# *TELL ME MORE!*
# *ETHICAL AND PROFESSIONALISM ISSUES IN DISCOVERY*

By Gina E. Cammarano and Lori M. Allen

## A. INTRODUCTION

Discovery in workers' compensation cases is an important tool for the parties, but it also raises several ethical and professionalism issues. Additionally, there are important time limits regarding discovery matters in the Workers' Compensation Act and Industrial Commission Rules.

The North Carolina Rules of Civil Procedure are not strictly applicable to proceedings under the North Carolina Workers' Compensation Act. *See Hogan v. Cone Mills Corp*., 315 NC 127, 337 S.E.2d 477 (1985), *and see* N.C. Gen. Stat. §1A-1. Therefore, Rule 26 of the North Carolina Rules of Civil Procedure (which governs depositions and discovery in civil actions) does not necessarily regulate discovery practice and procedures in North Carolina workers' compensation claims.

There are several Industrial Commission Rules, however, that govern discovery and discovery-related issues and procedures in workers' compensation claims, including Rule 402 (Submission of Earnings Statement Required), Rule 605 (Discovery), Rule 606 (Discovery- Post Hearing), Rule 607 (Discovery of Records and Reports), Rule 608 (Statement of Incident Leading to Claim), Rule 609 (Motions Practice in Contested Cases), and Rule 617 (Attorneys Retained for Proceedings). The statutory authority for the Industrial Commission's Rules regarding discovery is found in N.C. Gen. Stat. §97-80(f), which gives the Commission the authority to, by rule, provide for and limit the use of interrogatories and other forms of discovery, including production of books, papers, records, and other tangible things.

N.C. Gen. Stat. §97-80 also allows for subpoenas issued by the Industrial Commission to be served in accordance with Rule 45 of the North Carolina Rules of Civil Procedure (*see* §97-80(e)), gives the Commission the power to compel the production of books, papers, records, and other tangible things and the power to compel the attendance and testimony of witnesses (*see* §97-80(b)), and gives the Commission the authority to provide for reasonable sanctions for failure to comply with a Commission order compelling discovery (*see* §97-80(f)).

## B. ETHICAL CONDUCT IN DISCOVERY MATTERS, GENERALLY

All North Carolina lawyers must abide by the standards for ethical conduct set forth in Revised Rules of Professional Conduct of the North Carolina State Bar. Several of these Rules are relevant to discovery matters that arise in workers' compensation claims.

### 1. ***Rule 3.4: Fairness to Opposing Party and Counsel***

Rule 3.4 of the Revised Rules of Professional Conduct has a specific provision, subsection (d), which addresses discovery. It states that a lawyer shall not, in pretrial procedure, (1) make a frivolous discovery request, (2) fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party, or (3) fail to disclose evidence or information that the lawyer knew, or reasonably should have known, was subject to disclosure under applicable law, rules of procedure or evidence, or court opinions.

The Comment to Rule 3.4, points out that paragraph (d) of Rule 3.4 "makes it clear that a lawyer must be reasonably diligent in making inquiry of the client, or third party, about information or documents responsive to discovery requests or disclosure requirements arising from statutory law, rules of procedure, or case law . . . When responding to a discovery request or disclosure requirement, a lawyer must act in good faith. The lawyer should impress upon the client the importance of making a thorough search of the client's records and responding honestly. If the lawyer has reason to believe that a client has not been forthcoming, the lawyer may not rely solely upon the client's assertion that the response is truthful or complete."

### 2. ***Rule 4.1: Truthfulness in Statements to Others***

Rule 4.1 of the Revised Rules of Professional Conduct states: "In the course of representing a client a lawyer shall not knowingly make a false statement of material fact to a third person."

Obviously, a lawyer's obligation to be truthful in statements to others and not knowingly make a false statement of material fact would include statements made by the lawyer on the client's behalf when answering discovery.

### 3. ***Rule 3.1: Meritorious Claims and Contentions***

Rule 3.1 of the Revised Rules of Professional Conduct states, in relevant part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. . .". The Comment to Rule 3.1 reminds lawyers that they have "a duty not to abuse legal procedure."

The prohibition against non-meritorious claims and contentions means that attorneys should not send abusive discovery to the other side and should not make frivolous or unsupported objections to proper discovery requests.

#### *4. Rule 8.4: Misconduct*

Rule 8.4(a) of the Revised Rules of Professional Conduct states that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Rule 8.4(c) of the Revised Rules of Professional Conduct states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." And Rule 8.4(d) of the Revised Rules of Professional Conduct states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

Lawyers should be especially mindful of all three of these subsections of Rule 8.4 when handling discovery matters. The Comment to Rule 8.4 explains that lawyers are "subject to discipline when they violate or attempt to violate the Rules of Professional Conduct. . . [including] when they request or instruct an agent to do so on the lawyer's behalf." The Comment also states that offenses involving, among other things, "dishonesty, breach of trust, or serious interference with the administration of justice" are in the category of offenses that indicate a lack of fitness to practice law.

### C. SPECIFIC DISCOVERY TOPICS THAT RAISE ETHICAL ISSUES IN WORKERS' COMPENSATION CASES

When conducting and participating in discovery in workers' compensation cases, practitioners should be aware of the following specific discovery topics, as well as the North Carolina State Bar Revised Rules of Professional Conduct and North Carolina State Bar ethics opinions that govern these topics.

#### *1. Discovery Seeking Prohibited Information, Including Information Known or Equally Available to the Requesting Party or Information Not Relating to Issues in Dispute*

Rule 605(5) of the Industrial Commission's Workers' Compensation Rules states: "The signature of a party or attorney serving interrogatories or requests for production of documents constitutes a certificate by such person that he or she has personally read each of the interrogatories and requests for production of documents, that no such interrogatory or request for production of documents will oppress a party or cause any unnecessary expense or delay, that the information requested is not known or equally available to the requesting party, and that the interrogatory or requested document relates to an issue presently in dispute or that the requesting party reasonably believes may later be in dispute." Rule 605(5) further, states: "A party may serve an interrogatory, however, to obtain verification of facts relevant to an issue presently in dispute."

Whether the information requested is known or equally available to the requested party likely requires a case-by-case approach, but some examples may include interrogatories asking about an employee's job title(s) with the employer of injury or asking whether the employee has returned to work with the employer of injury. If the requesting party is in possession of, or has equal access to, the requested information, then this Rule appears to prohibit the request.

Regarding the utilization of an interrogatory to verify relevant facts, an interesting question arises as to the proper form of an interrogatory to obtain verification of facts relevant to an issue presently in dispute. Query whether the interrogatory must specifically state the facts sought to be verified, or whether the interrogatory may be worded in the typical fashion of standard interrogatories.

### *2. Subpoenas*

The use of subpoenas is authorized in workers' compensation cases under N.C. Gen. Stat. §97-80(e), and this section of the Act states that subpoenas should be served in accordance with N.C. Gen. Stat. §1A-1, Rule 45 (which is Rule 45 of the North Carolina Rules of Civil Procedure). A copy of the subpoena must be served upon all parties, pursuant to Rule 45(b)(2).

In 2013, §97-80(e) was amended to establish a time limit on the issuing and serving of a subpoena *duces tecum* (subpoena for the production of evidence/documents), and the Act now states: "A party shall not issue a subpoena *duces tecum* less than 30 days prior to the hearing date except upon prior approval of the Commission."

#### *RPC 236: Misuse of Subpoena Process*

The use of subpoenas in workers' compensation cases raises an important ethical issue because, as the North Carolina State Bar ruled in RPC 236, "a lawyer may not issue a subpoena containing misrepresentations as to . . . a lawyer's authority to obtain documentary evidence."

### *3. Objections*

Rule 3.1 of the Revised Rules of Professional Conduct makes it clear that when a lawyer lodges an objection to an interrogatory or other discovery request, that lawyer's objection must be based in fact and law and must not be frivolous. Further, Rule 3.4(d)(3) of the Revised Rules of Professional Conduct states that a lawyer may not fail to disclose evidence or information that the lawyer knew, or reasonably should have known, was subject to disclosure.

Common objections to discovery in workers' compensation cases include the objection that the information or documents sought are material prepared in anticipation of litigation, that

the information or documents sought are protected from disclosure under the work product doctrine, and/or that the information or documents sought are protected from disclosure under the attorney-client privilege.

There is a body of case law in North Carolina that deals with these issues, including *Evans v. United Services Automobile Association USAA*, 142 N.C. App. 18, 541 S.E.2d 782, *disc. rev. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001), *Cook v. Wake County Hospital System, Inc*., 125. N.C. App. 618, 482 S.E.2d 546, *disc. rev. allowed*, 346 N.C. 277, 487 S.E.2d 543 (1997), and *Willis v. Duke Power*, 291 N.C. 19, 229 S.E.2d 191 (1976). A detailed discussion of these cases is beyond the scope of this paper, but they make clear some basic principles.

First, materials prepared "in the ordinary course of business" are not protected from disclosure and are not considered to be prepared in anticipation of litigation. (*Willis*, 291 N.C. at 35, 229 S.E.2d at 201). Second, the investigation stage of the claims process is considered to be part of the ordinary course of an insurer's business, and material prepared in the course of the investigatory process is not generally entitled to protection under the work product doctrine. (*Evans*, 142 N.C. App at 29, 541 S.E.2d at 789). Third, just because evidence relates to communications between an attorney and his or her client, this, in and of itself, does not require its exclusion from disclosure or production because "only confidential communications are protected" and "[i]f it appears by extraneous evidence or from the nature of a transaction or communication that they were not regarded as confidential, or that they were made for the purpose of being conveyed by the attorney to others, they are stripped of the idea of a confidential disclosure and are not privileged." (*Evans*, 142 N.C. App at 32, 541 S.E.2d at 791, *citing Dobias v. White*, 240 N.C. 680, 684-85, 83 S.E.2d 785, 788 (1954)). However, the *Evans* Court also noted the complex nature of these matters with no "bright-line" rule. (*See Evans*, 142 N.C. App at 30, 541 S.E.2d at 790). Accordingly, the inquiry will be a fact-specific one decided on a case-by-case basis.

### *4. Social Media*

The use of social media is now ubiquitous, and this raises ethical issues for lawyers, especially when lawyers are in the pretrial phase of a case and conducting discovery. It should go without saying that the ethical standards set forth in several of the Revised Rules of Professional Conduct, including Rule 4.1 (Truthfulness in Statements to Others) and Rule 8.4 (Misconduct), make it clear that a lawyer *never* may conceal or misrepresent his or her identity on social media by using a fake name or fake account or by using someone else's account for the purpose of investigating a person or claim or for any other purpose in a legal matter and during the representation of a client.

Lawyers also should be aware of the following additional Rules and the following ethics opinion when utilizing social media and when advising clients about the use of social media:

***Rule 4.2: Communication with Person Represented by Counsel***

Rule 4.2(a) of the Revised Rules of Professional Conduct states: "During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

***Rule 4.3: Dealing with Unrepresented Person***

Rule 4.3 of the Revised Rules of Professional Conduct states, in relevant part: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not: (b) state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

***Industrial Commission Rule 617(a)***

Rule 617(a) of the Industrial Commission's Workers' Compensation Rules states: "No direct contact or communication concerning contested matters may be made with a represented party by the opposing party or any person on its behalf, without the attorney's permission except as permitted by G.S. 97-32 or other applicable law."

***2014 Formal Ethics Opinion 5: Advising a Civil Litigation Client About Social Media***

In this ethics opinion, the North Carolina State Bar ruled that: "a lawyer must advise a civil litigation client about the legal ramifications of the client's postings on social media as necessary to represent the client competently." Additionally, the State Bar ruled: "If the client's postings could be relevant and material to the client's legal matter, competent representation includes advising the client of the legal ramifications of existing postings, future postings, and third party comments."

