CHAPTER 12
ETHICS AND POLICY ISSUES IN GUARDIAN AD LITEM REPRESENTATION

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§ 12.1 Summary

Being an attorney advocate (AA) for the Guardian ad Litem Program puts an attorney in a unique situation. Instead of simply representing a client's wishes, as most attorneys do, an attorney advocate represents the best interests of a child. This type of representation is also unique because the attorney typically is representing the child as part of a team, which consists of the attorney, the volunteer, and, to a lesser degree, the GAL staff member. Another unique element is that the AA is working on a contractual basis with the GAL Program, typically juggling GAL contract responsibilities with those of an active law practice. These unique aspects of Guardian ad Litem representation give rise to unique ethical issues. This chapter of the Manual addresses ethical issues specifically applicable to GAL representation and does not attempt to cover general ethical issues. Please note, however, that there are not always clear-cut answers to these ethical dilemmas. Many of them have never been formally addressed by the State Bar or mentioned in case law or anywhere else. Consequently, there are times when the most we can do to resolve an ethical dilemma is to examine all aspects of an issue and approach it with logic, fairness, and care. However, this section is titled "Ethics *and Policy* Issues. . ." because for many of the issues that cases and the State Bar have failed to address, the GAL Program may have informal policies or formal "Guidelines" addressing these issues.

§ 12.2 Who Is the AA's Client?

A. The Complexity of Best Interest Representation

An AA represents the best interests, not necessarily the wishes, of a child, and does so via the recommendations of a GAL volunteer, with support and direction from the District Administrator of the local Guardian ad Litem office, pursuant to a contract with the Guardian ad Litem Services Division for the Administrative Office of the Courts. Does this sound confusing? It should. The AA seems to have obligations to all people or entities mentioned above, yet who is the AA's client? Some child advocates describe the GAL/AA joint enterprise as the AA representing the child through the GAL. [1] That statement would aptly describe this particular division of authority under Rule 1.2 of the Revised Rules of Professional Conduct of the North Carolina State Bar.[2]

B. The Child Is the Client

The definition of the GAL Attorney Advocate's client has not been resolved by the North Carolina State Bar or in North Carolina cases. The best guidance in resolving this dilemma is to examine the language of 7B-601, which states that ". . . an attorney shall be appointed in the case in order to assure protection of the child's legal rights . . ." This language specifically refers to protecting the child's rights and not to representation of the GAL volunteer or the program. Thus, it is reasonable to infer that the attorney advocate represents the child, not the volunteer. However, the representation is unconventional in that it is done as a team, in cooperation with the volunteer, and is of the child's best interests, not wishes.

[1] Ilene Nelson, "Ethical Dilemmas in Juvenile Court," revised 2/2000, page 8.
[2] The Revised Rules of Professional Conduct can be viewed at www.ncbar.com/rules.

§ 12.3 Dilemmas Arising from Team Representation

A. Conflicts of Opinion Between AA and GAL

1. Conflicts should be resolved outside the courtroom

If the AA, GAL and/or staff member disagree as to any aspect of the case, such a conflict must be identified and should be resolved prior to any court proceedings. Ideally, the GAL, AA, and staff member will agree on what to present to the court prior to any proceedings (although it is important to remember that the volunteer and the attorney are the appointed representatives of the child, not the staff member). If, however, the attempt at resolution (see the rest of the discussion in this subsection) yields more than one option to recommend to the court, than the attorney could present more than one option to the court under certain circumstances. First, the attorney must be mindful of his or her ethical obligation of competent and zealous representation.[3] Thus, the attorney must be able to present each option with equal zeal. In addition, there should be no "ownership" given to either option – the attorney should not state that the attorney has one recommendation and the GAL another. If the attorney is unable to present the options in this manner, then presenting more than one option would not be appropriate.

2. Insuring that everyone has the same information

Conflicts of opinion often result when one person lacks information that another person has. It is important to ensure that the AA, GAL, and staff member all have the same information from which to form an opinion on any issues surrounding the case.

3. Deferring to volunteer on issues of fact; deferring to attorney on issues of law; deferring to staff on issues of policy

The volunteer is the member of the team who is closest to the facts of the case. When a conflict arises as to an issue of fact, the team should typically defer to the volunteer, assuming the volunteer knows more about the facts than the attorney or staff member. When a conflict arises as to an issue of law, the team should defer to the attorney. When a conflict arises as to an issue of GAL policy, the team should defer to the GAL staff member who may choose to consult with a Regional Administrator.

4. When the conflict cannot be resolved

When the AA and GAL have attempted to resolve a conflict but simply cannot agree, the matter should be handed over to the District Administrator for resolution. As long as the resolution is something that both AA and GAL can live with, the team should move forward with it.

[3] See Rule 1.1, REV. RULES PROF. COND. and comments to Rule 1.3, REV. RULES PROF. COND., addressing competency and zeal in representation at the end of this chapter.

However, attorneys should not be expected to go to court and advocate for anything they oppose strongly or believe is not in the child's best interest. And of course, attorneys cannot put themselves in a situation that they feel would compromise ethical standards. If there is a conflict in opinion that cannot be resolved, one member of the team may have to resign from the case. If an attorney seeks to withdraw, the attorney can do so only within the bounds of professional responsibility and must be released by the judge.[4]

B. More Than Just a "Mouthpiece"? [5]

With heavy caseloads and a volunteer to do the legwork of investigation and make recommendations, it is easy for the AA to go to court feeling like a mere mouthpiece for the volunteer and/or program. But can the AA meet the ethical obligations of representation if merely acting as a "mouthpiece"?

The comments to Rule 1.3 of the Revised Rules of Professional Conduct state "[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Since the AA is acting as a member of a team, the AA is not expected to take on all aspects of representation as could be expected in many typical attorney-client situations. The volunteer an GAL staff will do much of the work that lays a foundation for good representation. But there is a big difference between offering good team representation to a client and simply offering "mouthpiece" representation. Engaging in "mouthpiece" representation is not meeting ethical obligations to a client. Consider the following examples:

Good Team Representation	**Mouthpiece Representation**
Learns and analyzes all information the GAL volunteer has gathered; asks that gaps in investigation be filled in	Is exposed to information GAL volunteer has gathered and considers it complete
Reviews GAL report for clarity and substance; ensures that facts in GAL report support recommendations; talks to GAL about case	Receives GAL report and looks at it; considers it complete
Develops strategy for presenting GAL's case: talks to other attorneys; determines what evidence should be presented and the manner in which it should be presented; subpoenas and prepares necessary witnesses; researches legal issues; files necessary motions, etc. (Active/initiating approach)	Plans to present whatever GAL volunteer pushes; plans to question any witness put on by other parties and respond to motions by other parties. (Passive/responsive approach)

[4] Guardian ad Litem Guidelines for Best Practice (2000), IV.E.4.a.5.
[5] This section also relates to § 12.6.E.

C. Action Only With Knowledge and Agreement of GAL

Because the AA acts as part of a team, the AA must be careful not to take actions that the GAL has no knowledge of or is not in agreement with unless the action is so legalistic in nature that it would be unrealistic for the GAL to have any input whatsoever. Even so, it is always best to inform the GAL to avoid the potential for surprise, confusion, and mistrust.

D. Being a Team Member

One important aspect of being a team member is an understanding of the division of responsibilities among team members. Chapter 8 of this manual discusses the role and responsibilities of the attorney advocate in relation to staff and volunteers. Please see Chapter 8 for this information.

E. Unauthorized Practice of Law

Rule 5.5(d) of the Revised Rules of Professional Conduct states that "A lawyer shall not assist a another person in the unauthorized practice of law." As such, the attorney advocate needs to be careful not to aid or allow a GAL volunteer or staff member to engage in activities that are considered practicing law. In other words, when dividing responsibilities in team representation, the attorney advocate should ensure that the attorney advocate takes on anything that could be considered practicing law.

Respondent parents, relatives, witnesses, social workers and others sometimes ask the GAL's opinion about what they should do, and at times they are actually asking for legal advice without realizing it. Through training and assistance, the GAL should be coached to avoid inadvertently giving legal advice.[6]

§ 12.4 Making Sense of "Best Interest" Representation

A. What Does "In the Best Interest of the Child" Mean?

Section B-5 of the American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases and the comments that follow speak well to the meaning of best interest:[7]

B-5. Child's Interests.

The determination of the child's interests should be based on objective criteria addressing the child's specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and the use of the least restrictive/detrimental alternatives available.[8]

Commentary

A lawyer who is required to determine the child's interests is functioning in a nontraditional role by determining the position to be advocated independently of the client. The lawyer should

[6] *Nelson*, "Ethical Dilemmas in Juvenile Court," pp. 8, 9.
[7] ABA Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases, Approved February, 1996. The standards can be accessed at the following link: http://www.abanet.org/child/resources.shtml
[8] *Id*., page 7.

base the position, however, on objective criteria concerning the child's needs and interests, and not merely on the lawyer's personal values, philosophies, and experiences. The child's various needs and interests may be in conflict and must be weighed against each other. Even nonverbal children can communicate their needs and interests through their behaviors and developmental levels. See generally James Garbarino & Frances M. Stjott, What Children Can Tell Us: Eliciting, Interpreting, and Evaluating Critical Information from Children (1992). The lawyer may seek the advice and consultation of experts and other knowledgeable people in both determining and weighing such needs and interests.

A child has basic physical and emotional needs, such as safety, shelter, food, and clothing. Such needs should be assessed in light of the child's vulnerability, dependence upon others, available external resources, and the degree of risk. A child needs family affiliation and stability of placement. The child's developmental level, including his or her sense of time, is relevant to an assessment of need. For example, a very young child may be less able to tolerate separation from a primary caretaker than an older child, and if separation is necessary, more frequent visitation than is ordinarily provided may be necessary.

In general, a child prefers to live with known people, to continue normal activities, and to avoid moving. To that end, the child's attorney should determine whether relatives, friends, neighbors, or other people known to the child are appropriate and available as placement resources. The lawyer must determine the child's feelings about the proposed caretaker, however, because familiarity does not automatically confer positive regard. Further, the lawyer may need to balance competing stability interests, such as living with a relative in another town versus living in a foster home in the same neighborhood. The individual child's needs will influence this balancing task.

In general, a child needs decisions about the custodial environment to be made quickly. Therefore, if the child must be removed from the home, it is generally in the child's best interests to have rehabilitative or reunification services offered to the family quickly. On the other hand, if it appears that reunification will be unlikely, it is generally in the child's best interests to move quickly toward an alternative permanent plan. Delay and indecision are rarely in a child's best interests.

In addition to the general needs and interests of children, individual children have particular needs, and the lawyer must determine the child client's individual needs. There are few rules which apply across the board to all children under all circumstances.[9]

B. Wishes Are Part of Best Interest

Rule 1.2 of the Revised Rules of Professional Conduct discusses abiding by a client's decisions concerning the objectives of a client's representation. Yet, in being obligated by statute to represent the best interests of the child and not the child's wishes, an AA cannot be bound by this rule. Nevertheless, a child's wishes should be an important factor in determining what is in the child's best interest. While the AA is obligated to represent the child's best interests and not the child's wishes, the GAL and AA must make an effort to determine what the child wants. While children often want what is best for them, there are times when the child's wishes and the GAL's determination of best interest conflict.

[9] Id., page 8.

Consider this example of the importance of ascertaining the child's wishes: the GAL believes that an adolescent should be placed in a specific therapeutic group home but learns that the child doesn't want to go there and has threatened to run away if placed there. While the GAL feels that this group home can offer the kind of care the child needs, the GAL is concerned that the child will in fact run away and be difficult or impossible to find. The GAL therefore decides to recommend another group home, which will not be as good at addressing the child's problem but where the child is willing to remain, along with additional outside services to address the child's needs. Had she not taken the child's wishes into consideration in her determination of best interests, this GAL may well have found herself searching for a missing child.

Both the GAL volunteer and the AA should make sure that the child client's wishes are presented to the court. GAL court reports should include a separate section dealing specifically with the child client's wishes. If a child client is too young to express his or her wishes, then the section addresses wishes should state so. *See* § 12.4 (C)(2)(b) below.

C. Dealing with Conflicts Between Wishes and Best Interest

What if the child's wishes conflict with what the GAL has determined to be the child's best interests and the GAL is not able or willing to reconcile the child's wishes with her recommendations to the court? The GAL Program's Guidelines for Best Practice set out expectations for the attorney advocate that include "Wishes expressed by the child are communicated to the court."[10] But what is the best way to do this when there is a conflict? A number of issues should be considered.

1. Determining whether there is middle ground

Every attempt should be made to arrive at a middle ground. The GAL, the AA, and the case supervisor should ask themselves once again whether there is any way to reconcile the wishes of the child with the GAL's recommendations to the court. Does the child fully understand the GAL's reasoning, and is it possible that if he did, he might agree with the GAL's recommendations? Is there something more the GAL can do to illustrate the reasoning behind the recommendations? Does the GAL fully understand the child's reasons for feeling the way he does, and the impact of recommending something that conflicts with those feelings? Might there be a way to modify the recommendations so that they still protect and promote the best interests of the child without conflicting with his wishes?

2. The child's voice in court concerning the child's wishes [11]

a. Allowing the child to speak

Even if the GAL cannot recommend what the child wants, the GAL should make sure the court *knows* what the child wants. The method in which the court is informed will depend on the child's age and the situation. For children 12 years old and older, the statute even requires that they be given notice of certain proceedings including reviews, permanency planning hearings, and post-termination of parental rights placement court reviews. **[7B-906; 7B-907; 7B-908]** As such, children twelve and older should be given the opportunity to talk to the judge if they so desire or if the GAL believes that such testimony would further the child's best interest. Younger children can also be given the opportunity to talk to the judge unless there is a good reason not to. If the

[10] Guidelines for Best Practice, I.E.1.d.
[11] See § 2.7.H, for more information on determining whether the child should be present and/or testify.

child does not wish to formally address the court, the AA may arrange for the judge to meet with the child in chambers or submit a letter to the judge. Alternatively, some districts utilize "Youth Court Reports" that specifically have a section written by the child-client. Allowing the child to speak can be empowering for children uprooted from their families.

b. Having the GAL or AA inform the court of the child's wishes

If the child does not inform the court of his or her wishes, someone must. It is reasonable for the child to expect that the GAL or AA will be that person since the GAL represents the child and must take wishes into account in determining best interest. The GAL or AA can simply tell the court what it is that the child wants even if the GAL's recommendations differ.

