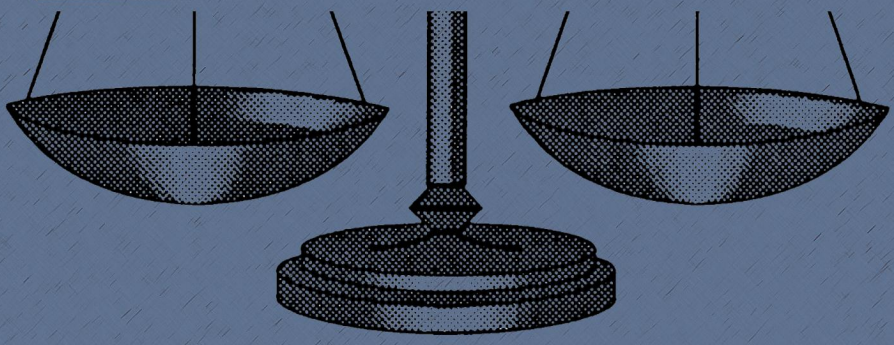
2015

PROFESSIONALISM & ETHICS

A NORTH CAROLINA PROSECUTOR'S GUIDE



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THE PROSECUTOR

"…is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that ***justice*** *shall be done. As such, he is in a peculiar and very definite sense the* ***servant of the law****, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with* ***earnestness*** *and* ***vigor*** *– indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."* Berger v. United States, 295 U.S. 78, 88 (1935).

We prosecutors have the best job in the criminal justice system because we have more freedom than any other actor to seek justice. Defense counsel protects their clients' interests and legal rights. Judges protect the parties' rights and the public's interest in the proper resolution of cases. However, it is not the job of judges or defense counsel to find the truth, decide who should be prosecuted, or hold the perpetrator accountable. Only prosecutors have the responsibility– and with it the ethical duty – to promote all of these vital components of justice.

What does this mean?

It means that we -- you -- have great power to alter the lives of many people: people accused of crimes, people victimized by crimes, their families and friends, and the community at large. A criminal charge may be life-changing to an accused or a victim; prosecution must never be taken lightly.

It means that we are obligated to keep an open mind. Not every person who is suspected of a crime should be arrested, not every suspect who is arrested should be prosecuted, not every case should be tried, and not every trial should be won. We have the responsibility, and with it, the ethical duty not to bring a case to trial unless we have diligently sought the truth and are convinced of the defendant's guilt. Notwithstanding this reality, none of us – not the police, the witness, the prosecutor, the judge, nor the juror – is omniscient or infallible. Our ethical duties don't end when a defendant is convicted. Defendants who are ultimately acquitted can nevertheless suffer irreparable harm from unethical prosecution: loss of freedom, employment, reputation, sense of security, and trust in government.

Like all lawyers, we have an ethical duty to be zealous but honorable advocates for our client. But unlike other lawyers, the client we represent is the public, whose interests are not necessarily served by winning every case. A guilty verdict serves our client's interest only if the defendant is in fact guilty and has received due process.

Unethical Conduct:
Consequences for Others

The Defendant

"The prosecutor . . . enters a courtroom to speak for the People and not just some of the People. The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of 'the People' includes the defendant and his family and those who care about him."
Lindsey v. State, 725 P.2d 649 (WY 1986) (quoting *Commentary On Prosecutorial Ethics*, 13 Hastings Const. L.Q. 537-539 [1986]).

A prosecutor's worst nightmare is not losing a major case or watching a dangerous criminal go free; it's convicting an innocent person. Nothing is more repugnant to our core principles of truth and justice. Unethical behavior by a prosecutor increases the risk that an innocent person will be convicted. The consequences for the defendant are obvious: incarceration, destruction of reputation, separation from family and friends, and extended damage to employability.

