



**NORTH CAROLINA PARALEGAL ASSOCIATION, INC.**

**5th ANNUAL NCCP & CLA/CP REVIEW COURSE**

**SEPTEMBER 14 - 15, 2012**

**Review Session: Ethics**

presented by: Albert Russell Hendrix  
Attorney at Law  
Legal Ethics Instructor  
UNC Charlotte Paralegal Program  
Charlotte, NC  
[russellhendrix@gmail.com](mailto:russellhendrix@gmail.com)

materials written by:

Blanche Berkowitz, NCCP  
Patricia F. Clapper, ACP, NCCP

**A. Russell Hendrix** is a native of Raleigh, North Carolina. He is the Legal Ethics instructor at UNC Charlotte's Paralegal Program. Russell graduated from UNC Chapel Hill with a B.A. in Political Science, in 1998, and from UNC Chapel Hill's School of Law, in 2001. He is a member of the Mecklenburg County Bar (MCB), the North Carolina State Bar, and a member of the North Carolina State Bar Winter Bar Candidate Committee for the 26<sup>th</sup> Judicial District. Russell enjoys reading, sports, and rooting for the North Carolina Tar Heels.

Patricia F. Clapper, has been a legal assistant with the general practice firm of Levine & Stewart in Chapel Hill for just over 15 years. She is a NALA Certified Legal Assistant with her specialization in litigation, and she is certified by the North Carolina State Bar. She is an active member of the North Carolina Paralegal Association, the National Association of Legal Assistants and the North Carolina Academy of Trial Lawyers Legal Assistants Division. She currently serves as President of the North Carolina Paralegal Association. She also serves on the curriculum advisory board for the Paralegal Program at Central Carolina Community College in Sanford.

Note:

The CLA/CP exam litigation section is based totally on FEDERAL law. The NCCP exam litigation section is based totally on STATE law. You will find that in most instances the Federal Rules and State rules are the same or very similar. The attached materials cover both Federal and State laws to assist you in preparing for both exams.

## Overview

The American Bar Association's Model Rules of Professional Conduct and Model Guidelines for the Utilization of Legal Assistant Services are the basis for most states' rules and attorney-paralegal working relationships. The rules are directed at the attorneys to oversee the practice of paralegals or non-lawyers whose work they must review and supervise.

Under North Carolina law, only licensed attorneys may provide legal services or prepare or help prepare legal documents for another person. The North Carolina State Bar is authorized to investigate and act on reports of the unauthorized practice of law.

The North Carolina state legislature has defined the practice of law in North Carolina as:

- performing any legal service for another person, firm or corporation, with or without compensation; preparing court documents; assisting in legal work; or advising another person, firm or corporation about their legal rights. (N.C. Gen. Stat. § 84-2.1)

This statute and two other statutes identify specific activities as the practice of law that may be performed only by attorneys. (N.C. Gen. Stat. §§ 84-4\*<sup>1</sup> and 84-5). The list of specifically identified activities that constitute the practice of law includes:

- Abstracting and passing upon titles to real estate; Organizing corporations; Preparing or aiding in the preparation of deeds, trusts, wills or other legal documents; Preparing or aiding in the preparation of probate petitions and accountings; Preparing or aiding in the preparation of court pleadings; and Appearing in court or before any judicial or quasi-judicial body on behalf of another.

This list of specific activities is provided only as examples. Any activities involving the preparation of legal documents, giving legal advice, or providing legal services for another constitutes the practice of law.

The unauthorized practice of law is engaging in the practice of law in North Carolina or advertising or otherwise holding out to the public of an ability to provide legal services by someone other than a licensed North Carolina attorney. The unauthorized practice of law is illegal because a person who is not trained and licensed as an attorney may seriously harm the interests of a member of the public by providing incompetent legal services.

Under the statutes, only licensed North Carolina attorneys may provide legal services in North Carolina, represent that they are attorneys, or appear in court on behalf of another party.

\* See Appendix

The primary exception to the unauthorized practice of law rules is the exception for self-representation – an individual may prepare legal documents for his own use and may represent himself or herself in court.

By statute and regulation, some federal agencies permit lawyers licensed in any jurisdiction and non-lawyers to provide limited legal services before that agency. Those agencies include:

- Social Security Administration; Internal Revenue Service; Patent and Trademark Office; and U.S. Citizenship and Immigration Services (USCIS)

Although these agencies permit certain activities by non-lawyers, the services that may be provided are limited and persons who are qualified to appear before these agencies may not hold themselves out as North Carolina attorneys.

An attorney licensed in another state may qualify to represent a party in a North Carolina court under a procedure known as *pro hac vice* admission as long as the North Carolina court authorizes the attorney to represent the party.

It is a violation of North Carolina's unauthorized practice of law statutes for a non-lawyer to practice law regardless of the relationship with the individual for whom the services are provided and regardless of the fact that no fees are charged. This is because the potential for harm still exists.

Assisting another person with settlement negotiations on a legal claim constitutes the unauthorized practice of law, even if no lawsuit has been filed, such as an automobile accident or personal injury matter.

A paralegal or other non-lawyer may only perform work constituting the practice of law if it is under the supervision and at the direction of a licensed North Carolina attorney. Attorneys may hire or contract with paralegals or other non-lawyers to perform such services provided the non-lawyers are properly supervised.

A business may prepare its own legal documents and utilize non-lawyers in such preparations and may use non-lawyer employees to appear in small claims court on its behalf. However, corporations must be represented in other court proceedings by a licensed North Carolina attorney.

Generally a non-lawyer may not help in filling out legal forms, especially if the assistance involves helping you understand what needs to be filled in, advising you of the consequences of completing the form in a certain manner, or otherwise providing legal advice concerning the completion of the form. Additionally, advising a person that a particular legal form is appropriate for the person's legal needs is legal advice that may not be given by a non-lawyer.

A business may not provide legal services, unless the business is a law firm or certain qualified, nonprofit organizations. Both by statute and court decision, a business entity, whether for profit or nonprofit, may not provide legal services to its customers, even if those services are performed by licensed attorneys.

The unauthorized practice of law is a misdemeanor criminal offense that may be prosecuted by the local district attorney. Additionally, accepting fees for unauthorized practice of law may involve other crimes, such as false pretense, that are felonies.

The State Bar may ask the courts for an injunction to prohibit a person or business from engaging in the unauthorized practice of law.

Engaging in unauthorized practice of law may also expose a person to potential civil liability to a person harmed by the unauthorized practice including potential claims of fraud or unfair and deceptive trade practices.

Complaints about the unauthorized practice of law should be in writing to the State Bar. The State Bar's Authorized Practice Committee has the authority to investigate suspected unauthorized practice of law, prosecute for injunctive relief, or refer the matter to other appropriate agencies. The staff of the State Bar will review the information you provide, conduct an appropriate investigation, and present it to the committee for a decision concerning the appropriate action. During the course of the investigation, the non-lawyer will be sent a summary of your complaint and may be sent a copy of your complaint and asked to provide a statement describing his or her version of events.

The Authorized Practice Committee meets quarterly in January, April, July, and October. The committee considers all complaints for which the investigation has been completed during the quarter. Whether an investigation is completed during the quarter in which it is filed depends upon many factors including:

- when the complaint was received; the complexity of the investigation; and the ability to locate the accused individual, material witnesses, and relevant evidence.

The committee are public.

If it appears from investigation that there was a violation of the laws on unauthorized practice, the committee will either warn the non-lawyer about the conduct, issue a cease and desist letter, or seek an injunction depending on the circumstances. The committee may also refer the matter to other authorities that have jurisdiction, such as the District Attorney, if the facts warrant.

If it appears that there was no violation or there is not enough evidence to show a violation, the Committee will take no action, dismiss the matter and close the file.

**(The above was excerpted from the North Carolina State Bar website)**

also (see Rule 5.1\*<sup>A</sup>, Rule 5.3\*<sup>B</sup> and Rule 5.5\*<sup>C</sup>)

## Preventing and avoiding the Unauthorized Practice of Law (“UPL”)

- Establishing an attorney-client relationship (agreeing to take a case), setting a fee for a client other than the firm’s standard or set fees, appearing in court to represent a client, offering your legal opinion and deposing a party are all situations that involve the unauthorized practice of law (“UPL”). If you are applying your legal knowledge of the law to the facts of a case and offering an opinion on it, you are giving legal advice. If you are ever in doubt whether something you are doing is UPL, simply do not do it.
- Be sure to properly identify yourself as a paralegal or legal assistant to anyone you deal with. You may need to specify that you cannot give any legal advice and that you are NOT a lawyer. Since you as may be the one who has the most contact with a client this may cause a lot of problems for you. NEVER ATTEMPT TO GIVE LEGAL ADVICE. It is unethical. Clients may pressure you for answers immediately and since you are the closest to the attorney, they will keep asking questions. It will be tempting to help them, especially if you know the answer to their question. It will be tempting to say, well I am not an attorney BUT..... avoid the temptation! You are not an attorney and you cannot give legal advice. This is called the unauthorized practice of law
- You may be in a position where you will get calls requesting to know what your firm’s fees are. Check with your firm and find out what the policy is on you quoting fees. Some firms do not want anyone but attorneys quoting fees. Your firm may have a set fee sheet and fees are quoted from the sheet and you may be allowed to quote a standard fee. If you are permitted to quote a fee to a client, remember, that client will take that as a set amount. Without knowing the entire circumstances of a matter, it is hard to tell someone how much it will cost. A good example is the client who calls and asks for a fee for an “uncontested divorce”. Your firm may have a set flat fee for such a case. What the client doesn’t tell you is that custody, child support and property division is contested. Any quote should be conditional upon the specifics of the case.
- It is acceptable to relay a message to a client such as “Mr. Stewart said he could obtain a reduction on your ticket which will result in no points.” When relaying a legal opinion, be sure that you are stating verbatim what the attorney told you without any interpretation on your part. It is also acceptable to give the client a status on their file such as “the complaint has been filed and we are waiting for service”. It is not acceptable to say “your case is going well” as this could give the client a false impression and could be seen as giving legal advice. If in doubt, simply state that you will check with the attorney and he or you will call the client back.
- Emergencies will arise when a client needs immediate help. If you cannot reach the attorney, assure the client that you will continue to try to reach him and apprise him of what is going on. Be very careful not to give legal advice to the client about how to handle the situation. If the client cannot get an immediate answer, he is likely to say “well, what should I do”. If you work for a firm with more than one attorney, you can check with another attorney about what to do or ask if that attorney would speak with the client. If there is only one attorney you will have to be insistent with the client that you cannot give him advice and you will do your best to try to reach the attorney.

- Friends and family will inevitably ask for legal help. This is an area where you will need to use your best judgment. Chances are that your attorney is willing to at least speak to your family or friend at little or no charge or help them draft documents. Remember that you are illegally practicing law by giving advice to your family and friends. If you were not in the legal field you could give practical advice; however, since your friends and family think you are in the field and should know, so therefore you may not give advice.
- Be aware of the language used in correspondence you create and send out. Remember, you cannot give legal advice. If the letter gives any kind of advice, it must be signed by your attorney. You could state: "As per Ms. Smith, the attorney handling your case...", if so advised by your attorney.
- As a legal assistant or paralegal you may not represent a client in Court. You may, however, appear at a hearing and report to the Court that the attorney is ill or has a scheduling conflict. Keep in mind when you are doing this that you are subject to the same professionalism as your attorney, ie., you are properly dressed for court. (2000 Formal Ethics Opinion 10). A legal assistant or paralegal may attend a deposition but may not examine or represent the witness. (RPC 183) \*<sup>2</sup>
- A paralegal or legal assistant may oversee the signing of closing documents so long as the attorney is present in the office to answer any questions. Overseeing the signing, simply means that, sign here, sign here, sign here. If ANY questions arise, the attorney must be brought into the closing. (2002 FEO 9) \*<sup>3</sup>
- A paralegal or legal assistant may sign his or her supervising attorney's name to a court document so long as emergency circumstances exist, the document was drafted under the supervision of that attorney and the signature discloses that someone else has signed on the attorney's behalf, among other requirements. (2006 FEO 13) \*<sup>4</sup>

### **Maintaining Confidentiality and the Attorney-Client Privilege**

- You must maintain client confidentiality at ALL times in all aspects of what you do. This will require you to use your judgment. When in doubt, check with someone who has more experience or whom you are comfortable approaching.
- Maintaining client confidentiality includes keeping client information at the office. It will be enticing to take those interesting tidbits of information home to your spouse or your friends-do not discuss the information with anyone.
- Never use a speaker phone when clients are present in the waiting area. Be careful of the conversations you have when you are in the waiting area or nearby because you never know who is listening.
- When putting calls through to your attorney while clients are present in the waiting area, you will have to use your judgment about how to handle the confidentiality of the client's name and matter.

- When leaving phone messages for clients, try to be as discreet as possible, leaving only your name and number if you can.
- The manner you keep your desk can also be important to confidentiality and attorney-client privilege, especially if you are in an area that can be accessible to clients, either in passing or meeting with clients. Make sure files are kept in such a manner that information cannot be seen. Even information on the file tab, if seen, can be a breach of confidentiality
- A confidentiality statement should be attached to all faxes and emails. Make sure this message appears **before** the text of your email or the text of the fax.
- Be sure to double and triple check your emails before hitting that send button. With technology today it is so easy to send the wrong email to the wrong person and that could mean disastrous results. Never use the reply all button unless you are absolutely positively sure that's what you want to do. Before using email to communicate with your client, be sure they are agreeable to accepting information from your firm that way, especially if more than one person has access to that email. Be sure to print emails to and from your client, they are just like letters.
- If your firm inadvertently receives documents from an opposing attorney, which you know were not meant for your firm, the documents should not be read and should be returned immediately to the sender. The best practice is to immediately place them into an envelope and seal it. This way there is no temptation to read it. This commonly occurs when an attorney sends a letter and mistakenly includes a letter he meant to send to someone else. The worst is when you accidentally receive documents from the opposing attorney which are related to the case you have together which you know were not meant to be sent. Although the temptation to read them will be strong, ethically, you should immediately place the documents into an envelope, seal it and return it to the attorney. (RPC 252) \*<sup>5</sup>
- Chinese Wall Rule: This rule allows a paralegal (or other attorney or support staff) to leave one law firm for a position in another law firm even if there is a pending legal case in common between the firms. The "tainted" person builds a "Chinese wall" around themselves, ensuring no access to the case. This person may not work on this case at all. (RPC 74\*<sup>6</sup>, 176\*<sup>7</sup>).
- Any outside source hired for assistance with a case is also subject to attorney-client privilege, such as financial planners hired to assist with estate planning, accountants or appraisers hired for equitable distribution cases or even an interpreter hired for a Spanish speaking client.
- The Bar does not require that papers generated in the office be recycled, however the ethics opinion which addresses material containing confidential and sensitive information states that "shredding the waste paper would be appropriate". Again this Rule does not require shredding but seems to say that, under the RPC, the only way to maintain the confidentiality is to shred or retain the document. So long as the method of shredding (whether done in your office or by a company) minimizes the risk that the confidential information will not be disclosed, it is acceptable to recycle the paper. (RPC 133) \*<sup>8</sup>