§ 12.5 Obligations to the Child and the Child's Role in Court

A. Contact with the Child and Preparation for Court

Is an attorney advocate expected to have contact with the child when a GAL volunteer is appointed in the case? The Guardian ad Litem Program's Guidelines for Best Practice set out expectations of at least monthly contact for the volunteer.[12] These Guidelines for Best Practice, however, only indirectly address expectations for contact with children by attorneys. The Guidelines state that the attorney is to advocate for and further the best interests and protect the legal rights of the child-client by "interviewing witnesses, including the child, when appropriate and preparing witnesses for court."[13] This guideline therefore suggests that there are no specific time expectations for contact but that contact should be made when appropriate for court preparation.

Although the volunteer maintains the primary connection with the child, and there is no automatic expectation of such a connection between child and attorney, at times the volunteer's connection is not enough for quality representation and the attorney must also have a connection for adequate court preparation. There are many situations in which the AA would be remiss in having no contact with the child: for example, when the child is expected either to testify in court or to informally address the judge. Whenever a child will speak to a judge, the AA must adequately prepare the child. The attorney must establish that the child is willing and able to speak and to prepare him to speak, as well as attempt to prepare him for any potential trauma and ease his fear of the unknown. There are other situations in which an attorney cannot adequately prepare his or her case without having contact with the child, and it is incumbent upon the attorney to determine when such contact is necessary.

B. Making Sure the Child Is Informed

Rule 1.4 of the Revised Rules of Professional Conduct emphasizes the importance of keeping a client informed and of explaining matters to a reasonable extent. While this rule refers to the client whose wishes are being represented, the fact that the AA represents best interests and not wishes should not diminish the importance of making sure the child and the GAL are informed and understand, to the extent that they should understand, what is going on. Obviously, the extent to which a child should be informed will depend on the age of the child and circumstances. In fact, the comments to Rule 1.4 state

[12] GAL Guidelines for Best Practice, III.G.1.a.1.
[13] Id. at IV.E.1.F.2.

as follows: "Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable; for example, where the client is a child or suffers from "diminished capacity."

Not knowing what is going on is one of the most difficult things for a child who is the subject of a petition. Imagine what it would be like to be taken out of your home, sent to live elsewhere, to be forced into changing schools and friends, going to see counselors, being interviewed by strangers and having no idea what will happen next. Ideally, social workers, counselors, foster parents, and other people who have become involved in this child's life are talking to him on his level about what is happening to him, what he can or cannot expect, and what their role in the process is to be. But as the child's representative, the GAL and also the AA should ensure that there are no gaps in the information that the child is receiving. They should make sure that the child has been informed of everything that is appropriate for his level of age and understanding, that the child is given an opportunity to ask questions about what is going on, and that the child has been given answers when answers exist. Even the Juvenile Code formally recognizes the importance of informing the child and allowing the child to be involved in certain child protection statute provisions. Such provisions require notice to the child, if age 12 or over, and/or information from the child in the hearing.[14]

C. The Child's Opportunity to Be in Court

The ABA Standards address the issue of the child's opportunity to be in court as follows:
D-5. Child at Hearing.

> *In most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify.*[15]

Commentary

> *A child has the right to meaningful participation in the case, which generally includes the child's presence at significant court hearings. Further, the child's presence underscores for the judge that the child is a real party in interest in the case. It may be necessary to obtain a court order or writ of habeas corpus ad testificandum to secure the child's attendance at the hearing.*
>
> *A decision to exclude the child from the hearing should be made based on a particularized determination that the child does not want to attend, is too young to sit through the hearing, would be severely traumatized by such attendance, or for other good reason would be better served by nonattendance. There may be other extraordinary reasons for the child's non-attendance. The lawyer should consult the child, therapist, caretaker, or any other knowledgeable person in determining the effect on the child of being present at the hearing. In some jurisdictions the court requires an affirmative waiver of the child's presence if the child will not attend. Even a child who is too young to sit through the hearing may benefit from seeing the courtroom and meeting, or at least seeing, the judge who will be making the decisions. The lawyer should provide the court with any required notice that the child will be present. Concerns about the child being exposed to certain parts of the evidence may be addressed by the child's temporary exclusion from the courtroom during the taking of that evidence, rather than by excluding the child from the entire hearing.*

[14] See, e.g., N.C.G.S. 7B-506, 7B-901, 7B-906.
[15] American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, approved February, 1996.

The lawyer should ensure that the state/custodian meets its obligation to transport the child to and from the hearing. Similarly, the lawyer should ensure the presence of someone to accompany the child any time the child is temporarily absent from the hearing.[16]

§ 12.6 The Attorney Advocate's Role Without the Burden of Proof

A. Introduction

The Attorney Advocate is often in the unique position of representing one who has full party status[17] in a case without being officially labeled as either the petitioner or the respondent. Thus the AA often has no burden of proof and no need to put on a defensive case. Yet the AA is still charged with the responsibility of putting on evidence, examining witnesses, and making arguments that support the best interests of the child.

B. Establishing a Goal

Even though the AA's client, the child, is neither petitioner nor respondent, the results of the case have more of an effect on the child than on anyone else. As a result, the AA must have a goal with regards to what should be achieved in each and every hearing. The attorney must have a goal in order to have a strategy. In adjudication, the AA's goal is likely to be the same as that of either the DSS attorney or the parents' attorney(s). In disposition, the goal may be the same or similar to that of the DSS attorney or the parents' attorney(s)--or it may be entirely different. In any event, the AA's strategy will revolve around making sure that all evidence surrounding the case that supports the GAL's goal is in fact presented in court.

Consider the commentary to Part I, subsection B-1 in the ABA Standards:

The child's attorney should not be merely a fact-finder, but rather, should zealously advocate a position on behalf of the child. (The same is true for the guardian ad litem, although the position to be advocated may be different). In furtherance of that advocacy, the child's attorney must be adequately prepared prior to hearings. The lawyer's presence at and active participation in all hearings is absolutely critical. See, Resource Guidelines, at 23.

Although the child's position may overlap with the position of one or both parents, third-party caretakers, or a state agency, the child's attorney should be prepared to participate fully in any proceedings and not merely defer to the other parties. Any identity of position should be based on the merits of the position, and not a mere endorsement of another party's position. . ..[18]

C. Communicating with Other Attorneys about Their Intentions

Communicating with DSS and parents' attorneys about their intentions in the case is the best way for the AA to prepare his or her case. If the AA knows or has a general idea regarding the other attorneys' goals and plans for presenting evidence, the AA will be able to develop a strategy that complements but does not duplicate their evidence. In fact, when the GAL's goals are essentially the same as one of the other attorneys, it may be beneficial to strategize with the other attorney in an attempt to maximize the effectiveness and efficiency of the presentation of evidence in the case. Conversations with another

[16] *Id*. at 13.
[17] N.C.G.S. 7B-601 states, "The juvenile is a party in all actions under this Subchapter."
[18] ABA Standards, page 3.

attorney who has the same goal can also help ensure that each party is not doing anything that would be detrimental to the other, since they are both pursuing the same goal.

D. Strategizing the Case According to the Goal and the Intentions of Other Parties

Once the AA has a goal and some idea of the other parties' intentions, the AA can determine what evidence he or she will need to prepare and present and the arguments that should be made in support of the goal.

E. Zealous Advocacy

1. What is zealous advocacy?

a. Rules of ethics

Rule 1.3 of the Revised Rules of Professional Conduct states "[a] lawyer shall act with reasonable diligence and promptness in representing a client." The comments to that Rule go on to say "a lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued."

b. "Painting a picture" for the court and quality representation

The dictionary definition of the word **"zeal" is "enthusiastic and diligent devotion in pursuit of a cause, ideal, or goal."** Zealous advocacy, therefore, is really all about being devoted to accomplishing goals on behalf of your client, which means providing the best possible quality representation. Law school teaches about the basics of quality representation regarding how and what to address in court according to the requirements of the law. But painting a picture takes representation a step further to ensure that evidence and arguments bring the case to life in the courtroom. Painting a picture for the court means utilizing evidence and arguments to convey to the court the detailed circumstances surrounding the client or other parties such that the judge can picture the situation a person is in and what this person's life is like. Details include tangible circumstances such as living arrangements, childcare, employment, mental and physical health as well as intangible ones such as a person's apparent capabilities or feelings about his or her situation. Time limitations, circumstances, local practice, and individual habits can present a host of impediments to putting to use the basics of quality representation. By overcoming the impediments and covering the basics, an attorney has all the tools needed to paint a picture of the lives of the people in the case for the court.

c. Some basic elements of quality representation [19]

- Deciding on what you need to accomplish for your client (goals)
- Having conversations with other parties to determine their perspective and intentions
- Developing a strategy to accomplish your goals
- Familiarizing yourself with all relevant information in the case
- Filling in gaps in information via investigation or delegation of investigation
- Determining what evidence you should presentaccording to your strategy as well as the anticipated strategy of other parties and evidence you expect them to present
- Knowing all statutory and case law relevant to your case and identifying cases you might use to support your position
- Having solid knowledge regarding local and state resources to address situations encountered
- Preparing evidence and witnesses
- Issuing subpoenas
- Preparing to get the most out of other parties' evidence via cross-examination
- Preparing for the unexpected
- Being an active participant in the proceedings
- Arguing your case to support your goal and "painting a picture" for the court

2. Getting help when you cannot do it all

Rule 1.1 of the Revised Rules of Professional Conduct addresses competence, stating:

> A lawyer shall not handle a legal matter which the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

If an AA becomes aware that he or she cannot give a case the time and attention it deserves, or that the case involves issues that the AA does not feel comfortable handling, the AA should get help. The AA can contact the GAL Pro Bono Program to inquire about getting an attorney to take on the entire case or simply assist with a particular issue in the case. AAs may also call the GAL State Office and consult with theGAL Associate Counsel or the Administrator.[20] The GAL Associate Counsel is available to research specific issues, to assist attorneys in strategizing their cases, to locate legal resources, and generally to offer any type of legal assistance that is within the scope of their abilities. RPC 199, set out at the end of this section, addresses the issue of lacking competence and experience to handle a case.

[19] The reader should also consult Chapter 8 of this manual for more information on expectations of representation by GAL attorney advocates.

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§ 12.7 Conflicts

A. Defining Conflict

Conflicts of interest do occur in GAL representation, and when they do, they are often not simple. The toughest issue in dealing with conflicts is in identifying them in the first place. The North Carolina Revised Rules of Professional Conduct ("the Rules") specifically address conflict in a number of rules. While these rules help to identify situations that could be defined as problematic legal conflicts, any situation still requires good judgment. There are also conflicts of interest in GAL representation that may or may not involve attorneys and do not fit the definition of a legal conflict within the Rules of Professional Conduct but that are, in fact, conflicts. In such cases, the conflict could be with the entire GAL Program, the GAL program in a particular district, or with a GAL staff member or volunteer. The Juvenile Code itself, in G.S. 7B-1202, refers to GAL conflicts of interest but does not define them. This statute states "If a conflict of interest prohibits a local program from providing representation to an abused, neglected, or dependent juvenile, the court may appoint any member of the district bar to represent the juvenile."

Thus there are no hard and fast rules for identifying potential conflicts, and it is best to deal with them on a case-by-case basis. **This subsection in the manual sets out scenarios and addresses the issue of conflict in each. It is important to note, however, that a slight change in the circumstances of a given situation could dramatically change the advice given on the best way to handle it.** Once it is established that a situation does in fact present a conflict, the issue then becomes the best way to deal with the conflict, which is usually less complicated.

1. Revised Rules of Professional Conduct on general conflicts and former clients

It is worth the time it takes to read over these rules again before tackling a potential conflict situation. The comments following these Rules (set out at the end of this chapter) are also valuable. Note that these are not the only Rules relating to conflict, but these are the ones that would apply most frequently to GAL representation.

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

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

(1) the representation of one client will be directly adverse to another client; or

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

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

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.7, NC REV. RULES PROF. COND.

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.9, NC REV. RULES PROF. COND.

2. Conflicts in GAL representation cannot be removed by consent of the child client

One of the difficulties in applying the Rules involving conflicts to GAL representation is the fact that the Rules allow certain conflicts to be waived by the client. In GAL representation, however, the client is a child and child clients are presumed incapable of certain decisions and actions, depending upon the child's age and maturity. However, a child of any age is not likely to be considered capable of making an appropriate decision about choosing to consent to representation in a situation with a potential conflict. For this reason, situations presenting conflicts that would be prohibited by the rules unless consent by the client can be obtained are situations that should be conflicted out by the GAL.

However, it is necessary to determine who actually has the conflict. If the conflict exists because the AA formerly represented a parent, then the client lays with the former client—not the child. As a result, the former adult client may give informed consent and waive the conflict.

B. Conflict Examples

1. Conflict within a sibling group

Example 1: When the GAL represents a group of siblings and the siblings are then split up and their interests divide, who should represent whom? For example, three little boys were in foster care together, and the two older boys were then moved to a new home. Now the foster family with the two older boys wants to adopt them but not their younger brother, who wants to be with his brothers. The GAL thinks it is not in the youngest boy's best interest to be split from his siblings, but it is also not in the oldest two boys' best interest to be moved from the family that wants to adopt them.

Advice: This conflict is prohibited by Rule 1.7, as the interests of the boys have become adverse to one another. Neither the AA nor the GAL program/volunteer can represent any of the boys. Representation must be given to conflict attorneys.

Example 2: The GAL program has been appointed to represent two children. One child confesses to molesting the other.

Advice: Again, this is a conflict prohibited by Rule 1.7 when the interests of the two children are adverse to one another. If the case is brand new, and there has been no GAL work on it yet, the AA and the GAL program/volunteer can represent one of the children; a conflict attorney must handle the other child. If there has been any work at all on the case, the AA and the GAL program/volunteer can no longer represent either child; conflict attorneys must handle their cases.