But the damage done by unethical behavior is not limited to innocent defendants or to defendants who are convicted. All defendants, innocent and guilty alike, are entitled to the presumption of innocence, the benefit of reasonable doubt, and due process. Unethical behavior by a prosecutor can render these fundamental rights illusory. And defendants who are ultimately acquitted can nevertheless suffer irreparable harm from unethical prosecution: loss of freedom, employment, reputation, sense of security, and trust in government.

The Victim and the Victim's Family

Unethical behavior by a prosecutor can re-victimize crime victims, the very people we strive to protect. Convicting an innocent person means that the guilty person is left unpunished and any sense of "closure" is a sham. Convicting a guilty person by unethical means subjects the victim and his or her family to the agony of seeing the conviction overturned, being dragged through a second, painful trial, or even watching the perpetrator go free.

Crime forces people from outside the court system into a strange and frightening world in the role of "victims." Some have already suffered horrific losses. The ordeal of appearing in court, facing the perpetrator, risking retaliation, describing the crime to strangers, being cross-examined, having his or her credibility attacked, and waiting in suspense through jury deliberations may be the second-most harrowing experience of a victim's life. It leaves most victims and their families thinking: "I never want to go through that again." Now imagine having to call the victim or the victim's family to tell them that, because of your own unethical behavior or that of another prosecutor in your office, they must go through it all again, their ordeal was wasted, the wrong person was convicted, or the right person was convicted but will now get a second chance to evade responsibility. Worse yet, imagine having to explain that, because of the gravity of the prosecutorial misconduct, there will be no retrial, only a dismissal with prejudice, and that the perpetrator will go free.

Your Community

"The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court, should be simply justice; and he has

no right to sacrifice this to any pride of professional success. And however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community." Hurd v. People, 25 Mich. 405, 416 (1872).

Conviction of an innocent person leaves the community exposed to future crimes by the guilty person. Also, the conviction will usually be seen by the police as "closing the book" on the crime, making it much less likely that the guilty person will ever be found.

Conviction of a guilty person, if tainted by unethical prosecutorial behavior, exposes the community to the tremendous expense, waste, and risk of a reversal and retrial. Using unethical methods to convict could result in the release of dangerous individuals back into your community who have escaped punishment because of your actions.

But the damage potentially caused to the community by a prosecutor's unethical behavior goes beyond the particular case. The public's trust in the integrity of the justice system is impaired when there is a perception that law enforcement does not follow basic rules of fairness. Witnesses may refuse to come forward or may feel justified in withholding evidence or giving false testimony if they feel that prosecutors are corrupt. Jurors may be reluctant to serve or may bring with them into the deliberation room a crippling mistrust of the law enforcement community. This distrust may not be limited to your district alone but could influence the public's perception of prosecutors state-wide.

Unethical Conduct: Consequences for You

We prosecutors hold people accountable for their actions. We are, in turn, accountable for ours. In the criminal justice system, with its multitude of actors, motivated adversaries, high stakes, and sentences lasting years, any unethical behavior by a prosecutor is likely to be discovered. Violations of your ethical obligations will expose you, your cases, your office, and your District Attorney to dire consequences. Unethical behavior by one prosecutor, if unpunished, can poison the atmosphere in an entire office. Moreover, your unethical conduct can cause the District Attorney public embarrassment and possible electoral defeat. Just as there are many levels of culpability for professional misconduct, there are many consequences for unethical actions.

- **You may be censured, suspended, or disbarred.** Violations of ethical rules governing the conduct of attorneys, including prosecutors, are overseen by the Superior Courts of the state and the North Carolina State Bar. Violations of ethical rules can lead to the loss of your law license and criminal sanctions.

- **An elected District Attorney may ultimately be removed from office as a consequence of unethical conduct.** NCGS § 7a-66.

- **You may lose your job.** You are not expected to win every case, but you are expected to conduct yourself ethically in every case. Your unethical conduct can lead to your dismissal or demotion. Assistant District Attorneys in North Carolina serve solely at the pleasure of the elected District Attorney.

- **Your case may suffer a variety of sanctions.** These include damaging delays, preclusion of evidence, dismissal with prejudice, and reversal of a conviction.