With regard to the issue of advising a client to remove postings on social media, the State Bar ruled: "The lawyer may advise the client to remove postings on social media if the removal is done in compliance with the rules and law on preservation and spoliation of evidence." However, the State Bar pointed out that a lawyer may not counsel a client or assist a client to engage in conduct the lawyer knows is criminal or fraudulent (*see* Rule 1.2(d) of the Revised Rules of Professional Conduct) and that a lawyer may not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value (*see* Rule 3.4(a) of the Revised Rules of Professional Conduct). The State Bar went on to rule: "The lawyer, therefore, should examine the law on preservation of information, spoliation of evidence, and obstruction of justice to determine whether removing

existing postings would be a violation of the law. If removing postings does not constitute spoliation and is not otherwise illegal, or the removal is done in compliance with the rules and law on preservation and spoliation of evidence, the lawyer may instruct the client to remove existing postings on social media. The lawyer may take possession of printed or digital images of the client's postings made for purposes of preservation." (2014 Formal Ethics Opinion 5, footnote 2 omitted).

### *5. Metadata*

Most lawyers now communicate with each other electronically, and many discovery requests and responses are made via email and by attaching electronic documents instead of hard copies of documents.

"Metadata" is defined by Merriam-Webster as "data that provides information about other data" and Rule 1.0 (Terminology) of the Revised Rules of Professional Conduct includes "metadata" in the definition of a "writing." In this age of electronic communication, where many documents exist and are shared in electronic format, metadata is a topic about which attorneys should be aware since the metadata in an electronic communication may include confidential information or attorney work product.

#### *2009 Formal Ethics Opinion 1*

The North Carolina State Bar has issued an ethics opinion specifically regarding the metadata, 2009 Formal Ethics Opinion 1. This ethics opinion rules that "a lawyer must use reasonable care to prevent the disclosure of confidential client information hidden in metadata when transmitting an electronic communication." The opinion also rules that "a lawyer who receives an electronic communication from another party or another party's lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document."

With regard to minimizing the risk of disclosing confidential information, this opinion states that lawyers "should exercise care in using software features that track changes, record notes, allow 'fast saves,' or save different versions, as these features increase the amount of metadata within a document." The opinion points out that a lawyer may use a metadata "scrubber" application to remove embedded information from an electronic document, or may choose to use an electronic document type that does not contain as much metadata, such as a PDF. A lawyer also may choose to avoid sending an electronic document at all and, instead, send a fax or hard copy in the mail.

This ethics opinion also makes it clear that a lawyer "may not search for confidential information embedded in metadata of an electronic communication from another party or a

lawyer for another party" because "[b]y actively searching for such information, a lawyer interferes with the client-lawyer relationship of another lawyer and undermines the confidentiality that is the bedrock of the relationship."

Additionally, this ethics opinion rules that "if a lawyer unintentionally views confidential information within metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party."

### *6. Receipt of Inadvertently Disclosed Materials from Opposing Party*

Because lawyer-client email communications are so common now, and because a lawyer may inadvertently email the wrong person (such as opposing counsel) instead of emailing the lawyer's client, workers' compensation practitioners must be aware of their ethical obligations if and when they are the unintended recipient of materials from the opposing party.

#### *Rule 4.4: Respect for Rights of Third Persons*

Rule 4.4(b) of the Revised Rules of Professional Conduct states: "A lawyer who receives a writing relating to the representation of the lawyer's client and knows or reasonably should know that the writing was inadvertently sent shall promptly notify the sender." The Comment to this opinion points out that the definition of "writing" in Rule 1.0 of the Revised Rules of Professional Conduct includes electronic communications and metadata.

#### *RPC 252: Receipt of Inadvertently Disclosed Materials from Opposing Party*

In this ethics opinion, the North Carolina State Bar ruled 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." (emphasis in original).

### *7. Interviewing Employee or Former Employee of Adverse Corporate Party*

As part of pretrial preparation and the discovery process, attorneys often speak with potential lay witnesses and other individuals who may have knowledge about matters relating to a case. When the opposing party is a represented corporate entity, ethical issues arise as to which employees or former employees an attorney can speak to without the permission of the corporation's attorney.

***Comment to Rule 4.2: Communication with Person Represented by Counsel***

In the Comment to Rule 4.2, the North Carolina State Bar states: "In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. It also prohibits communications with any constituent of the organization, regardless of position or level of authority, who is participating or participated substantially in the legal representation of the organization in a particular matter. Consent of the organization's lawyer is not required for communication with a former constituent unless the former constituent participated substantially in the legal representation of the organization in the matter."

***RPC 67: Interviewing Employee of Adverse Corporate Party***

This ethics opinion of the North Carolina State Bar rules that: "an attorney generally may interview a rank and file employee of an adverse corporate party without the knowledge or consent of the corporate party or its counsel."

***RPC 81: Interviewing the Former Employee of an Adverse Corporate Party***

This ethics opinion of the North Carolina State Bar rules that: "a lawyer may interview an unrepresented former employee of an adverse corporate party without the permission of the corporation's lawyer."

***97 Formal Ethics Opinion 2: Communications with Unrepresented Former Employees of Represented Organizations***

This ethics opinion of the North Carolina State Bar rules that: "a lawyer may interview an unrepresented former employee of an adverse represented organization about the subject of the representation unless the former employee participated substantially in the legal representation of the organization in the matter."

***8. <u>Asking About Citizenship in Discovery</u>***

In workers' compensation cases, asking about an employee's citizenship may be relevant to an issue in dispute, such as the employee's employability. However, a lawyer asking about citizenship in discovery should be mindful of Rule 3.1 (Meritorious Claims and Contentions) of the Revised Rules of Professional Conduct and Rule 4.4 (Respect for Rights of Third Persons) of the Revised Rules of Professional Conduct.

Rule 3.1 states that a lawyer should not assert or controvert an issue unless there is a basis in law and fact for doing so, and the Comment to Rule 3.1 states that a lawyer has a duty not to abuse legal procedure. The Comment to Rule 4.4 states that "[c]onduct that serves no substantial

purpose other than to intimidate . . . litigants, witnesses, or other persons with whom a lawyer interacts while representing a client . . . violates this rule."

***2009 Formal Ethics Opinion 5: Reporting Opposing Party's Citizenship Status to ICE***

This ethics opinion of the North Carolina State Bar rules that: " a lawyer may serve the opposing party with discovery requests that require the party to reveal her citizenship status, but the lawyer may not report the status to ICE unless required to do so by federal or state law."

### *9. Written Communications with the Industrial Commission Regarding a Discovery Dispute for the Purpose of Casting Opposing Party or Counsel in a Bad Light*

Industrial Commission Rule 609, which governs motions practice in workers' compensation cases, previously prohibited lawyers from using written communications, whether addressed directly to the Commission or copied to the Commission, as on opportunity to cast the opposing party or counsel in a bad light.

When the Industrial Commission re-adopted its Rules under the Administrative Procedures Act, this specific language did not remain in the Rule because the Administrative Procedures Act requires a statutory basis for all Rule provisions. However, it is clearly unprofessional to use a written communication to cast an opposing party or opposing counsel in a bad light in front of the Industrial Commission. Further, there is an ethics opinion of the North Carolina State Bar that addresses this issue.

***98 Formal Ethics Opinion 13: Written Communications with a Judge or Judicial Official***

This ethics opinion involves a workers' compensation claim in which Attorney A (who represented one of the parties in the claim) wrote to Attorney X (who represented the other party in the claim) regarding a discovery dispute, among other things. The letter implied that Attorney X had engaged in improper conduct by failing to respond to discovery, and Attorney A sent a copy of the letter to the Deputy Commissioner assigned to the claim.

In its ruling, the North Carolina State bar strictly limited the circumstances under which a lawyer may send an informal written communication to a judge or judicial official relative to a pending matter. As the State Bar noted: "Unfortunately, informal *ex parte* written communications, whether addressed directly to the judge or copied to the judge as in this inquiry, may be used as an opportunity to introduce new evidence, to argue the merits of the case, or to cast the opposing party or counsel in a bad light. To avoid the appearance of improper influence upon a tribunal, informal written communications with a judge or other judicial official should be limited to the following: (1) written communications, such as a proposed order or legal memorandum, prepared pursuant to the court's instructions; (2) written communications relative

to emergencies, changed circumstances, or scheduling matters that may affect the procedural status of a case such as a request for a continuance due to the health of a litigant or an attorney; (3) written communications sent to the tribunal with the consent of the opposing lawyer or opposing party if unrepresented; and (4) any other communication permitted by law or the rules or written procedures of the particular tribunal."

## D. IMPORTANT TIME LIMITATIONS REGARDING DISCOVERY MATTERS IN WORKERS' COMPENSATION CLAIMS

Workers' compensation practitioners should be aware of the following important time limits within the statute and Industrial Commission Rules regarding discovery matters.

### *1. G.S. §97-80(e): A Party Shall Not Issue a Subpoena Duces Tecum less than 30 Days Prior to the Hearing, Except Upon Prior Approval of the Commission*

In 2013, N.C. Gen. Stat. §97-80(e) was amended to create a time limit for serving a subpoena *duces tecum* (subpoena for the production of evidence/documents) in a workers' compensation claim. The amended statute states that a subpoena *duces tecum* cannot be issued less than 30 days before the date of the hearing, absent prior approval of the Commission.

### *2. Rule 605(6): Parties May Serve Requests for Production of Documents Without Leave of Commission Until 35 Days Prior to Hearing*

Effective November 1, 2014, Rule 605 of the Industrial Commission's Workers' Compensation Rules was amended to specifically include requests for production of documents as a proper type of discovery in workers' compensation cases. Prior to November 1, 2014, Rule 605 only specifically listed interrogatories.

In addition, requests for production of documents must be served no less than 35 days prior to the date of the hearing, unless permission of the Commission is obtained.

### *3. Rule 605(3): Interrogatory Answers Due Within 30 Days After Service*

Rule 605(3) of the Industrial Commission's Workers' Compensation Rules states that the party on whom interrogatories have been served shall serve a copy of the answers and objections, if any, within 30 days after service of the interrogatories, although the parties may stipulate to an extension of time. Also, the Rule states that any motion to extend the time to respond must state that an attempt to reach an informal agreement regarding an extension was made but was unsuccessful.

### 4. ***Rule 607(a): Documents Responsive to Rule 607 Request Must be Provided within 30 Days of the Request, and Future Documents Received Must be Provided within 15 Days of Receipt***

Most workers' compensation lawyers are very familiar with the Industrial Commission Rule 607 request and the types of documents that are responsive to a Rule 607 request. Following the initial Rule 607 request, the opposing party has 30 days to respond to the request, unless an objection is made within that time period. Further, Rule 607 of the Industrial Commission's Workers' Compensation Rules states that the duty to respond is a continuing one and that reports and records that come into the possession of a party after receipt of a Rule 607 request shall be provided to the requesting party within 15 days from receipt of the reports and/or records.

### 5. ***Rule 608: Furnishing Copy of Written or Recorded Statement to Plaintiff 45 Days After Request and 45 Days from Filing of Form 33, Even Without Request***

Rule 608 of the Industrial Commission's Workers' Compensation Rules states that any plaintiff who gives the employer, carrier, or any agent a written or recorded statement shall be furnished a copy of the statement within 45 days after requesting a copy of the statement. Further, even if the plaintiff has not requested a copy of the statement, he or she shall be furnished a copy within 45 days of the filing of a Form 33 Request for Hearing.

Rule 608(b) provides that if any person, firm or corporation "unreasonably fails to comply with this Rule, then an order may be entered by a Commissioner or Deputy Commissioner prohibiting that person, firm or corporation, or its representative, from introducing the statement into evidence or using any part of the statement."

### 6. ***Rule 402: Submission of Earnings Statement Required Within 30 Days of Request***

Rule 402(a) of the Industrial Commission's Workers' Compensation Rules states: "Within 30 days of a request by the employee or the Commission, the employer shall submit a verified statement of the specific days worked and the earnings of the employee during the 52-week period immediately preceding the injury to the Commission and the employee's attorney of record or the employee, if not represented."

