem or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997

Amended March 1, 2003

ETHICS OPINION NOTES

CPR 314. An attorney who believes his or her client is not competent to make a will may not prepare or preside over the execution of a will for that client.

RPC 157. A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection if reasonably necessary to protect the client's interest.

RPC 163. A lawyer may seek the appointment of an independent guardian ad litem for a child whose guardian has an obvious conflict of interest in fulfilling his fiduciary duties to the child.

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

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

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.

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RPC 157

April 16, 1993

Editor's Note: See Rule 1.14 of the Revised Rules for additional guidance.

Representing a Client of Questionable Competence

Opinion rules that a lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection.

Inquiry #1:

Attorney A represents a client on a social security matter and determines, from confidential communications with his client, that the client is, in the attorney's opinion, not competent to handle his affairs in relation to the representation and that the client's actions in regard to the matters involved in the representation are detrimental to the client's own interest. For example, the client who sought the attorney's assistance with receipt of benefits from the social security administration, refuses to cash checks obtained for the client from social security despite the client's obvious need for financial support. The attorney believes that either a guardian should be appointed for the client under state law or that a representative payee should be appointed for the client under federal social security law. The client refuses to agree for the attorney to seek the appointment of a guardian, to seek the appointment of a representative payee, or even for the attorney to discuss this problem with the client's family. The attorney is of the opinion that the client lacks the capacity to form objectives necessary for a normal attorney/client relationship.

May the attorney seek the appointment of a guardian or a representative payee for the client?

Opinion #1:

Yes. The Rules of Professional Conduct do not speak directly to the question presented. There is language in the comment to Rule 2.8 concerning discharge and withdrawal suggesting that where an attorney is representing a client who is mentally incompetent she may "in an extreme case... initiate proceedings for a conservatorship or similar protection of the client." It follows that Attorney A may under the circumstances described seek the appointment of a guardian or a representative payee without the client's consent and over the client's objection if such appears to be reasonably necessary to protect the client's interests. In so doing, the attorney may disclose only her belief that there exists a good faith basis for the relief requested and may not disclose the confidential information which led her to conclude that the client is incompetent, except as permitted or required by Rule 4(c).

Inquiry #2:

In taking that action, may the attorney reveal confidential information so as to establish the grounds for guardianship or representative payee status?

Opinion #2:

See the answer to Inquiry #1.

Inquiry #3:

If the attorney may not seek appointment of a representative payee or guardian, must the attorney withdraw from the matter?

Opinion #3:

See the answer to Inquiry #1.

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Client-Lawyer Relationship

Rule 1.6 Confidentiality of Information

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

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

(1) to comply with the Rules of Professional Conduct, the law or court order;

(2) to prevent the commission of a crime by the client;

(3) to prevent reasonably certain death or bodily harm;

(4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;

(5) to secure legal advice about the lawyer's compliance with these Rules;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(7) to comply with the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court; or

(8) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

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

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

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client acquired during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information acquired during a lawyer's prior representation of a former client, and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

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

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

Rules of Professional Conduct or other law. *See also* Scope.

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

Authorized Disclosure

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

Disclosure Adverse to Client

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

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

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

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

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

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

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

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

[14] Paragraph (b)(1) also permits compliance with a court order requiring a lawyer to disclose information relating to a client's representation. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client's representation, however, the lawyer must, absent informed consent of the client to do otherwise, assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal. *See* Rule 1.4. Unless review is sought, however, paragraph (b)(1) permits the lawyer to comply with the court's order.

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

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

Detection of Conflicts of Interest

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

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

Acting Competently to Preserve Confidentiality

[19] Paragraph (c) requires a lawyer to act competently to safeguard information acquired during the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *See* Rules 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information acquired during the professional relationship with a client does not constitute a violation of paragraph (c) if the lawyer

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

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

Former Client

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

Lawyer's Assistance Program

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

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997

Amended March 1, 2003; October 2, 2014

ETHICS OPINION NOTES

CPR 284. An attorney who, in the course of representing one spouse, obtains confidential information bearing upon the criminal conduct of the other spouse must not disclose such information.

CPR 300. An attorney, after being discharged, cannot discuss the client's case with the client's new attorney without the client's consent.

CPR 313. An attorney may not voluntarily disclose confidential information concerning a client's criminal record.

CPR 362. An attorney may not disclose the perjury of his partner's client.

CPR 374. Information concerning apparent tax fraud obtained by an attorney employed by a fire insurer to depose insureds concerning claims is confidential and may not be disclosed without the insurer's consent.