- **You may be criminally prosecuted.** You could be prosecuted under state or federal law; for example, for suborning perjury, for obstructing justice, or for other official misconduct. The North Carolina Criminal Procedure Act, 15A carries specific criminal sanctions for prosecutors. NCGS 15A-903(d) makes it a crime to willfully omit or misrepresent evidence or information required to be disclosed pursuant to discovery. NCGS 15A-268 makes it a crime to knowingly and intentionally destroy, alter, conceal or tamper with biological evidence unlawfully. Unethical prosecutors may be prosecuted themselves by agencies such as the North Carolina Attorney General, other state prosecutors, or the U.S. Attorney.

- **You may be sued civilly for damages.** To ensure their independent judgment and zealous advocacy, our law confers absolute immunity from civil liability upon individual prosecutors acting in their role as advocates for the state. Under some circumstances, you may have only qualified immunity. Civilly liability may extend to others in your office because of your actions. More importantly, personal immunity from civil prosecution does not diminish your ethical duties or shield you, in extreme cases, from criminal liability.

- **You will lose your reputation and effectiveness.** You will spend years building your reputation for integrity in the community of judges, defense attorneys, police, potential jurors, and fellow prosecutors. You can lose it all by a single act of unethical behavior. With diminished reputation comes diminished effectiveness. Judges have broad discretion to

punish a prosecutor whom they suspect of unethical conduct. You effectiveness as a litigator will be crippled. Your credibility with members of the defense bar will affect your ability to negotiate cases, as well as the civility of your practice, and your enjoyment of your job. No case is worth your reputation.

- **You'll know.** You didn't become a prosecutor to get rich or take the easy path. You did it because you know right from wrong and it's important to you to be on the side of right. Remember this when you're tempted to cut an ethical corner; even in the unlikely event that it stays hidden for your entire career, you'll still know, and it will rob you of the self-esteem that is your work's most valuable reward.

Professional Conduct

Ethical principles are the essence of criminal prosecution, not a burden upon it. Compliance with ethical rules requires that we know the rules: remain vigilant, remember the diverse public interests we have sworn to serve, and remind one another that we became prosecutors to seek justice

For your day-to-day practice, however, most ethical principles underlying the *Rules* can be distilled to a few common sense principles of fairness and professionalism found in the Prosecutor's Professionalism Creed:

Prosecutor's Professionalism Creed

To the people of North Carolina, I offer competence, faithfulness, diligence, and good judgment. I will represent you as I would want to be represented and to be worthy of your trust.

To the opposing parties and their counsel, I offer fairness, integrity, and civility. I will seek reconciliation and, if we fail to achieve it, I will make our dispute a dignified one.

To the courts, and other tribunals, and to those who assist them, I offer respect, truthfulness, and courtesy. I will strive to bring honor to the search for justice.

To the profession**,** I offer assistance. I will strive to keep our profession a high calling in the spirit of public service.

To the public, I offer service. I will strive to improve the law and our legal system, serving all equally, and to seek justice through the representation of the people.

The Prosecutor's Professional Creed was modeled after The NC Chief Justice's Commission on Professionalism's Lawyer's Professionalism Creed which is modeled after The Lawyer's Creed in the state of GA.

Rules of Professional Conduct

- **Be Prepared.** You must acquire "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." (Rule 1.1).

- **Be Diligent.** You must "act with reasonable diligence and promptness." (Rule 1.3)

- **Tell The Truth.** You must be candid about the facts and the law with judges, opposing counsel, and others. In representing the People, you must not "knowingly make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law [you] previously made to the tribunal"; "fail to disclose to the tribunal controlling legal authority" not already cited by opposing counsel; "offer or use evidence that [you] know is false" and if you become aware that the evidence you have presented is false, you "shall take reasonable remedial measures including, if necessary, disclosure to the tribunal" (Rule 3.3). You must not "knowingly make a false statement of material fact or law to a third person" (Rule 4.1). You must not make a false statement in an application for membership to the bar (Rule 8.1) or "concerning the qualifications or integrity of a judge" or judicial candidate (Rule 8.2). In an *ex parte* proceeding, you must disclose to the court all material facts known to you, including adverse facts that will enable the court to make an informed decision (Rule 3.3[d]).