## E. PROFESSIONALISM

> *"Greater civility can only enhance the effectiveness of our justice system, improve the public's perception of lawyers, and increase lawyers' professional satisfaction. I fear that we have lost sight of a fundamental attribute of our profession, one that Shakespeare described in The Taming of the Shrew. Adversaries in law, he wrote, 'strive mightily, but eat and drink as friends.' In contemporary practice, however, we speak of our dealings with other lawyers as war—and too often we act accordingly."*
>
> Sandra Day O'Connor, Former Associate Justice of the Supreme Court of the United States, *Professionalism: Remarks at the Dedication of the University of Oklahoma's Law School Building and Library, 2002.*

In addition to adhering to the standards for ethical conduct found in the Revised Rules of Professional Conduct, workers' compensation practitioners also should strive to conduct themselves in a professional manner.

As Rule 1.2(a)(2) of the North Carolina State Bar Revised Rules of Professional Conduct states: "A lawyer does not violate this rule [which states that a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued] by acceding to reasonable requests of opposing counsel that do not prejudice the rights of a client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process."

Examples of professionalism by workers' compensation practitioners regarding discovery matters include: (1) agreeing to reasonable requests for extensions of time to respond to discovery; (2) contacting opposing counsel before filing a motion regarding a discovery dispute (in addition to first making a good faith attempt to informally resolve the dispute without the need for a motion); and (3) contacting an opposing lawyer who failed to respond to a discovery request on time to remind the opposing lawyer of the discovery deadline and to give the opposing lawyer the opportunity to voluntarily respond to the discovery request.

## F. CONCLUSION

It is essential for workers' compensation practitioners to adhere to ethics and professionalism standards in all matters, including discovery matters.

The North Carolina State Bar has an excellent website on which attorneys can search for and review ethics opinions and the Revised Rules of Professional Conduct (see www.ncbar.gov). Any member of the North Carolina State Bar also may request informal advice from the State

Bar's ethics department regarding his or her own contemplated professional conduct either by calling the State Bar (919-828-4620) or by emailing the State Bar at ethicsadvice@ncbar.gov.

ADVOCATE

Search Rules

# RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, counsel or assist a witness to hide or leave the jurisdiction for the purpose of being unavailable as a witness, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey or advise a client or any other person to disobey an obligation under the rules of a tribunal, except a lawyer acting in good faith may take appropriate steps to test the validity of such an obligation;

(d) in pretrial procedure,

(1) make a frivolous discovery request,

(2) fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party, or

(3) fail to disclose evidence or information that the lawyer knew, or reasonably should have known, was subject to disclosure under applicable law, rules of procedure or evidence, or court opinions;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, ask an irrelevant question that is intended to degrade a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or a managerial employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses, including lost income, or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Paragraph (c) permits a lawyer to take steps in good faith and within the framework of the law to test the validity of rules; however, the lawyer is not justified in consciously violating such rules and the lawyer should be diligent in the effort to guard against the unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that the lawyer believes are in compliance with applicable law and

rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless the lawyer believes that the statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing the witness; and a lawyer should not, by subterfuge, put before a jury matters which it cannot properly consider.

[5] Paragraph (d) makes it clear that a lawyer must be reasonably diligent in making inquiry of the client, or third party, about information or documents responsive to discovery requests or disclosure requirements arising from statutory law, rules of procedure, or caselaw. "Reasonably" is defined in Rule 0.1, Terminology, as meaning "conduct of a reasonably prudent and competent lawyer." Rule 0.1(i). When responding to a discovery request or disclosure requirement, a lawyer must act in good faith. The lawyer should impress upon the client the importance of making a thorough search of the client's records and responding honestly. If the lawyer has reason to believe that a client has not been forthcoming, the lawyer may not rely solely upon the client's assertion that the response is truthful or complete.

[6] To bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, and as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact and is prohibited by paragraph (e). However, a lawyer may argue, on an analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

[7] Paragraph (f) permits a lawyer to advise managerial employees of a client to refrain from giving information to another party because the statements of employees with managerial responsibility may be imputed to the client. See also Rule 4.2.

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

Adopted July 24, 1997

Amended March 1, 2003;

October 1, 2003; November 16, 2006

## Ethics Opinion Notes

**CPR 2** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-2/). An attorney generally does not need the consent of the adverse party to talk to witnesses.

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

**CPR 340**. An attorney may represent a client with a malpractice claim even though the client has entered a contingent fee contract with a medical consultant for case evaluation, preparation and expert witness location, so long as the consultant does not present evidence and the compensation of the expert witness provided by the consultant is not contingent upon the outcome of the litigation.

**RPC 225** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-225/). Opinion holds that the lawyer for a defendant in criminal and civil actions arising out of the same event may seek the cooperation of a crime victim on a plea agreement provided the settlement of the victim's civil claim against the defendant is not contingent upon the content of the testimony of the victim or the outcome of the case.

**2008 Formal Ethics Opinion 15** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-15/). Opinion rules that, provided the agreement does not constitute the criminal offense of compounding a crime and is not otherwise illegal, and does not contemplate the fabrication, concealment, or destruction of evidence, a lawyer may participate in a settlement agreement of a civil claim that includes a non-reporting provision prohibiting the plaintiff from reporting the defendant's conduct to law enforcement authorities.

**2009 Formal Ethics Opinion 7** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-7/). Opinion rules that a criminal defense lawyer or a prosecutor may not interview an unrepresented child who is the alleged victim in a criminal case alleging physical or sexual abuse if the child is younger than the age of maturity as determined by the General Assembly for the purpose of an in-custody interrogation (currently age 14) unless the lawyer has the consent of a non-accused parent or guardian or a court order allows the lawyer to seek an interview with the child without such consent; a lawyer may interview a child who is this age or older without such consent or authorization provided the lawyer complies with Rule 4.3, reasonably determines that the child is sufficiently mature to understand the lawyer's role and purpose, and avoids any conduct designed to coerce or intimidate the child.

**2014 Formal Ethics Opinion 5** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-5/). Opinion rules a lawyer must advise a civil litigation client about the legal ramifications of the client's postings on social media as necessary to represent the client competently. The lawyer may advise the client to remove postings on social media if the removal is done in compliance with the rules and law on preservation and spoliation of evidence.

# TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Search Rules

## RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Comment

*Misrepresentation*

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

*Statements of Fact*

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortuous misrepresentation.

*Crime or Fraud by Client*

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. Rule 1.6(b)(1) permits a lawyer to disclose information when required by law. Similarly, Rule 1.6(b)(4) permits a lawyer to disclose information when necessary to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used.

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

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

## Ethics Opinion Notes

**RPC 182** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-182/). Opinion rules that a lawyer is required to disclose to an adverse party with whom the lawyer is negotiating a settlement that the lawyer's client has died.

**RPC 236** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-236/). Opinion rules that a lawyer may not issue a subpoena containing misrepresentations as to the pendency of an action, the date or location of a hearing, or a lawyer's authority to obtain documentary evidence.

**2008 Formal Ethics Opinion 3** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-3/). Opinion rules a lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

**2008 Formal Ethics Opinion 14** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-14/). Opinion rules that it is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract, or pleading excerpts from a legal brief, contract, or pleading written by another lawyer. .

# ADVOCATE

Search Rules

# RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

## Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim that otherwise would be prohibited by this Rule.

History Note:

Statutory Authority G.S. 84-23

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

## Ethics Opinion Notes

**CPR 122.** An attorney representing the defendant in divorce action, when advised by the client that parties have not been separated a year, must file an answer denying the allegation of separation even though the client does not wish to contest the divorce.

**CPR 321.** It is improper for an attorney to file motions and pleadings for the mere purpose of delay.

**2003 Formal Ethics Opinion 12** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-12/). Opinion rules that an insurance defense lawyer may give the insured and the insurance carrier an evaluation of a pending case, including settlement prospects, but may not recommend that the carrier decline to settle and go to trial if this recommendation is contrary to the wishes of the insured.

**2006 Formal Ethics Opinion 9** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2006-formal-ethics-opinion-9/). Opinion rules that if the lawyer concludes that pursuit of a lawsuit filed against a defendant is frivolous, but the GAL for the minor client insists on continuing the litigation, the lawyer must either move to withdraw from the representation or seek to have the GAL removed.

**2008 Formal Ethics Opinion 3** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-3/). Opinion rules a lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

**2008 Formal Ethics Opinion 4** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-4/). Opinion rules that a lawyer may issue a subpoena in compliance with Rule 45 of the Rules of Civil Procedure which authorizes a subpoena for the production of documents to the lawyer's office without the need to schedule a hearing, deposition or trial.

**2008 Formal Ethics Opinion 17** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-17/). Opinion rules that a lawyer appointed to represent a parent at the trial of a juvenile case may file a notice of appeal to preserve the client's right to appeal although the lawyer does not believe that the appeal has merit.

**2009 Formal Ethics Opinion 5** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-5/). Opinion rules that a lawyer may serve the opposing party with discovery requests that require the party to reveal her citizenship status, but the lawyer may not report the status to ICE unless required to do so by federal or state law.

**2009 Formal Ethics Opinion 15** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-15/). Opinion rules that a prosecutor must dismiss a DWI charge when the prosecutor fails to appeal a court order suppressing evidence from the traffic stop thereby eliminating the evidence necessary to prove the charge.

**2011 Formal Ethics Opinion 3** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-3/). Opinion rules that a criminal defense lawyer may advise an undocumented alien that deportation may result in avoidance of a criminal conviction and may file a notice of appeal to superior court although there is a possibility that the client will be deported.

**2013 Formal Ethics Opinion 1** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-1/). Opinion rules that, subject to conditions, a prosecutor may enter into an agreement to consent to vacating a conviction upon the convicted person's release of civil claims against the prosecutor, law enforcement authorities, or other public officials or entities.

# MAINTAINING THE INTEGRITY OF THE PROFESSION

Search Rules

## RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3.

## Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client or, in the case of a government lawyer, investigatory personnel, of action the client, or such investigatory personnel, is lawfully entitled to take.

[2] Many kinds of illegal conduct reflect adversely on a lawyer's fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation. A lawyer's dishonesty, fraud, deceit, or misrepresentation is not mitigated by virtue of the fact that the victim may be the lawyer's partner or law firm. A lawyer who steals funds, for instance, is guilty of the most serious disciplinary violation regardless of whether the victim is the lawyer's employer, partner, law firm, client, or a third party.

[3] The purpose of professional discipline for misconduct is not punishment, but to protect the public, the courts, and the legal profession. Lawyer discipline affects only the lawyer's license to practice law. It does not result in incarceration. For this reason, to establish a violation of paragraph (b), the burden of proof is the same as for any other violation of the Rules of Professional Conduct: it must be shown by clear, cogent, and convincing evidence that the lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Conviction of a crime is conclusive evidence that the lawyer committed a criminal act although, to establish a violation of paragraph (b), it must be shown that the criminal act reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. If it is established by clear, cogent, and convincing evidence that a lawyer committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, the lawyer may be disciplined for a violation of paragraph (b) although the lawyer is never prosecuted or is acquitted or pardoned for the underlying criminal act.

[4] A showing of actual prejudice to the administration of justice is not required to establish a violation of paragraph (d). Rather, it must only be shown that the act had a reasonable likelihood of prejudicing the administration of justice. For example, in State Bar v. DuMont,

52 N.C. App. 1, 277 S.E.2d 827 (1981), modified on other grounds, 304 N.C. 627, 286 S.E.2d 89 (1982), the defendant was disciplined for advising a witness to give false testimony in a deposition even though the witness corrected his statement prior to trial. The phrase "conduct prejudicial to the administration of justice" in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings. In State Bar v. Jerry Wilson, 82 DHC 1, for example, a lawyer was disciplined for conduct prejudicial to the administration of justice after forging another individual's name to a guarantee agreement, inducing his wife to notarize the forged agreement, and using the agreement to obtain funds.

