

# ETHICAL CONSIDERATIONS IN WORKERS' COMPENSATION CASES

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## I. INTRODUCTION

The source of guidance for ethical conduct by attorneys in North Carolina is the Revised Rules of Professional Conduct, which took effect on July 24, 1997. The revised rules superceded the Rules of Professional Conduct, which were originally enacted in 1985. The Rules, which form the basis for this paper, are found in The North Carolina State Bar Handbook, which is supplemented quarterly by The North Carolina State Bar Journal. When you are in doubt about the ethical implications of a particular course of action, this is the place to turn. So, DON'T THROW AWAY THOSE QUARTERLY ISSUES OF THE STATE BAR JOURNAL UNTIL THE NEW STATE BAR HANDBOOK IS ISSUED EVERY YEAR!

This discussion of ethical considerations for workers' compensation attorneys draws on the Rules, along with the Workers' Compensation Rules of the North Carolina Industrial Commission, and in some instances statutes and case law.

## II. ATTORNEY-CLIENT RELATIONSHIP

### A. Attorney Competence

In workers' compensation cases, attorneys are often asked to advise clients about legal matters outside the Workers' Compensation Act. The workers' compensation claimant may have several potential legal claims, such as those arising under the Americans with Disabilities Act, ERISA, or the REDA statute. The injured worker may have a claim for social security disability benefits, and actions taken in either the workers' compensation case or the social security case might significantly affect the other case.

The plaintiff's attorney who is not going to represent the client on these various claims may still be in a position to advise the client regarding these claims, or perhaps should refer the client to an attorney skilled in handling such matters. In a case in which an injured worker has potential employment-related claims, it may be advisable for both plaintiff and defense counsel to associate other lawyers to assist in resolving these claims.

In settlement negotiations, counsel are frequently confronted with issues not strictly governed by the workers' compensation statute, but nonetheless extremely important to the clients, employers and carriers. For example, in negotiating a settlement for what is arguably a case of permanent and total disability, the attorney

may be called upon to write language into the clincher agreement protecting settlement funds from the social security disability offset. At the same time the attorney must protect the client from the offset, he must be careful that the settlement language does not subject the client to a potential loss of Medicare benefits. By the same token, attorneys are often asked to insert social security offset language in clincher agreements when it is unclear whether the client is actually permanently and totally disabled, in the manner contemplated by social security regulations governing offsets. The attorney must decide whether inserting offset language in a clincher in this situation complies with the Code of Professional Responsibility.

Finally, the attorney involved in a workers' compensation case must also be aware of how the settlement might affect the client's employment situation, her entitlement to continued private disability benefits, and/or her duty to reimburse the employer for certain benefits paid. The attorney will also frequently be in a position to make a recommendation to a client regarding the possibility of structured settlement. Where the attorney has become aware that the client suffers, for whatever reason, from a limited capacity to manage funds for herself, the attorney's role is made even more difficult.

### **Rules of Professional Conduct:**

#### Rule 1.1 Competence

(a) 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.

(b) A lawyer shall not handle a legal matter without preparation adequate under the circumstances.

#### Rule 1.2 Scope of Representation

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

### **B. Declining or Terminating Representation**

Under what circumstances may or should an attorney decline representation, and what steps are necessary to effectuate termination of the relationship?

## **Rules of Professional Conduct:**

### 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) in representing a client before a tribunal, the lawyer reasonably believes that the client is bringing the legal action, conducting the defense, or asserting a position for the purpose of harassing or maliciously injuring any person;
- (3) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (4) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client or if:

- (1) the client knowingly and freely assents to the termination of the representation;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client insists upon pursuing an objective that the lawyer considers repugnant, imprudent, or contrary to the advice and judgment of the lawyer;
- (4) 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;
- (5) the representation has been rendered unreasonably difficult by the client;
- (6) 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

(7) other good cause for withdrawal exists.

(c) When permission for withdrawal from representation of a client is required by the rules of a tribunal, a lawyer shall not withdraw from the representation of a client in a proceeding before that tribunal without the permission of the tribunal.

(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 that has not been earned.

### **Workers' Compensation Rules:**

Rule 614 provides that:

(2) Any attorney who wishes to withdraw from representation in a proceeding before the Industrial Commission shall file with the Industrial Commission, in writing:

(a) A Motion to Withdraw which shall contain a statement of reasons for the request and that the request has been served on the client.

(b) A Motion to Withdraw before an award is made shall state whether the withdrawing attorney requests an attorney fee from the represented party once an award of compensation is made or approved.

(3) An attorney may withdraw from representation only by written order of the Industrial Commission. The issuance of an award of the Industrial Commission does not release an attorney as the attorney of record.

### **Opinions of the State Bar:**

*RPC 79 (January 12, 1990) Surrender of Medical Records.* Opinion rules that a lawyer who advances the cost of obtaining medical records before deciding whether to accept a case may not condition the release of the records to the client upon reimbursement of the cost.

*RPC 169 (January 14, 1994) Providing Client with Copies of Documents from the File.* This opinion rules that a lawyer is not required to provide a former client with copies of title notes and may charge a former client for copies of documents from the client's file under certain circumstances.

*RPC 223 (January 12, 1996). Responsibility to Client Who has Disappeared.* This opinion rules that when a lawyer's reasonable attempts to locate a client are

unsuccessful, the client's disappearance constitutes a constructive discharge of the lawyer requiring the lawyer's withdrawal from the representation.

### **C. Contact by Clients of Other Lawyers**

Plaintiff attorneys are often approached by potential clients who are already represented by other counsel. Lawyers in this situation often feel conflicted, since they want injured parties to obtain sound advice, yet don't want to interfere with the lawyer-client relationship between two others. One Rule of Professional Conduct provides guidance.

Rule 4.2 Communication with Person Represented by Counsel, provides:

(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 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.

Comment (1) to this rule states that

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.