- **Know Your Role.** When communicating with unrepresented persons, do not give legal advice other than the advice to secure counsel and do not imply you

are disinterested. You must not misrepresent your role in the matter (Rule 4.3). You must "make reasonable efforts to assure the accused has been advised of the right to ,and the procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel" (Rule 3.8[b]). Do "not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing." (Rule 3.8[c])

- **Don't Prosecute Without Probable Cause.** As a prosecutor, "you shall refrain from prosecuting a charge that [you] know is not supported by probable cause" (Rule 3.8[a]).

- **Don't Make Frivolous Arguments.** You must not "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." Attorneys may, however, argue in good faith for an extension, modification, or reversal of existing law (Rule 3.1).

- **Be Fair.** You must not knowingly "obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value" (Rule3.4[a]). Do not" falsify evidence, counsel or assist a witness to testify falsely, 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" (Rule 3.4[b]) You must not communicate directly or indirectly with a person represented by another lawyer, unless you have the lawyer's consent or are otherwise authorized to do so "by law or by court order" (Rule 4.2).

- **Protect The Integrity Of Courts And Juries.** In an adversarial proceeding, you must not engage in unauthorized *ex parte* communications with the judge or his or her staff regarding the merits. During a litigation, whether or not you are a participant, you must not engage in or cause another to engage in prohibited communications with a sitting juror or prospective juror or a juror's family members. After the jury has been discharged, "[you] may communicate with a juror unless the communication is prohibited by law or court order. [You] must refrain 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 [you]. [You] may not engage in improper conduct during the communication." You must promptly reveal to the court any improper conduct by a juror or by another toward a juror, venire person, or members of their families (Rule 3.5).

- **Try Your Case In The Courtroom, Not The Media.** The general rule is that a lawyer participating in a criminal or civil proceeding "shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." (Rule 3.6[a]). Rule 3.6[a] includes a list of categories of statements to the media deemed likely to materially prejudice a criminal proceeding, and a list of statements that can properly be made; read it before speaking with the media. Any statement announcing that a particular person has been charged with a crime must be accompanied by a statement that the charge is merely an accusation and that the defendant is presumed innocent unless and until proven guilty (Rule

3.6). **Specific to prosecutors** "except for statements that are necessary to inform the public of the nature and extent of the prosecutors action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule" (Rule 3.8[f]).

- **Obey The Law.** You must not "commit a criminal act that reflects adversely on [your] honesty, trustworthiness or fitness as a lawyer in other respects or engage in conduct involving dishonesty fraud deceit or misrepresentation or engage in conduct that is prejudicial to the administration of justice" (Rule 8.4).

- **Provide Guidance.** The District Attorney and supervisory prosecutors have an ethical duty to "make reasonable efforts" to ensure that subordinates act ethically (Rules 5.1). In addition, you can be held responsible for another prosecutor or non-lawyer's conduct that is a violation of the Rules of Professional Conduct if you "order or, with knowledge of the specific conduct, ratify the conduct involved (Rules 5.1 and 5.3).

- **Comply With Disclosure Rules.** After reasonably diligent inquiry, make timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions including all evidence or information known to the prosecutor that tends to negate the guilt of the accused

or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. (Rule 3.8[d]) "Every prosecutor should be aware of the discovery requirements established by statutory law and case law." *See, e.g.*, N.C. Gen. Stat. §15A-903 et. seq, *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. U.S.*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419 (1995). [You] may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest" (Rule 3.8, Comment 4).

*The complete *Rules of Professional Conduct* can be accessed through the State Bar website at www.ncbar.com If you confront specific issues involving any of these mandatory ethical rules, you should review the text of the rule itself and relevant advisory opinions issued by the State Bar.