[5] Threats, bullying, harassment, and other conduct serving no substantial purpose other than to intimidate, humiliate, or embarrass anyone associated with the judicial process including judges, opposing counsel, litigants, witnesses, or court personnel violate the prohibition on conduct prejudicial to the administration of justice. When directed to opposing counsel, such conduct tends to impede opposing counsel's ability to represent his or her client effectively. Comments "by one lawyer tending to disparage the personality or performance of another...tend to reduce public trust and confidence in our courts and, in more extreme cases, directly interfere with the truth-finding function by distracting judges and juries from the serious business at hand." State v. Rivera, 350 N.C. 285, 291, 514 S.E.2d 720, 723 (1999). See Rule 3.5, cmt. [10] and Rule 4.4, cmt. [2].

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

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

Adopted July 24, 1997

Amended March 1, 2003; March 5, 2015

## Ethics Opinion Notes

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

**CPR 168.** An attorney may file personal bankruptcy.

**CPR 188.** An attorney may not draw deeds or other legal instruments based on land surveys made by unregistered land surveyors.

**CPR 342.** An attorney should not close a loan where the transaction is conditioned by the lender upon the placement of title insurance with a particular company.

**CPR 369.** An attorney may close a loan if the lender merely suggests rather than requires the placement of title insurance with a particular company.

**RPC 127** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-127/). Opinion rules that deliberate release of settlement proceeds without satisfying conditions precedent is dishonest and unethical.

**RPC 136** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-136/). Opinion rules that a lawyer may notarize documents which are to be used in legal proceedings in which the lawyer appears.

**RPC 143** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-143/). Opinion rules that a lawyer who represents or has represented a member of the city council may represent another client before the council.

**RPC 152** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-152/). Opinion rules that the prosecutor and the defense attorney must see that all material terms of a negotiated plea are disclosed in response to direct questions concerning such matters when pleas are entered in open court.

**RPC 159** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-159/). Opinion rules that an attorney may not participate in the resolution of a civil dispute involving allegations against a psychotherapist of sexual involvement with a patient if the settlement is conditioned upon the agreement of the complaining party not to report the misconduct to the appropriate licensing authority.

**RPC 162** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-162/). 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.

**RPC 171** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-171/). Opinion rules that it is not a violation of the Rules of Professional Conduct for a lawyer to tape record a conversation with an opposing lawyer without disclosure to the opposing lawyer.

**RPC 180** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-180/). Opinion rules that a lawyer may not passively listen while the opposing party's nonparty treating physician comments on his or her treatment of the opposing party unless the opposing party consents.

**RPC 192** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-192/). Opinion rules that a lawyer may not listen to an illegal tape recording made by his client nor may he use the information on the illegal tape recording to advance his client's case.

**RPC 197** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-197/). Opinion rules that a prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.

**RPC 204** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-204/). Opinion rules that it is prejudicial to the administration of justice for a prosecutor to offer special treatment to individuals charged with traffic offenses or minor crimes in exchange for a direct charitable contribution to the local school system.

**RPC 221** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-221/). Opinion rules that absent a court order or law requiring delivery of physical evidence of a crime to the authorities, a lawyer for a criminal defendant may take possession of evidence that is not contraband in order to examine, test, or inspect the evidence. The lawyer must return inculpatory physical evidence that is not contraband to the source and advise the source of the legal consequences pertaining to the possession or destruction of the evidence.

**RPC 236** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-236/). Opinion rules that a lawyer may not issue a subpoena containing misrepresentations as to the pendency of an action, the date or location of a hearing, or a lawyer's authority to obtain documentary evidence.

**RPC 243** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-243/). Opinion rules that it is prejudicial to the administration of justice for a prosecutor to threaten to use his discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant.

**98 Formal Ethics Opinion 2** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-2/). Opinion rules that a lawyer may explain the effect of service of process to a client but may not advise a client to evade service of process.

**98 Formal Ethics Opinion 19** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-19/). Opinion provides guidelines for a lawyer representing a client with a civil claim that also constitutes a crime.

**99 Formal Ethics Opinion 2** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/99-formal-ethics-opinion-2/). Opinion rules that a defense lawyer may suggest that the records custodian of plaintiff's medical record deliver the medical record to the lawyer's office in lieu of an appearance at a noticed deposition provided the plaintiff's lawyer consents.

**2000 Formal Ethics Opinion 8** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2000-formal-ethics-opinion-8/). Opinion rules that a lawyer acting as a notary must follow the law when acknowledging a signature on a document.

**2001 Formal Ethics Opinion 12** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2001-formal-ethics-opinion-12/). Opinion rules that a closing lawyer may not counsel or assist a client to affix excess excise tax stamps on an instrument for registration with the register of deeds.

**2003 Formal Ethics Opinion 5** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-5/). Opinion rules that neither a defense lawyer nor a prosecutor may participate in the misrepresentation of a criminal defendant's prior record level in a sentencing proceeding even if the judge is advised of the misrepresentation and does not object.

**2003 Formal Ethics Opinion 11** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-11/). Opinion rules that a lawyer must deal honestly with the members of her former firm when dividing a legal fee.

**2005 Formal Ethics Opinion 3** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2005-formal-ethics-opinion-3/). Opinion rules that a lawyer may not threaten to report an opposing party or a witness to immigration officials to gain an advantage in civil settlement negotiations.

**2007 Formal Ethics Opinion 2** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2007-formal-ethics-opinion-2/). Opinion rules that a lawyer may not take possession of a client's contraband if possession is itself a crime and, unless there is an exception allowing disclosure of confidential information, the lawyer may not disclose confidential information relative to the contraband.

**2008 Formal Ethics Opinion 3** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-3/). Opinion rules a lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

**2008 Formal Ethics Opinion 4** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-4/). Opinion rules that a lawyer may issue a subpoena in compliance with Rule 45 of the Rules of Civil Procedure which authorizes a subpoena for the production of documents to the lawyer's office without the need to schedule a hearing, deposition or trial.

**2008 Formal Ethics Opinion 14** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-14/). Opinion rules that it is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract, or pleading excerpts from a legal brief, contract, or pleading written by another lawyer. .

**2008 Formal Ethics Opinion 15** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-15/). Opinion rules that, provided the agreement does not constitute the criminal offense of compounding a crime and is not otherwise illegal, and does not contemplate the fabrication, concealment, or destruction of evidence, a lawyer may participate in a settlement agreement of a civil claim that includes a non-reporting provision prohibiting the plaintiff from reporting the defendant's conduct to law enforcement authorities.

**2010 Formal Ethics Opinion 2** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-2/). Opinion rules that a lawyer may not serve an out of state health care provider with an unenforceable North Carolina subpoena and may not use documents produced pursuant to such a subpoena.

**2010 Formal Ethics Opinion 14** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-14/).

**2011 Formal Ethics Opinion 9** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-9/). Opinion rules that a lawyer may not allow a person who is not employed by or affiliated with the lawyer's firm to use firm letterhead.

**2011 Formal Ethics Opinion 12** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-12/). Opinion rules that a lawyer must notify the court when a clerk of court mistakenly dismisses a client's charges.

**2012 Formal Ethics Opinion 5** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-5/). Opinion rules that a lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee's lawyer using the employer's business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages unless a court determines that the messages are not privileged.

**2012 Formal Ethics Opinion 10** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-10/). Opinion rules a lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

**2014 Formal Ethics Opinion 7** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-7/). Opinion rules that a lawyer may provide a foreign entity or individual with a North Carolina subpoena accompanied by a statement/letter explaining that the subpoena is not enforceable in the foreign jurisdiction, the recipient is not required to comply with the subpoena, and the subpoena is being provided solely for the recipient's records.

**2014 Formal Ethics Opinion 8** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-8/). Opinion rules that a lawyer may accept an invitation from a judge to be a "connection" on a professional networking website, and may endorse a judge. However, a lawyer may not accept a legal skill or expertise endorsement or a recommendation from a judge.

**2014 Formal Ethics Opinion 9** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-9/). Opinion rules that a private lawyer may supervise an investigation involving misrepresentation if done in pursuit of a public interest and certain conditions are satisfied.

# RPC 236

Search Adopted Opinions

# MISUSE OF SUBPOENA PROCESS

*Adopted: January 24, 1997*

*Opinion rules that a lawyer may not issue a subpoena containing misrepresentations as to the pendency of an action, the date or location of a hearing, or a lawyer's authority to obtain documentary evidence.*

**Editor's Note:** This opinion was originally published as RPC 236 (Revised).

Inquiry #1:

Attorney A represents John Doe who was injured in an automobile accident. Witnesses are listed on the accident report. Attorney A issues subpoenas to the witnesses directing them to appear at his office at a designated time "to give testimony." The subpoenas are served on the witnesses who later appear at Attorney A's office at the appointed times. The only persons in attendance are Attorney A, a secretary/notary, and the witnesses. No notice was given to any adverse parties. Is Attorney A's conduct ethical?

Opinion #1:

No. Rule 45(a) of the Rules of Civil Procedure permits the issuance of a subpoena "for the purpose of attaining the testimony of a witness in a pending cause." Where no action is pending, it is false and deceptive, in violation of Rule 1.2(c) and Rule 7.2(a)(4), to issue a subpoena to a prospective witness that misleads the prospective witness as to the existence of a filed lawsuit and as to the prospective witness's legal obligation to appear.

Inquiry #2:

After the commencement of a child custody and support action, Mother's attorney issues and signs a subpoena to Father's employer directing the employer to appear in district court at a designated time and to produce Father's employment records. The case is not scheduled for trial or hearing. Mother's attorney attaches a letter to the subpoena that informs the employer that a court appearance may be avoided by sending copies of the employment records directly to the attorney. No notice is given to Father's attorney. Are the actions of Mother's attorney ethical?

Opinion #2:

No. Stating in the subpoena and in the letter to the employer that there is a scheduled court hearing at which the employment records must be produced is a misrepresentation of fact in violation of Rule 1.2(c) and Rule 7.2(a).

Inquiry #3:

Attorney A filed a caveat on behalf of two sons of Testator. Attorney A issues and serves a subpoena on Dr. John Smith, Testator's physician, directing Dr. Smith to appear at Attorney A's office at a designated time to produce all of the medical records pertaining to Testator. Attorney A also issues and serves a subpoena on the custodian of the records of ABC Bank directing the custodian to appear at Attorney A's office at a designated time to produce all of Testator's and Testator's executor's bank records for the preceding five years. No trial, hearing, or deposition is scheduled in the pending action. Attorney A writes letters to the witnesses advising them that they may avoid appearing at his office by providing him with copies of the documents he has subpoenaed. Attorney A did not give notice to any other party interested in the caveat proceeding. Is Attorney A's conduct ethical?

Opinion #3:

No. It is deceptive and a violation of Rule 1.2(c) and Rule 7.2(a)(4) for a lawyer to use the subpoena process (except in compliance with the Rules of Civil Procedure of the court where the action is pending) to mislead the custodian of documentary evidence as to the lawyer's authority to require the production of such documents. However, a subpoena issued in compliance with the applicable Rules of Civil Procedure may be used by the lawyer.

Inquiry #4:

Is notice to opposing counsel required when a lawyer issues a subpoena pursuant to Rule 45(c) of the Rules of Civil Procedure commanding a person to appear and produce records?

Opinion #4:

This is a question of civil procedure which is outside the purview of the Ethics Committee.

# TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Search Rules

## RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. It is not a violation of this rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy.