These are the limits of the ethical considerations for counsel in this situation. Attorneys are not prohibited by the rules from reviewing the client's case, and giving the client an honest opinion about how the case is being handled and stating how they might handle it differently. However, before urging the client to change counsel, one should consider case law on the tort of intentional interference with contractual relations.

### **D. Conflicts of Interest**

Attorneys in workers' compensation cases do not appear to face potential conflicts of interest as frequently as their colleagues who focus on personal injury cases. Nonetheless, these issues do arise from time to time.

#### **1. Conflicts in General**

Rule 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be, or is likely to be, directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the interest of the other client; and
  - (2) each client consents after consultation which shall include explanation of the implications of the common representation and the advantages and risks involved.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
- (1) the lawyer reasonably believes the representation will not be adversely affected; and
  - (2) the client consents after consultation which shall include explanation of the implications of the common representation and the advantages and risks involved.
- (c) A lawyer shall have a continuing obligation to evaluate all situations involving potentially conflicting interests, and shall withdraw from the representation of any party the lawyer cannot adequately represent without using the confidential information of another client or a former client except as Rule 1.6 allows.

*RPC 244 (January 24, 1977) Advance Disclaimer of Client-Lawyer Relationship.* This opinion rules that although a lawyer asks a prospective client to sign a form stating that no client-lawyer relationship will be created by reason of a free consultation with the lawyer, the lawyer may not subsequently disclaim the creation of a client-lawyer relationship and represent the opposing party.

## **2. Conflict Issues Important to Counsel for Plaintiffs**

Workers' compensation attorneys are not often presented with the prospect of representing multiple claimants who may be competing for the same limited funds. One exception may be in the case where an injured worker dies without having received all the benefits she was entitled to. If the worker died from her work-related injuries, her death benefits are payable to her surviving spouse or other dependents under G.S. § 97-38 and § 97-39. However, any unpaid TTD benefits are payable to the estate. If the death is from an unrelated cause, any unpaid § 97-31 benefits are payable to the surviving whole dependents, and then partial dependents, in the same manner as death benefits are paid. There may be competing heirs with claims to different sums. If counsel is asked to represent both the estate and the death dependents, at the outset of the representation the possible conflict should be explained and consent to an acceptable distribution of any lump sum settlement should be obtained. If this cannot be done, the parties should have separate counsel.

Rule 1.8 Conflict of Interest: Prohibited Transactions and Other Specific Applications

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation except that a lawyer may advance court costs and expenses of litigation including expenses of investigation and medical examinations and cost of obtaining and presenting evidence, provided the client remains ultimately liable for such costs and expenses.

\* \* \*

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien to secure the lawyer's fee or expenses, provided the requirements of Rule 1.8(a) are satisfied; and

(2) contract with a client for a reasonable contingent fee in a civil case, except as prohibited by Rule 1.55.

*RPC 170 (April 15, 1994) Joint Representation of Injured Party and Medical Insurance Carrier Holding Subrogation Agreement.* This opinion rules that a lawyer may jointly represent a personal injury victim and the medical insurance carrier that holds a subrogation agreement with the victim provided the victim consents and the lawyer withdraws upon the development of an actual conflict of interest.

*RPC 207 (October 20, 1995) Simultaneous Representation of Claimant and Insured Against Insurer in Bad Faith Action.* This opinion rules that a lawyer may represent an insured in a bad faith action against his insurer for failure to pay a liability claim brought by a claimant who is represented by the same lawyer.

*RPC 228 (July 26, 1996) Indemnifying the Tortfeasor's Liability Insurance Carrier for Unpaid Liens of Medical Providers as a Condition of Settlement.* Opinion rules that a lawyer for a personal injury victim may not execute an agreement to indemnify the tortfeasor's liability insurance carrier against the unpaid liens of medical providers.

*2001 Formal Ethics Opinion 6 (July 27, 2001) Multiple Representation of Claims for Workers' Compensation Death Benefits.* Opinion examines when a lawyer has a conflict of interest in representing various family members on claims for a deceased employee's workers' compensation death benefits.

*2001 Formal Ethics Opinion 7 (January 2002) Financial Assistance to Client.* Opinion prohibits a lawyer from advancing the cost of a rental car to a client even though the car will be used, on occasion, to transport the client to medical examinations.

### **3. Conflict Issues Important to Defense Counsel**

*RPC 91 (January 17, 1991) Conflict Between Insured and Insurer.* Opinion rules that an attorney employed by the insurer to represent the insured and its own interests may not send the insurer a letter on behalf of the insured demanding settlement within the policy limits.

*RPC 92 ((January 17, 1991) Representation of Insured and Insurer.* Opinion rules that an attorney representing both the insurer and the insured need not surrender to the insured copies of all correspondence concerning the case between herself and the insurer.

*RPC 103 (January 18, 1991) Representation of Insured and Insurer.* Opinion rules that a lawyer for the insured and the insurer may not enter voluntary dismissal of the insured's counterclaim without the insured's consent.

*RPC 112 (July 12, 1991) Representation of Insured and Insurer.* Rules that an attorney retained by an insurer to defend its insured may not advise insurer or insured regarding the plaintiff's offer to limit the insured's liability in exchange for an admission of liability.

*RPC 144 (January 15, 1993) Conflict in Joint Representation.* Opinion rules that a lawyer, having undertaken to represent two clients in the same matter, may not thereafter represent one against the other in the event their interests become adverse without the consent of the other.

*RPC 151(July 9, 1993) Representation of Insured and Insurer.* Opinion discusses when an attorney who is a full-time employee of an insurance company may represent the insurance company, the insured, or others respecting various matters of interest to the insurance company.

*99 Formal Ethics Opinion 14 (January 21, 2000). Representing Insurance Carrier and Uncooperative Insured.* Opinion rules that when an insured fails to cooperate with the defense, as required by the insurance contract, the insurance defense lawyer may follow the instructions of the insurance carrier unless the insured's lack of cooperation interferes with the defense or presenting an effective defense is harmful to the interests of the insured.