2. Baby with teenage mother

Example 1: The GAL program is appointed to a new case involving a baby who has a teenage mom. There are neglect petitions on both baby and the teenage mother.

Advice: The program may represent the baby or the mother but not both. If the mother has ever been a GAL client, the GAL program should represent the mother. If the program has never represented the mother, the GAL program should represent one but not both. The mother will need both a parents' attorney and a guardian ad litem (a Rule 17 GAL in one case and a 7B-601 GAL in the other). One attorney cannot act as both parents attorney and guardian ad litem because one involves representation of wishes and one involves representation of best interests.

Example 2: The GAL program currently represents a teenager. The teenager has a baby. A neglect petition is filed on the baby.

Advice: The GAL program cannot represent the baby and the case must be handled as a conflict. The mother will also now need a parent's attorney in addition to a GAL.

3. Program or attorney have represented parent years before as child client

This situation is addressed in Rule 1.9. When a petition is taken out on a child and the parent or caretaker named in the petition is or has been a GAL child client, the GAL program cannot represent the child named in the petition unless the former client gives informed consent to allow the representation. Note that GAL program district practice varies with respect to "program conflicts" and the appropriate course of action should be discussed with GAL staff. If

the case is still considered a conflict, an attorney who acts independently of the GAL program must handle the case.

4. Attorney advocate has represented child in a delinquency matter

a. Simultaneous representation in child protection proceedings and delinquency proceedings

An attorney advocate, as part of her private practice, is currently representing a child in a delinquency matter. The court wants to appoint her to be either the attorney or simply the GAL for this same child in a child protection proceeding while the delinquency matter is still open.

Advice:
The fact that the attorney has a very different duty of representation in each type of case could present a problem. These different duties could materially limit her representation pursuant to Rule 1.7(a) in that the attorney has "responsibilities to another client, a former client, or to a third person" since the attorney or GAL has responsibilities to the GAL Program and to the court to represent the best interests of the child and not necessarily the child's expressed wishes. In delinquency proceedings, however, she must represent the expressed wishes of the child in a traditional attorney-client relationship. It would be difficult for the attorney, and especially the child, to deal with the different roles the attorney must play in the different proceedings.

The attorney's "personal interests," referred to in Rule 1.7(b) may also present a problem if, for example, she finds herself arguing from very different perspectives in each case in front of the same judge, which might diminish her credibility; or if she finds that her involvement in one case would cause her to be biased so that she could not provide adequate representation in the other case.

Another problem might occur where the attorney, in the role of GAL or AA, would get access to confidential information that, as a delinquency attorney, she would not normally be able to access and which places her in an unfair position in the delinquency matter. In addition, there is the need to ensure that the actions of an attorney in one proceeding are not influenced to the detriment of the child by the other proceeding or in contradiction with the specific role the attorney is to play in each type of proceeding. Due to the number of potential problems outlined above, simultaneous representation although not prohibited, is not necessarily advisable.

b. GAL representation subsequent to delinquency representation

An attorney represented child in a delinquency matter in the past and the case is closed. The court now wants to appoint this attorney to represent the child in child protective proceedings either as the attorney or the GAL.

Advice: Because the proceedings are not simultaneous, as in the example above, some of the problems in that example are not present, and it may be possible for the attorney to represent the child. The attorney would still have to be sure the child understands the difference between the role she is playing in representing the child from the one she played in delinquency court. There should be no problem of access to information

since the GAL would be entitled to all confidential information. There should also be no potential for one case adversely affecting the other because the delinquency case is closed. However, the attorney should make certain that she has no bias resulting from her prior representation of the child ("personal interests" referred to in Rule 1.7(b)) that would adversely affect her ability to represent the child's best interest in a GAL matter.

c. Delinquency representation subsequent to GAL representation

Attorney advocate represented a child in abuse and neglect proceedings, and the case is now closed. Later the attorney advocate, who is in private practice, is appointed to represent the child in a delinquency matter.

Advice: Though this is not a good idea, it does not necessarily violate the Rules of Ethics. One difficulty with this situation is the problem of going from best interest representation for a client to wishes representation. Consider this example: an attorney knows detailed information about a child being sexually abused as a result of her GAL representation of that child. In that child's delinquency proceeding for sexual abuse, she wants to use that information as part of her defense and in her recommendations for disposition, but her client objects to that information coming out and in fact denies that he was sexually abused, plus he objects to her treatment recommendations. An attorney considering this would have to be sure that there was nothing about her representation in the abuse and neglect proceedings that would limit her ability to represent the child in the delinquency proceedings.

5. Attorney Advocate represents or has represented parent outside of the GAL program

Example 1: An attorney advocate currently represents a parent in a non-GAL case and is appointed to represent this parent's child in a GAL matter. Whom can she represent? Does it make a difference if the matter is related to the GAL case?

Advice: In representing the child, the AA may very well be in a position to be advocating for something that is adverse to the parent's interests, regardless of whether those interests are related to the other matter for which the attorney is representing the parent. As such, the attorney would not be able to fulfill her obligations to the parent or the Program by representing both. Another attorney would need to be appointed to handle the case. The Program itself, however, has no conflict in this matter and can remain involved.

Example 2: An attorney advocate has represented a parent in the past. The AA is now appointed to represent a child of this parent in a GAL matter. Can she represent the child? Does it make a difference if the matter is related to the GAL case?

Advice: In this situation, the attorney no longer has an attorney-client relationship with the parent, but does have a duty to a former client. Once again, however, the AA may well be in a position to be advocating for something that is adverse to the parent's interests, regardless of whether those interests are related to the other matter for which the attorney was representing the parent**.** The attorney advocate cannot take the case if she has ever represented the parent, unless the former client parent gives informed consent to allow the representation.

6. Attorney Advocate has represented DSS before

An attorney has previously represented the county and wants to become the attorney advocate for the GAL Program in the same county.

Question 1: Can she become the attorney advocate in the same county and district? Does it matter that her representation of the county never caused her to be involved in DSS abuse and neglect cases?

Advice: She can become the AA, as long as she is not currently representing DSS or the county in any capacity, whether or not she has been involved in DSS cases in her capacity as county attorney. RPC 14 (set out at the end of this chapter) makes it clear, however, that one cannot act as county attorney and GAL attorney simultaneously, regardless of the amount of contact the county attorney has had with abuse and neglect cases. Once her role as county attorney has ended, however, she can consider becoming a GAL Attorney Advocate.

Question 2: If she becomes a GAL Attorney Advocate, what should she do about GAL cases that involve one or more of the same parties as a case she handled for the county or for DSS?

Advice: Such cases must be handled by a conflict attorney, though the GAL Program itself has no conflict and may remain involved. Note, however, that if there is the potential for conflict in a substantial number of cases, the advantage of having an experienced DSS attorney in the position of AA may not outweigh the disadvantages of having to find an attorney to handle many of the cases.

7. Personal conflicts

Some personal conflict situations are specifically prohibited by the Revised Rules of Professional Conduct (*see* Rule 1.7 and Rule 1.8 for specifics), and some are not specifically addressed by the Rules but are problematic because of their potential for damaging the child's case.

a. Personal conflicts that could potentially damage the child's case

Some personal conflicts are not specifically addressed by the Rules of Professional Conduct either because they don not fit within the language of those rules or the conflict does not involve an attorney. Such potential conflict situations must be handled by evaluating each one with a focus on the best interests of the child. If an evaluation results in the conclusion that there is the potential for damage to the child's case, then the damage resulting from the conflict itself must be weighed against the detriments of handing over the case to another program and/or attorney. The following are some considerations in evaluating such conflicts and whether the case should be handled by someone else:

i. Could the potential conflict damage the child's case as the result of a claim of bias? For example, if a volunteer or staff member has any kind of relationship with or knowledge of a party or witness in the case, is there a possibility that the GAL's position will be compromised, attacked, or impeached by the existence of such knowledge or relationship in the case?

(Note that an attorney's relationship with a party or witness is discussed in § 7.B.7.a)

ii. Could the potential conflict interfere with the ability of a GAL staff member, attorney, or volunteer to zealously, effectively, and fairly represent a child client with an unyielding focus on the child's best interest?

iv. Could the child's safety be in jeopardy if the GAL program and/or AA, who may have already invested a great deal of time and effort in the case, are removed, requiring the child's representation to start from scratch with someone new? For example, the GAL finds out that there is a potential conflict right before a nonsecure hearing. The GAL fears that at this hearing, the judge may send the child back to an unsafe home and the GAL team has done extensive investigation and preparation for the hearing-- work that cannot be duplicated or carried out by a conflict attorney – which will be necessary in order to prevail at nonsecure. Here the child's safety (keeping the child from going home) may be more important than steering clear of the potential, but not yet existing, conflict.

v. When a case is conflicted out, will the child's case suffer due to:

- the difficulty of securing a conflict attorney in the district in general?
- the difficulty of securing an experienced and/or competent conflict attorney?
- the diminished level of representation the child will receive if the case is handled without a volunteer GAL?

8. Adoption of child by GAL or GAL attorney advocate

Question 1: Can a GAL or attorney advocate adopt a child who is currently involved with DSS?
Advice: Yes.

Question 2: If so, can the attorney advocate or volunteer who adopts still be an attorney advocate or a volunteer?

Advice: Yes, just not in his or her own adoption case. If the child to be adopted was or is a direct client of the GAL or attorney advocate who wants to adopt, then the GAL, attorney advocate, and entire program must withdraw immediately from the case and have a conflict attorney handle it.

Question 3: If the child to be adopted is actually a child-client of the GAL program but not directly represented by the GAL or attorney advocate who wants to adopt, what should the program do?

Advice: It may be possible for the program to handle the case, but it would have to be assigned to another district (obviously the attorney advocate or GAL wanting to adopt cannot be involved). Several factors should be considered to determine whether there is the potential for conflict and whether the case can be handled by another district or, instead, by an attorney

completely outside the GAL program. Some of these factors are described above in the subsection on personal conflicts in 7.b. and should be examined on a case-by-case basis.

C. Who Can and Should Handle Conflict Cases?

1. Whose conflict is it, anyway?

The first step in determining who should handle a conflict is determining who has the conflict. In other words, is the conflict with the GAL volunteer, the GAL program, the attorney advocate, or all three? If there is a conflict with the GAL program, then there is also a conflict for the GAL volunteer and for the attorney advocate. But if the conflict is strictly with the volunteer or strictly with the attorney, it may be possible for another volunteer or another attorney to handle the case while the program remains involved. If the program has a conflict, it may or may not be possible for a program in another district to handle the case. The type of conflict and its source will determine who is eligible to handle the case.

2. Imputed disqualification

a. The Revised Rules of Professional Conduct, under Rule 1.10, disqualifies a lawyer from representing a client when he or she has a certain type of relationship or association with a lawyer who has a conflict with that client.

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

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

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

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1. 6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

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

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

Rule 1.10, NC REV. RULES PROF. COND.

b. Are Attorney Advocates considered part of a "firm" for the purposes of Rule 1.10?

Most of the Attorney Advocates in our program who are one of two or three attorneys in a district have little, if any, interaction with the other attorney advocate(s) in the district, do not share office space or information, and could not be considered members of the same "firm." Whether Attorney Advocates can be considered members of the same "firm" for the purpose of ethical conflicts depends upon their level of interaction and sharing of information. If their case work does not overlap, that is, they handle separate cases and do not discuss them with one another, do not share an office, do not share information with one another, they are not going to be considered a firm. If, however, they typically discuss their cases with each other, share information, and share an office, they would likely be considered a "firm" and could therefore not take a case when the other attorney has a conflict. Determining whether one attorney has a conflict just because the other one does simply depends on the circumstances and the level of interaction between the two attorneys.

c. Specific examples

i. Different attorney advocates in the same district handling conflict cases for each other. With some types of conflicts, it is appropriate to allow another attorney advocate in the same district to handle the case. The only types of conflicts that can be handled this way would be those in which the attorney advocate, and not the program, has the conflict. For example, if the attorney has a conflict because she has represented the parent named in the petition in the past, it may be appropriate for the other attorney advocate to take the case, provided she has no conflict either. This would be appropriate as long as the attorneys within the district do not operate so closely together as to be considered part of the same "firm." (See subsection 2.b. above.)

ii. Having attorney advocates in different districts handle conflict cases for one another can be a good solution to a conflict, albeit an inconvenient one. It is often preferable to having a local conflict attorney handle a case when the attorney advocate has more experience and knowledge than any potential local conflict attorney. Logistics, however, can be the deciding factor.

iii. An attorney formerly affiliated with DSS or a GAL program may be an appropriate conflict attorney, unless he or she has had previous involvement with people in the present case that would cause another conflict. Such attorneys are experienced with child protection proceedings.

3. The best one for the job

Sometimes there are no options in determining who will handle a conflict case. The GAL program informs the court of the conflict, and the judge appoints the next attorney on the juvenile list. It may not be appropriate for the GAL to suggest to the court a specific attorney for a specific conflict case, because it might perpetuate the conflict if the conflict is a program conflict as well as an attorney conflict. However, it is wise for the program to always be aware of those attorneys in the district who may be potential conflict attorneys with sufficient experience and knowledge so that the GAL can assist the court in having a conflict "list" of sorts to fall back on in such situations. Such attorneys may not have an interest in being on the regular juvenile appointment list but may have an interest in doing GAL conflict cases from time to time. If the conflict is an attorney conflict but not a program conflict, it may be appropriate for the program, not the attorney, to suggest specific attorneys to the court.

§ 12.8 Who Can Talk to Whom and Confidentiality

A. Lawyers Talking to Represented People

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 by law to do so. 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.

REV. R. PROF. COND., RULE 4.2(A).