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

d) after reasonably diligent inquiry, make timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions including all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client, or participate in the application for the issuance

of a search warrant to a lawyer for the seizure of information of a past or present client in connection with an investigation of someone other than the lawyer, unless:

i. the information sought is not protected from disclosure by any applicable privilege;

ii. the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

iii. there is no other feasible alternative to obtain the information;

f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely

how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. See the ABA Standards of Criminal Justice Relating to the Prosecution Function. A systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] The prosecutor represents the sovereign and, therefore, should use restraint in the discretionary exercise of government powers, such as in the selection of cases to prosecute. During trial, the prosecutor is not only an advocate, but he or she also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all. In our system of criminal justice, the accused is to be given the benefit of all reasonable doubt. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence known to him or her that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.

[3] Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[4] Every prosecutor should be aware of the discovery requirements established by statutory law and case law. *See, e.g.*, N.C. Gen. Stat. §15A-903 et. seq, *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. U.S.*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419 (1995). The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial

harm to an individual or to the public interest.

[5] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings, and search warrants for client information, to those situations in which there is a genuine need to intrude into the client-lawyer relationship. The provision applies only when someone other than the lawyer is the target of a criminal investigation.

[6] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements that a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[7] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if

the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997; Amended March 1, 2003. Amended November 16, 2006.

Ethics Opinion Notes

RPC 129. Opinion rules that prosecutors and defense attorneys may negotiate plea agreements in which appellate and postconviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct.

RPC 152. Opinion rules that the prosecutor and the defense attorney must see that all material terms of a negotiated plea are disclosed in response to direct questions concerning such matters when pleas are entered in open court.

RPC 197. A prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.

RPC 204. It is prejudicial to the administration of justice for a prosecutor to offer special treatment to individuals charged with traffic offenses or minor crimes in exchange for a direct charitable contribution to the local school system.

RPC 243. It is prejudicial to the administration of justice for a prosecutor to threaten to use his discretion to schedule a

criminal trial to coerce a plea agreement from a criminal defendant.

2011 Formal Ethics Opinion 16. A criminal defense lawyer accused of ineffective assistance of counsel by a former client may share confidential client information with prosecutors to help establish a defense to the claim so long as the lawyer reasonably believes a response is necessary and the response is narrowly tailored to respond to the allegations.

Relevant North Carolina State Bar Ethics Opinions

RPC 189
October 21, 1994

Communications by DA's Staff with Unrepresented Traffic Violators
Opinion rules that the members of a district attorney's staff may not give legal advice about pleas to lesser included infractions to an unrepresented person charged with a traffic infraction.

Inquiry:
In County X, when a citizen receives a traffic citation, he or she is often told by the police officer or state trooper making the stop to call the district attorney's office directly in order to get the charge reduced or to get a prayer for judgment continued. If the citizen subsequently calls or goes to the district attorney's office, he or she will speak with an assistant district attorney, a victim/witness coordinator, or a secretary. The member of the district attorney's staff counsels the citizen about pleas to lesser infractions available to the citizen which will reduce insurance points and save the citizen money on his or her insurance premiums. If relevant, the staff member might also give the citizen advice about pleas that would prevent a forfeiture of the citizen's driver's license. Following the discussion, a Form CR-202, from the Administrative Office of the Courts, entering the citizen's guilty plea to a lesser included infraction, is prepared for the citizen. Is the practice of advising citizens as to their plea options allowed under the Rules of Professional Conduct?