### III. COMMUNICATIONS WITH OTHERS

#### A. Contacts with Persons Unrepresented by Counsel

##### 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 advice to the person, other than the advice to secure counsel, if the interests of such person are, or have a reasonable possibility of being, in conflict with the interests of the client; and
- (b) state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

##### Comment:

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

*RPC 194 (January 13, 1995) Communications with Unrepresented Prospective Defendant.* Opinion rules that in a letter to an unrepresented prospective defendant in a personal injury action, the plaintiff's lawyer may not give legal advice nor may he create the impression that he is concerned about or protecting the interests of the unrepresented defendant.

*97 Formal Ethics Opinion 2 (January 16, 1998), Communications with Unrepresented Former Employees of Represented Organizations.* Rules that a lawyer may interview an unrepresented former employee of an adverse represented organization about the subject of the representation unless the former employee participated substantially in the legal representation of the organization in the matter.

#### B. Contacts with Represented Persons

Attorneys are often confronted with questions about whom they, and their clients, can communicate with directly without violating any ethical rules. This seems especially true in workers' compensation cases, where the parties often have close relationships, such as that of employer and employee, which continue long after an adversarial relationship has also developed. As another example, both adjusters and injured

workers often contact the opposing party's counsel to discuss their cases. The following rules apply:

#### 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 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.

#### Comment:

[4] Parties to a matter may communicate directly with each other. The purpose of this rule is to prohibit a lawyer, or the lawyer's agents, from undermining an opponent's client-lawyer relationship through direct contact with a client in the absence of opposing counsel. Nothing herein is 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 their dispute.

[5] After a lawyer for another person or entity has been notified that an organization is represented by counsel in a particular matter, this rule would prohibit communications by the lawyer concerning the matter with persons having managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. 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.

[6] This rule also 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.

#### Rule 5.3 Responsibilities Regarding Non-Lawyer Assistants

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

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

(1) the lawyer orders the conduct involved; or

(2) the lawyer has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided, but fails to take reasonable action to avoid the consequences.

## Workers' Compensation Rules

Rule 614, Attorneys Retained for Proceedings, provides that “[n]o direct contact or communication concerning contested matters may be made with a represented party by the opposing party or any person on its behalf, without the attorney’s permission except as permitted by law or Industrial Commission Rules.

In 2001, the Ethics Committee of the State Bar reviewed several times the following inquiries and issued, at its October 17, 2001 meeting, Revised Proposed 2001 Formal Ethics Opinion 13:

### Inquiry #1:

Attorney represents the employer and workers’ compensation carrier in a workers’ compensation case filed by Plaintiff, an injured employee. Attorney knows that Plaintiff is represented by legal counsel. Attorney hired a private investigator to watch Plaintiff to see if Plaintiff engaged in any physical activity indicating that he is not injured to the extent that he claims. During the surveillance, the investigator engaged Plaintiff in a conversation about a motel property located next to Plaintiff’s property. As a pretext for the communication, the investigator told Plaintiff he was interested in purchasing the motel property. During the conversation, Plaintiff stated that he was repairing the motel property from storm damage. The investigator’s observations of Plaintiff during the remainder of the surveillance, without further verbal contact with Plaintiff, indicate that Plaintiff is physically able to work.

May Attorney offer the private investigator’s testimony about his conversation with Plaintiff into evidence in the workers’ compensation trial?

### Opinion #1:

No. Rule 4.2(a) of the Rules of Professional Conduct prohibits a lawyer from communicating about the subject of the presentation with a person the lawyer knows to be represented by another lawyer in the matter unless the other lawyer consents or the communication is authorized by law. A lawyer may not do through an agent that which the lawyer is prohibited by the Revised Rules of Professional Conduct from doing himself. See Rule 5.3. Therefore, a lawyer is professionally responsible for verbal communications with a represented person made by an investigator or other agent of the lawyer for the purpose of getting the person to make damaging disclosures. To discourage such unauthorized communications, a lawyer may not attempt to introduce into evidence the information gained by an agent’s improper contact with a represented person even if the lawyer made a reasonable effort to prevent the contact, including explicitly instructing the investigator not to communicate with the represented

person. *But see* ABA Comm. on Ethics and Professional Responsibility, Formal Op 95-396 (1995).

Inquiry #2:

If Attorney may not offer the information gained from the investigator's conversation with Plaintiff at trial, may Attorney still offer the evidence gained through the investigator's visual observations of Plaintiff?

Opinion #2:

Yes. Visual observation is not a direct contact or communication with a represented person and does not violate Rule 4.2(a).

Interestingly, the Revised Proposed Opinion left out the following inquiry and response which were included in the initial Proposed Opinion:

[former] Inquiry #2:

Assume the same facts as in Inquiry #1 except that the employer is self-insured and regularly hires a private investigator to observe employees who have made a workers' compensation claim. Attorney does not hire the investigator, does not supervise the activities of the investigator, and does not have any contact with the investigator. The employer gives the investigator's report to Attorney at the time that Attorney is retained to defend the claim. May Attorney offer the private investigator's testimony about his conversation with Plaintiff into evidence in the workers' compensation trial?

Opinion 2:

No, Attorney may not do indirectly that which he is prohibited from doing directly. See Opinion #1.

At its meeting in January 2002, the Ethics Committee referred this revised proposed opinion back to subcommittee for further report, in light of continued feedback from workers' compensation attorneys. Thus there is no final rule as of now, but the proposed rule does give an idea of the Committee's thinking on this topic.

Previous State Bar Opinions which provide guidance include the following:

*RPC 87 (April 13, 1990) Interviewing Nonparty Witnesses.* A lawyer wishing to interview a witness who is not a party, but who is represented by counsel, must obtain the consent of the witness' lawyer.

*RPC 119 (October 18, 1991) 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.

### **C. Employees of Corporations**

This topic arises so often among counsel that it deserves its own section here. The following State Bar opinions are helpful

*RPC 67 (July 14, 1989) Interviewing Employee of Adverse Corporate Party.* Opinion rules that an attorney generally may interview a rank and file employee of an adverse corporate party without the knowledge or consent of the corporate party or its counsel.