- If a client wishes to retrieve an original item, it is advisable to have them sign a document receipt. A good example of this is with original Wills. Wills are only released to the maker or to the Executor. ID is checked and then the receipt must be signed. When a file is returned to a client who has retained other counsel, it is advisable to have them sign a receipt acknowledging that they are receiving their file and if your firm is or is not retaining copies.
- You may have calls where the caller wants to verify whether your firm represents someone. Simply tell them that you are not allowed to release information about who the firm does and does not represent. This can be confusing and either require you to use your judgment or defer to someone with more experience. If another attorney's office is calling and they tell you they represent Mr. Smith and they are inquiring if you represent Ms. Smith, it may be acceptable to tell them yes or no; however it is preferential to defer to an attorney in your firm. If a collection agency is calling looking for a client – it is advisable not to release any information. Again, simply state that your firm cannot release information about who they do and do not represent.
- What if a client reveals to you or your attorney that he is planning to commit a crime? Is it unethical for you to approach the authorities? If there is an imminent threat of harm, it is acceptable for the confidentiality to be broken. However, if a client admits that he did commit the crime, the harm has been done and any such statements must be kept confidential. Attorney-client privilege extends even after your representation of a client is terminated. (Rule 1.6) \*<sup>9</sup>
- Must an attorney report child abuse disclosed to him by a client? The NC State Bar has found that, ethically, an attorney is not required to report abuse, despite that there is a law in place requiring any person who has cause to believe abuse exists to report it. There seems to be a conflict in the ethical aspect of this versus the legal aspect. (RPC 120\*<sup>10</sup>, 175\*<sup>11</sup>)
- An attorney representing a minor has the same confidential duty to that client to not disclose his or her information to any third party, even a parent or guardian. The only exception to this is if the parent or guardian must be informed to give their consent to any legally binding situation where the minor cannot, because of his or her age, legally consent. (98 FEO 18) \*<sup>12</sup>
- In proceedings against an attorney related to his representation of a client, confidential client information may be revealed but only to the extent reasonably necessary to respond to allegations concerning the lawyer's representation. (RPC 62) \*<sup>13</sup>
- A paralegal may communicate and negotiate with an insurance adjuster as long as the paralegal is directly supervised by the supervising attorney. The paralegal may not offer any value on the case or make or accept any settlement offer. (RPC 70) \*<sup>14</sup>
- Listservs, emails and message boards can be a pitfall in the area of confidentiality for legal assistants/paralegals. When posting your question, be sure to include only the facts necessary to relay your question. You never know who may be on the other end reading the post, possibly the paralegal at the opposing firm. Post your question broadly and as

vague as possible and ask for anyone who can help to email you directly. This way you know who you are dealing with on a one to one basis and can go into more details about the facts of the case. Of course, you never want to divulge personal information about who the client is.

### Conflicts of Interest

- You or your firm should have a system in place when a client file is open, or even better, when a client makes an appointment to ensure your firm does not have a conflict of interest. A conflict exists when the attorney-client relationship could be influenced such that it would affect the attorney's loyalty to the client, attorney's decision making or judgment, or attorney's protection of the client's best interests. Conflicts can occur if the attorney is already representing a party to the suit, has represented a party to the suit in the past or has a personal interest in the suit. The best general rule is that if there is any relation, don't take the case. Taking a case only to later have to turn it over to another attorney because of a conflict, creates more work for you and is not in the best interests of your client.
- Conflicts of interest also extend to potential clients. Even if you do not undertake to represent a potential client, you have still obtained confidential, factual information related to the case, which bars you from representing the adverse party. (RPC 246) \*<sup>15</sup>
- There are some instances where, although it appears on the face that a conflict exists, the attorney is permitted to represent a client. If the attorney represented Ms. Smith against Mr. Smith and then a year later, after the case is over, Mr. Smith calls and asks the attorney to handle a traffic ticket for him, the attorney could do it. There would be no harm to Ms. Smith by your representation of Mr. Smith in this case. Also, an attorney can obtain a written waiver of the conflict from both parties, which would allow the representation. However, even with a waiver, problems could still arise. (Rule 1.7) \*<sup>16</sup>
- Your firm represented a party and the adverse party calls your office because he has received your Complaint and wants a referral for an attorney to assist him. Can your firm give him the referral? Your referral could be seen as helping your case and hurting the other party. Your firm may be tempted to refer him to a "not so bright" attorney in an effort to make your case easier or not refer him to a particular attorney because she is the meanest or smartest. The best way to handle this is to direct them to a referral service such as lawyers.com or the NC Bar Referral Service.
- A client may tell you she really appreciates your help and wants to offer you lunch or brings you a small gift. She may offer you monetary compensation. As a rule, a lunch or a small token of appreciation is fine, however, monetary compensation is not. You are already being paid for your services. You should always clear invitations with your attorney first. Any gifts made to you that could affect your judgment or give the impression that you "working harder on that case" should be politely refused.
- Your firm represents two clients who want to form a corporation, partnership or other business venture. Your firm may assist them in setting the company up and preparing all necessary agreements. However, if any dispute arises related to the company, both clients will need to seek independent attorneys - your firm cannot represent either party.

It's always a good idea when representing multiple clients to get a written informed consent signed. (Rule 1.7) \*<sup>16</sup>

- If your office is contacted by a party to prepare a power of attorney for a third party, ethically, the third party is your client and must be consulted before you can prepare the power of attorney, even though that third party is not the one who contacted you. If a daughter contacts your office to prepare a power of attorney for her mother, your office must contact the mother to ensure that she does in fact wish your office to prepare a power of attorney for her and her daughter. (2003 FEO 7) \*<sup>17</sup>
- When representing a party and the adverse party is unrepresented, it's good practice that all communications be in writing so there's no appearance of any conflict of interest.
- Can your firm prepare an Acceptance of Service and Waiver of Answer for an unrepresented party in a domestic case? No, doing this has the same affect as preparing an Answer. Your firm also may not prepare the document and ask your client to give it to the adverse party. Your firm may, however, prepare just an Acceptance of Service. (CPR 296) \*<sup>18</sup>
- Two attorneys who are related may not represent adverse parties, however, this does not exclude another attorney in the same firm from representing a party. If the related attorney were to discover any confidential information (s)he would simply be subjected to keeping the information confidential. (RPC 11) \*<sup>19</sup>

### **Ex-Parte Communications**

- Attorneys may not make any written presentations to a Judge without copying the opposing attorney. Any document filed with the Court must be served on the opposing party. Any letters written to a judicial official must be copied to the opposing attorney. An attorney may request, ex-parte, a continuance on a matter after having first attempted to contact the other attorney with either a request to continue or notice of your intent to contact the Judge. (98 FEO 12\*<sup>20</sup>, 97 FEO 3\*<sup>21</sup>, 2001 FEO 15\*<sup>22</sup>, 97 FEO 5\*<sup>23</sup>)
- If a party is represented, you cannot communicate directly with that party. If that party calls you or sends you any documents, you should contact the other attorney immediately.
- Your firm may not directly contact the opposing party's treating physician unless you have obtained that party's authorization to do so. This is not just covered by ethics rulings, but by HIPAA. (RPC 162) \*<sup>24</sup>
- Can an attorney allow his client to contact the opposing party, even though that party is represented? Yes, so long as such contact is not caused by the attorney's encouragement. (RPC 119) \*<sup>25</sup>
- Any third party hired by your firm is also barred from directly contacting the opposing party if that party is represented. If you hired a realtor to sell the parties' home, the realtor must contact the party's attorney. The Bar's ethics opinion stops short of ruling that information obtained this way would not be admissible, but does state that the

attorney must ethically disclose to the opposing attorney and the Court the source of the information before it could be offered into evidence.

### **Extra Ethical Issues Involving the Legal Assistant/Paralegal**

- The Bar has stated that files should be maintained for 6 years after conclusion of the matter or sooner if the client gives his permission for the file to be destroyed. Upon closing a file, a disengagement letter should be sent advising the client of when the file will be destroyed. Original documents should be returned to the client and the file should be “cleaned up” before being shelved. (RPC 209\*<sup>26</sup>). RPC 234\*<sup>27</sup> states that the files can be stored electronically provided that important documents (stock certificates, contracts, etc.) are maintained.

Three important types of letters are the engagement, non-engagement and disengagement letters.

- Engagement letters confirm your firm’s representation and set out the terms and conditions of your firm’s representation. This letter is usually sent with a retainer agreement and other relevant intake sheets if necessary. In matters of a flat fee nature, there is not always a retainer agreement done, so the engagement letter is very important. The letter should be sent as soon as possible after the initial meeting and it should thank the client for choosing your firm to assist them, state what type of matter the firm will be handling for the client, and what the fee is. It should state that no work will begin until the fee or a retainer is received (especially important for traffic cases). It should review what was discussed during the initial meeting. This letter ensures the client understands the scope of the firm’s representation, what the fee will be and that the fee must be paid up front.
- Every potential client that meets with the attorney does not always become a client. It is important for those persons to understand that your firm does not represent them, especially in situations involving a statute of limitation or some other deadline, which is fast approaching. Non-engagement letters are very important to protect your firm from malpractice. Don’t fall into the trap of a client thinking that you are doing the work, a deadline being missed and your firm being sued. Clients tend to think that because the attorney has given them advice, that your firm represents them. Some courts have held that an attorney-client relationship did exist when it was reasonable for the client to have believed the relationship existed. Non-engagement letters should therefore be sent out immediately after the initial meeting and should clearly state that your firm does not represent the client. Non-engagement letters should state the matter for which the firm was consulted, confirm that your firm will not be representing the client, should not give any legal advice, note and explain any deadlines or statutes of limitation, refer the client to another attorney if desired. Keep in mind that even if the attorney has just an initial, one-time meeting with a potential client and does not take the case, the information obtained could still cause the firm to have a conflict of interest in the future. Non-engagement letters should be retained for a year, or longer if there’s an issue with a statute of limitation.
- Disengagement letters are sent at the conclusion of your firm’s representation of a client. The client should be clearly advised that your firm no longer represents him and whether

there are any outstanding issues (such as a statute of limitation). Thank the client for choosing your firm, return any original documents to the client, provide a short review the case and how the matter was concluded and settle any outstanding balance or money to be refunded. At the conclusion of the matter, any funds remaining in your trust account must immediately be returned to the client along with a trust accounting. If the client has a balance, include a final bill noting that the matter is concluded and the bill is a final bill. State that the file will be maintained for the required amount of time and destroyed after that. Inform the client if he wishes to have any documents from his file, he should advise you immediately. Most times, the client has copies of everything in the file already, but, if they request them you must send them one final copy. If you are maintaining any originals (such as Wills) inform the client that the originals are being kept in your office and advise them of the procedure for retrieving the documents.

- The file belongs to the client. The client is entitled to any documents from the file which he or she has knowledge of (pleadings, correspondence, documents given to the firm by the client). The client is not entitled to any “attorney work product” such as attorney notes, research, internal memos, etc. You cannot ethically hold a client’s file “hostage” for non-payment of attorney’s fees nor can you charge a client for final copies of the file, unless you have already provided the client with copies. You can, however, charge the client your actual cost to retrieve the file if it is located at an off-site storage. In cases of multiple client representation on one single matter, an attorney who has been discharged by one of those clients must deliver the entire file to that client, including information entrusted to the lawyer by the other client. (RPC 153\*<sup>28</sup>, RPC 169\*<sup>29</sup>, 98 FEO 9\*<sup>30</sup>)

The NC State Bar has issued the following interpretations based on requests for how to act under certain circumstances: Authorized Practice Advisory Opinions 2002-1\*<sup>31</sup>; Authorized Practice Advisory Opinions 2006-1\*<sup>32</sup>

# Appendix

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

Except as otherwise permitted by law, it shall be unlawful for any person or association of persons, except active members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any action or proceeding before any judicial body, including the North Carolina Industrial Commission, or the Utilities Commission; to maintain, conduct, or defend the same, except in his own behalf as a party thereto; or, by word, sign, letter, or advertisement, to hold out himself, or themselves, as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor-at-law, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any person or association of persons except active members of the Bar, for or without a fee or consideration, to give legal advice or counsel, perform for or furnish to another legal services; or to prepare directly or through another for another person, firm or corporation, any will or testamentary disposition, or instrument of trust, or to organize corporations or prepare for another person, firm or corporation, any other legal document. Provided, that nothing herein shall prohibit any person from drawing a will for another in an emergency wherein the imminence of death leaves insufficient time to have the same drawn and its execution supervised by a licensed attorney-at-law. The provisions of this section shall be in addition to and not in lieu of any other provisions of this Chapter. Provided, however, this section shall not apply to corporations authorized to practice law under the provisions of Chapter 55B of the General Statutes of North Carolina. (1931, c. 157, s. 1; 1937, c. 155, s. 1; 1955, c. 526, s. 1; 1969, c. 718, s. 19; 1981, c. 762, s. 3; 1995, c. 431, s. 4.)

A

## Revised Rules

[Back to revised rule search](#)

[Print rule](#)

[<< Previous Rule](#)

[Next Rule >>](#)

### Law Firms and Associations

#### Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority, shall make reasonable efforts to ensure that the firm or the organization has in effect measures giving reasonable assurance that all lawyers in the firm or the organization conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

#### Comment

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm or legal department of an organization. *See* Rule 1.0(d). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm or organization.

[2] Paragraph (a) requires lawyers with managerial authority within a firm or organization to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm or organization will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's or organization's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm or organization, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. *See* Rule 5.2. Firms and organizations, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm or organization can influence the conduct of all its members and the partners and managing lawyers may not assume that all lawyers associated with the firm or organization will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. *See also* Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Moreover, this Rule is not intended to establish a standard for vicarious criminal or civil liability for the acts of another lawyer. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

History Note: Statutory Authority G. 84-23

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

**Back to revised rule search**

B

## Revised Rules

[Back to revised rule search](#)

[Print rule](#)

[<< Previous Rule](#)

[Next Rule >>](#)

### Law Firms and Associations

#### Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

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

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or organization shall make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

- (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner or has comparable managerial authority in the law firm or organization in which the person is employed, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

#### Comment

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

[2] Paragraph (a) requires lawyers with managerial authority within a law firm or organization to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[3] A lawyer who discovers that a nonlawyer has wrongfully misappropriated money from the lawyer's trust account must inform the North Carolina State Bar pursuant to Rule 1.15-2(o).

History Note: Statutory Authority G. 84-23

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

ETHICS OPINION NOTES

CPR 163. An attorney may use a secretarial agency so long as reasonable care is used to protect confidentiality.

CPR 182. A layman may be employed to interview and represent social security claimants if the clients consent after disclosure of the layman's nonprofessional status.

CPR 253. A paralegal employed by a law firm may have a business card with the firm's identification.

CPR 262. A law firm's office manager may have a business card with the firm's identification.

CPR 334. An attorney's secretary may also work for private investigator. The attorney must take care that client confidences are not compromised.

**RPC 29.** An attorney may not rely upon title information from an abstract firm unless he supervised the nonlawyer who did the work.

**RPC 70.** A legal assistant may communicate and negotiate with a claims adjuster if directly supervised by the attorney for whom he or she works.

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

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

**RPC 139.** An attorney, having undertaken to represent adoptive parents, may sign and file adoption petition prepared by social services organization under her direct supervision.