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

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

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

RPC 33. An attorney may not disclose confidential information concerning the client's identity and criminal record without the client's consent nor may an attorney misrepresent such information to the court. In response to a direct question from the court concerning such matters, an attorney may not misrepresent the defendant's criminal record but is under

no ethical obligation to respond. If the client misrepresents his identity or record under oath, the attorney must ask the client to correct the misstatements. If the client refuses, the attorney must seek to withdraw. (*But see* Rule 3.3)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

98 FEO 16. Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is

not frivolous.

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

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

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

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

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

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

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

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

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.

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.

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 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.

CASE NOTES

Statement to Insurance Adjuster. - The attorney-client privilege does not cover a statement made to an insurance adjuster, not in the presence or at the request of counsel, and even before an attorney-client relationship exists. *Phillips v. Dallas Carrier Corp* ., 133 F.R.D. 475 (M.D.N.C. 1990).

Law firm was disqualified from representing plaintiff computer company in copyright case against another company which hired three of plaintiff's engineers where the law firm had previously represented one of the engineers. *Robert Woodhead, Inc. v. Datawatch Corp.* , 934 F. Supp. 181 (E.D.N.C. 1995).

Applied in *SuperGuide Corp. v. DirecTV Enters., Inc.* , 141 F. Supp. 2d 616 (W.D.N.C. 2001).

Quoted in *Travco Hotels, Inc. v. Piedmont Natural Gas Co* ., 332 N.C. 288, 420 S.E.2d 426 (1992).

Stated in *Furbush v. Otsego Mach. Shop, Inc.,* 914 F. Supp. 1275 (E.D.N.C. 1996).

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Client-Lawyer Relationship

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. 84-23

Adopted July 24, 1997

Amended March 1, 2003

ETHICS OPINION NOTES

CPR 110. An attorney may not advise client to seek a Dominican divorce knowing that the client will return immediately to North Carolina and continue residence.

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

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

RPC 118. An attorney should not waive the statute of limitations without the client'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 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. Opinion rules that a lawyer may explain the effect of service of process to a client but may not advise a client to evade service of process.

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

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

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

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
1.5
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.

CASE NOTES

Law Firm as Interested Party. - Law firm which had no contact with defendant/phony psychiatric resident accused of sexual misconduct with client and which had not been authorized by him to undertake his representation lacked the authority under subsection (a) of this rule to represent him on a limited basis, but could intervene under § 1A-1, Rule 24 (a)(2) as an interested party to protect its interests. *Dunkley v. Shoemate* , 350 N.C. 573, 515 S.E.2d 442 (1999).

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Advocate

Rule 3.5 Impartiality and Decorum of the Tribunal

(a) A lawyer shall not:

(1) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(2) communicate *ex parte* with a juror or prospective juror except as permitted by law;

(3) communicate *ex parte* with a judge or other official except:

(A) in the course of official proceedings;

(B) in writing, if a copy of the writing is furnished simultaneously to the opposing party;

(C) orally, upon adequate notice to opposing party; or

(D) as otherwise permitted by law;

(4) engage in conduct intended to disrupt a tribunal, including:

(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, members of the family of a juror or a prospective juror.

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

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the North Carolina Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of provisions. This rule also prohibits gifts of substantial value to judges or other officials of a tribunal and stating or implying an ability to influence improperly a public official.

[2] To safeguard the impartiality that is essential to the judicial process, jurors and prospective jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with prospective jurors prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with a juror or a prospective juror about the case.

[3] After the jury has been discharged, a lawyer may communicate with a juror unless the communication is prohibited by law or court order. The lawyer must refrain from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases, and must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] Vexatious or harassing investigations of jurors or prospective jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on the lawyer's behalf who conducts an investigation of jurors or prospective jurors should act with circumspection and restraint.

[5] Communications with, or investigations of, members of families of jurors or prospective jurors by a lawyer or by anyone on the lawyer's behalf are subject to the restrictions imposed upon the lawyer with respect to the lawyer's

communications with, or investigations of, jurors or prospective jurors.

[6] Because of the duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a juror, a prospective juror, or a member of the family of either should make a prompt report to the court regarding such conduct.

[7] The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal.

[8] All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if unrepresented. Ordinarily, an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel or, if there is none, to the opposing party. A lawyer should not condone or lend himself or herself to private 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] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. *See* Rule 1.0(m).

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997; Amended March 1, 2003.