(b) Notwithstanding section (a) above, in representing a client who has a dispute with a government agency or body, a lawyer may communicate about the subject of the representation with the elected officials who have authority over such government agency or body even if the lawyer knows that the government agency or body is represented by another lawyer in the matter, but such communications may only occur under the following circumstances:

(1) in writing, if a copy of the writing is promptly delivered to opposing counsel;

(2) orally, upon adequate notice to opposing counsel; or

(3) in the course of official proceedings.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule does not prohibit a lawyer who does not have a client relative to a particular matter from consulting with a person or entity who, though represented concerning the matter, seeks another opinion as to his or her legal situation. A lawyer from whom such an opinion is sought should, but is not required to, inform the first lawyer of his or her participation and advice.

[3] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[4] A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). However, parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client or, in the case of a government lawyer, investigatory personnel, concerning a communication that the client, or such investigatory personnel, is legally entitled to make. The Rule is not intended to discourage good faith efforts by individual parties to resolve their differences. Nor does the Rule prohibit a lawyer from encouraging a client to communicate with the opposing party with a view toward the resolution of the dispute.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. When a government agency or body is represented with regard to a particular matter, a lawyer may communicate with the elected government officials who have authority over that agency under the circumstances set forth in paragraph (b).

[6] Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[7] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[8] This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates. The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[9] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. It also prohibits communications with any constituent of the organization, regardless of position or level of authority, who is participating or participated substantially in the legal representation of the organization in a particular matter. Consent of the organization's lawyer is not required for communication with a former constituent unless the former constituent participated substantially in the legal representation of the organization in the matter. If an employee or agent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication would be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4, Comment [2].

[10] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(g). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[11] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

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

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

## Ethics Opinion Notes

**CPR 2** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-2/). An attorney generally does not need the consent of the adverse party to talk to witnesses.

**CPR 138**. An attorney representing a party may not send copies of motions to another party he knows has counsel.

**RPC 15** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-15/). Opinion rules that attorney may interview person with an adverse interest who is unrepresented and make a demand or propose a settlement.

**RPC 30** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-30/). Opinion rules that District Attorney may not communicate or cause another to communicate with represented defendant without the defense lawyer's consent.

**RPC 39** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-39/). Opinion rules that an attorney may not communicate settlement demands directly to an insurance company which has employed counsel to represent its insured unless that lawyer consents.

**RPC 61** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-61/). Opinion rules that a defense attorney may interview a child who is the prosecuting witness in a molestation case without the knowledge or consent of the district attorney.

**RPC 67** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-67/). Opinion rules that an attorney generally may interview a rank and file employee of an adverse corporate party without the knowledge or consent of the corporate party or its counsel.

**RPC 81** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-81/). Opinion rules that a lawyer may interview an unrepresented former employee of an adverse corporate party without the permission of the corporation's lawyer.

**RPC 87** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-87/). Opinion rules that a lawyer wishing to interview a witness who is not a party, but who is represented by counsel, must obtain the consent of the witness' lawyer.

**RPC 93** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-93/). Opinion concerns several situations in which an attorney who represents a criminal defendant wishes to interview other individuals who are represented by attorneys who will not agree to permit the attorney to interview their clients. In the first inquiry, Attorney A wishes to interview criminal defendant B, who has been indicted in a separate indictment from Attorney A's client. In the second inquiry, Attorney A wishes to interview criminal defendant B, who has been named as a criminal coconspirator with Aclient, but has not yet been joined as a codefendant for trial. In the third inquiry, Attorney A wishes to interview a coconspirator who was named in the same indictment with A's client.

**RPC 110** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-110/). Opinion rules that an attorney employed by an insurer to defend in the name of the defendant pursuant to underinsured motorist coverage may not communicate with that individual without the consent of another attorney employed to represent that individual by her liability insurer and that the attorney employed by the

liability insurer may not take a position on behalf of the insured which is adverse to the insured.

**RPC 128** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-128/). Opinion rules that a lawyer may not communicate with an adverse corporate party's house counsel, who appears in the case as a corporate manager, without the consent of the corporation's independent counsel.

**RPC 132** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-132/). Opinion rules that a lawyer for a party adverse to the government may freely communicate with government officials concerning the matter until notified that the government is represented in the matter.

**RPC 162** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-162/). 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.

**RPC 180** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-180/). Opinion rules that a lawyer may not passively listen while the opposing party's nonparty treating physician comments on his or her treatment of the opposing party unless the opposing party consents.

**RPC 184** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-184/). Opinion rules that a lawyer for an opposing party may communicate directly with the pathologist who performed an autopsy on the plaintiff's decedent without the consent of the personal representative for the decedent's estate.

**RPC 193** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-193/). Opinion rules that the attorney for the plaintiffs in a personal injury action arising out of a motor vehicle accident may interview the unrepresented defendant even though the uninsured motorist insurer, which has elected to defend the claim in the name of the defendant, is represented by an attorney in the matter.

**RPC 202** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-202/). Opinion rules that an attorney may communicate in writing with the members of an elected body that is represented by a lawyer in a matter if the purpose of the communication is to request that the matter be placed on the public meeting agenda of the elected body and a copy of the written communication is given to the attorney for the elected body.

**RPC 219** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-219/). Opinion rules that a lawyer may communicate with a custodian of public records, pursuant to the North Carolina Public Records Act, for the purpose of making a request to examine public records related to the representation although the custodian is an adverse party whose lawyer does not consent to the communication.

**RPC 224** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-224/). Opinion prohibits the employer's lawyer from engaging in direct communications with the treating physician for an employee with a workers' compensation claim.

**RPC 233** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-233/). Opinion rules that a deputy attorney general who is representing the state on the appeal of a death sentence should send a copy to the defense lawyer of a letter he received from the defendant.

**RPC 249** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-249/). Opinion rules that a lawyer may not communicate with a child who is represented by a GAL and an attorney advocate unless the lawyer obtains the consent of the attorney advocate.

**97 Formal Ethics Opinion 2** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/97-formal-ethics-opinion-2/). Opinion rules that a lawyer may interview an unrepresented former employee of an adverse represented organization about the subject of the representation unless the former employee participated substantially in the legal representation of the organization in the matter.

**97 Formal Ethics Opinion 10** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/97-formal-ethics-opinion-10/). Opinion rules that a prosecutor may instruct a law enforcement officer to send an undercover officer into the prison cell of a represented criminal defendant to observe the defendant's communications with other inmates in the cell.

**99 Formal Ethics Opinion 10** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/99-formal-ethics-opinion-10/). Opinion rules that a government lawyer working on a fraud investigation may instruct an investigator to interview employees of the target organization provided the investigator does not interview an employee who participates in the legal representation of the organization or an officer or manager of the organization who has the authority to speak for and bind the organization.

**2002 Formal Ethics Opinion 8** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2002-formal-ethics-opinion-8/). Opinion rules that a lawyer who is appointed the guardian ad litem for a minor plaintiff in a tort action and is represented in this capacity by legal counsel, must be treated by opposing counsel as a represented party and, therefore, direct contact with the guardian ad litem, without consent of counsel, is prohibited.

**2002 Formal Ethics Opinion 2** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2002-formal-ethics-opinion-2/). Opinion rules that a lawyer may represent a party suing a public body or non-profit organization, although the lawyer's partner or associate serves on the board, subject to certain conditions.

**2003 Formal Ethics Opinion 4** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-4/). Opinion rules that a lawyer may not proffer evidence gained during a private investigator's verbal communication with an opposing party known to be represented by legal counsel unless the lawyer discloses the source of the evidence to the opposing lawyer and to the court prior to the proffer.

**2004 Formal Ethics Opinion 4** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2004-formal-ethics-opinion-4/). Opinion rules that a lawyer may ask questions of a deponent that were recommended by another lawyer, although the deponent is the defendant in the other lawyer's case, provided notice of the deposition is given to the deponent's lawyer.

**2005 Formal Ethics Opinion 5** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2005-formal-ethics-opinion-5/). Opinion explores the extent to which a lawyer may communicate with employees or officials of a represented government entity.

**2006 Formal Ethics Opinion 19** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2006-formal-ethics-opinion-19/). Opinion rules that the prohibition against communications with represented persons does not apply to a lawyer acting solely as a guardian ad litem.

**2009 Formal Ethics Opinion 7** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-7/). Opinion rules that a criminal defense lawyer or a prosecutor may not interview an unrepresented child who is the alleged victim in a criminal case alleging physical or sexual abuse if the child is younger than the age of maturity as determined by the General Assembly for the purpose of an in-custody interrogation (currently age 14) unless the lawyer has the consent of a non-accused parent or guardian or a court order allows the lawyer to seek an interview with the child without such consent; a lawyer may interview a child who is this age or older without such consent or authorization provided the lawyer complies with Rule 4.3, reasonably determines that the child is sufficiently mature to understand the lawyer's role and purpose, and avoids any conduct designed to coerce or intimidate the child.

**2010 Formal Ethics Opinion 5** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-5/). Opinion rules that the lawyer for a child support enforcement program that brings an action for child support on behalf of the government does not have a client-lawyer relationship with the custodian of the children.

**2011 Formal Ethics Opinion 15** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-15/). Opinion rules that, pursuant to the North Carolina Public Records Act, a lawyer may communicate with a government official for the purpose of identifying a custodian of public records and with the custodian of public records to make a request to examine public records related to the representation although the custodian is an adverse party, or an employee of an adverse party, whose lawyer does not consent to the communication.

**2012 Formal Ethics Opinion 7** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-7/). Opinion provides that consent from the lawyer for a represented person must be obtained before copying that person on electronic communications; however, the consent required by Rule 4.2 may be implied by the facts and circumstances surrounding the communication.

**2012 Formal Ethics Opinion 9** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-9/). Opinion holds that a lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

**2014 Formal Ethics Opinion 9** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-9/). Opinion rules that a private lawyer may supervise an investigation involving misrepresentation if done in pursuit of a public interest and certain conditions are satisfied.

# TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Search Rules

## RULE 4.3 DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(a) give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client; and

(b) state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. To avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

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

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

## Ethics Opinion Notes

**CPR 296** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-296/). The attorney for the plaintiff in a domestic case may not make available to the defendant a form waiving the right to answer and other rights, nor may he allow his client to provide such a form to the defendant. ( But see RPC 165)

**RPC 15** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-15/). Opinion rules that attorney may interview person with an adverse interest who is unrepresented and make a demand or propose a settlement.

**RPC 61** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-61/). Opinion rules that a defense attorney may interview a child who is the prosecuting witness in a molestation case without the knowledge or consent of the district attorney.

**RPC 165** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-165/). Opinion rules that an attorney may provide a confession of judgment to an unrepresented adverse party for execution by that party so long as the lawyer does not undertake to advise the adverse party or feign disinterestedness.

**RPC 189** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-189/). Opinion rules that the members of a district attorney's staff may not give legal advice about pleas to lesser included infractions to an unrepresented person charged with a traffic infraction.

**RPC 193** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-193/). Opinion rules that the attorney for the plaintiffs in a personal injury action arising out of a motor vehicle accident may interview the unrepresented defendant even though the uninsured motorist insurer, which has elected to defend the claim in the name of the defendant, is represented by an attorney in the matter.

**RPC 194** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-194/). Opinion rules that in a letter to an unrepresented prospective defendant in a personal injury action, the plaintiff's lawyer may not give legal advice nor may he create the impression that he is concerned about or protecting the interests of the unrepresented prospective defendant.

**2002 Formal Ethics Opinion 6** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2002-formal-ethics-opinion-6/). Opinion rules that the lawyer for the plaintiff may not prepare the answer to a complaint for an unrepresented adverse party to file pro se.

**2003 Formal Ethics Opinion 7** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-7/). 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.

**2009 Formal Ethics Opinion 7** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-7/). Opinion rules that a criminal defense lawyer or a prosecutor may not interview an unrepresented child who is the alleged victim in a criminal case alleging physical or sexual abuse if the child is younger than the age of maturity as determined by the General Assembly for the purpose of an in-custody interrogation (currently age 14) unless the lawyer has the consent of a non-accused parent or guardian or a court order allows the lawyer to seek an interview with the child without such consent; a lawyer may interview a child who is this age or older without such consent or authorization provided the lawyer complies with Rule 4.3, reasonably determines that the child is sufficiently mature to understand the lawyer's role and purpose, and avoids any conduct designed to coerce or intimidate the child.