Under this Rule, Attorney Advocates must be careful not to speak with parents and caretakers who are represented by attorneys without first obtaining permission from their attorneys. Remember that the DSS attorney represents social workers; and here it is best to reach an understanding with the DSS attorney about how to handle this situation in general so that the attorney advocate does not have to start from scratch on this issue with each case. The DSS attorney may say that he or she has no problem with the attorney advocate talking to social workers in general, at any given time, on any given case and that it is not necessary to ask permission with each case. Or, the DSS attorney may make it clear that he or she expects the attorney advocate to get permission on a case-by-case or even conversation-by-conversation basis. In any event, having an understanding from the beginning can save time and trouble.

B. GAL Volunteers Talking to Represented People

Nonattorney GALs and GAL staff are not bound by the Rules of Professional Conduct, which apply to all attorneys. It is good policy, however, to say that in general, it is best for volunteers and staff not to engage in activities that would be considered a breach of the Rules of Professional Conduct by an attorney because like the attorney, they represent the best interests of the child and should adhere to such standards of conduct. Still, the volunteer does not have to obtain permission to talk to a represented person.[21] As a courtesy, it is recommended that the volunteer tell the DSS attorney and any parent's or caretaker's attorneys at the beginning of the case that they would like to talk to their client throughout the course of the case and ask if they have anything they would like the GAL to know in advance. Note also that if the GAL can be said to be acting as an agent of the attorney advocate in a particular situation (e.g., acting pursuant to attorney advocate's instructions), the Rules would definitely apply to the actions of the volunteer even though it might be the attorney advocate who suffers the consequences of such actions.[22] Only lawyers are actually bound by the Rules of Professional Conduct, however, so only lawyers can be punished for breaching them. Of course conduct that is also considered illegal will have implications for any party. *See 2006 Formal Ethics Opinion 19 at the end of this chapter.*

[21] An advisory ethics opinion received by the GAL state office in November, 1996, EA 2073 (set out at the end of this section), made it clear that such permission was not required because the volunteer is not a lawyer and the prohibition on communications with a represented opposing party only applies to lawyers. This EA has been revised to become 2006 Formal Ethics Opinion 19.

[22] See RPC 249, inquiries #3 and #4, which refer to a law enforcement officer acting as an agent of the DA and prohibits that officer from talking to the represented child without permission from the child's attorney.

C. Others Talking to Child

State Bar ethics opinions RPC 249 and RPC 61 (set out at the end of this chapter) make it clear that attorneys are prohibited from talking to a child who is represented by an attorney, including a GAL attorney advocate, without authorization from the child's attorney.

Many attorneys do not realize that they should not talk to the child about the case without the authorization of the GAL attorney advocate. Some attorneys, like criminal defense attorneys, may not even realize the child has an attorney. Parents' attorneys, DSS attorneys, law enforcement officers (when acting as agents of prosecutors), criminal defense attorneys and prosecutors have all been known to have such unauthorized conversations. Moreover, parents and caretakers with physical custody of the child often do not realize that they cannot give consent for the child to talk to an attorney.

Parents and other caretakers who have physical custody of the child can be informed by their own attorney (at the suggestion of the attorney advocate) that the child should not be talking to an attorney without the child's attorney's authorization. The parent or caretaker could also be so informed in the courtroom, on the record, if the judge allows it.

Attorneys, parents, and law enforcement personnel can be informed by way of a routine letter, sent out at the beginning of a case, simply explaining that the attorney advocate represents the child and must be contacted if they want to talk to the child. (See sample letters in appendix of this manual.) RPC 249 and RPC 61 address these issues directly and can be cited in a letter to attorneys, as can the statutory authority for the attorney advocate's representation of the child. **[7B-601]**

D. Confidentiality and Authorized Sharing of Information [23]

1. Disclosure of information concerning the child is prohibited

Rule 1.6 of the Revised Rules of Professional Conduct prohibits the attorney from disclosing confidential information about the child or the case. In addition, juvenile information is protected well beyond the scope of the attorney-client relationship and is vital to the protection of the child. Sections 7B-2901 to 7B-2902 of the Juvenile Code emphasize the strict confidentiality of juvenile records. Also, Section 7B-601 allows the GAL access to confidential information but states that "[t]he confidentiality of the information or reports shall be respected by the guardian ad litem and no disclosure of any information or reports shall be made to anyone except by order of the judge or unless otherwise provided by law."

2. Disclosure in child fatality or near-fatality cases

It is important to note that the rules of disclosure are different when there is a child fatality or near fatality. Such disclosure is governed by G.S. 7B-2902.

3. Agency sharing of information

a. "In the case of a child victim, the court may order the sharing of information among such public agencies as the court deems necessary to reduce the trauma to the victim." [7B-2901(c)] This statute is contained in the section of the Juvenile Code relating to records in abuse, neglect, and dependency cases. It is very general and can be interpreted to mean that agencies with a

[23] For more discussion on confidentiality, see § 1.9 of this manual.

specific court order to share information can do so – when such orders are made for the purpose of reducing trauma to the victim.

b. In addition to 7B-2901(c), 7B-3100 specifically addresses the sharing of juvenile information among certain agencies. This provision applies in cases of abuse, neglect, dependency, undisciplined, and delinquent behavior. Under section 7B-3100, the Office of Juvenile Justice, after consultation with the Conference of Chief District Court Judges, shall adopt rules designating certain local agencies that are authorized to share information concerning juveniles in accordance with the provisions of 7B-3100. [24] Such agencies shall share with one another, upon request, information in their possession that is *relevant to any case in which a petition is filed alleging that a juvenile is abused, neglected, dependent,* undisciplined, or delinquent and shall continue to do so until the juvenile is no longer subject to the jurisdiction of juvenile court. Any information shared pursuant to 7B-3100 *must remain confidential, shall be withheld from public inspection, and shall be used only for the protection of the juvenile and others or to improve the educational opportunities of the juvenile.* The Family Educational and Privacy Rights Act still applies to such information. Disclosure of information concerning any such juvenile that would reveal the identity of that juvenile is prohibited – except the publication of pictures of runaways with parental permission.

Agencies that may be designated include

- local mental health facilities
- local health departments
- local departments of social services
- local law enforcement agencies
- local school administrative units
- district attorney's office (but statute says DA is not required to release any information)
- Office of Juvenile Justice
- GAL Office

4. Access to information by the GAL

a. GAL's entitlement to confidential information: A GAL has the authority, by way of court order typically contained in the GAL's appointment order, to have access to any information or reports that he or she believes is relevant to the case, even if such information is confidential. [7B-601] Both the GAL and GAL attorney need one or more certified true copies of the appointment order. Some record custodians require a certified true copy for their records before allowing access or copies; others will accept a copy of a certified true copy or simply look at the appointment form to verify appointment before allowing access to records.

b. Privileges are not available: The physician-patient privilege and the husband-wife privilege are not available to persons from whom the information is sought. [7B-601]

c. Exception: Substance abuse records, educational records, military records, and video rental records are not necessarily inaccessible, but the GAL appointment order may not be the only thing required in order to access such records. See Chapter 11 in this manual for more information on substance abuse and education records.

[24] See the rules set out in 28 NCAC 01A.0301 and 28 NCAC 01A.0301 located at the end of this chapter.

5. Access to information from the GAL [25]

1. The GAL must keep all information regarding the case confidential, and no disclosure may be made except by court order or unless provided by law in Chapter 7B. [7B-601]

> In the case of *In re Guynn*, 113 N.C. App. 114 (1993), a father claimed he was prejudiced by the GAL's refusal to give him information that the GAL considered confidential. The court disagreed, saying he was not prejudiced by the GAL's refusal to provide a list of services offered to him, because he obtained that information from DSS.

2. Exception: the GAL can share information only if authorized by court order or by the administrative code provisions discussed above in subsection D.3. that relate to agency sharing.

E. Ex Parte Communication

Rule 3.5 of the Revised Rules of Professional Conduct states, in part:

> (a) A lawyer shall not:
> . . . (3) communicate ex parte with a judge or other official except:
> (i) in the course of official proceedings;
> (ii) in writing, if a copy of the writing is furnished simultaneously to the opposing party;
> (iii) orally, upon adequate notice to opposing party; or
> (iv) as otherwise permitted by law. . .

REV. R. PROF. COND., Rule 3.5(a)(3).

Given that the child is a party to the case, it would be inappropriate for a volunteer, attorney, or GAL staff member, acting as the child's representative, to have any communication with the judge that violates this Rule. The volunteer and the program would not be subject to all of the potential consequences for violation of this Rule as an attorney, but it is still a rule that they should adhere to.

At times, a GAL staff member may desire to communicate with a judge either orally or in writing about a general issue. This rule does not prohibit communication that is not about a particular case, since there would be no other "parties" to be placed at a disadvantage by the communication. However, communication that is of a general nature but that addresses an issue in a particular case that is still open may be construed to be about a particular case and could therefore cause problems under this Rule.

F. Attorney-Client Privilege [26]

1. Overview

Laws have not clearly defined the issue of attorney-client privilege in the context of guardians ad litem and attorney advocates working to represent child clients under North Carolina laws. Attorneys are therefore cautioned to be aware that hard and fast rules may not apply to this subject; perhaps the best

[25] For a discussion of appropriate action when a GAL is asked to share information about a juvenile or receives a subpoena, see § 1.9.E. of this manual.

[26] Much of this subsection on attorney-client privilege was adapted or extracted from "Ethical Dilemmas in Juvenile Court," by Ilene Nelson, 2000, pp. 10 – 14.

thing an attorney can do is to be educated concerning various viewpoints on this issue and make decisions relating to attorney-client privilege on a case-by-case basis. In general, it may be safest to assume that the attorney-client privilege is applicable in cases where an attorney acts only in the role of attorney advocate, but that the privilege is perhaps not fully applicable in cases where the attorney is acting as the guardian ad litem and the attorney. The following discussion may assist the reader in having a better understanding of the attorney-client privilege in the context of guardian ad litem representation.

The attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients; it thereby encourages observance of the law and aids in the administration of justice. *Commodity Futures Trading Commission v. Weintraub*, 471 US 343 (1985). Yet attorney-client privilege in best interest representation is anything but simple. Several different theories of privilege must be considered in order to adequately address this issue.

2. Wishes vs. best interest and the attorney-client privilege

If an attorney represents the wishes of a child then the traditional "attorney-client relationship" rules apply. The questions of confidentiality are governed primarily by Rule 1.6 of the North Carolina Revised Rules of Professional Conduct. In most states, there is no specific provision in the evidence code that defines the attorney-client privilege. It is a common law doctrine.

Does the child have a privilege when the attorney is representing the child's best interest? There are very few cases that speak directly to privilege when the attorney represents the best interest of the child. The attorney's role may determine whether a child's communications are confidential. Haralambie, Ann M., The Child's Attorney, ABA Section on Family Law (1993). When the attorney is appointed as the guardian ad litem, the privilege may not apply.[27] *Ross v. Gadwah*, 554 A.2d 1284 (l988); Alaska Bar Association Ethics opinion no. 854; (after *Ross*, the New Hampshire legislature enacted a statute creating attorney-client confidentiality between guardian ad litem and child. N.H. Rev. State. *458.127-a 110 (l992)*); *but see Bentley v. Bentley*, 448 N.Y.S. 2d 559 (l982). In *Bentley*, the New York appellate division of the Supreme Court held that interviews between the law guardian and the children in divorce-related proceedings are privileged since the relationship of law guardian and children is one of attorney-client and as such is not subject to cross-examination. However, in New York, the law guardian represents the child's wishes. It has been argued that since an attorney who represents best interest stands in the shoes of his client there is no privilege with his client. The attorney, this analysis goes on to argue, is his own client. If one is not representing one's client's wishes, it is difficult to assert privilege. The policy behind privilege is to protect the communication so an attorney can effectively represent his client's wishes. This is not the case with best interest representation.

§ 12.9 The Lawyer as a Witness

A. Revised Rules of Professional Conduct

Rule 3.7 Lawyer As Witness

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

[27] Note, however, that regardless of the existence or nonexistence of the attorney-client privilege, the Juvenile Code requires information to be kept confidential.

(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.[28]

REV. RULE PROF. COND., 3.7

B. Lawyer in the Role of Attorney Advocate

A lawyer who is paired with a GAL volunteer and assumes the role of attorney advocate may interpret Rule 3.7 the same as in any other type of legal representation. An attorney advocate working with a volunteer would rarely be in a position to want or need to testify since the volunteer takes on the role of witness when necessary.

C. Lawyer in the Role of Both Attorney and Volunteer

1. The circumstances

There are three situations in which an attorney will act as both GAL and attorney, representing the best interests of the child with no volunteer assistance: (1) when the attorney is an attorney advocate and there is no volunteer assigned to a case due to a shortage of volunteers, so the attorney has been appointed for both roles;[29] (2) when an attorney contracts with a district to handle certain cases without program or volunteer assistance; and (3) when a pro bono attorney is assigned to a case with no volunteer assistance.

In these situations, the attorney who is appointed as GAL as well as the attorney takes on both roles. In so doing, the attorney is often going to be in the position of needing to present evidence obtained firsthand to the court. The question, then, is whether Rule 3.7 prevents an attorney from acting in this role.

2. North Carolina State Bar Ethics Committee

With the development of the new Pro Bono Project of the Guardian ad Litem Program, GAL legal staff sought the advice of the State Bar Ethics Committee on the issue of attorneys acting in both the role of GAL and attorney in juvenile court representation.

The result was a Revised Ethics Advisory 2251, which is set out below:

Lawyer as Witness

Inquiry: *The North Carolina Guardian Ad Litem (GAL) Program is currently piloting a new pro bono project through which attorneys in selected counties may volunteer to serve as legal advocates for abused, neglected, and dependent children. The GAL*

[28] Also see comments to this Rule at the end of this section of the manual.

[29] A common problematic situation is one in which no volunteer is assigned to a case but no one officially takes on the role of the volunteer. An argument can be made that unless an attorney is officially appointed to act in both roles, the attorney cannot and should not take on the responsibilities normally assumed by the volunteer. As such, the AA who is not officially appointed to act in the role of GAL may be more likely to be considered in violation of Rule 3.7 if he or she acts as a witness than one who is officially acting in the capacity of a GAL pursuant to appointment.

