

Reasoning with Unreasonable Clients
2011 Spring Public Defender Conference
Bryan Collins
Wake County Public Defender

A. Defining “unreasonable”

1. Mr. “Know-it-All”
2. Ms. “You are Working for the State”
3. Mrs. Unrealistic Expectations
4. Sir “Talk to the Hand”
5. Mentally Challenged
6. Physically Threatening

B. Strategies for keeping clients from becoming unreasonable

1. Early jail visit
2. Speak client’s language
3. **LISTEN** to your client
 - a. Don’t immediately tell them the DA’s plea offer, despite Rule 1.4, Comment [2]. See Rule 1.4, Comment [7].
 - b. Ask the client what she wants and what she wants to tell you. Ask about her family, job and other important things in her life.
 - c. Make eye contact. Don’t write everything down at first.
4. Show your client you are fighting for them
 - a. Bond motions
 - b. Discovery demand
 - c. Interview witnesses
5. Reach out to family and friends
 - a. A word about requiring your client to sign some sort of permission to speak about his case with family- DON’T
6. Educate yourself about issues that are important to your client
 - a. Collateral consequences
 - b. Department of Corrections policies and procedures

C. The Rules about who gets to make decisions

1. North Carolina Rules of Professional Conduct
 - a. Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer
 - b. Rule 1.4: Communication
 - c. Rule 1.14: Client with Diminished Capacity

2. Case law
 - a. State v. Ali, 329 N.C. 394 (1991) - Impasse in jury selection: Client's wishes control.
 - b. State v. Davis, 101 N.C. App. 12 (1990) – Impasse in whether to call a witness: Client's wishes control.

D. Discovery issues

1. Jailhouse snitch
2. Jailhouse lawyer

E. Plea issues

1. How hard to push
2. Strategies and associated ethics issues
 - a. Family members
 - b. Clergy
 - c. Second opinions
 - d. Mock cross exam
3. Competence

F. The “CYA” Letter

1. See example of CYA letter in materials
2. Purpose of letter
3. When to write it

G. What to do when you've done everything and nothing works

1. Trading cases
2. Motions to withdraw
 - a. Rule 1.16
 - b. Mandatory v. permissive withdrawal
 - c. Must get approval of court
 - d. Must protect client's confidences and other interests.
3. Discharge by client
 - a. Duty to inform client the consequences of discharge



Office of the Public Defender

District 10-Wake County
227 Fayetteville Street, Suite 500
P.O. Box 351
Raleigh, NC 27601

G. Bryan Collins, Jr.
PUBLIC DEFENDER

Tel: (919) 715-1514
Fax: (919) 715-1510

February 15, 2011

Mr. Difficult Client
County Jail
County Seat, NC

Dear Mr. Client:

Your case is set for trial on (Date). I am writing to make sure you understand everything about your case and to help you make a good decision about going to trial. You are charged with (name each charge and a brief explanation of it e.g.: murdering Joe Doe in Centerville on January 5th, 2009).

(Next, give a detailed summary of the evidence against your client. Note which evidence is undisputed and which evidence your client disputes). As I have gone over with you in your discovery, the state has three witnesses who will say they saw you shoot Joe Doe at your sister's house. They all say that Joe kissed your sister right before you got there and that when you walked in the door, Jim Bigmouth said, "Joe just kissed your sister." They all say that you pulled out a pistol and yelled, "Nobody kisses my sister" and shot Joe between the eyes. You sat there until the police came and told them exactly what I just stated. The police have the gun with your fingerprints on it. They matched the bullet which the medical examiner removed from Joe's head with the gun. Joe's blood was on your shoes. You have made it clear to me that you did not mean to shoot Joe. You were very drunk and just wanted to scare him.

(Next, go over the applicable law in as simple and straightforward terms as possible). You are charged with first degree murder. That requires the state to prove that you killed Joe on purpose with malice and with premeditation and deliberation. (Then go on to explain intent, malice, etc and distinguish second degree murder, voluntary manslaughter and accident).

(Next, go over the possible outcomes and the likelihood of each). If we go to trial, the jury will be told to decide whether you are guilty of first degree murder or

second degree murder. They could also choose to find you not guilty. As we have discussed, they will not be allowed to consider manslaughter because the law is clear that since you didn't actually see Joe kiss your sister, you did not have a legal reason to shoot him. The law calls that "lack of adequate provocation." Also, since Joe didn't use deadly force against your sister, you can't claim that you were defending her. (Note, you should explain why defenses don't apply, even when they seem silly. If your client has mentioned them or even has heard about them from his cellmates, they are real to him and need to be explained).

The chance of a jury of 12 people believing this was an accident is very, very slim. (Explain why). To find you guilty of second degree murder instead of first degree murder, they are going to have to believe that you were so drunk that you couldn't form the specific intent to kill or that that you did it so fast that you didn't think about it first. I think you have about an equal chance of being convicted of first degree murder and second degree murder. (Explain why.)

If you are convicted of first degree murder, you will spend the rest of your life in prison. The only possible sentence for you is life without parole. If you are convicted of second degree murder, you will be sentenced by the judge to (explain where he falls on the grid, aggravating and mitigating factors and anything else relating to sentencing, including the judge's reputation).

You can either choose to go to trial or you can agree to a plea offer. The State has agreed that if you plead to second degree murder that you will get (explain offer).

Attached to this letter are copies of all the legal research I have done in your case, the pattern jury instructions, the sentencing chart, your prior record level chart (and anything else you can think of to show them all the work you have done on case).