**2009 Formal Ethics Opinion 12** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-12/). Opinion rules that a lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party provided the lawyer explains who he represents and does not give the unrepresented party legal advice; however, the lawyer may not prepare a waiver of exemptions for the adverse party.

**2014 Formal Ethics Opinion 10** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-10/). Opinion rules that a lawyer who handles adoptions as part of her or his law practice and also owns a financial interest in a for-profit adoption agency may, with informed consent, represent an adopting couple utilizing the services of the adoption agency but may not represent the biological parents.

**2015 Formal Ethics Opinion 1** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2015-formal-ethics-opinion-1/). Opinion rules that a lawyer may not prepare pleadings and other filings for an unrepresented opposing party in a civil proceeding currently pending before a tribunal if doing so is tantamount to giving legal advice to that person.

**2015 Formal Ethics Opinion 2** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2015-formal-ethics-opinion-2/). Opinion rules that when the original debt is $100,000 or more, a lawyer for a lender may prepare and provide to an unrepresented borrower, owner, or guarantor a waiver of the right to notice of foreclosure and the right to a foreclosure hearing pursuant to N.C.G.S. § 45-21.16(f) if the lawyer explains the lawyer's role and does not give legal advice to any unrepresented person. However, a lawyer may not prepare such a waiver if the waiver is a part of a loan modification package for a mortgage secured by the borrower's primary residence.

# 2014 FORMAL ETHICS OPINION 5

Search Adopted Opinions

# ADVISING A CIVIL LITIGATION CLIENT ABOUT SOCIAL MEDIA

*Adopted: July 17, 2015*

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

Inquiry #1:

A client's postings and other information that the client has placed on a social media[1] website (referred to collectively as "postings") are relevant to the issues in the client's legal matter and, if the matter is litigated, might be used to impeach the client. The client's lawyer does not use social media and is unfamiliar with how social media functions.

What is the lawyer's duty to be knowledgeable of social media and to advise the client about the effect of the postings on the client's legal matter?

Opinion #1:

Rule 1.1 requires lawyers to provide competent representation to clients. Comment [8] to the rule specifically states that a lawyer "should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice." "Relevant technology" includes social media. As stated in an opinion of the New Hampshire Bar Association, N. H. Bar Ass'n Op. 2012-13/05, "counsel has a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation."

If the client's postings could be relevant and material to the client's legal matter, competent representation includes advising the client of the legal ramifications of existing postings, future postings, and third party comments.

Inquiry #2:

The client's legal matter will probably be litigated, although a law suit has not been filed. May the lawyer instruct the client to remove postings on social media?

Opinion #2:

A lawyer may not counsel a client or assist a client to engage in conduct the lawyer knows is criminal or fraudulent. Rule 1.2(d). In addition, a lawyer may not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. Rule 3.4(a). The lawyer, therefore, should examine the law on preservation of information, spoliation[2] of evidence, and obstruction of justice to determine whether removing existing postings would be a violation of the law.

If removing postings does not constitute spoliation and is not otherwise illegal, or the removal is done in compliance with the rules and law on preservation and spoliation of evidence, the lawyer may instruct the client to remove existing postings on social media. The lawyer may take possession of printed or digital images of the client's postings made for purposes of preservation. See N.Y. State Bar, Ethics Op. 745 (2013)(lawyer may advise a client about the removal of postings if the lawyer complies with the rules and law on preservation and spoliation of evidence).

Inquiry #3:

May the lawyer instruct the client to change the security and privacy settings on social media pages to the highest level of restricted access?

Opinion #3:

Yes, if doing so is not a violation of law or court order.

# Endnotes

1. "Social media" is defined as "forms of electronic communication ([such] as Websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content ([such] as videos)." Social Media, Merriam-Webster, merriam-webster.com/dictionaty/social%20 media (last visited Jan. 20, 2015).

2. Black's Law Dictionary 1437 (8th ed. 2004) defines spoliation as the intentional concealment, destruction, alteration or mutilation of evidence, usually documents, thereby making them unusable or invalid. The doctrine of spoliation of evidence holds that when "a party fails to introduce in evidence documents that are relevant to the matter in question and within his control...there is a presumption, or at least an inference that the evidence withheld, if forthcoming, would injure his case." Jones v. GMRI, Inc., 144 N.C. App. 558, 565, 551 S.E.2d 867, 872(2001) (quoting Yarborough v. Hughes, 139 N.C. 199, 209, 51 S.E. 904, 907-08 (1905)).

# 2009 FORMAL ETHICS OPINION 1

Search Adopted Opinions

# REVIEW AND USE OF METADATA

*Adopted: January 15, 2010*

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

## Background

In the representation of clients in all types of legal matters, lawyers routinely send emails and electronic documents, spreadsheets, and PowerPoint presentations to a lawyer for another party (or directly to the party if not represented by counsel). The email and the electronic documents contain metadata [1] or embedded information about the document describing the document's history, tracking and management[2] such as the date and time that the document was created, the computer on which the document was created, the last date and time that a document was saved, "redlined" changes identifying what was changed or deleted in the document, and comments included in the document during the editing process. Pennsylvania Bar Ass'n. Comm. on Legal Ethics and Professional Responsibility, Formal Opinion 2007-500, *reconsidered* Pennsylvania Formal Op. 2009-100, notes that, although most metadata contains "seemingly harmless information," it may also contain "privileged and/or confidential information, such as previously deleted text, notes, and tracked changes, which may provide information about, e.g., legal issues, legal theories, and other information that was not intended to be disclosed to opposing counsel." This embedded information may be readily revealed by a "right click" with a computer mouse, by clicking on a software icon, or by using software designed to discover and disclose the metadata.[3] On occasion, one software application automatically displays or uses metadata that another software application hides from the user. The sender of the document may be unaware that there is metadata embedded in the document or mistakenly believe that the metadata was deleted from the document prior to transmission. The Ethics Committee is issuing this opinion sua sponte in light of the importance of the ethical issues raised by metadata.

## Inquiry #1:

What is the ethical duty of a lawyer who sends an electronic communication to prevent the disclosure of a client's confidential information found in metadata?

## Opinion #1:

Rule 1.6(a) of the Rules of Professional Conduct prohibits a lawyer from revealing information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or disclosure is permitted by one of the exceptions to the duty of confidentiality set forth in paragraph (b) of the rule. As noted in comment [20] to the rule, " [w]hen transmitting a communication that includes information acquired during the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients." Therefore, a lawyer who sends an electronic communication must take reasonable precautions to prevent the disclosure of confidential information, including information in metadata, to unintended recipients.[4]

RPC 215 addressed the preservation of confidential client information when using modern forms of communication including cellular phones and email. The opinion states that the professional obligation to use reasonable care to protect and preserve confidential information extends to the use of communications technology; "[h]owever, this obligation does not require that a lawyer use only infallibly secure methods of communication." Nevertheless, "a lawyer must take steps to minimize the risks that confidential information may be disclosed in a communication."

Lawyers have several options to minimize the risk of disclosing confidential information in an electronic communication. Lawyers should exercise care in using software features that track changes, record notes, allow "fast saves," or save different versions, as these features increase the amount of metadata within a document. Metadata "scrubber" applications remove embedded information from an electronic document and may be used to remove metadata before sending an electronic document to opposing counsel. Finally, lawyers may opt to

use an electronic document type that does not contain as much metadata, such as the portable document format (PDF), or may opt to use a hard copy or fax. Both commercial and freeware software solutions exist to help lawyers avoid inadvertently disclosing confidential information in an electronic communication.

What is reasonable depends upon the circumstances including, for example, the sensitivity of the confidential information that may be disclosed, the potential adverse consequences from disclosure, any special instructions or expectations of a client, and the steps that the lawyer takes to prevent the disclosure of metadata. Of course, when electronic communications are produced in response to a subpoena or a formal discovery request in civil litigation, the responding lawyer may not remove or restrict access to the metadata in the communications if doing so would violate any disclosure duties under law, the Rules of Civil Procedure, or court order.

Inquiry #2:

May a lawyer who receives an electronic communication from another party or the party's lawyer search for and use confidential information embedded in the metadata of the communication without the consent of the other party or lawyer?

Opinion #2:

No, a lawyer may not search for confidential information embedded in metadata of an electronic communication from another party or a lawyer for another party. By actively searching for such information, a lawyer interferes with the client-lawyer relationship of another lawyer and undermines the confidentiality that is the bedrock of the relationship. Rule 1.6. Additionally, if a lawyer unintentionally views confidential information within metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party.

The New York State Bar was the first to adopt the position that a lawyer should not search metadata for confidential information. The state bars of Alabama, Arizona, Florida, and Maine have followed this position.[5] New York Ethics Opinion 749 holds that,

> in light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship, use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege, the work product doctrine, or that may otherwise constitute a "secret" of another lawyer's client would violate the letter and spirit of [the New York] Disciplinary Rules.

Agreeing with the position of the New York State Bar, the Alabama State Bar Disciplinary Commission in Opinion 2007-02 finds that, " [t]he mining of metadata constitutes a knowing and deliberate attempt by the recipient attorney to acquire confidential and privileged information in order to obtain an unfair advantage against an opposing party." Although the ABA Standing Committee on Ethics and Professional Responsibility, in Formal Opinion 06-442 (2006),[6] takes the position that the Model Rules of Professional Conduct do not prohibit a lawyer from reviewing and using metadata, this position was subsequently rejected by the State Bar of Arizona among others. Arizona Opinion 07-03 observes that under the ABA opinion, which puts "the sending lawyer...at the mercy of the recipient lawyer..., the sending lawyer might conclude that the only ethically safe course of action is to forego the use of electronic document transmission entirely...[this is not] realistic or necessary."

The North Carolina State Bar Ethics Committee agrees that a lawyer may not ethically search for confidential information embedded within an electronic communication from another party or the lawyer for another party. To do so would undermine the protection afforded to confidential information by Rule 1.6 and would interfere with the client-lawyer relationship of another lawyer in violation of Rule 8.4(d), which prohibits conduct that is "prejudicial to the administration of justice."

The Ethics Committee recognizes that it is possible for a lawyer to unintentionally find confidential information upon viewing the contents of an electronic communication. If this occurs, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party.

Rule 4.4(b) requires a lawyer who receives a writing relating to the representation of a client that the lawyer knows, or reasonably should know, was inadvertently sent, to promptly notify the sender. Receiving confidential information embedded in the metadata of an electronic communication is analogous to receiving, for example, a faxed pleading that inadvertently includes a page of notes from opposing counsel. Although the receiving lawyer did not seek out the confidential information, the receiving lawyer in either situation has a duty to "promptly notify the sender" under Rule 4.4(b) if the receiving lawyer "knows or reasonably should know that the writing was inadvertently sent." Although the technology involved is different, the Ethics Committee believes that a lawyer who can recognize confidential information inadvertently included in a fax can also recognize confidential information inadvertently included in an electronic document.

Further, a lawyer who intentionally or unintentionally discovers confidential information embedded within the metadata of an electronic communication may not use the information revealed without the consent of the other lawyer or party.

Although the receipt of confidential information embedded in metadata is analogous to the receipt of a page of handwritten notes in a faxed pleading for purposes of notifying the sender under Rule 4.4(b), metadata differs from the readily apparent information contained in a paper communication. Confidential information may inadvertently be included in the metadata of an electronic document despite reasonable efforts by a sender to stay abreast of rapid technological changes and to prevent the transmission of confidential information.