**RPC 152.** District attorney is responsible for plea negotiating practices of lay assistant under her supervision of which she has knowledge.

**RPC 176.** A lawyer who employs a paralegal is not disqualified from representing a party whose interests are adverse to that of a party represented by a lawyer for whom the paralegal previously worked.

**RPC 183.** A lawyer may not permit a legal assistant to examine or represent a witness at a deposition.

**RPC 216.** A lawyer may use the services of a nonlawyer independent contractor to search a title provided the nonlawyer is properly supervised by the lawyer.

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

**99 Formal Ethics Opinion 6.** Opinion examines the ownership of a title insurance agency by lawyers in North and South Carolina as well as the supervision of an independent paralegal.

**2000 Formal Ethics Opinion 10.** Opinion rules that a lawyer may have a nonlawyer employee deliver a message to a court holding calendar call, if the lawyer is unable to attend due to a scheduling conflict with another court or for another legitimate reason.

**2002 Formal Ethics Opinion 9.** Opinion rules that a nonlawyer assistant supervised by a lawyer may identify to the client who is a party to such a transaction the documents to be executed with respect to the transaction, direct the client as to the correct place on each document to sign, and handle the disbursement of proceeds for a residential real estate transaction, even though the supervising lawyer is not physically present.

**2005 Formal Ethics Opinion 2.** Opinion rules that a law firm that employs a nonlawyer to represent Social Security claimants must so disclose in any advertising for this service and to prospective clients.

**2005 Formal Ethics Opinion 6.** Opinion rules that the compensation of a nonlawyer law firm employee who represents Social Security disability claimants before the Social Security Administration may be based upon the income generated by such representation.

**[Back to revised rule search](#)**

C

## Revised Rules

[Back to revised rule search](#)

[Print rule](#)

[<< Previous Rule](#)

[Next Rule >>](#)

### Law Firms and Associations

#### Rule 5.5 Unauthorized Practice of Law

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction if the lawyer's conduct is in accordance with these Rules and:

(1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or

(2) other than engaging in conduct governed by paragraph (1):

(A) the lawyer provides legal services to the lawyer's employer or its organizational affiliates and the services are not services for which pro hac vice admission is required; a lawyer acting pursuant to this paragraph is not subject to the prohibition in Paragraph (b)(1);

(B) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice;

(C) the lawyer acts with respect to a matter that is in or is reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission is required;

(D) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation; or

(E) the lawyer is providing services limited to federal law, international law, the law of a foreign jurisdiction or the law of the jurisdiction in which the lawyer is admitted to practice.

(F) the lawyer is the subject of a pending application for admission to the North Carolina State Bar by comity, having never previously been denied admission to the North Carolina State Bar for any reason, and

(i) is licensed to practice law in a state with which North Carolina has comity in regard to admission to practice law;

(ii) is a member in good standing in every jurisdiction in which the lawyer is licensed to practice law;

(iii) has satisfied the educational and experiential requirements prerequisite to comity admission to the North Carolina

State Bar;

(iv) is domiciled in North Carolina;

(v) has established a professional relationship with a North Carolina law firm and is actively supervised by at least one licensed North Carolina attorney affiliated with that law firm; and

(vi) gives written notice to the secretary of the North Carolina State Bar that the lawyer intends to begin the practice of law pursuant to this provision, provides the secretary with a copy of the lawyer's application for admission to the State Bar, and agrees that the lawyer is subject to these rules and the disciplinary jurisdiction of the North Carolina State Bar.

A lawyer acting pursuant to this provision is not subject to the prohibition in Paragraph (b) (1), may not provide services for which *pro hac vice* admission is required, and shall be ineligible to practice law in this jurisdiction immediately upon being advised that the lawyer's application for comity admission has been denied.

(d) A lawyer shall not assist another person in the unauthorized practice of law.

(e) A lawyer or law firm shall not employ a disbarred or suspended lawyer as a law clerk or legal assistant if that individual was associated with such lawyer or law firm at any time on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

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

#### Comment

[1] A lawyer may regularly practice law only in a jurisdiction in which the lawyer is admitted to practice. The practice of law in violation of lawyer-licensing standards of another jurisdiction constitutes a violation of these Rules. This Rule does not restrict the ability of lawyers authorized by federal statute or other federal law to represent the interests of the United States or other persons in any jurisdiction.

[2] There are occasions in which lawyers admitted to practice in another jurisdiction, but not in this jurisdiction, will engage in conduct in this jurisdiction under circumstances that do not create significant risk to the interests of their clients, the courts or the public. Paragraph (c) identifies six situations in which the lawyer may engage in such conduct without fear of violating this Rule. All such conduct is subject to the duty of competent representation. See Rule 1.1. Rule 5.5 does not address the question of whether other conduct constitutes the unauthorized practice of law. The fact that conduct is not included or described in this Rule is not intended to imply that such conduct is the unauthorized practice of law. With the exception of paragraph (c)(2)(A) and (F), nothing in this Rule is intended to authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice here. Presence may be systematic and continuous even if the lawyer is not physically present in this jurisdiction. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b). However, a lawyer admitted to practice in another jurisdiction who is partner, shareholder or employee of an interstate or international law firm that is registered with the North Carolina State Bar pursuant to 27 N.C.A.C. 1E, Section .0200, may practice, subject to the limitations of this Rule, in the North Carolina offices of such law firm.

[3] Lawyers not admitted to practice generally in the jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before a the tribunal or agency. Such authority may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency. Under paragraph (b) (1), a lawyer does not violate this Rule when the lawyer appears before such a tribunal or agency. Nor does a lawyer violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing, such as factual investigations and discovery conducted in connection with a litigation or administrative proceeding, in which an out-of-state lawyer has been admitted or in which the lawyer reasonably expects to be admitted. Nothing in paragraph (c) (1) is intended to authorize a lawyer not licensed in this jurisdiction to solicit clients in this jurisdiction.

[4] When lawyers appear or anticipate appearing before a tribunal or administrative agency with authority to admit

the lawyer to practice *pro hac vice*, their conduct is governed by paragraphs (a) and (c)(1) and not by (c)(2). Paragraph (c)(2) authorizes a lawyer to engage in certain conduct other than making or preparing for appearances before such a tribunal. For example, paragraph (c)(2)(A) recognizes that some clients hire a lawyer as an employee in circumstances that may make it impractical for the lawyer to become admitted to practice in this jurisdiction. Given that these clients are unlikely to be deceived about the training and expertise of these lawyers, lawyers may act on behalf of such a client without violating this Rule. The lawyer may also act on behalf of the client's commonly owned organizational affiliates but only in connection with the client's matters.

[5] Paragraph (c)(2)(B) recognizes that the complexity of many matters requires that a lawyer whose representation of a client consists primarily of conduct in a jurisdiction in which the lawyer is admitted to practice, also be permitted to act on the client's behalf in other jurisdictions in matters arising out of or otherwise reasonably related to the lawyer's representation of the client. This conduct may involve negotiations with private parties, as well as negotiations with government officers or employees, and participation in alternative dispute-resolution procedures. This provision also applies when a lawyer is conducting witness interviews or other activities in this jurisdiction in preparation for a litigation or other proceeding that will occur in another jurisdiction where the lawyer is either admitted generally or expects to be admitted *pro hac vice*.

[6] Paragraph (c)(2)(C) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[7] Paragraph (c)(2)(D) recognizes that association with a lawyer licensed to practice in this jurisdiction is likely to protect the interests of both clients and the public. The lawyer admitted to practice in this jurisdiction, however, may not serve merely as a conduit for an out-of-state lawyer but must actively participate in and share actual responsibility for the representation of the client. If the admitted lawyer's involvement is merely *pro forma*, then both lawyers are subject to discipline under this Rule.

[8] Paragraph (c)(2)(F) permits a lawyer who is awaiting admission by comity to practice on a provisional and limited basis if certain requirements are met. As used in this paragraph, the term "professional relationship" refers to an employment or partnership arrangement.

[9] The definition of the practice of law is established by N.C.G.S. §84-2.1. Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (d) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[10] Lawyers may also provide professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

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

affirmative statement or disclosure concerning the disbarred or suspended attorney's status with the law firm. Additionally, a disbarred or suspended attorney should be paid on some fixed basis, such as a straight salary or hourly rate, rather than on the basis of fees generated or received in connection with particular matters on which he or she works. Under these circumstances, a law firm employing a disbarred or suspended attorney would not be acting unethically and would not be assisting a nonlawyer in the unauthorized practice of law.

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

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997

Amended March 1, 2003; November 16, 2006

#### ETHICS OPINION NOTES

**CPR 19.** House counsel for an insurance company may not represent an insured in prosecuting a subrogation claim.

**CPR 325.** House counsel of a savings and loan association may not represent a subsidiary of the savings and loan association acting as trustee for a deed of trust in foreclosure.

**CPR 326.** House counsel for an insurance company may not represent the insured in defense of a third party claim or in prosecution of a subrogation claim.

**RPC 9.** House counsel for a mortgage bank which originates loans but has no proprietary interest of its own may not represent borrowers or lenders in closing loans originated by his employer.

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

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

**RPC 139.** A lawyer may not sign an adoption petition prepared by an adoption agency as an accommodation to that agency without undertaking professional responsibility for the adoption proceeding.

**RPC 151.** Although a corporate insurer acting through its employees cannot practice law and appear on behalf of others, a lawyer who is a full-time employee of an insurance company may represent the company in an action where the company is a named party.

**RPC 216.** A lawyer may use the services of a nonlawyer independent contractor to search a title provided the nonlawyer is properly supervised by the lawyer.

**98 Formal Ethics Opinion 7.** Opinion rules that a law firm may employ a disbarred lawyer as a paralegal provided the firm accepts no new clients who were clients of the disbarred lawyer's former firm during the period of misconduct; however, a disbarred lawyer may not work as a paralegal at a firm where he was employed as a lawyer during the period of misconduct.

**98 Formal Ethics Opinion 8.** Opinion rules that a lawyer may not participate in a closing or sign a preliminary title opinion if, after reasonable inquiry, the lawyer believes that the title abstract or opinion was prepared by a nonlawyer without supervision by a licensed North Carolina lawyer.

**99 Formal Ethics Opinion 6.** Opinion examines the ownership of a title insurance agency by lawyers in North and

South Carolina as well as the supervision of an independent paralegal.

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

**2000 Formal Ethics Opinion 10.** Opinion rules that a lawyer may have a nonlawyer employee deliver a message to a court holding calendar call, if the lawyer is unable to attend due to a scheduling conflict with another court or for another legitimate reason.

**2002 Formal Ethics Opinion 9.** Opinion rules that a nonlawyer assistant supervised by a lawyer may identify to the client who is a party to such a transaction the documents to be executed with respect to the transaction, direct the client as to the correct place on each document to sign, and handle the disbursement of proceeds for a residential real estate transaction, even though the supervising lawyer is not physically present.

**Authorized Practice Advisory Opinion 2002-1.** The North Carolina State Bar has been requested to interpret the North Carolina unauthorized practice of law statutes (N.C. Gen. Stat. §§84-2.1 to 84-5) as they apply to residential real estate transactions. The State Bar issues the following authorized practice of law advisory opinion pursuant to N.C. Gen. Stat. §84-37(f) after careful consideration and investigation. This opinion supersedes any prior opinions and decisions of any standing committee of the State Bar interpreting the unauthorized practice of law statutes to the extent those opinions and decisions are inconsistent with the conclusions expressed herein.

#### CASE NOTES

A licensed attorney who is a full-time employee of an insurance company may not ethically represent one of the company's insureds as counsel of record in an action brought by a third party for a claim covered by the terms of the insurance policy or appear as counsel of record for the insured in the prosecution of a subrogation claim for property damage. *Gardner v. North Carolina State Bar*, 316 N.C. 285, 341 S.E.2d 517 (1986).

**Back to revised rule search**

## Ethics Opinions

[Back to ethics opinions search](#)

[Print opinion](#)

[<< Previous Opinion](#)

[Next Opinion >>](#)

### RPC 183

October 21, 1994

#### Role of Legal Assistant in Deposition

*Opinion rules that a lawyer may not permit a legal assistant to examine or represent a witness at a deposition.*

#### Inquiry #1:

Is it ethical for a lawyer to permit a legal assistant to examine a witness at a deposition?

#### Opinion #1:

No. Pursuant to Rule 3.3(b) of the Rules of Professional Conduct, a lawyer having direct supervisory authority over a nonlawyer employed by a law firm must make reasonable efforts to ensure that the nonlawyer's conduct is "compatible with the professional obligations of the lawyer." Although several ethics opinions have indicated that a legal assistant or paralegal may undertake to handle certain matters such as negotiating with a claims adjuster, the opinions have all required that the legal assistant be directly supervised by the lawyer. See RPC 70, RPC 139, and RPC 152. In RPC 70, it is noted that "[u]nder no circumstances should the legal assistant be permitted to exercise independent legal judgment...." In a deposition, a lawyer is required to exercise her independent legal judgment, experience, and skill from moment to moment as she formulates questions in response to the statements made by the witness, considers objections to be made to questions, and analyzes any privilege the witness may assert. Allowing a legal assistant to examine a witness at a deposition is aiding the unauthorized practice of law in violation of Rule 3.1(a), may cause substantial harm to the client's case, and is improper.

#### Inquiry #2:

Is it ethical for a lawyer to permit a legal assistant to represent a witness at a deposition who is being deposed by the opposing counsel?

#### Opinion #2:

No. See Opinion #1.

#### Inquiry #3:

Is it ethical for a lawyer to permit a legal assistant to represent a client who is being deposed by an opposing counsel if the legal assistant is carefully instructed in advance that his or her sole role is to ensure that the opposing counsel's examination does not go beyond specific subject matters agreed upon in advance by the lawyer and the opposing counsel?

#### Opinion #3:

No. See Opinion #1.

## Ethics Opinions

[Back to ethics opinions search](#)

[Print opinion](#)

[<< Previous Opinion](#)

[Next Opinion >>](#)

### 2002 Formal Ethics Opinion 9

January 24, 2003

#### **Delegation to Nonlawyer Assistant of Certain Tasks Associated with a Residential Real Estate Transaction**

*Opinion rules that a nonlawyer assistant supervised by a lawyer may identify to the client who is a party to such a transaction the documents to be executed with respect to the transaction, direct the client as to the correct place on each document to sign, and handle the disbursement of proceeds for a residential real estate transaction, even though the supervising lawyer is not physically present.*

#### **Introduction:**

The North Carolina State Bar was asked to reconsider Formal Ethics Opinions 2001-4 and 2001-8. These opinions, together with Formal Ethics Opinion 99-13, rule that competent legal practice requires the physical presence of the lawyer at the closing conference for both a purchase and a refinancing of residential real estate.

This opinion is issued after full consideration and investigation of the issues raised by the entities requesting the review. The opinion supersedes Formal Ethics Opinions 99-13, 2001-4, and 2001-8 to the extent that they are inconsistent with the conclusions expressed herein.

#### **Inquiry:**

In connection with a residential real estate transaction, a lawyer is retained to ensure that the documents are properly executed and that the loan and sale proceeds are properly distributed, in addition to other services, if any, that the lawyer is retained to provide. May the lawyer assign to a nonlawyer assistant the tasks of presiding over the execution of the documents and the disbursement of the closing proceeds necessary to complete the transaction?