ETHICS OPINION NOTES

CPR 16. A lawyer or group of lawyers may contribute to a judge's campaign in a reasonable amount.

CPR 183. An attorney who represents a judge may not appear before the judge. (*But see* 97 FEO 1.)

CPR 225. It is permissible for an attorney to appear before his brother judge if the lawyer for the adverse party and his client consent.

CPR 226. Although an attorney may not appear before his brother judge without the consent of the parties, his partners and associates may.

CPR 283. The fact that a law firm's secretary is the spouse of a magistrate does not disqualify members of the law firm from practicing criminal law before the magistrate.

CPR 318. The fact that an attorney's spouse is a judge's secretary does not disqualify the attorney from practicing before the judge.

CPR 337. After a jury trial, an attorney may communicate with jurors as to why they decided issues as they did and their opinions of the attorney's performance, unless such is prohibited by court rule.

RPC 122. A member of the attorney general's staff may not consult *ex parte* with a trial court judge if it is likely that that attorney or another attorney working in the same division of the attorney general's office will represent the state in the appeal of the case.

RPC 214. A lawyer may not send a jury questionnaire directly to prospective members of the jury but, if the questionnaire is sent out by the court, such communications are not prohibited.

RPC 237. A lawyer may not communicate with the judge before whom a proceeding is pending to request an *ex parte* order unless opposing counsel is given adequate notice or unless authorized by law.

97 FEO 1. A lawyer may appear in court before a judge the lawyer represents in a personal matter provided there is disclosure of the representation and all parties and lawyers agree that the relationship between the lawyer and the judge is immaterial to the trial of the matter.

97 FEO 3. A lawyer may engage in an *ex parte* communication with a judge regarding a scheduling or administrative matter only if necessitated by the administration of justice or exigent circumstances and diligent efforts to notify opposing counsel have failed.

97 FEO 5. A lawyer must provide the opposing counsel with a copy of a proposed order at the same time that the lawyer submits the proposed order to the judge in an *ex parte* communication.

98 FEO 12. Opinion sets forth the disclosures a lawyer must make to the judge prior to engaging in an ex parte communication.

98 FEO 13. Opinion restricts informal written communications with a judge or judicial official relative to a pending matter.

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

2001 FEO 15. Opinion rules that a lawyer may not communicate ex parte with a judge in reliance upon the communication being "permitted by law" unless there is a statute or case law specifically and clearly authorizing such communications or proper notice is given to the adverse party or counsel. (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.

CASE NOTES

The trial judge did not abuse his discretion in removing a juror and substituting an alternate juror when the original juror contacted defense counsel at his home during the weekend recess and persisted in discussing matters of a personal nature, including counsel's marital status. Although there was no evidence that any matter which related to the trial of the defendant was discussed during the conversation, the exercise of discretion by the trial judge served to safeguard the trial of the defendant from even the appearance of impropriety. *State v. Price,* 301 N.C. 437, 272 S.E.2d 103 (1980).

Ethical transgressions by trial counsel do not always constitute legal error. *State v. Sanders* , 303 N.C. 608, 281 S.E.2d 7, *cert. denied* , 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d. 392 (1981).

Argument That Testifying Officers Could Be Prosecuted If They Lied. - A prosecutor who, in closing, made arguments based on matters outside the record by suggesting that the officers who testified against the defendant could be prosecuted for perjury and fired from their jobs, and lose their pensions if they lied, placed the jurors in the moral dilemma of either convicting the defendant or, in the alternative, causing the officers to suffer the grievous penalties suggested by the prosecutor. The argument was, therefore, improper and the defendant was entitled to a new trial. *State v. Potter* , 69 N.C. App. 199, 316 S.E.2d 359, *disc. rev. denied,* 312 N.C. 624, 323 S.E.2d 925 (1984).

The intentional act of soliciting someone to disrupt a criminal trial by an attorney representing a defendant was not a felony, but would support an order of disbarment. *In re Paul* , 84 N.C. App. 491, 353 S.E.2d 254, *cert. denied* , 319 N.C. 673, 356 S.E.2d 779 (1987), *cert. denied* , 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

Quoted in *State v. Bunch,* 104 N.C. App. 106, 408 S.E.2d 191 (1991).

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97 Formal Ethics Opinion 5

January 16, 1998

Editor's Note: This opinion was decided pursuant to the Revised Rules of Professional Conduct.

Ex Parte Submission of Proposed Order to Judge

Opinion rules that a lawyer must give the opposing counsel a copy of a proposed order simultaneously with the lawyer's submission of the proposed order to a judge in an ex parte communication.