Opinion:
No. An assistant district attorney or nonlawyer member of the district attorney's staff who is supervised by the district attorney may not give legal advice to a citizen charged with a traffic infraction who is not represented by a lawyer. The district

attorney and his or her legal staff represent the State of North Carolina when they negotiate a traffic citation against a citizen. Where the interests of an unrepresented person and the interests of a lawyer's client are in conflict, Rule 7.4(b) and Rule 7.4(c) prohibit the lawyer from (1) giving advice to the unrepresented person other than the advice to seek counsel and (2) implying that the lawyer is disinterested. If the lawyer knows or should know that the unrepresented person misunderstands the lawyer's role, the lawyer must make reasonable efforts to correct the misunderstanding. Rule 7.4(c). In addition, Rule 7.3(b) imposes upon a prosecutor a special duty to advise unrepresented individuals who are charged in a criminal matter of the individual's right to obtain counsel. The district attorney and the other lawyers in his or her office must make reasonable efforts to ensure that the conduct of nonlawyer members of the staff is compatible with the professional obligations of the lawyers not to give legal advice to an unrepresented citizen charged with an infraction. *See* Rule 3.3(b). The foregoing opinion does not prohibit a member of a district attorney's staff from responding to questions from an unrepresented citizen regarding the pleas the district attorney's office would be willing to approve.

RPC 197
January 13, 1995

Prosecutor's Duty to Notify Appropriate Persons of Dismissal of Criminal Charges
Opinion rules that a prosecutor must notify defense counsel, jail officials, or other appropriate persons to avoid the unnecessary detention of a criminal defendant after the charges against the defendant have been dismissed by the prosecutor.

Inquiry #1:

Defendant is being held in pretrial detention because he is unable to make bond. He is represented by Defense Lawyer. Prosecutor files a notice of voluntary dismissal of all charges pending against Defendant, pursuant to G.S. §15A-931, without placing the case on a published trial calendar. Prosecutor has access to a list of persons held in jail and the charges under which they are being held. This list includes an entry for Defendant. Is Prosecutor required by the Rules of Professional Conduct to serve Defense Lawyer with a copy of the written dismissal?

Opinion #1:
Yes, the prosecutor is required to either serve Defense Lawyer with a copy of the written dismissal or take other steps to notify Defense Lawyer, jail officials, or other appropriate persons in order to avoid the unnecessary detention of Defendant. A lawyer has a duty to avoid conduct that is prejudicial to the administration of justice pursuant to Rule 1.2(d) of the Rules of Professional Conduct. Prosecutors have a special duty "to seek justice, not merely to convict." *See* comment to Rule 7.3. In particular, Rule 7.3(d) requires a prosecutor to make timely disclosure to the defense of all evidence or information that tends to negate the guilt of the accused or mitigate the offense. The spirit, if not the letter of these rules, when considered *in pari materia*, calls for a prosecutor to take reasonable steps to ensure that a criminal defendant is not held in jail without charge.

Inquiry #2:
Is Prosecutor required by the Rules of Professional Conduct to provide the jail with a certified copy of the dismissal?

Opinion #2:
See opinion #1 above.

Inquiry #3:

Would the response to inquiry #2 be different if Defendant was unrepresented?

Opinion #3:
No. *See* opinion #1 above.

RPC 204

July 21, 1995
Editor's Note: This opinion was originally published as RPC 204 (Revised).

Prosecutor's Offer of Special Treatment to Defendants Who Make Charitable Contributions
Opinion rules that it is prejudicial to the administration of justice for a prosecutor to offer special treatment to individuals charged with traffic offenses or minor crimes in exchange for a direct charitable contribution to the local school system.

Inquiry:
District Attorney X would like to offer more favorable plea bargains to persons charged with traffic violations and minor criminal offenses upon condition that the individual charged make a direct charitable contribution to the local school board. In exchange for such contributions, the District Attorney would also like to offer to agree to the granting of continuances and PJCs (prayers for judgment continued) in traffic citation and minor criminal cases. The charitable contributions would not be court fines and would not be channeled through the court system. The District Attorney contends that by making a direct contribution to the school system, defendants are paying more money than they would be required to pay if they were fined by the court and the school system receives more money than it would receive from court fines alone. Would this practice be ethical?