#### **Opinion:**

Yes. The lawyer may delegate the direction of the execution of the documents and disbursement of the closing proceeds to a nonlawyer who is supervised by the lawyer provided, however, the nonlawyer does not give legal advice to the parties.

As is the case with any task that a lawyer delegates to a nonlawyer, competent practice requires that the lawyer determine that delegation is appropriate after having evaluated the complexity of the transaction, the degree of difficulty of the particular task, the training and ability of the nonlawyer, the client's sophistication and expectations, and the course of dealings with the client. Rule 1.1 and Rule 5.3.

When and how to communicate with clients in connection with the execution of the closing documents and the disbursement of the proceeds are decisions that should be within the sound legal discretion of the individual lawyer.<sup>1</sup> Therefore, the requirement of the physical presence of the lawyer at the execution of the documents, as promulgated in Formal Ethics Opinions 99-13, 2001-4, and 2001-8, is hereby withdrawn. A nonlawyer supervised by the lawyer may oversee the execution of the closing documents and the disbursement of the proceeds even though the lawyer is not physically present. Moreover, the execution of the documents and the disbursement of the proceeds may be accomplished by mail, by e-mail, by other electronic means, or by some other procedure that would not require the lawyer and the parties to be physically present at one place and time. Whatever procedure is chosen for the execution of the documents, the lawyer must provide competent representation and adequate supervision of any nonlawyer providing assistance. Rule 1.1, Rule 5.3, and Rule 5.5.

In considering this matter, the State Bar received strong evidence that it is in the best interest of the consumer (the borrower) for the lawyer to be physically present at the execution of the documents.<sup>2</sup> This ethics opinion should not be interpreted as implying that the State Bar disagrees with that evidence.

**Endnotes**

1. It is already common for lawyers, exercising their sound legal discretion, to delegate to their nonlawyer assistants certain other tasks in connection with a residential real estate transaction, such as the search of the public records and the recording of documents.

2. Transcript of the investigatory meeting of the Special Committee on Real Estate Closings, June 7, 2002. The transcript of the evidence received at the meeting is available from the North Carolina State Bar upon request.

**[Back to ethics opinions search](#)**

## Ethics Opinions

[Back to ethics opinions search](#)

[Print opinion](#)

[<< Previous Opinion](#)

[Next Opinion >>](#)

### 2006 Formal Ethics Opinion 13

October 20, 2006

#### Nonlawyer Signing a Lawyer's Name to a Pleading

*Opinion rules that if warranted by exigent circumstances, a lawyer may allow a paralegal to sign his name to court documents so long as it does not violate any law and the lawyer provides the appropriate level of supervision.*

#### Inquiry:

Paralegal works in Law Firm. Supervising Attorney A would like Paralegal to sign Attorney A's name to pleadings in the event Attorney A is unavailable to do so. Paralegal would put her initials after the lawyer's signature so it is clear she is signing on the lawyer's behalf. Assume for purposes of this inquiry that Attorney A has either drafted the pleading herself or has closely supervised the form and substance of the pleading drafted by Paralegal.

May Attorney A delegate the signing of the pleadings to nonlawyer staff under these circumstances?

#### Opinion:

As a general matter, a lawyer should always sign court documents and pleadings and should only delegate the signing of her name to a nonlawyer when the lawyer is unavailable and no other lawyer in the firm is able to do so. Nonetheless, if exigent circumstances require the signing of a pleading in the lawyer's absence, a lawyer may delegate this task to a paralegal or other nonlawyer staff only if 1) the signing of a lawyer's signature by an agent of the lawyer does not violate any law, court order, local rule, or rule of civil procedure, 2) the responsible lawyer has provided the appropriate level of supervision under the circumstances, and 3) the signature clearly discloses that another has signed on the lawyer's behalf.<sup>1</sup> The following two rules are relevant to a lawyer's responsibilities under the circumstances.

#### Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

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

...

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

#### Rule 5.5 Unauthorized Practice of Law

(d) A lawyer shall not assist another in the unauthorized practice of law.

Before permitting a paralegal or other nonlawyer staff member to sign the lawyer's name to any court document, the lawyer must carefully review pertinent case law, local rules, or rules of civil procedure to determine whether such delegation is permissible and therefore, compatible with the lawyer's professional obligations. Rule 5.3 (see above). If, for example, a pleading signed by the paralegal on the lawyer's behalf would be legally insufficient, then the lawyer cannot condone this practice. Nothing herein is intended to opine as to the legal sufficiency of a pleading signed on behalf of a lawyer.

In addition, the lawyer must exercise the appropriate level of supervision to avoid aiding in the unauthorized practice of law. Rule 5.5(d). The preparation of a pleading is the practice of law. G.S. A7 84-2.1 (2004). Nevertheless, a paralegal may prepare such a document under the close supervision of a lawyer. A lawyer must carefully and thoroughly review both the substance and form of a pleading prepared by a paralegal before filing the document with the court. Likewise, a lawyer may not permit her paralegal to sign the lawyer's name to a pleading, even in exigent circumstances, if the lawyer has not afforded the appropriate level of review and supervision.

Finally, the signature must evidence, on its face, that it is by another's hand to avoid misleading the court.

**Endnote**

1. A paralegal or paraprofessional may never sign and file court documents in her own name. To do so violates the statutes prohibiting the unauthorized practice of law.

**[Back to ethics opinions search](#)**

5

## Ethics Opinions

[Back to ethics opinions search](#)[Print opinion](#)[<< Previous Opinion](#)[Next Opinion >>](#)

### RPC 252

July 18, 1997

#### Receipt of Inadvertently Disclosed Materials from Opposing Party

Editor's Note: To the extent that this opinion is contrary to Rule 4.4, Respect for Rights of Third Persons, paragraph (b) and comments [2] and [3], as revised in 2003 and thereafter, the rule and comment are controlling.

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

#### Inquiry #1:

Insurance Company is the liability carrier for Defendant Motorist. Plaintiff is represented by Attorney C. After settlement discussions failed, Attorney C filed suit on behalf of Plaintiff. Insurance Company hired Attorney X to defend the suit. Before responsive pleadings were filed, adjuster for Insurance Company erroneously sent the company's claim file to Attorney C. The claim file was sent by certified mail, return receipt requested, addressed to Attorney C. The cover letter was also addressed to Attorney C. However, the letter's salutation read "Dear Attorney X." A copy of the letter to the defendant from the adjuster was also enclosed with the file. This letter incorrectly informed the defendant that he would be defended by Attorney C. In addition to a photo of Plaintiff's vehicle, Plaintiff's medical records, and Attorney C's demand letter, the file included a "claim diary" that Attorney C read and believes contains *prima facie* evidence of an unfair and deceptive trade practice by Insurance Company.

Attorney C sent a copy of the file to the adjuster and to Attorney X. Attorney X demands the return of the original file. Is Attorney C required to return the original file to Insurance Company?

#### Opinion #1:

Yes. Attorney C has a duty of honesty and a duty of courtesy to all persons involved in the legal process. See Rule 1.2(c) and Rule 7.1(a). The original file does not belong to Attorney C or to his client. From the cover letter, it could be readily ascertained that the accompanying materials were subject to the attorney-client privilege or otherwise confidential and were sent to Attorney C inadvertently. Upon realizing that the materials were not intended for his eyes, Attorney C should have (1) refrained from reviewing the file materials, (2) notified the opposing counsel of their receipt, and (3) followed opposing counsel's instructions as to the disposition of such materials. Under these circumstances, the receiving attorney may not use the substance of the materials inadvertently sent to him to the advantage of his client.

#### Inquiry #2:

Was it acceptable for Attorney C to read the cover letter and examine the claim file although Attorney C realized from the salutation on the cover letter that the letter and the attached materials were sent to him erroneously?

**Opinion #2:**

No. A lawyer who is the recipient of an inadvertent disclosure of written materials by an opposing party or opposing counsel is required to discontinue reading the materials as soon as the lawyer realizes that the materials may be subject to the attorney-client privilege of others, or are otherwise confidential communications involving an attorney, and the materials were not intended for his or her eyes. This requirement is consistent with a lawyer's duty of honesty as well as a lawyer's duty to avoid offensive tactics and treat with courtesy and consideration all persons involved in the legal process. Rule 1.2(c) and Rule 7.1(a)(1). It also respects the opposing party's confidentiality. See Rule 4.

**Inquiry #3:**

Would the response to inquiry #2 be different if the inadvertently disclosed materials were sent by opposing counsel instead of a representative of the opposing party?

**Opinion #3:**

No.

**[Back to ethics opinions search](#)**

6

## Ethics Opinions

[Back to ethics opinions search](#)

[Print opinion](#)

[<< Previous Opinion](#)

[Next Opinion >>](#)

### RPC 74

October 20, 1989

#### Conflict of Interest Involving a Legal Assistant

*Opinion rules that a firm which employs a paralegal is not disqualified from representing an interest adverse to that of a party represented by the firm for which the paralegal previously worked.*

#### Inquiry:

Paralegal P worked for Firm A. While working with Firm A she participated in some degree with the preparation and interviewing of two plaintiff clients. Paralegal P subsequently left Firm A of her own volition.

Firm B hired Paralegal P approximately six months after she left Firm A. Firm B represents a defendant in the case on which Paralegal P had worked while employed with Firm A. Firm B has not allowed Paralegal P to work on the file in any way.

Can Firm B continue to employ Paralegal P or does Paralegal P's previous employment with Firm A create a conflict of interest?

#### Opinion:

Firm B may continue to employ Paralegal P and continue in the case but should take extreme care to insure that P is totally screened from participation in the case.

[Back to ethics opinions search](#)

## Ethics Opinions

[Back to ethics opinions search](#)

[Print opinion](#)

[<< Previous Opinion](#)

[Next Opinion >>](#)

### RPC 176

July 21, 1994

#### Conflict of Interest Involving a Legal Assistant

*Opinion rules that a lawyer who employs a paralegal is not disqualified from representing a party whose interests are adverse to that of a party represented by a lawyer for whom the paralegal previously worked.*

#### Inquiry:

Attorney A had two full-time staff members: a receptionist/secretary and a paralegal/secretary ("Paralegal"). Paralegal's normal duties included working on personal injury actions and real estate matters. On occasion, Paralegal helped with domestic actions. While Paralegal was employed by Attorney A, Attorney A represented Client A in a domestic matter. Paralegal denies working on the case on a regular basis while she was employed by Attorney A. Paralegal also denies having any knowledge of the specific facts of the case. Attorney A contends that Paralegal was substantially involved in assisting in the representation of Client A and was privy to confidential information regarding Client A. It is clear that Paralegal had some exposure to the case while employed by Attorney A.

After the employment of Paralegal was terminated by Attorney A, Paralegal went to work for Attorney B in another law firm. Attorney B represents Client B in the same domestic action in which Attorney A represents Client A.

Attorney A has requested that Attorney B withdraw from the representation of Client B because of Paralegal's prior involvement in the action. Should Attorney B withdraw from the representation of Client B?

#### Opinion:

No, Attorney B may continue to represent Client B in the case and may continue to employ Paralegal. The imputed disqualification rules contained in Rule 5.11 of the Rules of Professional Conduct do not apply to nonlawyers. However, Attorney B must take extreme care to ensure that Paralegal is totally screened from participation in the case even if Paralegal's involvement in the case while employed by Attorney A was negligible. See RPC 74. This requirement is consistent with a lawyer's duty, pursuant to Rule 3.3(b), to make reasonable efforts to ensure that the conduct of a nonlawyer over whom the lawyer has direct supervisory authority is compatible with the professional obligations of the lawyer including the obligation to avoid conflicts of interest and to preserve the confidentiality of client information.

[Back to ethics opinions search](#)

## Ethics Opinions

[Back to ethics opinions search](#)

[Print opinion](#)

[<< Previous Opinion](#)

[Next Opinion >>](#)

### RPC 133

July 17, 1992

#### Recycling Office Waste Paper

*Opinion rules that a law firm may make its waste paper available for recycling.*

#### Inquiry #1:

What kind of guarantees must be obtained from a recycling company before a law office may give the company its waste paper products?

#### Opinion #1:

A lawyer has a professional obligation under Rule 4 of the Rules of Professional Conduct to protect confidential information in his or her possession from unauthorized disclosure. This obligation extends to the handling of waste paper products embodying confidential information generated in the ordinary course of legal business. However, this professional obligation does not generally compel any particular mode of trash handling or disposal. In particular, there is no general requirement that waste paper which may evidence client confidences be shredded. It is sufficient in most cases for the responsible attorney to ascertain that those persons or entities responsible for the disposal of waste paper employ procedures which effectively minimize the risk that confidential information might be disclosed. The responsible attorney should take particular care to ensure that custodial personnel under his or her direct supervision are conscious of the fact that confidential information may be present in waste paper products and are aware that the attorney's professional obligations require that there be no breach of confidentiality in regard to such information. So long as the attorney takes the precautions noted above, there is no reason why his or her law firm's waste paper products could not be made available for recycling.

#### Inquiry #2:

Do any of a law firm's waste paper products need to be shredded to comport with ethical considerations of client confidentiality?

#### Opinion #2:

A law firm will occasionally generate waste paper embodying confidential information which is so sensitive that the attorney's professional obligations under Rule 4 can only be satisfied by the paper's retention or its destruction. Under such circumstances shredding the waste paper would be appropriate.

[Back to ethics opinions search](#)

9

## Revised Rules

[Back to revised rule search](#)[Print rule](#)[<< Previous Rule](#)[Next Rule >>](#)

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

(c) 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

10

## Ethics Opinions

[Back to ethics opinions search](#)[Print opinion](#)[Back to search results](#)

Keywords: privilege

[<< Previous Opinion](#)[Next Opinion >>](#)

### RPC 120

July 17, 1992

Editor's Note: This opinion was originally published as RPC 120 (Revised). See *also* RPC 175.

#### Reporting Child Abuse

*Opinion rules that, for the purpose of the Rules of Professional Conduct, a lawyer may, but need not necessarily, disclose confidential information concerning child abuse pursuant to a statutory requirement.*

#### Inquiry:

Attorney A represents Clients H and W who are the parents of three minor children. During the course of the representation, H and W inform Attorney A of a matter unrelated to the representation, namely, that the minor children are the victims of continuing emotional and/or sexual and/or physical abuse.

G.S. Â§7A-543 generally requires that "any person or institution who has cause to suspect that any juvenile is abused or neglected shall report the case of that juvenile to the director of the Department of Social Services in the county where the juvenile resides or is found." The rule does not except from its terms attorneys whose suspicions are aroused by information received in confidence. Must Attorney A report the abuse of H and W's children to the director of the Department of Social Services against the wishes of her clients H and W?

#### Opinion:

No. A lawyer is not ethically required to report the child abuse under the facts described in the inquiry. Rule 4(b)(1) generally prohibits a lawyer from knowingly revealing confidential information of her client. The information in question is certainly confidential information as that term is defined in Rule 4(a) in that it was gained in the professional relationship, the clients have requested that it be held inviolate, and its disclosure would likely be embarrassing or detrimental to the clients. Rule 7.1(a)(3) states that a lawyer shall not intentionally prejudice or damage his or her client during the course of the professional relationship. Despite the language used by G.S. Â§7A-543 ("any person" shall report suspected child abuse or neglect to the director of the Department of Social Services in that county), there is nothing in Chapter 7A, Article 44, of the North Carolina General Statutes on "Screening of Abuse and Neglect Complaints" that abrogates attorney-client confidentiality or privilege. (G.S. Â§7A-551 specifically abrogates the physician-patient and psychologist-client privileges, while not mentioning the attorney-client privilege.)