Inquiry #1:

Attorney A represents a prisoner condemned to death. He files a motion for appropriate relief ("MAR") seeking a new trial, pursuant to G.S. §15A-1415 *et seq.*, by mailing the motion to the clerk of Superior Court with a letter requesting that the MAR be brought to the court's attention. Attorney A also serves a copy of the motion on Attorney B who is the district attorney and represents the state of North Carolina in this matter. Attorney C, an assistant attorney general, also represents the state in the matter.

After receiving the MAR, Attorney C prepares an answer and proposed order. The proposed order decides numerous contested factual and legal issues in the state's favor, dismisses the MAR, and includes space for the judge's signature. Attorney B delivers the MAR, the unfiled answer, the proposed order, and documents from the court file to Superior Court Judge D in chambers. Judge D has had no previous involvement in the case. Attorney B offers to make any modifications to the proposed order requested by Judge D.

Subsequently, Judge D signs the proposed order and returns it to Attorney B. Attorney B then files the answer and the signed order with the clerk of court and mails copies of the documents to Attorney A. This occurs five days after Attorney B delivered the answer and proposed order to Judge D. When Attorney A receives the answer and order from Attorney B, it is the first notice that Attorney A has received that the case was under consideration by Judge D. May lawyers make a written presentation to a judge without timely notice to the opposing lawyer?

Opinion #1:

No. Rule 3.5 of the Revised Rules of Professional Conduct addresses a lawyer's duty to maintain the impartiality of a tribunal. Comment [7] to Rule 3.5 includes the following observations:

> All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party.

This advice should be heeded in all *ex parte*communications with a judge.

Rule 3.5(a)(3)(ii) permits a lawyer to communicate *ex parte* with a judge in writing only "if a copy of the writing is furnished simultaneously to the opposing party." The repealed rule on the same topic, repealed Rule 7.10(b)(2), allowed a written communication with a judge "if the lawyer promptly deliver[ed] a copy of the writing to opposing counsel..." The rule was changed to emphasize the importance of notifying the opposing counsel of an *ex parte* written communication with a judge. Delivery of a document to opposing counsel five days after its submission to a judge would not be "prompt" under the standard of the repealed rule and it utterly fails to meet the requirement of "simultaneous" delivery under Rule 3.5(a)(3)(ii). To comply with Rule 3.5, a lawyer must hand deliver a copy of the written communication to the opposing lawyer at the same time or prior to the

time that the written communication is hand delivered to the judge or, if the written communication is mailed to the judge, the lawyer must put the written communication in the mail for delivery to opposing counsel at the same time or before it is placed in the mail for delivery to the judge.

Inquiry #2:

It is the practice of the bar in this judicial district to give the opposing lawyer prior or contemporaneous notice of the submission to the court of a proposed order and the opportunity to comment upon or object to the proposed order. May a lawyer fail to comply with this practice by submitting a proposed order to a judge in an *ex parte* communication prior to providing the proposed order to the opposing counsel?

Opinion #2:

No. *See* opinion #1 above. Such conduct also violates Rule 3.5(a)(4)(i) which prohibits conduct intended to disrupt a tribunal, including "failing to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving opposing counsel timely notice of the intent not to comply." Moreover, failure to give the opposing lawyer an opportunity to comment upon or object to a proposed order before it is submitted to the judge is unprofessional and may be prejudicial to the administration of justice. It is the more professional practice for a lawyer to provide the opposing counsel with a copy of a proposed order in advance of delivering the proposed order to the judge and thereby give the opposing counsel an adequate opportunity to comment upon or object to the proposed order.

At a minimum, Rule 3.5(a)(3)(ii) requires a lawyer to furnish the opposing lawyer with a copy of the proposed order simultaneously with its delivery to the judge and, if the proposed order is furnished to the opposing counsel simultaneously, Rule 3.3(d) requires the lawyer to disclose to the judge in the *ex parte* communication that the opposing lawyer has received a copy of the proposed order but has not had an opportunity to present any comments or objections to the judge. Rule 3.3(d) provides that "in an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."

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98 Formal Ethics Opinion 12

July 16, 1998

Ex Parte Communication with a Judge

Opinion sets forth the disclosures a lawyer must make to the judge prior to engaging in an ex parte communication.

Inquiry #1:

When may a lawyer communicate ex parte with a judge to request a continuance or discuss other administrative matters?