The exchange of electronic documents, however, is vital to the functioning of the legal profession in the twenty-first century. Although Rule 4.4(b) does not require a lawyer to return an inadvertently sent paper document or specifically prohibit the use of information contained in such a document, Rule 8.4(d) prohibits conduct that is "prejudicial to the administration of justice." As comment [4] to Rule 8.4 observes, "[t]he phrase 'conduct prejudicial to the administration of justice' in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings." Allowing the use of confidential information that is found embedded within metadata would inhibit the efficient functioning of the modern justice system and also undermine the protections for client confidences in the Rules of Professional Conduct and the attorney-client privilege. Therefore, the use of found metadata is "prejudicial to the administration of justice" in violation of Rule 8.4(d) and is prohibited.

In summary, a lawyer may not search for and use confidential information embedded in the metadata of an electronic communication sent to him or her by another lawyer or party unless the lawyer is authorized to do so by law, rule, court order or procedure, or the consent of the other lawyer or party. If a lawyer unintentionally views metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party.

## Endnotes

1. 1. Metadata is explained in Pennsylvania Bar Ass'n. Comm. on Legal Ethics and Professional Responsibility, Formal Op. 2007-500 (2007), reconsidered Pennsylvania Formal Op. 2009-100 (2009), as follows: "Metadata, which means 'information about data,' is data contained within electronic materials that is not ordinarily visible to those viewing the information. Although most commonly found in documents created in Microsoft Word, metadata is also present in a variety of other formats, including spreadsheets, PowerPoint presentations, and Corel WordPerfect documents."

2. 2. Arizona State Bar Comm. on the Rules of Professional Conduct, Op. 07-03 (2007).

3. 3. Pennsylvania Formal Op. 2007-500 (2007), reconsidered Pennsylvania Formal Op. 2009-100 (2009).

4. 4. This is consensus position among the jurisdictions that have considered the issue as well as the ABA Standing Committee on Ethics and Professional Responsibility. Alabama State Bar Disciplinary Comm'n, Op. 2007-02 (2007); Arizona State Bar Comm. on the Rules of Professional Conduct, Op. 07-03 (2007); Colorado Bar Ass'n. Ethics Comm., Op. 119 (2008); District of Columbia Legal Ethics Comm., Op. 341 (2007); Florida Professional Ethics Comm., Ethics Op. 06-2 (2006); Maine Bd. of Bar Overseers Professional Ethics Comm'n., Op. 196 (2008); Maryland State Bar Ass'n. Comm. on Ethics, Op. 2007-09 (2006); New York State Ethics Op. 782 (2004); Pennsylvania Formal Op. 2009-100 (2009); ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 06-442 (Aug. 5, 2006).

5. 5. Alabama Ethics Op. 2007-02 (2007); Arizona Op. 07-03 (2007); Florida Ethics Op. 06-2 (2006); Maine Op. 196 (Oct. 21, 2008); and New York Ethics Op. 749 (2001). District of Columbia Legal Ethics Comm. Op. 341 (2007) holds that a lawyer may not view metadata if the lawyer has actual knowledge that it was provided inadvertently.

6. 6. ABA Formal Op. 06-442 (2006) concludes that the Model Rules of Professional Conduct permit a lawyer to review and use metadata contained in email and other electronic documents. The Colorado Bar Association, Maryland State Bar Association, and Pennsylvania Bar Association agree with the position expressed in the ABA opinion. Colorado Op. 119 (2008); Maryland Op. 2007-09 (2006); Pennsylvania Op. 2009-100 (2009).

# TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Search Rules

# RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a writing relating to the representation of the lawyer's client and knows or reasonably should know that the writing was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Threats, bullying, harassment, insults, slurs, personal attacks, unfounded personal accusations generally serve no substantial purpose other than to embarrass, delay, or burden others and violate this rule. Conduct that serves no substantial purpose other than to intimidate, humiliate, or embarrass lawyers, litigants, witnesses, or other persons with whom a lawyer interacts while representing a client also violates this rule. See also Rule 3.5(a) (prohibiting conduct intended to disrupt a tribunal) and Rule 8.4(d) (prohibiting conduct prejudicial to the administration of justice).

[3] Paragraph (b) recognizes that lawyers sometimes receive writings that were mistakenly sent or produced by opposing parties or their lawyers. See Rule 1.0(o) for the definition of "writing," which includes electronic communications and metadata. A writing is inadvertently sent when it is accidentally transmitted, such as when an electronic communication or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a writing was sent inadvertently, then this rule requires the lawyer promptly to notify the sender in order to permit that person to take protective measures. This duty is imputed to all lawyers in a firm. Whether the lawyer who receives the writing is required to take additional steps, such as returning the writing, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a writing has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer. A lawyer who receives an electronic communication from the opposing party or the opposing party's lawyer must refrain from searching for or using confidential information found in the metadata embedded in the communication. See 2009 FEO 1.

[4] Some lawyers may choose to return a writing or delete electronically stored information unread, for example, when the lawyer learns before receiving the writing that it was inadvertently sent. Whether the lawyer is required to do so is a matter of law. When return of the writing is not required by law, the decision voluntarily to return such a writing or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

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

Adopted July 24, 1997

Amended March 1, 2003; August 18, 2005; October 2, 2014; March 5, 2015

## Ethics Opinion Notes

**RPC 181** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-181/). Opinion rules that a lawyer may not seek to disqualify another lawyer from representing the opposing party by instructing a client to consult with the other lawyer about the subject matter of the representation when the client has no intention of retaining the other lawyer to represent him.

**RPC 252** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-252/). 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.

**2007 Formal Ethics Opinion 1** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2007-formal-ethics-opinion-1/). Opinion rules that a lawyer owes no ethical duty to the heirs of an estate that he represents in a wrongful death action except as set forth in Rule 4.4.

**2009 Formal Ethics Opinion 1** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-1/). Opinion rules that a lawyer must use reasonable care to prevent the disclosure of confidential client information hidden in metadata when transmitting an electronic communication and a lawyer who receives an electronic communication from another party or another party's lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document.

**2009 Formal Ethics Opinion 5** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-5/). Opinion rules that a lawyer may serve the opposing party with discovery requests that require the party to reveal her citizenship status, but the lawyer may not report the status to ICE unless required to do so by federal or state law.

**2010 Formal Ethics Opinion 2** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-2/). Opinion rules that a lawyer may not serve an out of state health care provider with an unenforceable North Carolina subpoena and may not use documents produced pursuant to such a subpoena.

**2011 Formal Ethics Opinion 16** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-16/). Opinion rules that a criminal defense lawyer accused of ineffective assistance of counsel by a former client may share confidential client information with prosecutors to help establish a defense to the claim so long as the lawyer reasonably believes a response is necessary and the response is narrowly tailored to respond to the allegations.

**2012 Formal Ethics Opinion 5** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-5/). Opinion rules that a lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee's lawyer using the employer's business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages unless a court determines that the messages are not privileged.

**2014 Formal Ethics Opinion 4** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-4/). Opinion rules that a lawyer may send a subpoena for medical records to an entity covered by HIPAA without providing the assurances necessary for the entity to comply with the subpoena as set out in 45 C.F.R. §164.512(e)(ii).

**2014 Formal Ethics Opinion 7** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-7/). Opinion rules that a lawyer may provide a foreign entity or individual with a North Carolina subpoena accompanied by a statement/letter explaining that the subpoena is not enforceable in the foreign jurisdiction, the recipient is not required to comply with the subpoena, and the subpoena is being provided solely for the recipient's records.

**2015 Formal Ethics Opinion 1** (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2015-formal-ethics-opinion-1/). Opinion rules that a lawyer may not prepare pleadings and other filings for an unrepresented opposing party in a civil proceeding currently pending before a tribunal if doing so is tantamount to giving legal advice to that person.

# RPC 252

Search Adopted Opinions

# RECEIPT OF INADVERTENTLY DISCLOSED MATERIALS FROM OPPOSING PARTY

*Adopted: July 18, 1997*

*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.*

**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.

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.

# RPC 67

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## INTERVIEWING EMPLOYEE OF ADVERSE CORPORATE PARTY

*Adopted: July 14, 1989*

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

Inquiry:

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

Opinion:

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

# RPC 81

Search Adopted Opinions

## INTERVIEWING THE FORMER EMPLOYEE OF AN ADVERSE CORPORATE PARTY

*Adopted: January 12, 1990*

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

Inquiry:

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

Opinion:

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

# 97 FORMAL ETHICS OPINION 2

Search Adopted Opinions

# COMMUNICATIONS WITH UNREPRESENTED FORMER EMPLOYEES OF REPRESENTED ORGANIZATIONS

*Adopted: January 16, 1998*

*Opinion rules that a lawyer may interview an unrepresented former employee of an adverse represented organization about the subject of the representation unless the former employee participated substantially in the legal representation of the organization in the matter.*

**Editor's Note:** Opinion was originally published as RPC 254. Before adoption, it was revised to reference the appropriate sections of the Revised Rules of Professional Conduct under which it was finally decided.

Inquiry #1:

Y Insurance Company carries the workers' compensation coverage for Employer. Adjuster, an employee of Y Insurance Company, was assigned to investigate and manage Employee's workers' compensation claim against Employer. During the three years that she handled Employee's claim, Adjuster played a major role in the decision making relative to the defense of the claim.

Last year, Attorney A was assigned to represent Y Insurance Company and Employer in Employee's workers' compensation action. Adjuster and Attorney A have worked closely together on the defense of the case. Adjuster's input, her knowledge of the claims file, and the records Adjuster has maintained in the claims file are integral to Attorney A's defense of the case.

May the lawyers for Employee communicate directly with Adjuster about Employee's claim without the consent of Attorney A?

Opinion #1:

No. Rule 4.2(a) of the Revised Rules of Professional Conduct provides: "[d] uring the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The ABA Committee on Ethics and Professional Responsibility states, in Formal Opinion 95-396 (1995), that such "anticontact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests."

An organization that is represented by legal counsel in a matter also falls within the protection of Rule 4.2. Communications by adverse counsel with certain personnel of a represented organization are prohibited. Comment [5] to Rule 4.2 states that "...this rule will prohibit communications by the lawyer concerning the matter with persons having managerial responsibility on behalf of the organization...." Compare RPC 67 (permitting ex parte communications with a "rank and file" employee of an adverse corporate party). Although an adjuster for an insurance company may not be considered a "manager" or "management personnel" for the company, the adjuster does have managerial responsibility for the claims that she investigates. The adjuster is also privy to privileged communications with the legal counsel for the company and is generally involved in substantive conversations with the organization's lawyer regarding the representation of the organization. To safeguard the client-lawyer relationship from interference by adverse counsel and to reduce the likelihood that privileged information will be disclosed, Rule 4.2(a) protects from direct communications by opposing counsel not only employees who are clearly high-level management officials but also any employee who, like the adjuster in this inquiry, has participated substantially in the legal representation of the organization in a particular matter. Such participation includes substantive and/or privileged communications with the organization's lawyer as to the strategy and objectives of the representation, the management of the case, and other matters pertinent to the representation.

Inquiry #2:

About three months before an important Industrial Commission hearing in Employee's case, Adjuster left the employment of Y Insurance Company to become an adjuster for Z Insurance Company. Attorney B represents Employee in the workers' compensation action. Not long before the Industrial Commission hearing, Adjuster was in Attorney B's offices on an unrelated matter. Attorney A was not present. Attorney B approached Adjuster to discuss Employee's case. Should Attorney B have obtained the consent of Attorney A prior to speaking directly with Adjuster with regard to Employee's workers' compensation case?