Recognizing the State Bar's lack of authority to rule on questions of law, and rendering this opinion as an ethical matter only, until such time as our courts should dispositively rule that G.S. Â§7A-543 abrogates client confidentiality and privilege and requires a lawyer to report child abuse, Rule 4 controls and the lawyer is not ethically required to report child abuse (from information gained in the professional relationship), and the failure to so report will not be deemed a violation of Rule 1.2(b) and (d) and/or Rule 7.2(a)(3). In other words, although a lawyer failing to report suspected child

abuse might sometime be criminally prosecuted pursuant to G.S. Â§7A-543, the State Bar will not treat this conduct as unethical under the present state of the law.

The above notwithstanding, it is possible that the exception contained in Rule 4(c)(4) might justify the disclosure of the confidential information in question. That provision authorizes an attorney to disclose confidential information regarding the intention of her clients to commit a crime. If Attorney A in this situation is satisfied that her clients intend to continue abusing their children, disclosure would certainly be allowed by this exception to the general rule.

Further, because G.S. Â§7A-543 is unclear and subject to being interpreted as abrogating attorney-client confidentiality and privilege, until our courts settle the legal question, an attorney will be allowed, in his or her discretion, to interpret G.S. Â§7A-543 as requiring such report and thus may ethically report the information gained through the confidential relationship concerning child abuse under the exception to Rule 4(b) contained in Rule 4(c)(3) to the effect that confidential information may be disclosed when "required by law."

This inquiry and response has focused solely on reporting suspected, but unknown and previously unreported, past and possibly ongoing child abuse, in order for it to be investigated and dealt with by the Department of Social Services. Once a client is accused of, under investigation for, or charged with child abuse that is a past act, attorney-client confidentiality and privilege would be protected by the client's constitutional rights to effective assistance of counsel, and it would be unethical to divulge such information gained in the professional relationship as to the client's past conduct.

**[Back to ethics opinions search](#)**

//

## Ethics Opinions

[Back to ethics opinions search](#)

[Print opinion](#)

[<< Previous Opinion](#)

[Next Opinion >>](#)

### RPC 175

January 13, 1995

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

#### Reporting Child Abuse

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

#### Inquiry #1:

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

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

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

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

Does Rule 4 of the Rules of Professional Conduct require an attorney to report his or her suspicion that a child is abused, neglected or dependent to the local Department of Social Services (DSS) if the information giving rise to the suspicion was gained during a professional relationship with a client, which is not for the purpose of representing the client in an abuse, neglect or dependency case, and the information would otherwise be considered confidential information under Rule 4?

#### Opinion #1:

No. Rule 4(b) prohibits a lawyer from revealing the confidential information of his or her client except as permitted under Rule 4(c). Rule 4(c) includes a number of circumstances under which a lawyer "may reveal" the confidential information of his or her client. Subsection (3) of Rule 4(c) allows a lawyer to reveal confidential information "when... required by law or court order."

The rule clearly places the decision regarding the disclosure of a client's confidential information within the lawyer's discretion. While that discretion should not be exercised lightly, particularly in the face of a statute compelling disclosure, a lawyer may in good faith conclude that he or she should not reveal confidential information where to do so would substantially undermine the purpose of the representation or substantially damage the interests of his or her client. See Rule 7.1(a)(3) (which prohibits actions by a lawyer which will intentionally "[p]rejudice or damage his client during the course of the professional relationship..."). For example, a lawyer may be unwilling to comply with

the child abuse reporting statute because he or she believes that compliance would deprive a client charged with a crime of the constitutional right to effective assistance of counsel. Under such circumstances, where a lawyer reasonably and in good faith concludes that revealing the confidential information will substantially harm the interests of his or her client and, as a matter of professional responsibility, declines to report confidential client information regarding suspected child abuse or neglect to DSS, the failure to report will not be deemed a violation of Rule 1.2(b) and (d) (respectively defining misconduct as committing a criminal act and engaging in conduct prejudicial to the administration of justice) or Rule 7.2(a)(3) (prohibiting a lawyer from concealing that which he is required by law to reveal). It is recognized that the ethical rules may not protect a lawyer from criminal prosecution for failure to comply with the reporting statute.

**Inquiry #2:**

Is it ethical for a lawyer to reveal confidential information of a client regarding suspected child abuse or neglect to DSS pursuant to the requirements of the child abuse reporting statute?

**Opinion #2:**

Yes, a lawyer may ethically report information gained during his or her professional relationship with a client to DSS in compliance with the statutory requirement even if to do so may result in substantial harm to the interests of the client. Rule 4(c)(3).

*Note: The foregoing opinion is limited to the specific inquiries set out therein. It should not be read to stand for the general proposition that an attorney's good faith is a bar to a disciplinary proceeding based upon the attorney's violation of a statute.*

**Back to ethics opinions search**

12

## Ethics Opinions

[Back to ethics opinions search](#)[Print opinion](#)[<< Previous Opinion](#)[Next Opinion >>](#)

### 98 Formal Ethics Opinion 18

January 15, 1999

#### Revealing Confidential Information to Parents of Minor Client

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

#### Inquiry #1:

Attorney A is defending Minor, who is 15 years old, against criminal charges. Minor is being tried as an adult. The State has offered Minor a plea to a reduced charge. Minor does not consent to the disclosure to his parents of any of the evidence against him or the plea offer. Is Attorney A required to disclose the information to Minor's parents?

#### Opinion #1:

Rule 1.14(a) of the Revised Rules of Professional Conduct requires a lawyer to "maintain a normal client-lawyer relationship with the client" although "[the] client's ability to make adequately considered decisions in connection with the representation is impaired...because of minority ...." Therefore, a lawyer owes the duty of confidentiality to a minor client and may not disclose confidential information to minor's parents unless there is an applicable exception in Rule 1.6(d) permitting disclosure. Rule 1.6(d)(3) permits a lawyer to reveal confidential client information when permitted by law or court order. A lawyer representing a minor may disclose confidential information to the minor's legal guardian, over the minor's objection, if the disclosure is necessary for the guardian to make a legally binding decision about the subject matter of the representation. See Rule 1.14, cmt. [3]. However, the lawyer may withhold confidential information from the legal guardian if the lawyer believes that the guardian is acting adversely to the interests of the child or the information is not necessary to make a decision about the representation.

In the present inquiry, Minor is being tried as an adult and the consent of Minor's parents is not necessary for Minor to make a legally binding decision about the plea agreement. Therefore, Attorney A must honor Minor's request and not disclose the information to Minor's parents.

#### Inquiry #2:

If Minor's parents are not his legal guardians but Minor instructs Attorney A to disclose the plea offer to his parent or parents, may Attorney A do so?

#### Opinion #2:

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

[Back to ethics opinions search](#)

## Ethics Opinions

[Back to ethics opinions search](#)

[Print opinion](#)

[<< Previous Opinion](#)

[Next Opinion >>](#)

### RPC 62

July 14, 1989

#### Disclosure of Client Confidences in Defense of Legal Malpractice Claim

*Opinion rules that an attorney may disclose client confidences necessary to protect her reputation where a claim alleging malpractice is brought by a former client against the insurance company which employed the attorney to represent the former client.*

#### Inquiry:

Insurance Company A hired law firm N to represent client Z in a lawsuit. This representation of Z was provided under reservation of rights, since Insurance Company A contended that various claims in the complaint against Z were not covered by its policy. Z also retained private counsel. Eventually, the lawsuit was settled. Thereafter, Z sought to recover damages against Insurance Company A for, inter alia, alleged inadequate representation of Z by law firm N. What confidences of Z, if any, may law firm N reveal to Insurance Company A? Does the answer change if law firm N is still representing Z for the purpose of getting an escrow agreement signed as part of the settlement of the original lawsuit?

#### Opinion:

Rule 4(c)(5) provides that an attorney may reveal confidential information "to the extent the lawyer reasonably believes necessary...to respond to allegations in any proceeding concerning the lawyer's representation of the client."

The lawsuit between Insurance Company A and Z is a "proceeding concerning the lawyer's representation" of N. It is not necessary that law firm N be a party to the suit. Law firm N may therefore reveal confidences to the extent necessary to clear its name of the charge of inadequate representation, but should take care not to reveal confidences that are not necessary to its defense. The Rule 4(c)(5) exception to the confidentiality rule applies both to current and former clients. Therefore, law firm N may reveal confidences necessary to defend itself, even if it is representing Z in the escrow agreement matter.

[Back to ethics opinions search](#)

14

## Ethics Opinions

[Back to ethics opinions search](#)

[Print opinion](#)

[<< Previous Opinion](#)

[Next Opinion >>](#)

### RPC 70

October 20, 1989

#### Role of the Legal Assistant

*Opinion rules that a legal assistant may communicate and negotiate with a claims adjuster if directly supervised by the attorney for whom he or she works.*

#### Inquiry:

May an attorney permit his legal assistant to communicate and negotiate with the claims adjuster for the adverse party's insurance carrier?

#### Opinion:

Yes, so long as the legal assistant is directly supervised by the attorney for whom he or she works. Rule 3.3(b). Under no circumstances should the legal assistant be permitted to exercise independent legal judgment regarding the value of the case, the advisability of making or accepting any offer of settlement or any other related matter.

[Back to ethics opinions search](#)

15

## Ethics Opinions

[Back to ethics opinions search](#)[Print opinion](#)[<< Previous Opinion](#)[Next Opinion >>](#)

### RPC 246

April 4, 1997

#### Duty of Confidentiality Owed to Prospective Client

*Opinion rules that, under certain circumstances, a lawyer may not represent a party whose interests are opposed to the interests of a prospective client if confidential information of the prospective client must be used in the representation.*

#### Inquiry:

In 1993, Attorney A represented Mr. and Ms. X on personal injury claims arising out of an automobile accident. In September 1996, Mr. X was seriously injured, as were three passengers in his automobile, in a single car accident. Mr. X contends that the accident was caused by the driver of another automobile who forced him off the road and then left the scene of the accident. While Mr. X was in the hospital, Ms. X went to Attorney A to retain him to represent Mr. X on his claim for injuries arising out of the accident. Attorney A interviewed Ms. X, discussed the facts of the case with her, and obtained confidential information from her concerning the cause of the accident. Attorney A kept a photocopy of the accident report Ms. X brought to him. At the end of the interview, Attorney stated that he believed Mr. X would be considered the party at fault and he did not want to represent Mr. X.

Attorney A now represents the three passengers in Mr. X's automobile on their liability claims against Mr. X for injuries arising out of the accident. Neither Mr. X nor Ms. X consents to the representation of the passengers on their claims against Mr. X. May Attorney A proceed with the representation of the passengers without the consent of Mr. X or Ms. X?

#### Opinion:

No, Attorney A may not continue his representation of the passengers if he obtained confidential information from Ms. X that he intends to use to the advantage of the passengers in their action against Mr. X.

Although the duties of professional responsibility flowing from the attorney-client relationship do not generally attach until after a lawyer has agreed to represent a client, "there are some duties, such as that of confidentiality under Rule 4, that may attach when the lawyer agrees to consider whether a client-lawyer relationship may be established." Rules of Professional Conduct, Section .02, Scope, comment [3]. When Ms. X met with Attorney A to retain him in the new matter, she did so in the context of her prior professional relationship with Attorney A. In this situation, it is reasonable to conclude that Ms. X believed that her communications with Attorney A would be treated as confidential. Therefore, the duty of confidentiality attached to her communications although Attorney A did not ultimately agree to the representation. Rule 4(b)(3) prohibits the use of confidential information of a client for the advantage of a third person unless the client consents. If Ms. X does not consent to the use of the information obtained from her, Attorney A has a conflict of interest and is disqualified from the representation of the passengers. Rule 5.1(c).

[Back to ethics opinions search](#)

16

## Revised Rules

[Back to revised rule search](#)

[Print rule](#)

[<< Previous Rule](#)

[Next Rule >>](#)

### Client-Lawyer Relationship

#### Rule 1.7 Conflict of Interest: Current Clients

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

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

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

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

#### Comment

#### *General Principles*

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

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

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

17

## Ethics Opinions

[Back to ethics opinions search](#)[Print opinion](#)[<< Previous Opinion](#)[Next Opinion >>](#)

### 2003 Formal Ethics Opinion 7

January 16, 2004

#### Preparation of Power of Attorney for Principal Upon Request of Prospective Attorney-in-Fact

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

#### Inquiry #1:

Adult Child asks Attorney to prepare a durable power of attorney for her father to execute. No explanation is given as to why the father is not present to make the request. Adult Child has asked that specific powers be included in document, including the power to transfer to her, as Attorney-in-Fact, title to any of her father's assets. Adult Child asks that the document contain the condition that it will be effective upon its execution by her father. Adult Child will take the Power of Attorney to her father to execute. She does not want the document to contain provisions whereby witnesses can attest to either her father's capacity or whether he is under undue influence at the time he executes the document. Adult Child is ready to write out a check for the fee.

May Attorney draft the power of attorney?

#### Opinion #1:

Yes, but not based solely on the instructions of Adult Child. Attorney must clarify that she represents the father and, therefore, has certain duties to the father as a client. When a lawyer is engaged by a person to render legal services to another person, the lawyer may not allow the third party to direct or regulate the lawyer's professional judgment in rendering such legal services. Rule 5.4(c). Similarly, Rule 1.8(f) provides that when a lawyer's services are being paid for by someone other than the client, the lawyer may not accept the compensation unless the client gives informed consent, there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and confidential information relating to the representation of the client is protected. Competent representation of the father in this situation requires an independent consultation with the father to obtain his informed consent to the representation and to determine whether he wants or needs the power of attorney and, if so, who should be appointed attorney-in-fact and what powers should be granted to that person. For guidance on the representation of a client who may have diminished capacity, see Rule 1.14.

The situation described in this inquiry is distinguishable from a commercial or business transaction in which the lawyer is engaged by one person to prepare a power of attorney for execution by another person. Frequently, the power of attorney names the person requesting the legal services as the attorney-in-fact. If the document is being prepared to facilitate a specific task for the benefit of this person, such as the transfer of stock or real estate, the lawyer represents the person requesting the legal services and does not represent the signatory on the power of attorney. Thus, the purpose and goals of the engagement determine the identity of the client, not the signatory on the document prepared by the lawyer.

A lawyer may be asked by a client to prepare a document for the signature of a third party under circumstances that give rise to a reasonable belief that the client may be using the lawyer's services for an improper purpose such as actual or constructive fraud or the exertion of undue influence. If so, the lawyer may not assist the client and must decline or withdraw from the representation. Rule 1.2(d) and Rule 1.16(a)(1).