Opinion #1:

As noted in 97 Formal Ethics Opinion 3, the administration of justice or exigent circumstances may necessitate an *ex parte* oral communication with a judge to resolve a scheduling or administrative matter. If so, the lawyer may initiate an *ex parte* communication with the judge only after a good faith effort is made to notify the opposing lawyer. 97 Formal Ethics Opinion 3. Unlike the prohibition on *ex parte* communications "as to the merits of a matter" in Rule 7.10(b) of the superseded (1985) Rules of Professional Conduct, Rule 3.5(a) of the Revised Rules of Professional Conduct prohibits all *ex parte* communications with a judge except in the following situations: (1) in the course of official proceedings; (2) in writing, if the lawyer simultaneously delivers a copy of the writing to opposing counsel; (3) orally, upon adequate notice to the opposing counsel; or (4) as otherwise authorized by law. Because an *ex parte* communication may influence the outcome of a case, a lawyer should avoid such communications unless the opposing party receives adequate notice or the communication is allowed by law. *See* RPC 237 (citing statutes permitting *ex parte* communications in certain emergencies) and 97 Formal Ethics Opinion 3.

Inquiry #2:

Lawyer A has two different matters scheduled simultaneously in courts in different judicial districts. She has made several unsuccessful attempts to notify the opposing counsel in one matter that she needs to request a continuance from the judge. May Lawyer A request a continuance in an *ex parte* communication with the judge?

Opinion #2:

Yes, provided she fully informs the judge of the reason for her *ex parte* communication and she gives the judge an opportunity to determine whether he will hear the matter *ex parte*. The disclosures to the court should include the following: (1) that the lawyer is about to engage in an *ex parte* communication; (2) why it is necessary to speak to the judge *ex parte*; (3) the authority (statute, caselaw or ethics rule or opinion) that permits the *ex parte* communication; and (4) the status of attempts to notify the opposing counsel or the opposing party if unrepresented. If these disclosures are made, the judge can decide whether an *ex parte* discussion with the lawyer is appropriate.

Inquiry #3:

Do the limitations on *ex parte* communications with a judge apply equally to criminal defense counsel and to the lawyers in the district attorney's staff?

Opinion #3:

Yes.

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Advocate

Rule 3.7 Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. *See* Rule 1.7. *See* Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(f) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be

precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997; Amended March 1, 2003.

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.

CASE NOTES

Counsel Is Not Incompetent to Testify. - The weight of authority in this country is that while it is a breach of professional ethics for a party's attorney to testify about other than formal matters without withdrawing from the litigation, he is not incompetent to testify. The testimony is admissible if otherwise competent. ***Town of Mebane v. Iowa Mut. Ins. Co.***, 28 N.C. App. 27, 220 S.E.2d 623 (1975).

But Is Discouraged from Doing So. - The Supreme Court of North Carolina has historically discouraged the practice of attorneys testifying on behalf of clients, and although it has been allowed, in most instances the lawyer acting as a witness for his client had previously surrendered his right to participate in the litigation. ***Town of Mebane v. Iowa Mut. Ins. Co.*** , 28 N.C. App. 27, 220 S.E.2d 623 (1975).

Exceptions Where Counsel May Testify for Client. - While the Disciplinary Rules set forth in the Code of Professional Conduct (now replaced by the Rules of Professional Conduct) do not control the admissibility of evidence or the competency of witnesses, they do govern the ethics and conduct of attorneys licensed to practice law in the State. It should be the policy of the courts to give effect to these rules which specifically address the question of when an attorney may be a witness for a party he represents. Both the Code of Professional Conduct and the common practice recognized by the North Carolina Supreme Court provide for exceptions where attorneys may testify on their clients'

behalf. *Town of Mebane v. Iowa Mut. Ins. Co.* , 28 N.C. App. 27, 220 S.E.2d 623 (1975).

Testimony for Client Before Administrative Board. - There is no compelling reason to extend existing law by holding that evidence presented by an attorney who testifies while representing a client before a local administrative board may not be considered by such local administrative board. However, attorneys are strongly discouraged from serving as both witnesses and advocates, even before local administrative boards, unless compelling circumstances exist. *Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment* , 44 N.C. App. 539, 261 S.E.2d 520, *cert. denied* , 299 N.C. 737, 267 S.E.2d 663 (1980).

Discretion of Trial Judge. - Whether to allow defense counsel to testify on a collateral matter, impeachment of a witness, is in the discretion of the trial judge. *State v. Elam* , 56 N.C. App. 590, 289 S.E.2d 857, *cert. denied* , 305 N.C. 461, 292 S.E.2d 577 (1982).