Program has a significant shortage of volunteers to serve as attorneys. [Footnote: In fiscal year 1997 the GAL program's 89 paid attorney advocates represented 15,582 child victims statewide. This is an attorney-client ratio of 1:175. In some urban areas, the ratio was 1:900.] In addition, the GAL Program needs volunteers to serve as guardians ad litem. Therefore, the Program would like to have any willing attorney-advocates also appointed as the GALs on their cases.

Often GALs present evidence obtained firsthand. For example, a GAL might need to report to the court that a parent had been observed in an intoxicated state or that a teacher had described disturbing behavior by a child involved in the case. Such testimony might be presented to the court in a written report or during the hearing itself.

All of the cases involving GALs are heard before a judge and never before a jury. Attorney believes it would be a substantial hardship on the GAL program to forego dual appointments for attorney volunteers.

Is it a violation of the Revised Rules for an attorney to serve in the GAL Program as both the guardian ad litem and the attorney-advocate?

Opinion: *Yes, however, Rule 3. 7 of the revised Rules of Professional Conduct provides as follows:*

> *A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:*
>
> > *(1) the testimony relates to an uncontested issue;*
> > *(2) the testimony relates to the nature and value of legal services rendered in the case; or*
> > *(3) disqualification of the lawyer would work substantial hardship on the client.*

Ordinarily, an attorney who learns he will need to be a witness in his client's case should not act as advocate at trial nor should he seek the court's permission to do so unless he reasonably believes one of the above exceptions applies. A court has substantial discretion under this rule to permit an attorney to serve as advocate in a matter notwithstanding his role as witness. For example, where an attorney-advocate seeks appointment as GAL, a court may take into consideration the shortage of GALs and attorney-advocates in North Carolina in assessing whether denial of the appointment of GAL works a "substantial hardship" on the client.

3. Conclusion

In this Advisory, the Ethics Committee's initial answer is a bit confusing. While the Advisory indicates that such a dual role and submission of evidence would only be appropriate if the court, in its discretion, deems it appropriate, other things indicate that in general, this dual role is acceptable to the Bbar. First, it is noteworthy that the above Advisory was the third version and was revised to, among other things, delete original language that required the attorney to seek prior approval from the court before being appointed to serve in both roles. In addition, a Subcommittee Report on this Advisory states "one member of the subcommittee observed that the Act creating the GAL program contemplates a lawyer serving in both capacities and

therefore, as a matter of public policy there is an implicit recognition that an exception should be allowed to the prohibition on combining the roles of advocate and witness."[30]

Therefore, it seems that the State Bar Ethics committee finds it generally acceptable for an attorney to act as both attorney advocate and GAL in spite of the language in Advisory 2251. Given the language in the Advisory, however, it is wise for any attorney acting in both roles to make sure that the court is aware of the situation to ensure that the court has no problem with the attorney presenting evidence obtained firsthand.

§ 12.10 Professional Responsibility According to the GAL Guidelines for Best Practice

The following is an excerpt from Guardian ad Litem Guidelines for Best Practice (subsection IV.E.4) discussing professional responsibility for attorney advocates:

a. Maintains professional standards and ethics.

   (1) The vulnerability of the population of children served by the Program, as well as the Program's credibility and integrity in the legal and child advocacy communities, requires a high standard of ethics. The Attorney Advocate is expected to bring ethical conflicts and questions to the Guardian ad Litem Services Division Program Administrator and/or Associate Counsel for assistance with resolution.

   (2) Attorney Advocates are not appointed to cases in which their representation would violate the North Carolina Rules of Professional Conduct (RPC). (Rules 1.7; 1.9; and 1.10 of the Revised Rules of Professional Conduct of the North Carolina State Bar.)

   (3) Attorney Advocates follow all RPCs and withdraw from any case in which they would violate the RPCs by continuing representation.

   (4) Attorney Advocates zealously represent the best interests and protect the legal rights of their child-clients throughout the proceedings.

   (5) Attorney Advocates may withdraw from a case only if they can do so without violating the RPCs after consulting with the GAL District Administrator.

   (6) Attorney Advocates who interact on a regular basis, consult with each other, or are in any sense of the word colleagues, are considered part of a "law firm" for the purpose of applying the RPCs to conflicts.

b. Works and interacts appropriately for the situation with system players such as Department of Social Services, Mental Health, Office of Juvenile Justice, Clerks'

[30] Subcommittee Report, Ethics Advisory 2251, December 21, 1999.

Offices, and others to enhance Guardian ad Litem facilitation and cooperation.

c. Appears for scheduled court hearings throughout the proceedings. If unable to attend, ensures that the child-client will be represented by securing separate counsel and being responsible for compensation of that representation if necessary.

d. Offers and accepts constructive criticism regarding program operation and job duties.

e. Completes training related to Juvenile Law and the Guardian ad Litem Program as required by the Attorney Advocate contract.

f. Notifies the GAL District Administrator or designee if unable to fulfill contract obligations in regard to any hearing, and works with the District Administrator or designee to secure counsel for that hearing including offering compensation for coverage if necessary.

g. Provides complete, timely and accurate requests for payment by the Program as requested and attaches any documentation to payment requests as policy dictates.

h. In accordance with provisions of the North Carolina State Bar, retain client files for a minimum of six (6) years after the case is closed, unless arrangements have been made with GAL staff for the Program to retain the files.

28 N.C.A.C. 1A.0301 (2007)

.0301 DESIGNATED AGENCIES AUTHORIZED TO SHARE INFORMATION

The following agencies shall share with one another upon request, information in their possession that is relevant to any case in which a petition is filed alleging that a juvenile is abused, neglected, dependent, undisciplined or delinquent:

(a) The Department of Juvenile Justice & Delinquency Prevention;

(b) The Office of Guardian Ad Litem Services of the Administrative Office of the Courts;

(c) County Departments of Social Services;

(d) Area mental health developmental disability and substance abuse authorities;

(e) Local law enforcement agencies;

(f) District attorneys' offices as authorized by *G.S. 7B-3100*;

(g) County mental health facilities, developmental disabilities and substance abuse programs;

(h) Local school administrative units;

(i) Local health departments; and

(j) A local agency designated by an administrative order issued by the chief district court judge of the district court district in which the agency is located, as an agency authorized to share information pursuant to these Rules and the standards set forth in *G.S. 7B-3100*.

Authority *G.S. 7B-3100*;

28 N.C.A.C. 1A.0302 (2007)

.0302 INFORMATION SHARING AMONG AGENCIES

(a) Any agency that receives information disclosed pursuant to *G.S. 7B-3100* and shares such information with another authorized agency, shall document the name of the agency to which the information was provided and the date the information was provided.

(b) When the disclosure of requested information is prohibited or restricted by federal law or regulations, a designated agency shall share the information only in conformity with the applicable federal law and regulations. At the request of the initiating designated agency, the designated agency refusing the request shall inform that agency of the specific law or regulation that is the basis for the refusal.

Authority *G.S. 7B-3100*;

SELECTED REVISED RULES OF PROFESSIONAL CONDUCT
NORTH CAROLINA STATE BAR

North Carolina State Bar
(Current with amendments received through 4/1/2007)

RULE 1.1 COMPETENCE

A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to, or consultation or association with, another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that which is reasonably necessary under the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into, and analysis of, the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined, in part, by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Distinguishing Professional Negligence

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

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

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

(a) 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, or 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.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

Scope of Representation 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(e) 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).

RULE 1.3 DILIGENCE

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

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

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

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

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

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule .0122 of Subchapter 1B of the Rules of the North Carolina State Bar (providing for court appointment of a lawyer to inventory files and take other protective action to protect the interests of the clients of a lawyer who has disappeared or is deceased or disabled).

Distinguishing Professional Negligence

[6] Conduct that may constitute professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client diligently. Generally speaking, a single instance of unaggravated negligence does not warrant discipline. For example, missing a statute of limitations may form the basis for a claim of professional malpractice. However, where the failure to file the complaint in a timely manner is due to inadvertence or a simple mistake such as mislaying the papers or miscalculating the date upon which the statute of limitations will run, absent some other aggravating factor, such an incident will not generally constitute a violation of this rule.

[7] Conduct sufficient to warrant the imposition of professional discipline is typically characterized by the element of intent or scienter manifested when a lawyer knowingly or recklessly disregards his or her obligations. Breach of the duty of diligence sufficient to warrant professional discipline occurs when a lawyer consistently fails to carry out the obligations that the lawyer has assumed for his or her clients. A pattern of delay, procrastination, carelessness, and forgetfulness regarding client matters indicates a knowing or reckless disregard for the lawyer's professional duties. For example, a lawyer who habitually misses filing deadlines and court dates is not taking his or her professional responsibilities seriously. A pattern of negligent conduct is not excused by a burdensome case load or inadequate office procedures.

RULE 1.4 COMMUNICATION

(a) A lawyer shall;

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

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

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

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

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

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

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

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

Communicating with Client

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

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

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

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain

the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

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

Withholding Information

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

RULE 1.6 CONFIDENTIALITY OF INFORMATION

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

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

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

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

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

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

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

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

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

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

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

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

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

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

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

Authorized Disclosure

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

Disclosure Adverse to Client

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

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

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

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

[10] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the

disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

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

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

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

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

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

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

paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[17] A lawyer must act competently to safeguard information acquired during the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

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

Former Client

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

Lawyer's Assistance Program

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

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

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

(1) the representation of one client will be directly adverse to another client; or

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

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

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

General Principles

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

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

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

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

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

Identifying Conflicts of Interest: Directly Adverse

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

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

Identifying Conflicts of Interest: Material Limitation

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

Lawyer's Responsibilities to Former Clients and Other Third Persons

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

Personal Interest Conflicts

[10] The lawyer's own interest should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to

a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

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

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

Interest of Person Paying for a Lawyer's Service

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

Prohibited Representations

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

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

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

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the

meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

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

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

Consent Confirmed in Writing

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

Revoking Consent

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

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse

consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

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

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

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

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the

likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

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

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

Special Considerations in Common Representation

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

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

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

informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

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

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

Organizational Clients

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

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

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one or more of the clients in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent or the continued representation of the client(s) is not materially adverse to the interests of the former clients. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

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

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

may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

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

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1. 6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; It should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients, In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

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

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Whether information is "generally known" depends in part upon how the information was obtained and in part upon the former client's reasonable expectations. The mere fact that information is accessible through the public record or has become known to some other persons, does not necessarily deprive the information of its confidential nature. If the information is known or readily available to a relevant sector of the public, such as the parties involved in the matter, then the information is probably considered "generally known." See Restatement (Third) of The Law of Governing Lawyers, 111 cmt. d.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e).

With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

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

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

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1. 6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

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

(2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

Definition of "Firm"

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

Principles of Imputed Disqualification.

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

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

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

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

[6] Where the conditions of paragraph (c) are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.

[7] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(2) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, nor does it specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.
[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] Rule 1.10(d) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict

may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

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

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

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

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

(1) the representation will result in violation of law or the Rules of Professional Conduct;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

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

(1) withdrawal can be accomplished without material adverse effect on the interests of the client; or

(2) the client knowingly and freely assents to the termination of the representation; or

(3) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; or

(4) the client insists upon taking action that the lawyer considers repugnant, imprudent.-or contrary to the advice and judgment of the lawyer, or with which the lawyer has a fundamental disagreement; or

(5) the client has used the lawyer's services to perpetrate a crime or fraud; or

(6) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; or

(7) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(8) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; or

(9) other good cause for withdrawal exists.

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

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

[Adopted July 27, 1997. Amended February 27, 2003.]

Comment

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

Mandatory Withdrawal

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

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

Discharge

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

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

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special

effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1. 14.

Optional Withdrawal

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

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

Assisting the Client upon Withdrawal

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

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

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

RULE 3.2 EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent

lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

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 a 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.

[Adopted July 24, 1997. Amended February 27, 2003; Amended effective October 1, 2003; Amended Effective November 16, 2006.]

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled 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 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.

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) A lawyer shall not:

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

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

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

(A) in the course of official proceedings;

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

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

(D) as otherwise permitted by law;

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

(A) failing to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving opposing counsel timely notice of the intent not to comply;

(B) engaging in undignified or discourteous conduct that is degrading to a tribunal; or

(C) intentionally or habitually violating any established rule of procedure or evidence; or

(5) communicate with a juror or prospective juror after discharge of the jury if:

(A) the communication is prohibited by law or court order;

(B) the juror has made known to the lawyer a desire not to communicate; or

(C) the communication involves misrepresentation, coercion, duress or harassment.

(b) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a a juror or a prospective juror.

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

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

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

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

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

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

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

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

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

[8] All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if unrepresented. Ordinarily, an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel or, if there is none, to the opposing party. A lawyer should not condone or lend himself or herself to private importunities by another with a judge or hearing officer on behalf of the lawyer or the client.

[9] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for

subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[10] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

RULE 3.7 LAWYER AS WITNESS

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

(1) the testimony relates to an uncontested issue;

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

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

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

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

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

Advocate-Witness Rule

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

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

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other

witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

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

Conflict of Interest

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

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

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.

[Adopted July 24, 1997. Amended February 27, 2003.]

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(f). 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.

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.

[Adopted July 24, 1997. Amended February 27, 2003.]

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.

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iv) is domiciled in North Carolina;

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

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

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

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

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

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

[Adopted July 24, 1997. Amended February 27, 2003; Amended Effective November 16, 2006.]

Comment

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

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

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

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

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

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

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

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

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

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

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

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

SELECTED ETHICS OPINIONS

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RPC 14
October 24, 1986

County Attorney as Guardian Ad Litem

Opinion rules that county attorney who occasionally advises the Department of Social Services may not act as guardian ad litem in child abuse cases.

Inquiry:

Attorney C is county attorney for County X. As county attorney, C represents the interests of the county at the direction of the five –member Board of Commissioners, who employ him at their pleasure. Occasionally, Attorney C is asked informal questions by County X's Department of Social Services' director. Attorney C is not attorney of record for the Department of Social Services. Nor does he participate as its attorney in any proceedings officially involving the Department of Social Services. However, County X, of course, does provide funding for the operation of the Department of Social Services.