Opinion #2:

Yes. The protection afforded by Rule 4.2(a) to "safeguard the client-lawyer relationship from interference by adverse counsel" can be assured to a represented organization only if there is an exception to the general rule that permits ex parte contact with former employees of an organization without the consent of the organization's lawyer. See RPC 81 (permitting a lawyer to interview an unrepresented former employee of an adverse corporate party without the permission of the corporation's lawyer). The exception must be made for contacts with a former employee who, while with the organization, participated substantially in the legal representation of the organization, including participation in and knowledge of privileged communications with legal counsel. Permitting direct communications with such a person, although no longer employed by the organization, would interfere with the effective representation of the organization and the organization's relationship with its legal counsel. Such communications are permitted only with the consent of the organization's lawyer or in formal discovery proceedings. The general rule, set forth in RPC 81, permitting a lawyer to interview an unrepresented former employee of an adverse organizational party without the consent of the organization's lawyer, remains in effect with the limited exception explained above.

Inquiry #3:

[The facts of this inquiry are unrelated to the preceding inquiries.]

Employee X is no longer employed by Corporation. While an employee of Corporation, however, Employee X may have engaged in activities that would constitute the sexual harassment of other employees of Corporation. An action alleging sexual harassment based on Employee X's conduct was brought against Corporation. Although he is not a named defendant in the action, Employee X's acts, while an employee, may be imputed to the organization. When he was employed, Employee X did not discuss the corporation's representation in this matter with Corporation's lawyer. Employee X is unrepresented. May the lawyer for the plaintiffs in the sexual harassment action interview Employee X without the consent of the lawyer for Corporation?

Opinion #3:

Yes. Unlike the adjuster in the two prior inquiries, Employee X was not an active participant in the legal representation of his former employer in the sexual harassment action. It does not appear that he was involved in any decision making relative to the representation of Corporation nor was he privy to privileged client-lawyer communications relative to the representation. Rather, Employee X is a fact witness and a potential defendant in his own right. Permitting ex parte contact with Employee X by the plaintiff's counsel will not interfere with Corporation's relationship with its lawyer nor will it result in the disclosure of privileged client-lawyer communications regarding the representation. Comment [5] to Rule 4.2, which indicates that the rule prohibits communications with any employee "... whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization, " should be applicable only to current employees. The purpose of Rule 4.2 is not enhanced by extending the prohibition to former employees who, during the time of their employment, did not participate substantively in the representation of the organization.

Although the plaintiff's lawyer may communicate directly with the Employee X, the lawyer's communications are subject to the protections for unrepresented persons set fourth in Rule 4.3. Rule 4.3(a) prohibits a lawyer from giving advice to an unrepresented person, other than the advice to secure legal counsel, if the interests of the person are in conflict with the interests of the lawyer's client. Similarly, Rule 4.3(b) requires the lawyer to make known to the unrepresented person that the lawyer is not disinterested.

# 2009 FORMAL ETHICS OPINION 5

Search Adopted Opinions

# REPORTING OPPOSING PARTY'S CITIZENSHIP STATUS TO ICE

*Adopted: January 22, 2009*

*Opinion rules that a lawyer may serve the opposing party with discovery requests that require the party to reveal her citizenship status, but the lawyer may not report the status to ICE unless required to do so by federal or state law.*

Inquiry #1:

Lawyer is defending a medical malpractice lawsuit in which a mother and her child are plaintiffs. The child is a natural born US citizen. Lawyer believes the mother is a Mexican citizen and suspects she is an undocumented alien.

The basis of the suit is injury to the child during birth. Plaintiff's counsel has forecast damages of over $30,000,000. The amount of damages is based in part on the cost of medical care in the United States. The cost of the same medical care in Mexico would be substantially less.

May Lawyer serve plaintiffs with discovery requests that require Mother to reveal her manner of entry into the United States and the status of her citizenship or legal residence?

Opinion #1:

Yes. If the discovery requests are intended to uncover information that is relevant to the defense of the case and which is admissible evidence (or may lead to admissible evidence) and is not for the improper purpose of creating a file to use to threaten the plaintiff with deportation, to harass the plaintiff, or for some other improper purpose, lawyer is not prohibited from engaging in such discovery. See Rule 3.1, Rule 4.4, 2005 FEO 3.

Inquiry #2:

If Lawyer engages in the discovery and determines that Mother is in the country illegally, may Lawyer call the US Immigration and Customs Enforcement (ICE) and report the mother's status?

Opinion #2:

No, unless federal or state law requires Lawyer to report Mother's illegal status to ICE.

Rule 4.4(a) provides that, in representing a client, "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person." Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. Comment [4] to Rule 8.4 provides that "paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings."

It is unlikely that Lawyer's impetus to report Mother to ICE is motivated by any purpose other than those prohibited under these principles. The Ethics Committee has already determined that a lawyer may not threaten to report an opposing party or a witness to immigration officials to gain an advantage in civil settlement negotiations. 2005 FEO 3. Similarly, Lawyer may not report Mother's illegal status to ICE in order to gain an advantage in the underlying medical malpractice action.

Inquiry #3:

Would the answer to either Inquiry #1 or Inquiry #2 change if Mother was not a party to the litigation?

Opinion #3:

No. See Rule 4.4(a).

# 98 FORMAL ETHICS OPINION 13

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# WRITTEN COMMUNICATIONS WITH A JUDGE OR JUDICIAL OFFICIAL

*Adopted: July 23, 1999*

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

Inquiry:

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

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

Opinion:

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

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

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

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

The submission to a tribunal of formal written communications, such as pleadings and motions, pursuant to the tribunal's rules of procedure, does not create the appearance of granting undue advantage to one party. Unfortunately, informal ex parte written communications, whether addressed directly to the judge or copied to the judge as in this inquiry, may be used as an opportunity to introduce new evidence, to argue the merits of the case, or to cast the opposing party or counsel in a bad light. To avoid the appearance of improper influence upon a tribunal, informal written communications with a judge or other judicial official should be limited to the following

1) Written communications, such as a proposed order or legal memorandum, prepared pursuant to the court's instructions

2) Written communications relative to emergencies, changed circumstances, or scheduling matters that may affect the procedural status of a case such as a request for a continuance due to the health of a litigant or an attorney;

3) Written communications sent to the tribunal with the consent of the opposing lawyer or opposing party if unrepresented; an

4) Any other communication permitted by law or the rules or written procedures of the particular tribunal

# CLIENT-LAWYER RELATIONSHIP

Search Rules

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

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

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

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

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

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

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

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

Comment

*Allocation of Authority between Client and Lawyer*

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

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

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

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

*Independence from Client's Views or Activities*

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

*Agreements Limiting Scope of Representation*

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

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

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

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

*Criminal, Fraudulent and Prohibited Transactions*

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

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

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

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

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

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

Adopted July 24, 1997

Amended March 1, 2003

## Ethics Opinion Notes

**RPC 44** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-44/). Opinion rules that a closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

**RPC 103** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-103/). Opinion rules that a lawyer for the insured and the insurer may not enter voluntary dismissal of the insured's counterclaim without the insured's consent

**RPC 114** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-114/). Opinion rules that attorneys may give legal advice and drafting assistance to persons wishing to proceed pro se without appearing as counsel of record.

**RPC 118** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-118/). Opinion rules that an attorney should not waive the statute of limitations without the client's consent.

**RPC 129** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-129/). Opinion rules that prosecutors and defense attorneys may negotiate plea agreements in which appellate and postconviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct.

**RPC 145** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-145/). Opinion rules that a lawyer may not include language in an employment agreement that divests the client of her exclusive authority to settle a civil case.

**RPC 172** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-172/). Opinion rules that an attorney retained by an insurance carrier to defend an insured has no ethical obligation to represent the insured on a compulsory counterclaim provided the attorney apprises the insured of the counterclaim in sufficient time for the insured to retain separate counsel.

**RPC 208** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-208/). Opinion rules that a lawyer should avoid offensive trial tactics and treat others with courtesy by attempting to ascertain the reason for the opposing party's failure to respond to a notice of hearing where there has been no prior lack of diligence or responsiveness on the part of opposing counsel.

**RPC 212** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-212/). Opinion rules that a lawyer may contact an opposing lawyer who failed to file an answer on time in order to remind the other lawyer of the error and to give the other lawyer a last opportunity to file the pleading.

**RPC 220** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-220/). Opinion rules that a lawyer should seek the court's permission to listen to a tape recording of a telephone conversation of his or her client made by a third party if listening to the tape recording would otherwise be a violation of the law.

**RPC 223** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-223/). Opinion rules that when a lawyer's reasonable attempts to locate a client are unsuccessful, the client's disappearance constitutes a constructive discharge of the lawyer requiring the lawyer's withdrawal from the representation.

**RPC 240** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-240/). Opinion rules that a lawyer may decline to represent a client on the property damage claim while agreeing to represent the client on the personal injury claim arising out of a motor vehicle accident provided that the limited representation will not adversely affect the client's representation on the personal injury claim and the client consents after full disclosure.

**RPC 252** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-252/). 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.

**98 Formal Ethics Opinion 2** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-2/). Opinion rules that a lawyer may explain the effect of service of process to a client but may not advise a client to evade service of process.

**99 Formal Ethics Opinion 12** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/99-formal-ethics-opinion-12/). Opinion rules that when a lawyer appears with a debtor at a meeting of creditors in a bankruptcy proceeding as a favor to the debtor's lawyer, the lawyer is representing the debtor and all of the ethical obligations attendant to legal representation apply.

**2002 Formal Ethics Opinion 1** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2002-formal-ethics-opinion-1/). Opinion rules that a lawyer may participate in a non-profit organization that promotes a cooperative method for resolving family law disputes although the client is required to make full disclosure and the lawyer is required to withdraw before court proceedings commence.

**2003 Formal Ethics Opinion 2** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-2/). Opinion rules that a lawyer must report a violation of the Rules of Professional Conduct as required by Rule 8.3(a) even if the lawyer's unethical conduct stems from mental impairment (including substance abuse).

**2003 Formal Ethics Opinion 7** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-7/). 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.

**2003 Formal Ethics Opinion 16** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-16/). Opinion rules that a lawyer who is appointed to represent a parent in a proceeding to determine whether the parent's child is abused, neglected, or dependent, must seek to withdraw if the client disappears without communicating her objectives for the representation, and, if the motion is denied, must refrain from advocating for a particular outcome.

**2005 Formal Ethics Opinion 10** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2005-formal-ethics-opinion-10/). Opinion addresses ethical concerns raised by an internet-based or virtual law practice and the provision of unbundled legal services.

**2008 Formal Ethics Opinion 3** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-3/). Opinion rules a lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

**2008 Formal Ethics Opinion 7** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-7/). Opinion rules that a closing lawyer shall not record and disburse when a seller has delivered the deed to the lawyer but the buyer instructs the lawyer to take no further action to close the transaction.

**2010 Formal Ethics Opinion 1** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-1/). Opinion rules that a lawyer retained by an insurance carrier to represent an insured whose whereabouts are unknown and with whom the lawyer has no contact may not appear as the lawyer for the insured absent authorization by law or court order.

**2011 Formal Ethics Opinion 3** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-3/). Opinion rules that a criminal defense lawyer may advise an undocumented alien that deportation may result in avoidance of a criminal conviction and may file a notice of appeal to superior court although there is a possibility that the client will be deported.

**2012 Formal Ethics Opinion 5** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-5/). Opinion rules that a lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee's lawyer using the employer's business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages unless a court determines that the messages are not privileged.

**2012 Formal Ethics Opinion 9** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-9/). Opinion holds that a lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

**2012 Formal Ethics Opinion 10** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-10/). Opinion rules a lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

**2013 Formal Ethics Opinion 2** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-2/). Opinion rules that if, after providing an incarcerated criminal client with a summary/explanation of the discovery materials in the client's file, the client requests access to any of the discovery materials, the lawyer must afford the client the opportunity to meaningfully review relevant discovery materials unless certain conditions exist.

**2014 Formal Ethics Opinion 5** (http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-5/). Opinion rules a lawyer must advise a civil litigation client about the legal ramifications of the client's postings on social media as necessary to represent the client competently. The lawyer may advise the client to remove postings on social media if the removal is done in compliance with the rules and law on preservation and spoliation of evidence.