The decision whether to go to trial or take the plea offer is your decision to make. It is my job to make sure you understand your options. It is also my job to answer all of your questions and to give you my advice. I want you to understand that you are risking going to prison forever. The plea offer assures that you will be out of prison by the time you are 50 years old. It is also better than the sentence you will get if we go to trial and you are convicted of second degree murder. The only way you come out better than the plea offer is to convince 12 people this was an accident. You shot Joe from three feet away and hit him between the eyes. Do you honestly believe anybody is going to call that an accident?

(List all the personal reasons he should plead, whether it be to get out in time for his daughter's wedding or to hold his grandchildren. Some clients are motivated by the chance to go through the grades in prison faster and to someday get work release. If you have gotten to know your client, you will have a much better idea what motivates him. If you know that particular family members want him to take plea, include that).

I will fight for you no matter what you decide. This is your decision and I am with you. The best way I know to fight for you right now is to do everything I can to show you that this plea is the best choice for your life. I love trying cases. Trying this

one would be a mistake. (If your plea has an expiration date, make sure you include it somewhere in this paragraph). (Next, tell him to take time to think it over and that you will be back on a certain date to get his answer. Then make sure you go back on that date).

Sincerely,

G. Bryan Collins, Jr.
Public Defender

Some lawyers put a place at the bottom for client to sign that they have read and understand. Some also add a place for them to note their decision and a place to acknowledge that rejecting the plea is done against advice of counsel. I think there are reasons to do these and reasons not to. You should take your client's personality and all other circumstances into account before deciding whether to add such items.

The material printed below is the property of the NC State Bar.

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

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 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 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.

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.

Cases regarding allocation of responsibility between attorney and client:

In State v. Ali, Defendant claimed that the trial court violated his right to counsel by allowing his attorneys to accede to his desire to not strike a juror, over their objections. The Court observed that “[n]o person can be compelled to take the advice of his attorney.” Normally, “tactical decisions, such as which witnesses to call, ‘whether and how to conduct cross-examinations, what jurors to accept or strike, and what trial motions to make are ultimately the province of the lawyer....’ *However, when*

counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship." Where there is such a disagreement, counsel should make a record of it. Here, counsel proceeded properly, therefore there was no error. State v. Ali, 329 N.C. 394 (1991); accord State v. Freeman, 690 S.E. 17 (N.C. App. 2010). This deference to the client's wishes does not solely apply to voir dire, but also has been held to apply to the calling of witnesses over the objection of an attorney. State v. Davis, 398 S.E.2d 645 (N.C. App. 1990).

The material printed below is the property of the NC State Bar.

Client-Lawyer Relationship

Rule 1.4 Communication

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

Comment

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

Communicating with Client

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

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

substance of the representation.

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

Explaining Matters

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

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

Withholding Information

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

History Note: Statutory Authority G. 84-23

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

ETHICS OPINION NOTES

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

CASE NOTES

Failure to Notify Client of Dates. - The attorney violated the Code of Professional Responsibility by failing to notify the client of court dates. *North Carolina State Bar v. Frazier*, 62 N.C. App. 172, 302 S.E.2d 648, *appeal dismissed*, 308 N.C. 677, 303 S.E.2d 546 (1983).

A lawyer is ethically bound to advise his client of a plea bargain offer. *State v. Simmons*, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

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

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.

The material printed below is the property of the NC State Bar.

Client-Lawyer Relationship

Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of law or the Rules of Professional Conduct;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client; or
- (2) the client knowingly and freely assents to the termination of the representation; or
- (3) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; or
- (4) the client insists upon taking action that the lawyer considers repugnant, imprudent, or contrary to the advice and judgment of the lawyer, or with which the lawyer has a fundamental disagreement; or
- (5) the client has used the lawyer's services to perpetrate a crime or fraud; or
- (6) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; or
- (7) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (8) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; or
- (9) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Forfeiture by the client of a substantial financial investment in the representation may have such effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or imprudent or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

[10] The lawyer may never retain papers to secure a fee. Generally, anything in the file that would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and canceled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. The lawyer's personal notes and incomplete work product need not be released.

[11] A lawyer who represented an indigent on an appeal which has been concluded and who obtained a trial transcript furnished by the state for use in preparing the appeal, must turn over the transcript to the former client upon request, the transcript being property to which the former client is entitled.

History Note: Statutory Authority G. 84-23

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

ETHICS OPINION NOTES

CPR 3. A client is entitled to his file upon withdrawal of his attorney.

CPR 315. An attorney must give an indigent client the transcript provided by the state after disposition of the appeal.

RPC 58. Another member of a lawyer's firm may substitute for the lawyer in defending a criminal case if there is no prejudice to the client and the client and the court consent.

RPC 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 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 234. An inactive client file may be stored in an electronic format provided original documents with legal significance are preserved and the documents in the electronic file can be reproduced on paper.

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

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

CASE NOTES

Inadequate Notice of Withdrawal. - An attorney did not withdraw from representation when he sent his client a letter stating that he believed he could not handle the client's case and that the client should visit the office for further discussion. *North Carolina State Bar v. Sheffield*, 73 N.C. App. 349, 326 S.E.2d 320, cert. denied, 474 U.S. 981, 106 S. Ct. 385, 88 L. Ed. 2d. 338 (1985).

Duty of Attorney to Withdraw. - Where an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon the court, he must withdraw from representation of the client, seeking leave of the court, if necessary. The right of a client to effective counsel in any case (civil or criminal) does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation or presentation of false evidence. *In re Palmer*, 296 N.C. 638, 252 S.E.2d 784 (1979).