*RPC 81 (January 12, 1990) Interviewing the Former Employee of an Adverse Corporate Party.* Rules that a lawyer may interview an unrepresented former employee of an adverse corporate party without the permission of the corporation's lawyers.

*99 Formal Ethics Opinion 10 (July 21, 2000) Communicating with Employee of Adverse Organization in a Criminal Investigation.* Opinion rules that a government lawyer working on a fraud investigation may instruct an investigator to interview employees of the target organization provided the investigator does not interview an employee who participates in the legal representation of the organization or an officer or manager of the organization who has the authority to speak for and bind the organization.

Interestingly, language in the proposed rule prohibiting the interview of "an employee whose acts or omissions may be imputed to the organization" was omitted from the final opinion. The following is part of the comment to the opinion:

Comment:

Informal communication is also prohibited with an employee whose statement may constitute an admission on the part of the organization. This does not mean that informal communication is prohibited with any employee who may make a damaging statement about the corporation that would be admissible in evidence. Rather, the prohibition is limited to informal communications with employees who have the authority to speak for and bind the corporation. See RPC 67 (interpreting Rule 7.4 of the superseded (1985) Rules of Professional Conduct; opinion prohibits informal communications with corporate employees with managerial responsibility who are authorized to speak for the corporation).

The comment to Rule 4.2 also mentions a prohibition on informal communications with any person "whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability..." An acknowledged example of such a person is the employee who is involved in an automobile accident while driving the company truck. It is assumed that the interest of the organization and the tortfeasor-employee are sufficiently aligned to place the tortfeasor-employee within the protection of the anti-contact rule. In the instant inquiry, however, Attorney A may instruct the investigator to ask the house managers and aides whether they saw others falsify records and whether they were asked or instructed by superiors to falsify records.

**D. Pursuing a Criminal Judgment in Order to Obtain a Favorable Result in a Civil Proceeding**

Former Rule 7.5 Omitted

Rule 7.5 of the superseded (1985) Rules of Professional Conduct prohibited a lawyer from “present[ing], participat[ing] in presenting, or threaten[ing] to present criminal charges primarily to obtain an advantage in a civil matter.” Rule 7.5 was deliberately omitted from the Revised Rules of Professional Conduct adopted on July 24, 1997.

98 *Formal Ethics Opinion 19 (April 23, 1999), Threats Involving the Criminal Justice System*, provides guidelines for a lawyer representing a client with a civil claim that also constitutes a crime.

Comment:

“The absence of the Rule from the Revised Rules of Professional Conduct does not mean, however, that all threats involving the criminal justice system are permitted nor does it mean that abuse of the legal system or extortion are condoned. . . . A lawyer may present, participate in presenting, or threaten to present criminal charges to obtain an advantage in a civil matter if the criminal charges are related to the civil matter and the lawyer reasonably believes that the charges are well grounded in fact and warranted by law and, further provided, the lawyer’s conduct does not constitute a crime under North Carolina law.”

Another State Bar ethics opinion on this topic is *RPC 225 (January 12, 1996) Seeking Cooperation on Plea Agreement from Crime Victim with Pending Civil Action*. This opinion holds that the lawyer for a defendant in criminal and civil actions arising out of the same event may seek the cooperation of a crime victim on a plea agreement provided the settlement of the victim’s civil claim against the defendant is not contingent upon the content of the testimony of the victim or the outcome of the case.

**E. Contacting the Industrial Commission**

**Rules of Professional Conduct:**

Rule 3.5 Impartiality and Decorum of the Tribunal provides the following:

- (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:
  - (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;
- (4) engage in conduct intended to disrupt a tribunal, including:
  - (i) 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;
  - (ii) engaging in undignified or discourteous conduct that is degrading to a tribunal; or
  - (iii) intentionally or habitually violating any established rule of procedure or evidence; or
- (5) after discharge of the jury, ask questions of or make comments to a juror that are calculated merely to harass or embarrass the jury or to influence the juror's actions in future jury service.

#### **Rules of the Industrial Commission:**

Rule 614 of the Workers' Compensation Rules requires an attorney who is retained by a party in a proceeding before the Commission to file a notice of appearance with the Commission. A copy of the notice must be served on all other counsel and on all unrepresented parties.

Rule 609 of the Workers' Compensation Rules, entitled Motions Practice in Contested Cases, provides:

- (6) In all cases where correspondence relative to a case before the Industrial Commission is sent to the Industrial Commission, copies of such correspondence shall be contemporaneously sent by the same method of transmission to the opposing party, or, if represented, to opposing counsel. Written communications, whether addressed directly to the Commission or copied to the Commission, may not be used as an opportunity to introduce new evidence or to argue the merits of the case, with the exception of the following instances:
  - (a) Written communications, such as a proposed order or legal memorandum, prepared pursuant to the Commission's instructions;
  - (b) Written communications relative to emergencies, changed circumstances, or scheduling matters that may affect the procedural status of a case such as a request for continuance due to the health of a litigant or an attorney;

(c) Written communications sent to the tribunal with the consent of the opposing lawyer or opposing party if unrepresented; and

(d) Any other communication permitted by law or the rules or procedures of the Commission.

At no time may written communications, whether addressed directly to the Commission or copied to the Commission, be used as an opportunity to case the opposing party or counsel in a bad light.

### **Opinions of the State Bar**

*97 Formal Ethics Opinion 3 (October 24, 1997) 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.

*98 Formal Ethics Opinion 12 (October 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.

*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.

*99 Formal Ethics Opinion 16 (April 14, 2000) Presentation of Consent Judgment Containing False Information.* Opinion rules that a lawyer may not participate in the presentation of a consent judgment to a court if the lawyer knows that the consent judgment is based upon false information.

*2001 Revised Proposed Formal Ethics Opinion 15 (January 2002) Ex Parte Communication with a Judge When Permitted by Law.* Opinion rules that a lawyer may not communicate ex parte with a judge in reliance upon the communication being “permitted by law” unless there is a statute or case law specifically and clearly authorizing such communications or proper notice is given to the adverse party or counsel. (Note: This opinion is slated for clarification; however, the outcome of the clarified final opinion will not differ from that of the revised proposed opinion.)