Attorney C considered becoming an appointed Guardian Ad Litem in cases involving abused and neglected children. In some of these cases, the interests of the Department of Social Services may appear to conflict with those of the abused or neglected children. May Attorney C ethically serve as Guardian Ad Litem for abused and neglected children while serving as county attorney for County X?

Opinion:

No. Although Attorney C does not provide extensive legal services for the Department of Social Services, he does advise them from time to time in his capacity as county attorney. Therefore, he does have a conflict of interest preventing him from serving as Guardian Ad Litem in any proceeding in which the Department of Social Services is or may be involved. *See* Rule 5.1; *see also* CPR 171. Nor can he obtain valid, informed consent from the two clients involved. Thus, the representation is barred.

RPC 61
July 13, 1990

Editor's Note: This opinion was originally published as RPC 61 (Revised).

Defense Counsel's Right to Interview Minor Prosecuting Witness

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.

Inquiry:

Vi, a seven-year-old child, is carried by her mother, Eve, to the Duke Pediatric Unit, where physical evidence of sexual abuse is diagnosed, and where Vi reports to the physician that her stepfather, Mo, is the perpetrator. Mo is arrested for felonious sex crimes against his young stepdaughter, Vi. Attorney X is appointed or retained to represent Mo. Eve, mother of Vi, expresses that she sympathizes with her husband, Mo, now in jail, and refuses to believe Vi's accusations. Eve brings Vi to Attorney X's office. May Attorney X interview Vi and obtain a statement without the knowledge or consent of the district attorney?

Opinion:

Yes. Rule 7.4(a) of the Rules of Professional Conduct only prohibits communication with a person known to be represented by counsel in regard to the matter in question. The prosecuting witness in a criminal case is not represented, for the purposes of the rule, by the district attorney. For that reason, the lawyer for the defendant need not obtain the consent of the district attorney to interview the prosecuting witness. Nor may the district attorney instruct the witness not to communicate with the defense lawyer. Rule 7.9(d). However, it would be unethical under Rule 7.4(a) for any attorney to question or interview Vi without first ascertaining whether a guardian ad litem or attorney had been appointed for Vi and, if so, without obtaining the consent of the guardian ad litem or attorney. The defense attorney must be careful to ensure that the prosecuting witness is not intimidated or induced to believe the attorney is disinterested or representing the interests of the witness. Rule 7.4(c). Reasonable efforts must be made immediately to correct any such misunderstanding if such becomes apparent. This is particularly important when the prosecuting witness is a child.

RPC 87
April 13, 1990

Interviewing Nonparty Witnesses

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.

Inquiry:

Attorney A has filed suit against Z in a civil matter. Attorney A wishes to contact X, who is a nonparty, potential witness. X has informed Attorney A that she has an attorney representing her respecting the civil matter about which Attorney A has sued Z. X is willing to discuss the civil matter with Attorney A, however. Once Attorney A learns that X has an attorney, must A obtain permission of X's attorney before discussing the civil matter with X further?

The express language of Rule 7.4 appears to be limited only to **parties** in a matter. The last sentence of the comment to the Rule, however, states that it applies to "**any person**, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." (emphasis added) Since this language is in the comment, rather than the Rule itself, does it represent only an aspirational standard, or is it obligatory?

Opinion:

Once Attorney A learns that X has an attorney, A must obtain the permission of X's attorney before discussing the civil matter with X. This is made clear by that portion of the comment to the Rule which is set forth in the inquiry. In this instance, as in most cases, the comment is intended to explain the Rule.

As a matter of policy, Rule 7.4(a) was designed to reduce the risk that an attorney/client relationship in regard to a particular matter might be subverted by the importunings of counsel representing other persons or entities whose interests in the same matter might be adverse. The attorney/client relationship enjoyed by a potential witness and his or her counsel is no less worthy of protection than that enjoyed by any named party and his or her lawyer.

RPC 119
October 18, 1991

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

Communication Between Opposing Parties

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

Inquiry:

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

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

Opinion:

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

for the attorney to use his or her client as an agent, or to use any other actual agent of the attorney, to communicate with the opposing represented party in violation of Rule 7.4(a).

This opinion supersedes CPR 150.

RPC 120
July 17, 1992

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

Reporting Child Abuse

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

Inquiry:

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

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

Opinion:

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

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

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

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

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

RPC 163
April 15, 1994

Editor's Note: This opinion was originally published as RPC 163 (Revised).

Request for Independent Guardian Ad Litem Where Existing Guardian Has Conflict

Opinion rules that an attorney may seek the appointment of an independent guardian ad litem for a child whose guardian has an obvious conflict of interest in fulfilling his fiduciary duties to the child.

Inquiry #1:

Attorney X represents A, a seventeen-year old high school student who was injured in a motor vehicle accident at the time that she was riding in an automobile being driven by her mother, M. There is a question as to whether the oncoming vehicle was negligent, whether M was negligent, or both. A's father, F, and M originally asked Attorney X to represent both M and A. Attorney X explained that there appeared to be a conflict of interest between M and A and that Attorney X would be willing to represent only A. M and F agreed. Attorney X entered into a fee agreement with F signing as guardian for A. No lawsuit has been filed at this time. After investigating the motor vehicle accident, Attorney X concluded that M was most likely negligent, although the driver/owner of the oncoming vehicle may also have been negligent. F left a telephone message for Attorney X indicating that he was no longer interested in pursuing A's claims since it appeared likely that M would be the major defendant and if a judgment was entered against her, it would raise F and M's automobile insurance rates. F did not respond to Attorney X's request that he come in to discuss the matter in person. Attorney X wrote to F explaining that M and F's insurance rates would go up if the driver of the other car made a claim against M and, therefore, making a claim on A's behalf would have no additional adverse effect on the family's insurance rates. In this letter, Attorney X told F that he believed that F and M had a moral as well as an ethical duty to A to proceed. Attorney X believes that A's parents are not acting in A's best interests. They appear to be protecting their own interests to the exclusion of A's interests. Having

advised F that Attorney X believes that he has an ethical and moral duty to proceed, is Attorney X's ethical duty satisfied?

Opinion #1:

Yes. However, on these particular facts, where F's only stated reason for failing to pursue his daughter's claim is the protection of the family's automobile insurance rates and no other concerns or contingencies have been indicated by F, it would be permissible for Attorney X to seek the appointment of an independent guardian ad litem to represent A's interests. This would be consistent with Attorney X's primary duty to represent the interest of A, who is the real party in interest. *See* CPR 15.

Inquiry #2:

May Attorney X seek the appointment of an independent guardian ad litem and proceed with filing suit after the independent guardian ad litem has reviewed the case and agrees that Attorney X should proceed?

Opinion #2:

Yes. *See* Opinion #1 above.

RPC 175
January 13, 1995

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

Reporting Child Abuse

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

Inquiry #1:

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

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

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

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

Does Rule 4 of the Rules of Professional Conduct require an attorney report his or her suspicion that a child is abused, neglected or dependent to the local Department of Social Services (DSS) if the information giving

rise to the suspicion was gained during a professional relationship with a client, which is not for the purpose of representing the client in an abuse, neglect or dependency case, and the information would otherwise be considered confidential information under Rule 4?

Opinion #1:

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

The rule clearly places the decision regarding the disclosure of a client's confidential information within the lawyer's discretion. While that discretion should not be exercised lightly, particularly in the face of a statute compelling disclosure, a lawyer may in good faith conclude that he or she should not reveal confidential information where to do so would substantially undermine the purpose of the representation or substantially damage the interests of his or her client. See Rule 7.1(a)(3) (which prohibits actions by a lawyer which will intentionally "[p]rejudice or damage his client during the course of the professional relationship…"). For example, a lawyer may be unwilling to comply with the child abuse reporting statute because he or she believes that compliance would deprive a client charged with a crime of the constitutional right to effective assistance of counsel. Under such circumstances, where a lawyer reasonably and in good faith concludes that revealing the confidential information will substantially harm the interests of his or her client and, as a matter of professional responsibility, declines to report confidential client information regarding suspected child abuse or neglect to DSS, the failure to report will not be deemed a violation of Rule 1.2(b) and (d) (respectively defining misconduct as committing a criminal act and engaging in conduct prejudicial to the administration of justice) or Rule 7.2(a)(3) (prohibiting a lawyer from concealing that which he is required by law to reveal). It is recognized that the ethical rules may not protect a lawyer from criminal prosecution for failure to comply with the reporting statute.

Inquiry #2:

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

Opinion #2:

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

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

RPC 199
January 13, 1995

Ethical Responsibilities of Court-Appointed Lawyer

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

Inquiry #1:

Attorney A was appointed by a district court judge to serve as lead counsel in defending an indigent defendant ("Defendant") against a charge of first-degree murder. Attorney A is licensed to practice in North Carolina but has limited experience in representing criminal defendants. He practices law in a rural area without a sufficient library and other resources appropriate for the ongoing legal research necessary for a capital case. Attorney A believes he is not competent to represent a client in a capital murder case. He has never been on any court list for appointment to represent indigent defendants.

Attorney A filed a motion to withdraw with the district court which advised the court that he did not believe he was competent to provide legal representation in such a matter. After a hearing, the district court concluded that Attorney A is competent and denied the motion to withdraw. Attorney A in good faith still believes that he is not competent to represent Defendant. Is it ethical for Attorney A to take additional steps to legally challenge the appointment?

Opinion #1:

Yes. Rule 6 of the Rules of Professional Conduct provides that a lawyer shall not handle a legal matter that he knows he is not competent to handle unless he can associate an experienced lawyer to assist him. If a lawyer who is appointed to represent an indigent criminal defendant honestly and reasonably concludes that he is not competent to represent the client, at a minimum, he has a duty to advise the court of his perceived lack of competency, as Attorney A did in the preceding inquiry. If the court determines that the lawyer is competent but the lawyer in good faith continues to believe that he is not competent and his representation would be harmful to the client's interests, it is not unethical for the lawyer to challenge the appointment by appropriate legal procedures, including but not limited to, making a motion to have the appointment set aside in superior court, filing a petition for *certiorari* with the appellate courts or appealing a contempt ruling for refusal to serve. If the lawyer controverts his appointment through such legal proceedings, he must be acting in good faith and not merely to avoid the inconvenience or expense of the appointment. *See* Rule 7.2(a)(1).

Although the lawyer has an initial duty to advise the court that he believes he is not competent to handle a matter, if the court nevertheless determines that the lawyer is competent and refuses to release the lawyer from the appointment, it is not unethical for the lawyer to proceed with the representation on this basis without further challenge to the appointment.

Inquiry #2:

Is it ethical for Attorney A to refuse to serve as appointed counsel for Defendant and accept the court's sanction?

Opinion #2:

Yes, if Attorney A has unsuccessfully challenged the appointment through reasonably available legal procedures and he continues, as a matter of professional responsibility, to believe that he is not competent to serve as legal counsel to Defendant, it is not unethical for Attorney A to refuse to serve and to accept the court's sanction. *See* Rule 6(a)(1).

Inquiry #3:

Would the responses to inquiry #1 or inquiry #2 be different if Attorney A is appointed to assist another experienced lawyer who will serve as lead counsel?

Opinion #3:

Yes. Whether Attorney A is appointed lead counsel or appointed to assist an experienced lawyer would be relevant to the assessment of Attorney A's competency to represent Defendant. As noted in Rule 6, a lawyer may consider himself competent to handle a legal matter he would otherwise not be competent to handle if he associates an experienced lawyer to assist him with the matter. If Attorney A is serving as "second chair" to an experienced lawyer, it would not be reasonable for him to conclude that he is not competent to handle the matter.

Inquiry #4:

Attorney A's malpractice insurer has expressed concern that Attorney A's representation of Defendant in the capital case may present an unreasonable risk of exposure to a malpractice claim, particularly since it would require Attorney A to practice in an area outside his chosen areas of concentration. If Attorney A represents Defendant, he believes he should make a record that will document his own lack of competence in order to preserve a due process or other constitutional challenge to the state system of appointing attorneys for indigent defendants charged with capital crimes. By so doing, Attorney A fears he may be building a civil case against himself for malpractice if Defendant is convicted of first-degree murder or some lesser charge. Does Attorney A have a conflict of interest?

Opinion #4:

No. The fact that Attorney A's malpractice insurer has expressed concern regarding Attorney A's representation of Defendant does not create a disqualifying conflict of interest because Attorney A's responsibility to his client should not be limited or affected by his malpractice carrier's concern. *See* Rule 5.1(b). If Attorney A accepts the appointment of the court and proceeds with the representation, Attorney A has a duty to zealously represent his client to the best of his ability. *See* Canon VII. This includes taking whatever steps are necessary to make himself competent to handle the case including, but not limited to, attempting to associate an experienced lawyer or seeking the court appointment of an experienced lawyer to assist him, educating himself about the relevant law, utilizing available resources such as the resource center in the office of the appellate defender (which provides assistance to counsel for those accused of capital crimes), traveling to an adequate law library, etc. Attorney A may not pursue a course of conduct that will intentionally prejudice or damage Defendant during the course of the professional relationship. *See* Rule 7.1(A)(3). This would include approaching the representation from the perspective that his job is to document his own incompetence.

If Attorney A represents Defendant to the best of his ability, but concludes that he may have committed an error or errors that were prejudicial to Defendant's case, he must advise Defendant that mistakes were made that may have been harmful to Defendant's case and that it is in Defendant's best interest to consult independent counsel regarding his legal rights. *See* Rule 6(b)(2)(1) and (2).

Note: Whether a lawyer can be required, over his objection, to represent a criminal defendant if he has not voluntarily placed his name on a list for court appointments is a legal issue which the Ethics Committee has no authority to address. Moreover, no opinion is expressed herein as to the constitutional propriety of appointing inexperienced lawyers to represent indigent criminal defendants in capital cases.

RPC 208
July 21, 1995

Avoiding Offensive Trial Tactics

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.