#### Inquiry #2 (facts are unrelated to facts in Inquiry #1):

Mom is elderly and, although she lives on her own, depends upon the assistance of Daughter, her adult child. Although Daughter believes Mom's mental and physical capacities are diminishing and that Mom can no longer care for herself in her own home, Mom's mental competency is not the immediate issue. Daughter contacts Attorney, stating that she is doing so "on Mom's behalf" to have Daughter appointed as Mom's attorney-in-fact and for assistance placing Mom in a nursing home. Daughter asked for a consultation at which Mom will not be present.

May Attorney meet with Daughter alone and, if so, who will be the client, Daughter or Mom?

**Opinion #2:**

Attorney may meet with Daughter alone to discuss the representation. However, because the purpose of the representation is to benefit Mom, Mom is the client. See Opinion #1. Attorney must explain to Daughter, in a timely and clear manner, that Attorney represents Mom and does not represent Daughter. Rule 4.3. Further, Attorney must inform Daughter that, in the event Mom and Daughter become antagonistic, Attorney will continue to represent only Mom and any information provided to Attorney by Daughter may be used to further the representation of Mom.

**Inquiry #3:**

May Attorney represent both Mom and Daughter?

**Opinion #3:**

Yes, however, because the representation of one of the clients may be materially limited by Attorney's responsibilities to the other client, Attorney must satisfy the conditions of Rule 1.7(b) before asking the clients to consent to the joint representation. In particular, Attorney must be able to make a reasonable determination that she can provide competent and diligent representation to each affected client and she must provide sufficient information about the potential conflict to obtain Mom's and Daughter's informed consents. Their consents must be confirmed in writing. Rule 1.7(b)(1) and (4).

In a family situation such as this, a lawyer may readily determine that the parties are working together for a common goal that is in the best interest of the elderly parent. However, these situations are fraught with the potential for abuse of the elderly client or conflicts between the relative's goal for the representation (e.g., putting Mom in a nursing home) and the parent's goal (e.g., independent living). In the current situation, for example, Attorney must advise Mom that she can choose anyone to be the attorney-in-fact and is not required to name Daughter.

Comment [29] to Rule 1.7 offers these cautionary words:

In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recriminations . . . Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good.

**Inquiry #4:**

Would the following disclosure and consent form satisfy the requirements of Opinion #2?

I, [Daughter], understand that Attorney does not represent me regarding issues that concern my mother. I understand that Attorney may be representing my mother after Attorney meets with her. I also understand that whatever I say to Attorney may be used against my interests by Attorney in her representation of my mother. I understand I could hire my own lawyer and I have chosen not to do so. I have read this document and understand its contents.

**Opinion #4:**

Yes.

**Inquiry #5:**

Daughter signs the disclosure form described in Inquiry #4. Mom refuses to move to a nursing home and Daughter brings a guardianship proceeding. May Daughter's statements to Attorney in the initial interview be used by Attorney to defend Mom's competency in the guardianship proceeding brought by Daughter?

**Opinion #5:**

Yes.

**[Back to ethics opinions search](#)**

18

## Ethics Opinions

[Back to ethics opinions search](#)

[Print opinion](#)

[Next Opinion >>](#)

### **CPR 296**

July 15, 1981

#### **INQUIRY:**

Attorney A practices domestic relations law in Wake County. The Clerk of the Domestic Courtroom for Wake County District Court has available a document entitled "Acceptance of Service and Waiver" which is frequently used for uncontested divorces. The form states that the defendant, or defendant's attorney, accepts service of the summons and acknowledges receipt of a copy of the summons and a copy of the complaint. The form further states that the defendant waives service by an officer and further waives the right to file an answer or any other pleadings, the right to be notified of the time and place of the trial of the action, and waives the right to trial by jury, and further agrees that the court may proceed immediately with the trial of the action in question.

In view of CPR's 121 and 125, may Attorney A representing a plaintiff in a divorce or other action ethically prepare this form and make it available to a defendant? May he do so only at the request of the defendant? May he allow his client, the plaintiff, to provide such a form to the defendant?

#### **OPINION:**

No. Attorney A may not send to or directly make available to a defendant the "Acceptance of Service and Waiver" form. To provide the form waiving the right to answer and to be notified of the date of trial has the same effect as providing an answer for the defendant. See CPR's 121 and 125. Similarly, Attorney A may not allow his client, the plaintiff, to provide such a form to the defendant. See CPR 125. Of course, Attorney A may send to defendant a form solely for acceptance of service. See CPR 121, Question 1.

[Back to ethics opinions search](#)

19

## Ethics Opinions

[Back to ethics opinions search](#)[Print opinion](#)[<< Previous Opinion](#)[Next Opinion >>](#)

### RPC 11

October 24, 1986

#### Married Lawyers in Different Firms

*Opinion rules that when married lawyers are employed in different firms and those firms represent adverse parties, neither firm is disqualified.*

#### Inquiry:

Firm One employs Lawyer A as an associate. Lawyer A is married to Lawyer B who is a partner in firm Two. Lawyer A was formerly an associate in Firm Two. Both Firm One and Firm Two have more than one office. However, Lawyer A and Lawyer B practice in offices of their respective firms in the same city, where they reside.

Where Firm One and Firm Two represent adverse or potentially adverse interests in a matter, but neither Lawyer A nor Lawyer B participates actively in the matter, is either firm disqualified from that representation? What inquiry must be made, if any, if the facts do not make the potential involvement of the other spouse's firm immediately apparent? Is client disclosure and consent required for accepting representation? Is it necessary for the firm to insulate or "build a Chinese Wall around" the spouse attorney where actual or potential adverse representation is apparent?

Where Firm One and Firm Two represent adverse or potentially adverse interests in a matter, may either Lawyer A or Lawyer B participate in the representation? If so, what disclosure or client consent is required? Does it matter whether the fact of adverse representation is revealed only after substantial involvement or attention to the matter by either or both firms?

#### Opinion:

Rule 5.9 of the Rules of Professional Conduct prohibits a lawyer who is related to another lawyer as parent, child, sibling, or spouse from representing a client in a representation adverse to a person whom the lawyer knows is represented by the spouse or other relative unless the client consents after full disclosure concerning the relationship. The Rule specifically provides that it does not disqualify other lawyers in the firm. Thus, Firm One and Firm Two may represent adverse or potentially adverse interests. The Rule does not appear to require client disclosure and consent where the spouse partner or associate is not actively involved in the representation. Nor is there necessarily any need for any special inquiry if the spouse partner or associate is not involved in the case. Nor does there appear to be any reason to "build a Chinese Wall around" the spouse attorney simply because a firm in which his spouse is a partner or associate is actively involved in representing an adverse or potentially adverse interest. Should the spouse attorney acquire any "confidential information" within the meaning of Rule 4, he or she is required to observe the confidential nature of that information, even in communicating with his or her spouse.

Rule 5.9 implicitly permits one spouse to participate in matters even though his or her spouse is a partner or associate in a firm representing an adverse interest where the other spouse does not appear to be participating actively. However, client disclosure and consent may be required if there is any reason to believe that the spouse lawyer's own interest may be involved. (See Rule 5.1(b)). This will depend on the circumstances in view of the case, the size of the firms, effect upon the income of the two spouses, and other relevant matters. For example, since Lawyer B is a partner in

Firm Two and presumably received income based upon a percentage of Firm Two's profits, Lawyer A's personal interest under Rule 5.1(b) could be involved, as a result of the effect on family income, in a case in which Firm Two, but not necessarily Lawyer B, represents an adverse party. Consideration of the type of fee, the amount of money involved, the financial relationship between firm income and Lawyer B's income, and other matters may be relevant here. Under any circumstances, the representation by either firm, or even by either of the spouses, may be undertaken if the client consents after full disclosure of the relationship and possible consequences or effects on the representation, if any, in view of the firm and the particular lawyer involved. See Rule 5.9; see Rule 5.1. Whenever either spouse is involved in representation in a matter in which the other spouse's firm also represents one of the parties, great care should be taken to ensure that no problems are created as a result of the relationship and the representation, such as may happen even by a message left at the attorney's home by the client. See ABA Formal Opinion 340 (September 3, 1975).

**[Back to ethics opinions search](#)**

20

## Ethics Opinions

[Back to ethics opinions search](#)[Print opinion](#)[<< Previous Opinion](#)[Next Opinion >>](#)

### 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.

**[Back to ethics opinions search](#)**

21

## Ethics Opinions

[Back to ethics opinions search](#)[Print opinion](#)[<< Previous Opinion](#)[Next Opinion >>](#)

### 97 Formal Ethics Opinion 3

October 24, 1997

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

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

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

#### Inquiry #1:

Attorney A represents Defendant X who is charged with driving while impaired. The case is scheduled for trial in district court the following day. Criminal district court is in session daily, and a motion to continue could be heard in open court. Attorney A, outside the course of official proceedings, contacts the local district court judge to request a continuance of the trial of Defendant X. Attorney A does not discuss the merits of the case with the local judge. Is a communication with the local district court judge to request a continuance, made without the prosecutor's knowledge or presence, an ethical violation?

#### Opinion #1:

Yes, unless the *ex parte* communication is necessitated by the administration of justice or exigent circumstances and diligent efforts to contact the opposing lawyer (in this case, the prosecutor) have failed.

Rule 3.5(a) of the Revised Rules of Professional Conduct prohibits communications with the judge except in the following situations: (1) in the course of official proceedings; (2) in writing, if the lawyer promptly delivers a copy of the writing to opposing counsel; (3) orally, upon adequate notice to the opposing counsel; or (4) as otherwise authorized by law. If an *ex parte* oral communication with a judge may influence the outcome of a case, the lawyer should avoid the communication unless the opposing party receives adequate notice or the communication is allowed by law. See RPC 237 (citing statutes permitting *ex parte* communications in certain emergencies). Nevertheless, the administration of justice or exigent circumstances may necessitate an *ex parte* oral communication with a judge to resolve a scheduling or administrative matter. If so, the lawyer may engage in the *ex parte* communication with the judge only after a diligent effort has been made to notify the opposing lawyer.

#### Inquiry #2:

A retired judge from outside the district is scheduled to preside over the next day's session of district court. Attorney A is seeking the continuance from the local district court judge because he wants to avoid the trial of Defendant X's case by the visiting judge. Does this affect the opinion set forth above?

#### Opinion #2:

No.

**Inquiry #3:**

Defendant Z is charged with driving while impaired. He is the grandson of a retired deputy sheriff who has been very active in local politics for many years. The deputy sheriff supported and campaigned for at least two of the three local district court judges. At least two of the judges have visited in the retired deputy's home.

One of the three judges voluntarily recused himself from the trial of Defendant Z. The day before the case was scheduled for trial, the prosecutor separately approached each of the other two judges. Without the knowledge of Defendant Z's lawyer, the prosecutor informed each judge of Defendant Z's relationship to the retired deputy sheriff and inquired whether the judge would hear the case. Each judge indicated that he would recuse himself from the case. As a consequence, the trial was postponed in order that it might be heard by a judge from another county. Is a communication with a local judge to inquire as to whether the judge will recuse himself from a particular case, made without the opposing lawyer's knowledge or presence, an ethical violation?

**Opinion #3:**

Yes. See opinion #1 above.

97 Formal Ethics Opinion 4 (revised)

April 17, 1998

**[Back to ethics opinions search](#)**

22

## Ethics Opinions

[Back to ethics opinions search](#)[Print opinion](#)[<< Previous Opinion](#)[Next Opinion >>](#)

### 2001 Formal Ethics Opinion 15

April 19, 2002

#### Ex Parte Communication with a Judge when Permitted by Law

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

**Inquiry:**

Rule 3.5(a)(3) prohibits *ex parte* communications with a judge or other official except under the following circumstances:

- (i) in the course of official proceedings;
- (ii) in writing, if a copy of the writing is furnished simultaneously to the opposing party;
- (iii) orally, upon adequate notice to opposing party; or
- (iv) as otherwise permitted by law.

G.S. 15A-539 of the North Carolina General Statutes states as follows: "A prosecutor may at any time apply to an appropriate district court judge or superior court judge for modification or revocation of an order of release under [Article 26]." The statute does not say that the application to the judge may be made *ex parte*.

On more than one occasion, Attorney A has gotten a client's bond modified in a court proceeding only to have the prosecutor communicate with the judge *ex parte* and obtain a reinstatement of the original bond. The prosecutor, in reliance upon the statement "at any time" in G.S. 15A-539, presumes that he or she is permitted by law to engage in these *ex parte* communications without notice to Attorney A or the client.

Does the *ex parte* communication with the judge violate Rule 3.5(a)(3)?

**Opinion:**

Yes. Lawyers must act in good faith when determining whether an *ex parte* communication is "permitted by law" particularly because such communications limit the adverse party's right to be heard and to be represented by counsel. Therefore, a lawyer may not engage in an *ex parte* communication with a judge or other official in reliance upon the communication being "permitted by law" unless there is a statute or case law specifically and clearly authorizing such communication. Such authorization may not be inferred by the absence in the statute or case law of a specific statement requiring notice to the adverse party or counsel prior to the *ex parte* communication. See RPC 237.

[Back to ethics opinions search](#)

23

## Ethics Opinions

[Back to ethics opinions search](#)[Print opinion](#)[<< Previous Opinion](#)[Next Opinion >>](#)

### 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. Â§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.

Â Â Â 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."

**[Back to ethics opinions search](#)**

24

## Ethics Opinions

[Back to ethics opinions search](#)

[Print opinion](#)

[<< Previous Opinion](#)

[Next Opinion >>](#)

### RPC 162

July 21, 1994

Editor's Note: This opinion was originally published as RPC 162 (Third Revision).

### Communications with Opposing Party's Physicians

*Opinion rules that an attorney may not communicate with the opposing party's nonparty treating physician about the physician's treatment of the opposing party unless the opposing party consents.*

#### Inquiry #1:

Attorney A is defense counsel in a personal injury case. Through discovery, Plaintiff, P, produces complete medical records from her attending physicians. The records of certain of these attending physicians appear to be favorable to the defendant and supportive of defendant's theory of the case. Before the case is set for trial, may Attorney A communicate with Plaintiff's physicians without seeking the consent of Plaintiff or her counsel in order to have the physician decipher his handwriting and medical codes in the records that Attorney A has received as a part of discovery in the civil action?

#### Opinion #1:

No. Communications with Plaintiff's nonparty treating physician concerning any aspect of the physician's treatment of Plaintiff or the substance of the physician's testimony at trial is unethical as against public policy unless the opposing party consents. See *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990).

Note: This opinion does not address communications with treating physicians in workers' compensation cases and no opinion is thereby expressed as to any ethical or public policy limitations on such communications. See G.S. A§97-27.

#### Inquiry #2:

Under the same circumstances outlined in Inquiry #1, may Attorney A discuss with the physician his generalized opinions without regard to the medical treatment and medical condition of the Plaintiff at issue in the lawsuit?

#### Opinion #2:

See answer to Inquiry #1.

#### Inquiry #3:

After the case has been called for trial and the physician in question is subpoenaed as a witness for defense, may Attorney A communicate with physician to discuss the matters set forth in Inquiries #1 and #2 above?

#### Opinion #3:

See answer to Inquiry #1.

**Inquiry #4:**

Under the circumstances outlined in Inquiry #3, may Attorney A communicate with physician to arrange for his witness's appearance at the trial?