## F. Contacts with Physicians and Requests for Medical Records

The American Medical Association Code of Medical Ethics, Section 5.05, provides the following:

The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential communications or information without the expressed consent of the patient, unless required to do so by law.

The obligation to safeguard patient confidences is subject to certain exceptions which are ethically and legally justified because of overriding social considerations. Where a patient threatens to inflict serious bodily harm to another person or to him or herself and there is a reasonable probability that the patient may carry out the threat, the physician should take reasonable precautions for the protection of the intended victim, including notification of law enforcement authorities. Also, communicable diseases, gun shot and knife wounds should be reported as required by applicable statutes or ordinances. (IV) Issued December 1983; Updated June 1994.

In addition, on December 28, 2000, the United States Department of Health and Human Services published new comprehensive medical privacy regulations, entitled Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Parts 160 and 164. The final compliance date for health care providers is April 14, 2003. The regulations require health care providers to obtain consent before releasing health care information, and require separate patient authorization for non-routine disclosures and most non-health care purposes. The regulations also provide a higher standard of protection for psychotherapy notes. Civil and criminal penalties have been established for violations of the regulations. A comprehensive overview of the regulations can be found at [www.aspe.hhs.gov/adminsimp/final/pvcguide1.htm](http://www.aspe.hhs.gov/adminsimp/final/pvcguide1.htm).

In Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990) the Supreme Court barred attorneys from engaging in nonconsensual communications with an opposing party's treating physician even in cases in which the statutory physician-patient privilege has been waived. According to the Court, "[t]he primary policy reason against allowing ex parte interviews involves the unique and confidential nature of the physician-patient relationship." Id. at 333, 389 S.E.2d at 46. Noting the widespread belief among the public that communications with doctors will be kept confidential, the Court held that, "once the statutory privilege has been waived, the confidential nature of the physician-patient relationship remains, even though medical information is subject to discovery." Id. at 334, 389 S.E.2d at 46.

In 1996, the North Carolina Court of Appeals held that Crist applies in workers' compensation cases. Salaam v. North Carolina Department of Transportation, 122 N.C. App. 83, 468 S.E.2d 536 (1996), disc. rev. improv. granted, 345 N.C. 494, 480 S.E.2d 51 (1997). As the Court of Appeals explained in Evans v. Young-Hinkle Corp., 123 N.C. App. 693, 695-96, 474 S.E.2d 152, 154 (1996), disc. rev. denied, 346 N.C. 177, 486 S.E.2d 203 (1997): "In Salaam . . ., we applied Crist in the worker's compensation context and held that the Commission erred when it admitted a doctor's deposition testimony taken after defense counsel engaged in ex parte contact with the plaintiff's physician without the consent of plaintiff's counsel."

While defense counsel in workers' compensation cases appear to be abiding by the mandates of Crist and Salaam with respect to conversations with the plaintiff's treating physicians, some take the position that the holdings in these cases do not apply to the acquisition of medical records from treating physicians, even in denied claims. Instead of requesting copies of the plaintiff's medical records in discovery, opposing counsel frequently write to plaintiffs' treating physicians requesting medical records and, citing G.S. § 97-27, (a statute covering medical examinations by the employer's physician) state that the plaintiff has no privilege in such records. Another approach by defense counsel is to subpoena the records directly. Plaintiffs' counsel generally take the position that both of these tactics are unethical.

Another ethical concern for plaintiff's counsel arises in the context of discovery. Are all of the plaintiff's medical records discoverable, or only those related to the injury that is the subject of the lawsuit? It is important to respond to discovery requests for medical records in a manner that complies with the rules of civil procedure while at the same time preserving the confidentiality to which the client is still entitled. This may be accomplished by a protective order, or by in camera inspection of sensitive documents by the court before they are released to opposing counsel, or to counsel's client.

### **Opinions of the State Bar**

*RPC 162 (July 21, 1994) Communications with Opposing Party's Physician.* Opinion rules that an attorney may not communicate with the opposing party's nonparty treating physician about the physician's treatment of the opposing party unless the opposing party consents.

*RPC 180 (July 21, 1994) Communications with Opposing Party's Physicians.* Opinion rules that a lawyer may not passively listen while the opposing party's nonparty treating physician comments on his or her treatment of the opposing party unless the opposing party consents.

*RPC 184 (October 21, 1994) Communications with Physician Performing Autopsy.* Opinion rules that a lawyer for the opposing party may communicate directly with the pathologist who performed an autopsy on the plaintiff's decedent without the consent of the personal representative for the decedent's estate.

*RPC 224(October 24, 1997) Communicating with Treating Physician.* Opinion prohibits the employer's lawyer from engaging in direct communications with the treating physician for an employee with a workers' compensation claim.

*RPC 236 (January 24, 1997) Misuse of Subpoena Process.* Opinion rules that a lawyer may not issue a subpoena containing misrepresentations as to the pendency of an action, the date or location of a hearing, or a lawyer's authority to obtain documentary evidence.

*99 Formal Ethics Opinion 2 (April 23, 1999) Obtaining Medical Records.* Opinion rules that a defense lawyer may suggest that the records custodian of plaintiff's medical record deliver the medical record to the lawyer's office in lieu of an appearance at a noticed deposition provided the plaintiff's lawyer consents.