Request by Defendant for Withdrawal of Plaintiff's Counsel. - Defendant's request that counsel for plaintiff be precluded from testifying at trial or that his law firm be disqualified from further representation of plaintiff would be denied, where plaintiff had not yet determined who its witnesses would be. If plaintiff subsequently determined that counsel should be called as a witness at trial, then the court, at the appropriate time, could order his withdrawal, as well as that of his law firm. *FDIC v. Kerr,* 111 F.R.D. 476 (W.D.N.C. 1986).

This rule only applies to lawyers, not their employees. *Seafare Corp. v. Trenor Corp.* , 88 N.C. App. 404, 363 S.E.2d 643, *cert. denied* , 322 N.C. 113, 367 S.E.2d 917 (1988).

Preference for Other Witnesses. - If other witnesses are available who can provide the information sought, it is not error not to permit an attorney for a party to testify. *State v. Daniels* , 337 N.C. 243, 446 S.E.2d 298 (1994).

Testimony Not Prejudicial. - Defendant could show no prejudice from defense counsel's testimony during a voir dire hearing on a collateral matter regarding the attorney's handling of evidence. *State v. Parker* , 119 N.C. App. 328, 459 S.E.2d 9 (1995).

Applied in *SuperGuide Corp. v. DirecTV Enters., Inc.* , 141 F. Supp. 2d 616 (W.D.N.C. 2001).

Stated in *Spivey v. United States,* 912 F.2d 80 (4th Cir. 1990); *H.B.S. Contractors v. Cumberland County Bd. of Educ.* , 122 N.C. App. 49, 468 S.E.2d 517 (1996).

Cited in *Central Carolina Nissan, Inc. v. Sturgis* , 98 N.C. App. 253, 390 S.E.2d 730 (1990); *State ex rel . Long v. American Sec. Life Assurance Co.* , 109 N.C. App. 530, 428 S.E.2d 200 (1993); *Berkeley Fed. Sav. & Loan Ass'n v. Terra Del Sol, Inc.,* 111 N.C. App. 692, 433 S.E.2d 449 (1993); *Beam v. Kerlee* , 120 N.C. App. 203, 461 S.E.2d 911 (1995).

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2006 Formal Ethics Opinion 19

January 19, 2007

Communication by Guardian ad Litem with Represented Person

Opinion rules that the prohibition against communications with represented persons does not apply to a lawyer acting solely as a guardian ad litem.

Inquiry #1:

G.S. Section 7B-601 of the Juvenile Code provides for the appointment of a guardian ad litem (GAL) for every child alleged to be abused or neglected. The section states that a GAL who is not an attorney shall be appointed an attorney to assure the protection of the child's legal rights through the dispositional phase of the proceedings and after disposition when necessary to further the best interests of the child. The section also provides that the GAL and the attorney advocate have standing to represent the juvenile in all actions under the subject chapter.

Some of the duties of the GAL, as defined in G.S. 7B-601, include: investigating the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; facilitating, when appropriate, the settlement of disputed issues; exploring options with the judge at the dispositional hearing; and protecting and promoting the best interests of the juvenile.

It is alleged that Child A was sexually abused by her father. Attorney X and Guardian Ad Litem Y were appointed to represent Child A in the juvenile petition. Guardian Ad Litem Y is not an attorney. She is interested in interviewing the mother of Child A. The mother is represented in this matter by another attorney. Must Guardian Ad Litem Y obtain the approval of the mother's attorney before communicating with the mother?

Opinion #1:

No. Rule 4.2 only prohibits communications with a represented person "[d]uring [the lawyer's] representation of a client." This prohibition does not apply to Guardian Ad Litem Y because it does not apply to nonlawyers.

Inquiry #2:

Would Opinion #1 be different if Guardian Ad Litem Y is an attorney but is performing the role of guardian ad litem solely and is not performing the role of the attorney advocate?

Opinion #2:

No. Guardian Ad Litem Y may communicate with the mother without obtaining the consent of the mother's attorney. If Guardian Ad Litem Y is not acting as the attorney advocate but is only serving as the appointed special guardian "at law" of the child, she is not subject to the prohibition in Rule 4.2 because she is not acting in the course of her representation of a client. *See* Opinion #1.

Inquiry #3:

Would Opinion #1 change if the person with whom Guardian Ad Litem Y wanted to speak also had an appointed GAL?

Opinion #3:

No.

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