**Opinion #4:**

Yes, Attorney A may communicate with the plaintiff's nonparty treating physician in order to arrange the physician's appearance at the trial as a witness.

**Inquiry #5:**

Under the circumstances mentioned in Inquiry #3, may Attorney A communicate to physician the questions the attorney expects to pose to the physician at trial, so long as neither privileged information or responses to those inquiries are sought from physician?

**Opinion #5:**

Yes, provided the communication is in writing.

**[Back to ethics opinions search](#)**

25

## Ethics Opinions

[Back to ethics opinions search](#)[Print opinion](#)[<< Previous Opinion](#)[Next Opinion >>](#)

### RPC 119

October 18, 1991

Editor's Note: *But see* Rule 4.2(a) of the Revised Rules.

#### Communication Between Opposing Parties

*Opinion rules that an attorney may acquiesce in a client's communication with an opposing party who is represented without the other attorney's consent, but may not actively encourage or participate in such communication.*

#### Inquiry:

Attorney A represented a passenger who suffered serious injuries when thrown from an auto driven by a fraternity friend who was represented by Attorney B. Attorney B also represented the father of the driver under family purpose allegations. Attorney C represented the liability carrier. The injuries sustained by the plaintiff were severe and the liability carrier indicated that it would pay its limits. The principal issue was the contribution of the driver and his father. A few days before the scheduled trial and after inconclusive negotiations between the attorneys on the excess aspect, Attorney B permitted his client, the driver, to telephone Attorney A's client who was a military officer in another state in an effort to negotiate a settlement. Attorney A had no knowledge of the communication until receiving a call from his client. Confusion resulted over what the plaintiff agreed to accept. Attorney A protested to Attorneys B and C concerning the direct communication with his client. Again, without the knowledge of Attorney A but with the permission of Attorney B, the defendant-driver contacted Attorney A's client and attempted to resolve the amount and method of paying the excess.

Is it permissible for an attorney to allow his client to contact the adverse party and attempt to negotiate settlement without the knowledge or permission of the attorney for the adverse party, even though at one time the parties may have been close friends?

#### Opinion:

Yes. Opposing parties themselves may communicate with each other with or without the consent of their lawyers about any matters they deem appropriate. Such communications may include efforts to negotiate a resolution of a controversy between the parties, the results of which may be reported to the parties' lawyers. At the same time Rule 7.4(a) provides: "During the course of his representation of a client, a lawyer shall not: (1) communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." Although client contact with the opposing represented party can be allowed or permitted by the attorney, the attorney cannot cause (by active encouragement, client preparation, or personal participation) such communication so as to accomplish indirectly what he or she could not do directly due to the prohibition of Rule 7.4(a). The lawyer must be careful to distinguish between active encouragement and participation on the one hand and passive acquiescence on the other. It is improper for the attorney to use his or her client as an agent, or to use any other actual agent of the attorney, to communicate with the opposing represented party in violation of Rule 7.4(a).

This opinion supersedes CPR 150.

**[Back to ethics opinions search](#)**

26

## Ethics Opinions

[Back to ethics opinions search](#)[Print opinion](#)[<< Previous Opinion](#)[Next Opinion >>](#)

### RPC 209

January 12, 1996

Editor's Note: This opinion was originally published as RPC 209 (Revised).

#### Disposing of Closed Client Files

*Opinion provides guidelines for the disposal of closed client files.*

#### Inquiry #1:

Attorney A has been in practice for 20 years. Whenever he completes a matter for a client, he closes the client's file and retains it in his office. Attorney A has run out of space to store files in his office. The expense of renting storage space to store files is prohibitive. May Attorney A dispose of the closed client files?

#### Opinion #1:

Yes, subject to certain requirements.

The original file belongs to the client and, because of the general fiduciary duty to safeguard the property of a client, a lawyer should store a client's file in a secure location where client confidentiality can be maintained. See Rule 4 and Rule 10.1 of the Rules of Professional Conduct, and RPC 79.

With the consent of the client, a closed file may be destroyed at any time. Absent the client's consent to disposal of a file, a closed file must be retained for a minimum of six years after the conclusion of the representation. Six years is the required minimum period for retaining a closed client file because this retention period is consistent with retention period for records of client property set forth in Rule 10.2(b). Of course, the statute of limitations may require the retention of a closed file for more than six years.

If six years have not passed since a client's file became inactive, the file may only be destroyed with the consent of the client or, after notice to the client, the client fails to retrieve the file. The client should be contacted and advised that the lawyer intends to destroy the file unless the client retrieves the file or, within a reasonable period of time, directs that the file be transferred to another lawyer. See RPC 16. If the client indicates that he or she does not wish to retrieve the file, the lawyer may dispose of the file. On the other hand, if the client indicates that he or she would like to retrieve the file, the client must be given a reasonable opportunity to do so. If the client fails to retrieve the file within a reasonable period of time, the file may be destroyed. RPC 16. If the client fails to retrieve the file after notice, the lawyer should review the file and retain any items in the file that belong to the client or contain information useful in the assertion or defense of the client's position in a matter for which the statute of limitations has not expired. See RPC 16. These items should be retained until the client consents to their destruction or retention is no longer required by law or necessary to protect the client's rights.

After the passage of six years, the lawyer is not required to notify the client that the file will be destroyed. However, if not previously reviewed and purged of the client's possessions, the lawyer should review the file and retain any items that belong to the client. These items should be returned

to the client or retained in a secure place until retrieved by the client or until the items are deemed abandoned and escheat to the state under Chap. 116B of the North Carolina General Statutes. The remaining records in the file may be destroyed.

A record should be maintained of all destroyed client files. RPC 16.

**Inquiry #2:**

Do closed client files have to be destroyed or disposed of in a particular manner?

**Opinion #2:**

No particular method of destroying files is prescribed by the Rules of Professional Conduct. However, if closed files are destroyed, the method chosen must preserve client confidentiality. See Rule 4. RPC 133 ruled that a law firm may recycle its waste paper if the responsible attorney can "ascertain that those persons or entities responsible for the disposal of waste paper employ procedures which effectively minimize the risk that confidential information might be disclosed." When client files are destroyed, similar precautions should be taken.

**Inquiry #3:**

Attorney A has in storage not only the files of his own clients but also the client files of lawyers who were formerly his law partners. What should Attorney A do with these client files?

**Opinion #3:**

Although the files belong to clients of lawyers other than Attorney A, because Attorney A has retained possession of these files, he has a fiduciary obligation to see that the files are properly handled. A former client is most likely to look for the attorney who previously handled his or her matter when trying to locate a legal file. Therefore, Attorney A may return these files to the original lawyers. Alternatively, Attorney A may dispose of the files in a manner that is consistent with the guidelines set forth in this opinion.

**[Back to ethics opinions search](#)**

27

## Ethics Opinions

[Back to ethics opinions search](#)

[Print opinion](#)

[<< Previous Opinion](#)

[Next Opinion >>](#)

### RPC 234

October 18, 1996

#### Electronic Storage of Client's File

*Opinion rules that an inactive client file may be stored in an electronic format provided original documents with legal significance are preserved and the documents in the electronic file can be reproduced on paper.*

#### Inquiry:

RPC 209 requires a lawyer to retain a client's file for six years after the file becomes inactive. During the six years, the file may only be destroyed with the consent of the client or, after notice to the client, the client fails to retrieve the file. Prior to the expiration of the six-year period, may a law firm convert the paper documents in a client's file into an electronic format, such as magnetic or optical disks readable by computer, store the disks, and destroy the original paper file?

#### Opinion:

Yes, provided: (1) original documents with legal significance, such as wills, contracts, stock certificates, etc., are culled from the paper file and stored in a safe place or returned to the client; and (2) the documents stored in an electronic format can be reproduced in a paper format. Rule 2.8 (a)(1) and RPC 209

[Back to ethics opinions search](#)

## Ethics Opinions

[Back to ethics opinions search](#)

[Print opinion](#)

[<< Previous Opinion](#)

[Next Opinion >>](#)

### RPC 153

January 15, 1993

#### Termination of Joint Representation: The Former Client's Right to the File

*Opinion rules that in cases of multiple representation a lawyer who has been discharged by one client must deliver to that client as part of that client's file information entrusted to the lawyer by the other client.*

#### Inquiry:

Minor Plaintiff was injured during a surgical procedure at Hospital. Nurse anesthetist, a hospital employee, participated actively in the surgery, along with several others. Due to the focus of the early investigation by the hospital, Nurse independently sought an attorney to represent her interests and selected Attorney A, who was in private practice and who coincidentally generally represented Hospital and the liability insurance carrier for the hospital and the nurse, as a hospital employee. At the same time Nurse was represented by Attorney B, who was in charge of Hospital's legal department, and who held himself out to Nurse as her attorney during investigation of the occurrence and in protecting her in the event of a lawsuit that was felt to be "imminent." Before undertaking representation of Nurse, Attorney A obtained approval of Attorney B and his office on behalf of Hospital and the liability insurance carrier. After Attorney A, Attorney B on behalf of Hospital, and the insurance company determined that the interests of Nurse and Hospital were the "same," they agreed to the joint representation of Nurse and Hospital and undertook investigation and management of the case, which continued for some time. Despite recognition by Attorneys A and B from the outset that reports of the incident by various participants differed, no disclosure was made of potential conflicts of interest existing at the time or that might arise later, and no attempt was made to limit the representation or sharing of information. During the period of joint representation of Nurse and Hospital, substantial information concerning the incident was gathered and placed in the file(s) maintained concerning the joint representation by both Attorneys A and B. Among the items contained in the files were statements obtained from individuals participating in the surgery by persons in Hospital's risk management department, a division of Hospital's legal department, headed by Attorney B. The files also contained hospital records of the injured party, which were furnished by Hospital. Nurse became aware of a "proposed statement" of facts concerning the occurrence, which was proposed by Attorney A as a report to be given to the injured minor's family, and, in her opinion, erroneously focused blame on her. Nurse had not participated in formulation of this statement and had not authorized it. Nurse requested a copy of the file from Attorney A for her review and use and asked if her interests were being protected. Nurse did not receive the file and did not receive answers satisfactory to her. Nurse then consulted Attorney X, who undertook to represent Nurse. Attorney X contacted Attorney A and requested a copy of all materials in the files relating to the representation of Nurse in order to assist in properly representing Nurse. Attorney A, on instructions from Attorney B for Hospital, refused to surrender statements that were given him by Hospital's risk management department, claiming that such materials are privileged as having been obtained in anticipation of litigation or trial. Attorney A also refused to surrender a copy of hospital records of the injured party claiming that those records are also privileged.

Under the circumstances, do Attorneys A and B have an ethical obligation to surrender the contents of the file(s) to Nurse and her new Attorney X?

**Opinion:**

Yes, otherwise irreparable harm could be done to a client needing the accumulated information to assist her defense. Rule 5.1 makes loyalty an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation and comply with Rule 2.8. Rule 2.8 (a)(2) obligates a lawyer whose employment has been terminated to surrender to the former client those portions of the file to which the client is entitled. Loyalty to a client is impaired when a lawyer cannot 1) represent the client zealously under Rule 7.1 and avoid prejudicing or damaging the client during the course of the professional relationship (Rule 7.1 (a)(3)), and 2) when the lawyer cannot keep the client reasonably informed or promptly comply with reasonable requests for information (Rule 6(b)(1)). When a lawyer undertakes representation of codefendants, an impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony or incompatibility of positions. Identifying and resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation and not the client's responsibility. Once Attorneys A and B determined that Nurse's and Hospital's interests were the same and, presumably, that no conflict of interest existed and then undertook joint representation of Nurse and Hospital, with the consent of Hospital and its insurance company, information gathered on behalf of Nurse and Hospital (who were deemed to have the "same interest") lost its confidential nature as between Nurse and Hospital by implied authorization, if not actual consent, under Rule 4(c)(1) and (2). Since Nurse relied on reasonable attorney-client expectations of protection of her interests and access to information, Attorneys A and B are now estopped to negate consent to the rights inuring to Nurse's benefit from the joint representation. Nurse is entitled to immediate possession of all information in the joint representation file or files of Attorneys A and B accumulated to the date of termination of representation that would or could be of some value to her in protecting her interests. This includes the items specified in the inquiry and any others that would or could be of some help to Nurse. The information must be surrendered unconditionally by Attorneys A and B without regard to whether the cost of its acquisition was advanced by either attorney or client (hospital). RPC 79. The attempt by Attorneys A and B to revoke the implied or actual authority to share information with Nurse can only apply prospectively to information gathered and work done after termination of representation.

**[Back to ethics opinions search](#)**

29

## Ethics Opinions

[Back to ethics opinions search](#)[Print opinion](#)[<< Previous Opinion](#)[Next Opinion >>](#)

### RPC 169

January 14, 1994

#### Providing Client with Copies of Documents from the File

*Opinion rules that a lawyer is not required to provide a former client with copies of title notes and may charge a former client for copies of documents from the client's file under certain circumstances.*

##### Inquiry #1:

Attorney represented Ex-client on a number of real estate transactions prior to the termination of the employment. Attorney provided Ex-client with the original documents or copies of most of the pertinent documents at the time of the closing for each real estate transaction. All of the real estate transactions Attorney handled for Ex-client were completed and Attorney no longer represents Ex-client. Ex-client has asked Attorney to provide him with copies of the documents in his closed real estate files. Attorney has provided Ex-client with copies of deeds, maps, title opinions, title insurance policies, correspondence and all of the significant information regarding the purchases and the loans for Ex-client's respective properties. He has not provided Ex-client with copies of his title notes. Attorney considers his title notes to be work product which often involves using base title notes for subdivisions or title notes from other files as well as the conveyance list files maintained by Attorney's law firm. Is Attorney ethically required to provide Ex-client with a copy of the title notes for the properties?

##### Opinion #1:

No. Although Rule 2.8(a)(2) requires a lawyer to deliver to a former client "all papers ...to which the client is entitled," the comment to the rule notes that "[t]he lawyer's personal notes...need not be released." See *also* CPR 3.

##### Inquiry #2:

If Attorney does not condition the delivery of the copies to Ex-client on the payment of his bill for prior legal services, may Attorney charge Ex-client for the copies he delivers to Ex-client of documents which Attorney had already provided to Ex-client at the time of the closings?

##### Opinion #2:

Yes. When Attorney delivered the original documents to Ex-client at the time of the closings for the real estate transactions, he fulfilled the requirements of Rule 2.8 (a)(2). If Attorney kept copies of these original documents, Attorney may charge Ex-client for any additional copies which Attorney makes for Ex-client but attorney may not condition the delivery of these copies to Ex-Client on the payment of his bill for legal services. If Attorney retained in his office files any original documents from Ex-client's real estate transactions, Attorney must bear the cost of making copies for Ex-client until such time as he delivers the original documents to Ex-client.

[Back to ethics opinions search](#)

30

## Ethics Opinions

[Back to ethics opinions search](#)

[Print opinion](#)

[<< Previous Opinion](#)

[Next Opinion >>](#)

### 98 Formal Ethics Opinion 9

July 16, 1998

#### Charging for the Cost of Retrieving a Closed Client File

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

#### Inquiry:

May a lawyer charge a client for retrieving a closed file from storage?

#### Opinion:

A lawyer may charge a client the actual cost of retrieving a closed client file from storage subject to certain conditions.