#### **Decisions of the Industrial Commission:**

Johnson v. Chicago Bridge and Iron Co., I.C. No. 734549 (January 21, 1998) (striking opinions of physicians who reviewed surveillance videotape that was sent to them ex parte)

Burchette v. East Coast Millwork Distributors, Inc., I.C. No. 445150 (August 16, 2000)(striking medical notes and opinion of physician who received from defendants ex parte a note containing false and misleading information about plaintiff's job performance)

Terry v. PPG Industries, Inc., I.C. No. 589762 (August 1, 2001)(striking just that portion of physician's testimony that was tainted by viewing surveillance videotape that was submitted to him ex parte; striking entire testimony would punish plaintiff for error of defendant)

In March 2001 Executive Secretary Weaver was presented with a motion by a plaintiff for an order directing defendants to retract letters to two physicians requesting medical records, where the physicians' treatment was not being provided by defendants, and the plaintiff had not consented to the release of the records. The motion also requested that defendants be ordered to comply with the applicable rules governing discovery in workers' compensation claims. Weaver found that the correspondence in question was not within the purview of N.C.Gen. Stat. § 97-27, and ordered the defendants to abide by the applicable Rules of the Industrial Commission governing discovery.

#### **IV. REPRESENTING MINORS AND INCOMPETENT PERSONS**

Numerous ethical issues may arise when representing an adult who does not appear able to act in his own interest. This often occurs in workers' compensation cases, where clients may become depressed, or develop other mental disorders, as a

result of their work-related injuries. A few general rules are worth learning. First, if you question your client's competence, you may seek guidance from an appropriate health care professional, and if you believe the client to be incompetent, you may seek the appointment of a guardian for him, even over his objection. Second, although a guardian ad litem may be appointed by the Commission to pursue an incompetent client's claim, that person has no authority to receive or handle the client's funds. With rare exception, covered below, only a general guardian appointed by the Clerk of Superior Court can assume that responsibility. Finally, an attorney cannot enter into a contract on behalf of a minor without court approval. Creech ex rel. Creech v. Melnik, \_\_\_ Ct. App. \_\_\_, 556 S.E.2d. 587 (2001).

**A. Rule 1.14 Client Under a Disability**

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

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

Comment:

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

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should, as far as possible, accord the represented person the status of client, particularly in maintaining communication.

[3] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances,

however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

[4] If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. *See Rule 1.2(d)*.

#### *Disclosure of the Client's Condition*

[5] Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

### **B. Guardianship and Incompetency Proceedings for Adults and Minors; Funds Held for Minors and Incapacitated Adults**

G.S. § 35A-1101 (7) defines an "incompetent adult" as "an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition. "

G.S. § 35A-1101(10) further defines "inebriety" as "the habitual use of alcohol or drugs rendering a person incompetent to transact ordinary business concerning the person's estate, dangerous to person or property, cruel and intolerable to family, or unable to provide for family." Mental illness is defined in G.S. 35A-1101(12) as "an illness that so lessens the capacity of a person to sue self-control, judgment, and discretion in the conduct of the person's affairs and social relations as to make it necessary or advisable for the person to be under treatment, care, supervision, guidance or control."

Chapter 35A, enacted in 1987, preempted the authority of the trial court to determine competency. The chapter sets forth the exclusive procedure for determining the incompetency of infants and adults, by special proceedings filed with the Clerk of Superior Court. G.S. 35A-1102. The Clerk has the authority to require the respondent in such a proceeding to attend a multidisciplinary evaluation. G.S. § 35A-1111. In a situation where no incompetency adjudication has yet occurred, the action contemplated in the last clause of §1A-1, Rule 25(b), which discusses continuation of an action when one party becomes incompetent, would be referral of the competency issue to the clerk of superior court. Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), rev'd on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990).

A person having the amount of \$5,000 or less for an incapacitated adult for whom there is no guardian may pay that amount to the clerk of superior court, who has

the authority to administer the funds on behalf of the incapacitated adult. G.S. § 7A-111(b).

By statute, parents are the natural guardians of the person of their children. G.S. §35A-1201(a)(6). Chapter 35A also provides the means for appointment of a guardian of the estate for a minor child. See G.S. §35A-1203; 1220. G.S. § 35A-1227 provides that insurance proceeds or other funds to which a minor is entitled may be paid to and administered by the public guardian or by the clerk of court, pursuant to G.S. § 7A-111. That statute, in turn, provides that the clerk of court may hold and administer funds of up to \$25,000 for a minor who has no guardian.

### **C. Proceedings Before the Industrial Commission**

#### **1. *Appointment of Guardian Ad Litem***

Rule 604 of the Workers' Compensation Rules provides as follows:

(1) In all cases where it is proposed that minors or incompetents shall sue by their guardian ad litem, the Industrial Commission shall appoint such guardian ad litem upon the written application of a reputable, disinterested person closely connected with such minor or incompetent; but if such person will not apply then, upon the application of some reputable citizen; and the Industrial Commission shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

(2) In no event, however, shall any compensation be paid directly to the guardian ad litem. Rather, compensation payable to a minor or incompetent shall be paid as provided in N.C.Gen.Stat. § 97-48 and N.C.Gen. Stat. § 97-49. The use of the word "guardian" in N.C. Gen. Stat. § 97-49 shall mean a general guardian appointed by the General Courts of Justice and shall not mean a guardian ad litem.

The attorney seeking appointment of a guardian ad litem must use Form 42, Application for Appointment of Guardian Ad Litem.

#### **2. *Payment of Funds to, or for the Benefit of, Minors***

G.S. § 97-48 provides as follows:

(a) Whenever payment of compensation is made to a widow or widower for her or his use, or for her or his use and the use of the child or children, the written receipt thereof of such widow or widower shall acquit the employer: Provided, however, that in order to protect the interests of minors or incompetents the Industrial Commission may at its discretion

change the terms of any award with respect to whom compensation for the benefit of such minors or incompetents shall be paid.

(d) A minor employee under the age of 18 years may sign agreements and receipts for payments of compensation for temporary total disability, and such agreements and receipts executed by such minor shall acquit the employer. Where the injury results in a permanent disability and the sum to be paid does not exceed five hundred dollars (\$500.00) the minor employee may execute agreements and sign receipts and such agreements and receipts shall acquit the employer; provided, that when deemed necessary the Commission may require the signature of a parent or person standing in place of a parent.

G.S. § 97-49 provides:

If an injured employee is mentally incompetent or is under 18 years of age at the time when any right or privilege accrues to him under this Article, his guardian, trustee or committee may in his behalf claim and exercise such right or privilege.