Inquiry #1:

Attorney A, who represents the defendant in a civil matter, did not receive the notice of hearing from opposing counsel, Attorney X, because Attorney A's address had changed. At the civil district court calendar call for the first day of the session, when hearing dates are set, Attorney A did not appear nor did his client. Attorney X asked the court to set the matter for trial at the earliest possible date. The case was set for trial two days later. Neither the judge nor Attorney X inquired as to whether Attorney A had received the notice of hearing nor did they attempt to ascertain whether Attorney A was prevented from appearing at the calendar call by an emergency or otherwise. Attorney L, who was at the calendar call on an unrelated matter and who is not associated with either Attorney A or Attorney X, subsequently advised Attorney A of the trial date. Under these circumstances, before asking the court to set the case for trial, must Attorney X verify that the notice of hearing was actually received and that there was no emergency or other problem preventing the appearance of Attorney A or his client at the calendar call?

Opinion #1:

No, Attorney X is not required to verify that the notice of hearing was actually received by the opposing lawyer. However, Rule 7.1(a)(1) of the Rules of Professional Conduct provides that a lawyer does not violate the duty to zealously represent a client

> …by acceding to reasonable requests by opposing counsel which do not prejudice the rights of his 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.

Avoiding offensive tactics and treating others with courtesy includes not taking advantage of the opposing party or the opposing counsel's failure to respond to a notice of hearing when there has been no prior lack of diligence or responsiveness on the part of the opposing counsel. Under these circumstances, as a matter of professionalism, Attorney X should make a reasonable effort to ascertain Attorney A's whereabouts or the reason for his absence before asking the judge to schedule the hearing at the earliest possible date.

Inquiry #2:

Does the court have a duty to verify that Attorney A has received notice of the hearing?

Opinion #2:

Judges are subject to the Code of Judicial Conduct and the regulation of the Judicial Standards Commission. Therefore, no opinion is expressed to the ethical duty of a judge in this situation.

Inquiry #3:

Do the other lawyers at the calendar call have a responsibility to verify that Attorney A has received notice of the hearing or that there was no emergency or other problem preventing Attorney A's appearance at the hearing?

Opinion #3:

No. However, as a matter of professionalism, lawyers are encouraged to treat other practitioners with courtesy and to assist other practitioners in meeting the duty of competent representation.

RPC 237
October 18, 1996

Ex Parte Communications with Judge

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

Inquiry #1:

Attorney A represented Wife in negotiations on a separation agreement from Husband. Husband was represented by a lawyer in Attorney B's law firm. A separation agreement, giving Wife custody of the minor child of the marriage, was executed and incorporated by reference in the divorce decree. The case was heard by Judge J.

Several years later, Attorney B filed a motion on behalf of Husband for a change of custody. Attorney B would like to contact Judge J in chambers to ask Judge J to sign an *ex parte* order changing the custody of the child to Husband. Without sending Attorney A a copy of the motion or notifying Attorney A of his intentions, may Attorney B communicate with Judge J outside the course of the official proceedings for the purpose of asking Judge J to sign the *ex parte* order?

Opinion #1:

No. Rule 7.10(b) prohibits a lawyer representing a client in an adversary proceeding from communicating as to the merits of the cause with a judge before whom the proceeding is pending if the communications will occur outside official proceedings. Rule 7.10(b)(3) does permit oral communications with a judge provided the opposing party is given adequate notice. Although Rule 7.10(b)(4) also permits *ex parte* communications with a judge about the merits of a cause if authorized by law, such communications must be specifically authorized by statute, court rule, or other law. *See*, e.g., G.S. §50B-2(c) (authorizing *ex parte* orders in domestic violence actions); G.S. §50-13.5(d)(3) (authorizing *ex parte* custody orders when a child is exposed to substantial risk of injury, abuse or abduction); and Rule 65 of the Rules of Civil Procedure (*ex parte* temporary restraining orders permitted).

Inquiry #2:

Does Attorney B have a duty to give Attorney A notice of oral or written communications with Judge J outside the course of official proceedings if Attorney A is the attorney of record?

Opinion #2:

Yes. *See* opinion #1. If the communications are in writing, Attorney B must promptly deliver a copy of the written communication to Attorney A. Rule 7.10(b)(2).

Inquiry #3:

If Attorney B asks the judge in chambers to issue a show cause order directing Husband to appear and show cause at some later date, may Attorney B communicate with Judge J, outside the course of official proceedings in the cause, without notifying Attorney A?

Opinion #3:

No, if Attorney B will communicate with Judge J as to the merits of the cause. However, if Attorney B submits only the written pleadings necessary for the issuance of a show cause order and does not communicate with the judge as to the merits of the cause, he may communicate with the judge in this manner provided he promptly delivers a copy of the pleadings and order to Attorney A. *See* Rule 7.10(b)(2).

Inquiry #4:

Does a lawyer have a duty to examine the court record to determine whether there is an attorney of record for the opposing party before seeking an order from a judge outside the course of official proceedings?

Opinion #4:

A lawyer should make reasonable inquiry, including an examination of the court record, to determine if there is an attorney for the opposing party. Although there may be no attorney of record, Rule 7.10(b) requires notification to an unrepresented opposing party prior to communicating orally with the judge as to the merits of the cause.

RPC 246
April 4, 1997

Duty of Confidentiality Owed to Prospective Client

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

Inquiry:

In 1993, Attorney A represented Mr. And Ms. X on personal injury claims arising out of an automobile accident. In September 1996, Mr. X was seriously injured, as were three passengers in his automobile, in a single car accident. Mr. X contends that the accident was caused by the driver of another automobile who forced him off the road and then left the scene of the accident. While Mr. X was in the hospital, Ms. X went

to Attorney A to retain him to represent Mr. X on his claim for injuries arising out of the accident. Attorney A interviewed Ms. X, discussed the facts of the case with her, and obtained confidential information from her concerning the cause of the accident. Attorney A kept a photocopy of the accident report Ms. X brought to him. At the end of the interview, Attorney stated that he believed Mr. X would be considered the party at fault and he did not want to represent Mr. X.

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

Opinion:

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

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

RPC 249
April 4, 1997

Communication with a Child Represented by GAL and Attorney Advocate

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.

Inquiry #1:

Joey is ten years old. He lives with his mother and her boyfriend. The Department of Social Services (DSS) substantiated numerous abuse allegations against the mother for improper discipline and beatings. After no improvement in the mother's behavior, DSS filed a neglect and abuse petition and received a nonsecure custody order. Pursuant to G.S. §7A-586(a) of the Juvenile Code, the court appointed a guardian ad litem and an attorney advocate to represent the interests of Joey. G.S. §7A-586(a) provides for the appointment of a guardian ad litem (GAL) for every child alleged to be abused or neglected. The statute states that a GAL who is not an attorney shall be appointed an attorney to assure the protection of the child's legal rights through the dispositional phase of the proceedings and after disposition when necessary to further the best interests of the child. The GAL and the attorney advocate have standing to represent the juvenile in all actions under the subchapter.

The attorney for Joey's mother, Attorney M, would like to interview Joey without informing the GAL or the attorney advocate. May he do so?

Opinion #1:

Rule 7.4(1) provides that, during the course of his or her representation of a client, a lawyer is prohibited from communicating or causing another to communicate about the subject of the representation with a party 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. Joey is represented by an attorney, and the attorney advocate's consent must be obtained prior to any communication by Attorney M with Joey.

Inquiry #2:

Is the permission of the attorney for DSS sufficient to allow Attorney M to interview Joey without the consent of the attorney advocate?

Opinion #2:

No, the attorney for DSS does not represent Joey.

Inquiry #3:

The district attorney intends to prosecute the mother for child abuse. The district attorney would like to interview Joey without informing or obtaining the consent of the GAL or the attorney advocate. May the district attorney interview Joey under these circumstances?

Opinion #3:

No. The comment to Rule 7.4 states, "This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." *See also* RPC 87.

Inquiry #4:

May the district attorney instruct a sheriff's deputy to interview Joey without informing or obtaining the consent of the GAL or the attorney advocate?

Opinion #4:

No, an attorney may not instruct an agent to do that which the attorney cannot do. *See* Rule 3.3.

Inquiry #5:

May the attorney for DSS interview Joey without informing or obtaining consent of the GAL or the attorney advocate?

Opinion #5:

No. *See* opinion #1 above.

Inquiry #6:

If the GAL is also an attorney, would any of the above opinions be different?

Opinion #6:

No. If an attorney advocate was appointed, the GAL is not acting in the capacity of an attorney for the juvenile. Rule 7.4(d) requires the consent of the attorney representing the client prior to direct communication with the client.

Inquiry #7:

If the court appoints a GAL for Joey but does not appoint an attorney advocate, may the attorney for Joey's mother, the district attorney, or the attorney for DSS interview Joey without the consent of the GAL?

Opinion #7:

No, the consent of the GAL must be obtained before communicating with Joey. This is consistent with the policy and purpose behind G.S. §71-586. *See also* RPC 61.

Inquiry #8:

Would the preceding opinions be different if a guardian ad litem were appointed pursuant to G.S. §1A-1, Rule 17, which provides for the appointment of a guardian ad litem for infants or incompetent persons who are parties in civil actions?

Opinion #8:

No, if the GAL has an attorney for the matter, opposing counsel may not communicate with the GAL or the minor without the consent of the attorney. Rule 7.4(1). Moreover, if the guardian ad litem is not represented by an attorney in the matter, RPC 61 still prohibits communications with the minor unless the consent of the guardian ad litem is obtained.

[Reprinted with Permission of the North Carolina State Bar [32]]

97 Formal Ethics Opinion 3
October 24, 1997

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

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

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

Inquiry #1:

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

Opinion #1:

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

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

Inquiry #2:

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

Opinion #2:

No.

Inquiry #3:

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

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

Opinion #3:

Yes. *See* opinion #1 above.

97 Formal Ethics Opinion 4 (revised)

April 17, 1998

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97 Formal Ethics Opinion 5
January 16, 1998

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

Ex Parte Submission of Proposed Order to Judge

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

Inquiry #1:

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

After receiving the MAR, Attorney C prepares an answer and proposed order. The proposed order decides numerous contested factual and legal issues in the state's favor, dismisses the MAR, and includes space for the judge's signature. Attorney B delivers the MAR, the unfiled answer, the proposed order, and documents

from the court file to Superior Court Judge D in chambers. Judge D has had no previous involvement in the case. Attorney B offers to make any modifications to the proposed order requested by Judge D.

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

Opinion #1:

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

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

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

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

Inquiry #2:

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

Opinion #2:

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

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

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98 Formal Ethics Opinion 12
July 16, 1998

Ex Parte Communication with a Judge

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

Inquiry #1:

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

Opinion #1:

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

Inquiry #2:

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

Opinion #2:

Yes, provided she fully informs the judge of the reason for her *ex parte* communication and she gives the judge an opportunity to determine whether he will hear the matter *ex parte*. The disclosures to the court

should include the following: (1) that the lawyer is about to engage in an *ex parte* communication; (2) why it is necessary to speak to the judge *ex parte*; (3) the authority (statute, caselaw or ethics rule or opinion) that permits the *ex parte* communication; and (4) the status of attempts to notify the opposing counsel or the opposing party if unrepresented. If these disclosures are made, the judge can decide whether an *ex parte* discussion with the lawyer is appropriate.

Inquiry #3:

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

Opinion #3:

Yes.

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98 Formal Ethics Opinion 13
July 23, 1999

Written Communications with a Judge or Judicial Official

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. However, 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.

2003 Formal Ethics Opinion 16

July 16, 2004

Representation of Absent Respondent in Dependency Proceeding

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.

Inquiry:

At an initial non-secure custody proceeding, Attorney is appointed by the court to represent Mother who is a respondent in a proceeding brought by the local department of social services to determine whether Mother's minor son is an abused, neglected, or dependent juvenile. Another lawyer is appointed to represent Father. Although Mother is present at the time of the appointment, she and Father subsequently disappear. At the time of the appointment, Attorney had minimal conversation with Mother and he does not know what position she would take in the proceedings.

"Dependent juvenile" is defined in the Juvenile Code, G.S. 7B-101(9), as "[a] juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or

supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement."

Attorney knows that the parents are missing and, therefore, there is no parent responsible for the son's care. May Attorney advocate for an adjudication of dependency in the proceeding?

Opinion:

No. As stated in Rule 1.2(a) of the Rules of Professional Conduct, "…a lawyer shall abide by a client's decisions concerning the objectives of representation…." Comment [1] adds that the rule "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." If the client is not present to give instructions to the lawyer as to the objectives of the representation, the lawyer may not substitute his own objectives even if the facts appear to support a particular position.

A lawyer is required to make a motion to withdraw when the client has disappeared and the lawyer is ignorant of the client's objectives for the litigation. RPC 223. Such a motion is appropriate only after the lawyer has used reasonable diligence to locate the client but is unsuccessful. *Id*.

If Attorney's motion to withdraw is denied, Attorney may participate in the proceedings to the limited extent that such participation is consistent with the known objectives of the missing client and the court's order of appointment. However, Attorney may not advocate for any particular position or outcome in the proceeding and Attorney does not have a duty to file an appeal.

2004 Formal Ethics Opinion 11

January 21, 2005

Lawyer Appointed as Guardian-ad-Litem

Opinion explores the role of a lawyer who is appointed guardian-ad-litem for respondent parent with diminished capacity.

Inquiry #1:

Attorney A is appointed guardian-ad-litem (GAL) for a respondent parent with diminished capacity in a Termination of Parental Rights (TPR) action. The parent is indigent and, pursuant to N.C. Gen. Stat. A7 7B-1111(a)(6), has also been appointed legal counsel, Attorney B. In *In re Shepard*, 03-212 (N.C. App. filed January 20, 2004), the court of appeals held that, in a TPR action based upon parental "incapability," a parent's GAL, who is a lawyer but is not providing legal representation to the parent, "may testify as to the ward's parental capability, and ultimately against the interest of their ward as to the termination hearing." *Id*. at 1. The basis for the court's decision stems from the observation that the North Carolina State Bar's Rules of Professional Conduct do not appear to govern the conduct of a GAL who acts "purely as a guardian and not an attorney." *Id*. at 8. The court also suggested that the role of the GAL is to ensure that the parent receives procedural due process by helping to explain and execute his or her rights.