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

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

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

[Back to ethics opinions search](#)

## Ethics Opinions

[Back to ethics opinions search](#)

[Print opinion](#)

[<< Previous Opinion](#)

[Next Opinion >>](#)

### Authorized Practice Advisory Opinion 2002-1

January 24, 2003

#### On the Role of Laypersons in the Consummation of Residential Real Estate Transactions

The North Carolina State Bar has been requested to interpret the North Carolina unauthorized practice of law statutes (N.C. Gen. Stat. §84-2.1 to 84-5) as they apply to residential real estate transactions. The State Bar issues the following authorized practice of law advisory opinion pursuant to N.C. Gen. Stat. §84-37(f) after careful consideration and investigation. This opinion supersedes any prior opinions and decisions of any standing committee of the State Bar interpreting the unauthorized practice of law statutes to the extent those opinions and decisions are inconsistent with the conclusions expressed herein.

#### Issue 1:

May a nonlawyer handle a residential real estate closing for one or more of the parties to the transaction?

#### Opinion 1:

No. Residential real estate transactions typically involve several phases, including the following: abstraction of titles; application for title insurance policies, including title insurance policies that may incorporate tailored coverage; preparation of legal documents, such as deeds (in the case of a purchase transaction) and deeds of trust; explanation of documents implicating parties' legal rights, obligations, and options; resolution of possible clouds on title and issues concerning the legal rights of parties to the transaction; execution and acknowledgement of documents in compliance with legal mandates; recordation and cancellation of documents in accordance with North Carolina law; and disbursement of proceeds after legally-recognized funds are available. These and other functions are sometimes called, collectively, the "closing" of the residential real estate transaction. As detailed below, the North Carolina General Assembly has determined specifically that only persons who are licensed to practice law in the state may handle many of these functions.<sup>1</sup>

A person who is not licensed to practice law in North Carolina and is not working under the direct supervision of an active member of the State Bar may not perform functions or services that constitute the practice of law.<sup>2</sup> For example, under the express language of N.C. Gen. Stat. § 84-2.1 and 84-4, a non-lawyer who is not working under the direct supervision of an active member of the State Bar would be engaged in the unauthorized practice of law if he or she performs any of the following functions for one or more of the parties to a residential real estate transaction: preparation or aiding in preparation of deeds, deeds of trust, or other legal documents; abstracting or passing upon titles; advising or giving an opinion upon the legal rights or obligations of any person, firm, or corporation; or holding himself or herself out as competent or qualified to give legal advice or counsel or as furnishing any services that constitute the practice of law.

Accordingly, a non-lawyer is engaged in the unauthorized practice of law if he or she performs any of the following functions in connection with a residential real estate closing (identified only as examples):

1. Abstracts or provides an opinion on title to real property;
2. Explains the legal status of title to real estate, the legal effect of anything found in the chain of title, or the legal effect of an item reported as an exception in a title insurance commitment except as necessary to underwrite a policy of insurance and except that a licensed title insurer, agency, or agent may explain an underwriting decision to an insured or prospective insured, including providing the reason for such decision;

3. Explains or gives advice about the rights or responsibilities of parties concerning matters disclosed by a land survey under circumstances that require the exercise of legal judgment or that have implications with respect to a party's legal rights or obligations;
4. Provides a legal opinion or advice in response to inquiries by any of the parties regarding legal rights or obligations of any person, firm, or corporation, including but not limited to the rights and obligations created by a promissory note, the effect of a pre-payment penalty, the rights of parties under a right of rescission, and the rights of a lender under a deed of trust;
5. Advises or instructs a party to the transaction with respect to alternative ways for taking title to the property or the legal consequences of taking title in a particular manner;
6. Drafts a legal document for a party to the transaction or assists a party in the completion of a legal document, or selects or assists a party in selecting a form legal document among several forms having different legal implications;
7. Explains or recommends a course of action to a party to the transaction under circumstances that require the exercise of legal judgment or that have implications with respect to the party's legal rights or obligations;
8. Attempts to settle or resolve a dispute between the parties to the transaction that will have implications with respect to their respective legal rights or obligations.

The foregoing list of examples of functions that constitute the practice of law is not exclusive, but reflects a range of responsibilities and duties that involve the following: the exercise of legal judgment; the preparation of legal documents such as deeds, deeds of trust, and title opinions; the explanation or interpretation of legal documents in circumstances that require the exercise of legal judgment; the provision of legal advice or opinions; and the performance of other services that constitute the practice of law.

**Issue 2:**

May a nonlawyer who is not acting under the supervision of a lawyer licensed in North Carolina (1) present and identify the documents necessary to complete a North Carolina residential real estate closing, direct the parties where to sign the documents, and ensure that the parties have properly executed the documents; and (2) receive and disburse the closing funds?

**Opinion 2:**

Yes. So long as a nonlawyer does not engage in any of the activities referenced in Opinion 1, or in other activities that likewise constitute the practice of law, a nonlawyer may: (1) present and identify the documents necessary to complete a North Carolina residential real estate closing, direct the parties where to sign the documents, and ensure that the parties have properly executed the documents; or (2) receive and disburse the closing funds.

Notwithstanding this opinion, evidence considered by the State Bar with respect to this advisory opinion indicates that, at the time documents are presented to the parties for execution, a lawyer who is present may identify or be asked about important issues affecting the legal rights or obligations of the parties. A lawyer may provide important legal guidance about such issues, but a nonlawyer is not permitted to do so. Moreover, a consumer's retention of a licensed North Carolina lawyer provides financial protection to the consumer. The North Carolina Rules of Professional Conduct require a lawyer to properly handle all fiduciary funds, including residential real estate closing proceeds. In the event a lawyer mishandles the closing proceeds, the lawyer is subject to professional discipline, and the State Bar Client Security Fund may provide financial assistance for a person injured by the lawyer's improper application of funds. On the whole, the evidence considered by the State Bar indicates that it is in the best interest of a consumer to be represented by a lawyer with respect to all aspects of a residential real estate transaction.

The evidence the State Bar has considered suggests, however, that performing administrative or ministerial activities in connection with the execution of residential real estate closing documents and the receipt and disbursement of the closing proceeds does not necessarily require the exercise of legal judgment or the giving of legal advice or opinions. Indeed, the execution of closing documents and the disbursement of closing proceeds may be accomplished—and often have been accomplished—by mail, by e-mail, or by other electronic means, or by some other procedure that would not involve the lawyer and the parties being physically present at one place and time. The State Bar therefore concludes that it should not be presumed that performing the task of overseeing the execution of residential real estate closing

documents and receiving and disbursing closing proceeds necessarily involves giving legal advice or opinions or otherwise engaging in activities that constitute the practice of law.

Nonlawyers who undertake such responsibilities, and those who retain their services, should also be aware that (1) the North Carolina State Bar retains oversight authority concerning complaints about activities that constitute the unauthorized practice of law; and (2) the North Carolina criminal justice system may prosecute instances of the unauthorized practice of law. In addition, non-lawyers and consumers should bear in mind that other governmental authorities such as the Federal Trade Commission, the North Carolina Attorney General, district attorneys, and the banking commissioner, have jurisdiction over unfair trade practices and violations of requirements regarding lending practices.

#### **Endnotes**

1. Except as permitted under *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962), which allows a party having a "primary interest" in a transaction to prepare deeds of trust and other documents to effectuate the transaction.
2. The State Bar notes that the North Carolina General Assembly and Supreme Court are the entities that have the power to make the ultimate determination whether an activity constitutes the practice of law.

**[Back to ethics opinions search](#)**

32

## Ethics Opinions

[Back to ethics opinions search](#)[Print opinion](#)[<< Previous Opinion](#)

### Authorized Practice Advisory Opinion 2006-1

October 20, 2006

#### Quasi-Judicial Hearings on Zoning and Land Use

**Inquiry:**

May a person who is not a lawyer appear before planning boards, boards of adjustment, or other governmental bodies conducting quasi-judicial hearings in a representative capacity for another party?

**Opinion:**

At its October 2005 meeting, the Authorized Practice Committee responded to an inquiry concerning the propriety of a person who is not a lawyer appearing before planning boards, boards of adjustment, and city and county government in a representative capacity. The committee's advisory opinion distinguished appearances on legislative concerns, such as general rezoning cases and ordinance amendments, from appearances on behalf of petitioners for special use permits and variances, which are quasi-judicial matters. The committee has received comments from a number of interested parties, including architects, land use planners, and city and county attorneys as a result of that opinion. The committee is issuing this advisory opinion to supplement the prior opinion.

At its October 2005 meeting, the Authorized Practice Committee responded to an inquiry concerning the propriety of a person who is not a lawyer appearing before planning boards, boards of adjustment, and city and county government in a representative capacity. The committee's advisory opinion distinguished appearances on legislative concerns, such as general rezoning cases and ordinance amendments, from appearances on behalf of petitioners for special use permits and variances, which are quasi-judicial matters. The committee has received comments from a number of interested parties, including architects, land use planners, and city and county attorneys as a result of that opinion. The committee is issuing this advisory opinion to supplement the prior opinion.

First, the committee reiterates that the adoption of ordinances and amendments to official zoning maps (i.e. general rezoning cases) by the elected officials in city and county governments are legislative in nature and that any interested person may appear and speak on such matters before governmental bodies, even as representatives of groups or interested parties, without engaging in the unauthorized practice of law. Nonetheless, the general statutory prohibitions on unauthorized practice of law still apply even to persons who appear before governmental bodies on legislative matters. Non-lawyers may not hold themselves out as attorneys, provide legal services or advice, or draft any legal documents with regard to such matters. See N.C. Gen. Stat. §§ 84 2.1 and 4.

The law is clear that hearings on applications for special use permits and variances under zoning ordinances, as well as appeals from staff level interpretations related to permits, are quasi-judicial proceedings. N.C. Gen. Stat. §§ 153A-345 and 160A-381 and 388. See, *Humble Oil & Refining Co. v. Bd. of Aldermen of Chapel Hill*, 284 N.C. 458, 202 S.E.2d 129 (1974) and *Woodhouse v. Board of Comm'rs of Nags Head*, 299 N.C. 211, 261 S.E.2d 882 (1980). (For simplicity, the quasi-judicial hearings before these bodies are hereafter referenced to as a "variance hearing" unless the context indicates otherwise.) The governmental body before which the variance hearing is conducted sits in a judicial role of applying the standards of an ordinance to the particular circumstances of a particular party. Accordingly, the role of the governmental body is to receive evidence and make decisions based upon the evidence presented.

Variance hearings require the governmental body hearing the matter to observe certain formalities. Evidence, including witness evidence, is presented to the hearing body, although the Rules of Evidence need not be strictly observed. All witnesses before the body must be sworn and their testimony is subject to cross-examination. The hearing body has the power and authority to issue

subpoenas to compel witness testimony. A record of the proceedings must be preserved. The decision is to be based upon the evidence presented at an open hearing, and not on extraneous matters or personal knowledge of the members of the board. The applicant has the burden of proof. The board must make written findings of fact to support its decision. And, the decision of the board is reviewable by the courts on appeal based solely upon the record of the proceedings.

The committee believes that the law is also clear that an appearance on behalf of another person, firm, or corporation in a representative capacity for the presentation of evidence through others, cross-examination of witnesses, and argument on the law at a quasi-judicial proceeding is the practice of law. N.C. Gen. Stat. §§ 84 2.1 and 4. Consequently, because the variance hearings are by definition quasi-judicial proceedings, the committee concludes that it is the unauthorized practice of law for someone other than a licensed attorney to appear in a representative capacity to advocate the legal position of another person, firm, or corporation that is a party to the proceeding.

The committee has been urged to recognize that architects, landscape architects, land use planners, and engineers play a vital role at these quasi-judicial proceedings by presenting necessary facts and information on behalf of their clients at variance hearings. The committee agrees that the information these professionals can present is critical to the decision before the hearing body. These professionals are subject matter experts whose expert opinions, as witnesses, must be presented to the hearing body. They are witnesses who are in the best position to explain to the hearing body the facts of the proposed design and its anticipated effects on a variety of factors, including traffic, environment, and aesthetics, within the framework of matters properly under consideration at the variance hearing. The committee does not believe that the role of legal advocate by attorneys in quasi-judicial proceedings should interfere with or inhibit the role of non-lawyer professionals who speak as witnesses and present information at these quasi-judicial proceedings. In fact, their roles should be complementary.

It is axiomatic that the committee has no authority to amend or formulate exceptions to the statutes. In issuing an advisory opinion, it simply articulates how it believes a court would ultimately resolve the question for the guidance of the public. The committee cannot recognize or create exceptions to the law as expressed by the legislature and the courts. Further, we believe, as a practical matter, that effective representation of parties in variance hearings is becoming increasingly dependent upon legal advocacy of the rights of the parties with an eye toward compiling a supportable record in the event of an appeal. These are the skills an attorney provides. While it is true that many of these hearings involve routine and non-controversial matters, even questions about matters such as the height of residential fences may become the subject matter of an appeal where the appellate courts may only consider the record produced at the variance hearing. See *Robertson v. Zoning Board of Adjustment for the City of Charlotte*, 167 N.C. App. 531, 605 S.E.2d 723 (2004). It is difficult to predict in advance when a matter may require a comprehensive record for appellate purposes. Therefore, with this further elaboration, the committee re-affirms its initial opinion expressed by letter dated October 31, 2005, that the representation of another person at a quasi-judicial hearing is the practice of law.

That said, this opinion should not be interpreted to diminish the role and expertise of land use professionals as witnesses at variance hearings. These professionals may still present their evidence in support of the position of their clients. However, they may not examine or cross-examine other witnesses or advocate the legal position of their clients.

The committee's opinion is also not intended to affect the ability of city and county planning staff to present factual information to the hearing board, including a recitation of the procedural posture of the application, and to offer such opinions as they may be qualified to make without an attorney for the government present, as the committee understands is the proper, current practice and role of the planning staff. Further, nothing in this opinion should be interpreted as limiting the ability of a corporate officer or employee from testifying on factual matters on behalf of a corporate party during a hearing or suggesting that individual parties may not represent themselves before these boards.

In sum, the committee is of the opinion that land use professionals, including architects, engineers, and land use planners, may appear and testify as to factual matters and any expert opinions that they are qualified to present at quasi-judicial proceedings, but the presentation of other evidence, including the examination and cross-examination of witnesses, making legal arguments, and the advocacy for results on behalf of others before quasi-judicial zoning and land use hearings, is the practice of law that may be performed only by licensed attorneys at law.

May a person who is not a lawyer appear before planning boards, boards of adjustment, or other governmental bodies conducting quasi-judicial hearings in a representative capacity for another party? At its October 2005 meeting, the Authorized Practice Committee responded to an inquiry concerning the propriety of a person who is not a lawyer appearing before planning boards, boards of adjustment, and city and county government in a representative capacity. The committee's advisory opinion distinguished appearances on legislative concerns, such as general rezoning cases and ordinance amendments, from appearances on behalf of petitioners for special use permits and variances, which are quasi-judicial matters. The committee has received

comments from a number of interested parties, including architects, land use planners, and city and county attorneys as a result of that opinion. The committee is issuing this advisory opinion to supplement the prior opinion.

**[Back to ethics opinions search](#)**