#### **D. Opinions of the North Carolina State Bar**

*RPC 109 (January 17, 1992) Representation of Parents Individually and as Guardian Ad Litem.* This opinion rules that an attorney may not represent parents as guardians ad litem for their injured child and as individuals concerning their related tort claims after having received a joint settlement offer which is insufficient to fully satisfy all claims.

*RPC 123 (January 17, 1992) Representation of Parents and Child.* Opinion rules that a lawyer may represent parents and an independent guardian ad litem for their child concerning related tort claims under certain circumstances. In the same case scenario described in RPC 109, the attorney may represent the child, who proceeds through an independent guardian ad litem, and the parents as well.

*RPC 157 (April 16, 1993) Representing a Client of Questionable Competence.* Opinion rules that a lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection.

*RPC 163 (April 15, 1994) 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.

*98 Formal Ethics Opinion 18 (January 15, 1999) Revealing Confidential Information to Parents of Minor Client.* Opinion rules that a lawyer representing a minor owes the duty of confidentiality to the minor and may only disclose confidential

information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation.

## **V. ISSUES ARISING IN LITIGATION AND SETTLEMENT**

### **A. Boundaries of Client and Counsel Authority**

Both plaintiff and defense counsel have every right, and are required, to pursue their claims and defenses vigorously and diligently. But of course advocacy occasionally steps over the ethical line. Is it ethical for defense counsel to defend a claim where the vocational rehabilitation professional's services have been obtained for the purpose of placing the injured worker in any job that can be found, whether suitable or not? Is it ethical for a plaintiff's attorney to delay every action in a case for the purpose of postponing an injured worker's ultimate required attempt to return to work? The following guidelines apply.

#### Rule 1.2 Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), [constraining unethical conduct] and shall consult with the client as to the means by which they are to be pursued.

(1) A lawyer shall abide by a client's decision whether to accept an offer of settlement of 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.

#### Rule 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

*RPC 145 (January 15, 1993) Lawyer Approval of Settlement.* Rules that a lawyer may not include language in an employment agreement that divests the client of her exclusive authority to settle a case.



### Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.

#### Comment:

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not been first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or if the lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification, or reversal of existing law.

N.C. Gen. Stat. § 97-88.1 provides: "If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." "The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness." Sparks v. Mountain Breeze Restaurant, 55 N.C. App. 663, 286 S.E.2d 575 (1982). Where the defendant employer admitted that the plaintiff suffered an injury arising out of his employment, but contended there was no evidence of medical causation, the plaintiff was entitled to attorney fees after medical records showed a disability rating and defendant offered no evidence at the hearing. Poplin v. PPG Industries, 108 N.C. App. 55, 422 S.E.2d 353 (1992). See also Hawley v. Wayne Dale Construction, \_\_\_ N.C. App. \_\_\_, 552 S.E.2d 269 (2001) (upholding Commission's order that plaintiff's counsel pay \$1,000 attorney's fee for failure to stipulate to medical report at hearing, contrary to Rule 612(2)).

### **B. Disclosures During the Course of Litigation**

As a matter of routine practice, attorneys must consider whether they have a duty to reveal information that is potentially damaging to their clients' cases. In addition to the duty to abide by the Rules of the Industrial Commission regarding discovery, and the Rules of Civil Procedure, the following Rule of Professional Conduct applies:

#### Rule 1.6 Confidentiality of Information

(a) "Confidential information" refers to information protected by the attorney-client privilege under applicable law, and other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. For the purposes of this rule, "client" refers to present and former clients.

(b) “Confidential information” also refers to 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.

(c) Except when permitted under paragraph (d), a lawyer shall not knowingly:

(1) reveal confidential information of a client;

(2) use confidential information of a client to the disadvantage of the client; or

(3) use confidential information of a client for the advantage of the lawyer or a third person, unless the client consents after consultation.

(d) A lawyer may reveal:

(1) confidential information, the disclosure of which is impliedly authorized by the client as necessary to carry out the goals of the representation;

(2) confidential information with the consent of the client or clients affected, but only after consultation with them;

(3) confidential information when permitted under the Rules of Professional Conduct or required by law or court order;

(4) confidential information concerning the intention of a client to commit a crime and the information necessary to prevent the crime;

(5) confidential information to the extent the lawyer reasonably believes necessary to rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services were used;

(6) confidential information to the extent the lawyer reasonably believes necessary 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; and

(7) confidential information to the extent permitted by the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court.

Comment:

[22] The duty of confidentiality continues after the client-lawyer relationship has terminated.

**Opinions of the State Bar:**

*RPC 117 (July 17, 1992) Reporting Contagious Disease.* Opinion rules that a lawyer may not reveal confidential information concerning his client's contagious disease.

*RPC 182 (October 21, 1994) Disclosure of Client's Death.* Opinion rules that a lawyer is required to disclose to an adverse party with whom the lawyer is negotiating a settlement that the lawyer's client has died.

**C. Attorney Fees, Expenses and Trust Account Matters**

**1. Attorney Fees**

**Rules of Professional Conduct**

Rule 1.5 Fees

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence experienced in the area of law involved would be left with a definite and firm conviction that the fee is clearly excessive. Factors to be considered in determining whether a fee is clearly excessive include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

### **Approval of the Industrial Commission in Workers' Compensation Cases**

G.S. § 97-90(a) provides that attorneys' fees shall be subject to the approval of the Commission. G.S. § 97-90(b) further provides that "[a]ny person (i) who receives any fee, other consideration, or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the Commission or the court, as provided in subsection (c), or (ii) who makes it a business to solicit employment for a lawyer or for himself in respect of any claim or award for compensation, shall be guilty of a Class 1 misdemeanor."

The statute does not refer specifically to counsel for injured workers, but that has been its application. The plaintiff's attorney seeking a fee must submit a copy of his or her fee agreement to the Commission prior to the conclusion of the hearing. G.S. § 97-90(c). The statute sets out a procedure for appeal to the Full Commission, and then to the Superior Court, in the event of dissatisfaction with the amount of the fee awarded.