Is a lawyer, appointed solely as GAL for the parent, governed by the Rules of Professional Conduct?

ETHICS AND POLICY ISSUES IN GUARDIAN AD LITEM REPRESENTATION

Opinion #1:

The court in *Shepard* recognized that some of the Rules of Professional Conduct create duties that are owed only in the professional client-lawyer relationship. For example, the confidentiality rule only applies when a lawyer has a client-lawyer relationship or has agreed to consider the formation of one. Scope, cmt. [4]. Conversely, there are other rules that apply although a lawyer is acting in a non-professional capacity. For example, a lawyer who commits fraud in a business transaction has violated Rule 8.4 by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Preamble, cmt. [3].

The GAL does not have a client-lawyer relationship with the parent, and therefore, would not be governed by the Rules of Professional Conduct relating to duties owed to clients. *See* RPC 249. Notwithstanding the above, it may be prudent for the GAL to explain fully to the parent, to the extent possible, his or her role in the litigation, specifically that the GAL is not acting as the parent's lawyer.

Inquiry #2:

If the court appointed a lawyer to serve both as lawyer for the parent and as the parent's GAL, do the Rules of Professional Conduct require that the lawyer keep all communications confidential?

Opinion #2:

Yes. A lawyer serving as both lawyer and GAL for a parent in a TPR action must comply with Rule 1.6 of the Rules of Professional Conduct. Rule 1.6 generally prohibits a lawyer from revealing information acquired during the professional relationship unless the client gives informed consent or one of the exceptions allowing disclosure applies.

Inquiry #3:

If the court appoints the same lawyer as counsel for the parent and as the parent's GAL, does the lawyer have a conflict of interest?

Opinion #3:

The *Shepard* court acknowledged that there exists little guidance on the role or specific duties of a GAL, but suggested that the role of the GAL is guardian of the parent's procedural due process. *Shepard*, at 7. If the role of the GAL is limited to ensuring procedural due process for the parent by helping to explain and execute his or her rights, then this role is consistent with the role of a lawyer representing a client. Therefore, there is no conflict of interest in undertaking representation as both GAL and lawyer. The Ethics Committee takes no position at this time as to whether the GAL has additional responsibilities or whether an expanded role could result in a conflict of interest.

Inquiry #4:

Assume the parent has separate appointed counsel. Under *Shepard*, how can the parent's GAL perform his duties with competence if the parent has been advised by her lawyer that she should not share confidential information with the GAL?

Opinion #4:

The performance of the GAL's duties, as distinct from a lawyer's duties to a client, is not a matter upon which the Ethics Committee can opine.

Inquiry #5:

Assume the facts in Inquiry #4. Can the parent's lawyer ever advise the client to confer candidly with the GAL under the Rules of Professional Conduct?

Opinion #5:

Yes. In light of the *Shepard* decision, a lawyer should inform the parent, to the extent possible, that the GAL does not owe the parent a duty of confidentiality and that the GAL could be called upon to testify as to parental capability. Then, the lawyer must analyze each case and determine whether the parent's full disclosure to the GAL will accomplish the goals of the representation. If the lawyer believes full disclosure is appropriate under the circumstances, he or she may advise the client that he may be candid with the GAL. Likewise, a lawyer may reasonably conclude that full disclosure would not be in the parent's interests and may advise the client against it.

2006 Formal Ethics Opinion 10

July 21, 2006

Safeguarding Confidential Health Information of Clients and Third Parties

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

Inquiry #1:

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) required the US Department of Health and Human Services to establish a set of national standards for the protection of certain health information including identifiable medical records of individual patients. Pursuant to this mandate, the US Department of Health issued Standards for Privacy of Individually Identifiable Health Information (the Privacy Rule) which establishes national standards for the protection of protected health information. The Privacy Rule applies to health plans, health care clearinghouses, and to any health care provider who transmits health information in electronic form in connection with certain specified transactions.[1]

Lawyers frequently obtain medical records and health information of both clients and opposing parties in conjunction with the prosecution or defense of medical malpractice and personal injury cases and other representations involving questions of injury or disability. It does not appear that lawyers or law firms are covered by the Privacy Rule.[2] However, in light of the public policy favoring the protection of sensitive medical information that is manifested by the Privacy Rule, what actions should a lawyer take to safeguard the health information of a client from disclosure to unauthorized persons?

Opinion #1:

The duty of confidentiality set forth in Rule 1.6 of the Rules of Professional Conduct prohibits a lawyer from revealing information acquired during the professional relationship unless the client gives informed consent, the disclosure is impliedly authorized to carry out the purpose of the representation, or the disclosure is otherwise permitted by the Rules. Comment [3] to Rule 1.6 observes that the confidentiality rule applies "not only to matters communicated in confidence by the client, but also to all information acquired during the

representation." Therefore, health information obtained during the representation of a client is clearly covered by the duty of confidentiality.

Neither Rule 1.6 nor the comment to the rule provide guidance on the standard of care that a lawyer must use in fulfilling the duty of confidentiality. However, in the absence of a specific mandate, a lawyer is generally expected to use reasonable care in fulfilling his or her duties under the Rules. *See* Rule 0.2, Scope ("The Rules of Professional Conduct are rules of reason."). For example, RPC 133 states that a law firm is not required to shred waste paper that includes confidential client information and may recycle the waste paper provided the lawyer determines that

> those persons or entities responsible for the disposal of waste paper employ procedures which effectively minimize the risk that confidential information might be disclosed...[and] custodial personnel…are conscious of the fact that confidential information may be present in waste paper products and are aware that the attorney's professional obligations require that there be no breach of confidentiality in regard to such information.

Similarly, RPC 215 provides that a lawyer may communicate confidential client information over a cellular or cordless telephone, despite the risk of interception, because the duty of confidentiality "does not require that a lawyer use only infallibly secure methods of communication." Instead, the lawyer "must use reasonable care to select a mode of communication that, in light of the exigencies of the existing circumstances, will best maintain any confidential information that might be conveyed in the communication." *Id.; accord* RPC 133 (some client information may be so sensitive that the duty can only be satisfied by shredding waste paper). Thus, the standard of care for safeguarding client confidential information is reasonable care as dictated by the circumstances.

In determining the degree of protection and care with which a client's health information is handled, the public policy of providing substantial protection for the privacy of such information which is expressed in the Privacy Rule should inform the actions of lawyers and law firms, particularly with regard to the disposal of such records.

Inquiry #2:

Lawyers may receive the health information of an opposing party or other third party in conjunction with the representation of a client. What duty does a lawyer have to protect the privacy of the health information of a third party?

Opinion #2:

Any information acquired during the course of a representation, including information of third parties, is confidential and may only be disclosed as authorized by Rule 1.6. Nevertheless, even if disclosure is permitted under the Rules, lawyers are encouraged to respect the privacy of third parties and to handle and dispose of health information of third parties with the same care that would be used with regard to the health information of a client.

It goes without saying that if a lawyer determines that health information in his or her possession is subject to the requirements of the Privacy Rule, the lawyer must follow the mandates of the rule with regard to the retention, transmission, or disposal of the health information.

Endnotes

1. *Summary of the HIPAA Privacy Rule*, OCR Privacy Brief, US Department of Health and Human Services, Office for Civil Rights. http://www.hhs.gov/ocr/privacysummary.pdf
2. *Id.*

2006 Formal Ethics Opinion 19

January 19, 2007
Communication by Guardian ad Litem with Represented Person

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

Inquiry #1:

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

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

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

Opinion #1:

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

Inquiry #2:

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

Opinion #2:

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

Inquiry #3:

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

Opinion #3:

No.

ETHICS AND POLICY ISSUES IN GUARDIAN AD LITEM REPRESENTATION

SELECTED ETHICS DECISIONS

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ED 99-5 Communications with a Minor Absent Consent of the Minor's Attorney-Advocate

Inquiry #1:

Six years ago, Attorney a was appointed attorney-advocate for a nine-year-old boy through the Guardian ad Litem program. *See* N.C.G.S sec. 7A-586. For the last several years, Attorney A has also been the boy's appointed guardian ad litem. In this capacity, she has represented the boy's best interests in all legal proceedings including the termination of his mother's parental rights.

Unbeknownst to Attorney a. Attorney B recently interviewed the boy extensively relative to the boy's expressed desires in the juvenile proceeding. In addition to interviewing the boy, Attorney B also called a press conference and included a press release in which he divulged confidential information about the boy including the boy's history of abuse. Attorney B did not obtain the consent of Attorney A to release the information. Attorney B sought to be appointed to represent the boy but the request was denied.

May a lawyer interview a minor without the knowledge or consent of the minor's attorney-advocate?

Opinion #1:

Yes, unless law or court order prohibits the communication.

Rule 4.2 of the revised Rules of Professional Conduct does not prohibit a lawyer who does not have a client in a particular matter from consulting with a person who, though represented, seeks another opinion. *See* Rule 4.2, Cmt. [1]. Moreover, Rule 1.14(a) permits a lawyer to "maintain a normal client-lawyer relationship with a client" although "[the] client's ability to make adequately considered decisions in connection with the representation is impaired. . . because of minority. . . ." Nevertheless, if a minor lacks the ability to consent to representation as a matter of law or the court has ordered that there be no communications with the minor without the consent of the attorney-advocate, the lawyer may not communicate with the minor in the context of a client-lawyer relationship without that consent.

Inquiry #2:

May Attorney B reveal confidential information of the boy without the consent of the Attorney A?

Opinion #2:

No, unless allowed by one of the exceptions to the duty of confidentiality and such disclosure is not otherwise prohibited by court order or law. If a court order or law prohibits the disclosure of confidential information of the boy relative to the abuse and negligence case without the consent of the attorney-advocate, Attorney B may not reveal the information without that consent. If the consent of the attorney-advocate is not required, Attorney B may reveal the boy's confidential information only if permitted to do so by the Revised Rules of Professional Conduct. 98 Formal Ethics opinion 18. Having entered into a client-lawyer relationship with the boy, Attorney B may only reveal confidential information if one of the following applies: (1) disclosure is impliedly authorized by the client as necessary to carry out the goals of the representation; (2) the client consents to the disclosure; (3)

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disclosure is permitted under the Revised Rules of Professional Conduct or required by law or court order; or (4) the lawyer reasonably believes that disclosure is necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.

Whether disclosure is authorized under Rule 1.6(d) depends upon the facts of each case. However, before revealing confidential information of a minor, even with the minor's implied or expressed consent, a lawyer must consider the minor's ability to make adequately informed decisions relative to the representation and should examine the minor's privacy interests carefully, particularly with regard to revealing confidential information to the media.

ETHICS AND POLICY ISSUES IN GUARDIAN AD LITEM REPRESENTATION

SELECTED ETHICS ADVISORIES

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EA 2251 Lawyer as witness

Inquiry: The North Carolina Guardian Ad Litem (GAL) Program is currently piloting a new pro bono project through which attorneys in selected counties may volunteer to serve as legal advocates for abused, neglected, and dependent children. The GAL Program has a significant shortage of volunteers to serve as attorneys.[1] In addition, the GAL Program needs volunteers to serve as guardians ad litem. Therefore, the program would like to have any willing attorney-advocates also appointed as the GALS on their cases.

Often GALs present evidence obtained firsthand. For example, a GAL might need to report to the court that a parent had been observed in an intoxicated state or that a teacher had described disturbing behavior by a child involved in the case. Such testimony might be presented to the court in a written report or during the hearing itself.

All of the cases involving GALs are heard before a judge and never before a jury. Attorney believes it would be a substantial hardship o the GAL program to forego dual appointments for attorney volunteers.

Is it a violation of the Revised Rules for an attorney to serve in the GAL Program as both the guardian ad litem and the attorney-advocate?

Opinion: Yes, however, Rule 3.7(a) of the Revised Rules of Professional conduct provides as follows:

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

(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client.

Ordinarily, an attorney who learns he will need to be a witness in his client's case should not act as advocate at trial nor should he seek the court's permission to do so unless he reasonably believes one of the above exceptions applies.

A court has substantial discretion under this rule to permit an attorney to serve as advocate in a matter notwithstanding his role as witness. For example, where an attorney-advocate seeks appointment as GAL, a court may take into consideration the shortage of GALs and attorney-advocates in North Carolina in assessing whether denial of the appointment of GAL works a "substantial hardship" on the client.

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[1] In fiscal year 1997, the GAL program's 89 paid attorney-advocates represented 15,582 child victims statewide. This is an attorney-client ration of 1:175. In some urban areas, the ratio was 1:900.

EA 2073 Communicating with a Represented Person

Inquiry #1 G.S. Section 7A-586 of the Juvenile Code provides for the appointment of a guardian ad litem (GAL) for every child alleged to be abused or neglected. The section states that a GAL who is not an attorney shall be appointed an attorney to assure the protection of the child's legal rights through the dispositional phase of the proceedings and after disposition when necessary to further the best interests of the child. The section also provides that the GAL and the attorney advocate have standing to represent the juvenile in all actions under the subject chapter.

Some of the duties of the GAL, as defined in G.S. 7A-586, include: investigating the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; facilitating, when appropriate, the settlement of disputed issues; exploring options with the judge at the dispositional hearing; and protecting and promoting the best interests of the juvenile.

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

Opinion #1: No. The prohibition on communications with a represented opposing party found in Rule 7.4 of the Rules of Professional Conduct does not apply to Guardian Ad Litem Y because the Rules of Professional Conduct do not apply to nonlawyers.

Inquiry #2: Would the answer to inquiry #1 be different if Guardian Ad Litem Y is an attorney but is performing the role of guardian ad litem solely and is not performing the role of the attorney advocate?

Opinion #2: Guardian Ad Litem Y may communicate with the mother without obtaining the consent of the mother's attorney. Rule 7.4 prohibits communications with a represented opposing party "[d]uring the course of [the lawyer's]representation of a client." If Guardian Ad Litem Y is not acting as the attorney advocate but is only serving as the appointed legal representative of the child, she is not subject to the prohibition in Rule 7.4 because she is not acting in the course of her representation of a client.