In death cases, the practice of the Industrial Commission is to award a fee based in large part on the time spent on the case. This is particularly true where the claim is uncontested. This is not inconsistent with Rule 1.5 or the Commission's authority under the statute.

### **Auditing of Defense Attorney Fees**

In recent years, insurance carriers have worked hard to reduce legal fees for representation in personal injury and workers' compensation cases. Some of the measures taken by carriers to reduce costs have come under scrutiny by various state bars. The decisions from the North Carolina State Bar on this issue are as follows:

*98 Formal Ethics Opinion 10 (July 16, 1998) Submission of Legal Bills to Audit Company at Request of Insurance Carrier.* Opinion rules that an insurance defense lawyer may not disclose confidential information about an insured's representation in bills submitted to an independent audit company at the insurance carrier's request unless the insured consents.

*98 Formal Ethics Opinion 17 (January 15, 1999) Compliance with Insurance Carrier's Billing Requirements and Guidelines.* Opinion rules that a lawyer may not comply with an insurance carrier's billing requirements and guidelines if they interfere with the lawyer's ability to exercise his or her independent professional judgment in the representation of the insured.

*99 Formal Ethics Opinion 11 (January 21, 2000) Consent to Submission of Legal Bills to Audit Company.* Opinion rules that an insurance defense lawyer may not submit billing information to an independent audit company at the insurance carrier's request unless the insured's consent to the disclosure, obtained by the insurance carrier, was informed.

## **2. Payment and Collection of Expenses**

The Workers' Compensation Act is silent on the matter of expenses charged by attorneys. Therefore, this is a matter of agreement between attorney and client. As is set out in Section II.D.2. above, the Rules of Professional conduct require that the client remain ultimately liable for the costs and expenses of litigation. Rule 1.8(e). The examples given in the rule are "expenses of investigation and medical examinations and costs of obtaining and presenting evidence." It is clear from the rule that goods and services paid for by the plaintiff's law firm to entities outside the firm will fall under this rule. As for those expenses that are internal to the firm, there appears to be no hard and fast rule about which expenses may be considered chargeable to the client, as long as the amount charged to the client reflects the actual cost of the service provided. The rules permit attorneys to advance these expenses and to collect them at the time that a client receives an award or settlement.

## **Opinions of the State Bar**

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

Comment:

[3] . . . [I]t 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.

*CPR 157.* An attorney handling a personal injury case may advance the cost of the client's medical examination if such is actually an expense of litigation for which the client remains ultimately liable.

*RPC 76 (October 20, 1998) Advancing a Client's Fine.* Opinion rules that a lawyer may advance his client's fine, where favorable plea bargain is offered only on initial court date, and attorney expects to seek reimbursement from client.

*RPC 80 (January 12, 1990) Lending Money to a Client.* Opinion rules that a lawyer may not lend money to a client who is represented in pending or contemplated litigation except to finance costs of litigation.

*RPC 124 (January 17, 1992) Costs of Class Action Litigation.* Opinion rules that a lawyer may not agree to bear the costs of federal class action litigation.

### **3. Referral Fees, Fee Sharing and Other Miscellaneous Fees**

Rule 1.5(e) provides that: A division of fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of, and does not object to, the participation of all the lawyers involved; and (3) the total fee is reasonable.

Comment [5] states that: A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (3) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.

*RPC 148 (January 15, 1993) Division of Fees.* Opinion holds that a lawyer may not split a fee with another lawyer who does not practice in her law firm unless the division is based upon the work done by each lawyer or the client consents in writing, the fee is reasonable, and responsibility is joint.

*RPC 205 (April 14, 1995) Referral Fees.* Opinion rules that a lawyer may receive a fee for referring a case to another lawyer provided that, by written agreement with the client, both lawyers assume responsibility for the representation and the total fee is reasonable.

#### **4. Trust Account Matters**

This is a topic that warrants a full presentation, so it will not be covered in any depth in this paper. The reader is referred generally to Rule 1.15 et seq., Preserving the Property of Others. The State Bar opinions below cover special issues that arise in the disbursement of personal injury settlements, but they are instructive in workers' compensation cases where the client may have unpaid medical bills or other expenses associated with the case.

*RPC 69 (October 20, 1989) Payment of Client Funds to Medical Providers.* Opinion rules that a lawyer must obey the client's instructions not to pay medical providers from the proceeds of settlement in the absence of a valid physician's lien.

*RPC 75 (October 20, 1989) Disbursement of Client Funds.* Opinion rules that a lawyer may not pay his or her fee or the fee of a physician from funds held in trust for a client without the client's authority.

*RPC 125 (January 17, 1992) Disbursement of Settlement Proceeds.* Opinion rules that a lawyer may not pay a medical care provider from the proceeds of a settlement negotiated prior to the filing of suit over his client's objection unless the funds are subject to a valid lien.

*RPC 127 (April 17, 1992) Conditional Delivery of Settlement Proceeds.* Opinion rules that deliberate release of settlement proceeds without satisfying conditions precedent is dishonest and unethical.

*2001 Formal Ethics Opinion 11 (January 2002) Disbursements to Medical Providers in Absence of Medical Lien.* Opinion rules that when a client authorizes a lawyer to assure a medical provider that it will be paid upon the settlement of a personal injury claim, the lawyer may subsequently withhold settlement proceeds from the client and maintain the funds in her trust account, although there is no medical lien against the funds, until a dispute between the client and the medical provider over the disbursement of the funds is resolved.

#### **VI. CONCLUSION**

Attorneys who regularly represent injured workers and who defend employers and carriers in workers' compensation cases belong to a small group. Chances are high that the attorney you offend today will be hired to bring or defend the next workers' compensation case in which you are involved. Follow the ethical guidelines as carefully as possible. Be polite when you question the ethics of opposing counsel's conduct. And whenever in doubt, call the State Bar!