Opinion:

No. The offer of special treatment from a prosecutor to individuals charged with traffic violations or minor criminal offenses in exchange for direct donations to even the most worthy charity implies that justice can be purchased. Such conduct is clearly prejudicial to the administration of justice in violation of Rule 1.2(d) of the Rules of Professional Conduct. *See also* Rule 7.2(a)(9). This practice would also be contrary to a prosecutor's special responsibility "to seek justice, not merely to convict." Comment to Rule 7.3.
This opinion does not limit or prohibit the exercise of the authority granted to a prosecutor to recommend a particular plea arrangement which includes restitution or reparation pursuant to G.S. §15A-1021.

RPC 243
January 24, 1997

Restraint in Exercising Prosecutor's Discretion to Calendar Cases
Opinion rules that it is prejudicial to the administration of justice for a prosecutor to threaten to use his discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant.

Inquiry #1:
Defense Attorney represents Client on a pending criminal charge. Prosecutor offered Client a plea bargain. Defense Attorney informs Prosecutor that Client will not accept the offered plea bargain. Prosecutor tells Defense Attorney that if Client does not accept the offered plea bargain, "Client's going to be sitting in the courtroom all week and he's going to be on the calendar every Monday morning for weeks to come." Is it unethical for Prosecutor to imply that he will use the statutory calendaring power of the district attorney's office to delay Client's trial if Client will not accept the plea bargain?

Opinion #1:
Yes, threatening to use the discretion to schedule a criminal trial to coerce a plea agreement from a criminal defendant is prejudicial to the administration of justice in violation of Rule 1.2(d) of the Rules of Professional Conduct. A prosecutor should use restraint in the discretionary exercise of the authority to calendar criminal cases. See comment [1] to Rule 7.3, "Special Responsibilities of a Prosecutor," ("... the prosecutor represents the sovereign and therefore should use restraint in the discretionary use of government
powers....").

Inquiry #2:
If a lawyer overhears the conversation between Prosecutor and Defense Attorney, does the lawyer have a duty to report Prosecutor's conduct to the State Bar or other appropriate authority?

Opinion #2:
Rule 1.3(a) requires a lawyer who has knowledge that another lawyer has committed a violation of the Rules of Professional Conduct "that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects" to report the conduct to the North Carolina State Bar or other appropriate authority. Comment [3] to Rule 1.3 states that [t]his rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the alleged offense and not the quantum of evidence of which the lawyer is aware.

Prosecutor's conduct may be an isolated incident resulting from a momentary lapse in judgment. If so, such conduct does not raise a "substantial" question as to Prosecutor's fitness as a lawyer. The lawyer who overhears the conversation may want to counsel Prosecutor with regard to his conduct, but the lawyer

is not required to report the conduct to the State Bar. However, if the lawyer knows that Prosecutor routinely abuses the discretionary power to schedule criminal cases or, after being advised that this conduct is a violation of the Rules, Prosecutor continues the conduct, the lawyer should report the matter to the State Bar or other appropriate authority.

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 10
January 16, 1998

Undercover Officer Planted by Prosecutor in Cell of Represented Defendant
Opinion rules that a prosecutor may instruct a law enforcement officer to send an undercover officer into the prison cell of a represented criminal defendant to observe the defendant's communications with other inmates in the cell.

Inquiry:
Two or more criminal defendants are charged with criminal offenses and are in custody. The prosecutor would like to advise the investigating law enforcement officers to "plant" an undercover officer, posing as an inmate, in the cell with the defendants. The undercover officer would be instructed to

listen to the defendants' discussions of their cases. However, the undercover officer would also be instructed not to enter into these discussions, not to ask the defendants any questions about their cases, and not to give the defendants any advice about their cases.
May the prosecutor instruct the investigating officers to plant an undercover officer in the prison cell?

Opinion:
Yes, provided the prosecutor also instructs the officers to conduct their listening activities within all applicable constitutional and statutory limitations and, where necessary, to explain those limitations to the officers. This opinion is limited to the conduct of prosecutors. *See* Rule 4.2(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...is authorized by law to do so.")

98 Formal Ethics Opinion 5
April 16, 1998

Disclosure of Client's Prior Driving Record
Opinion rules that a defense lawyer may remain silent while the prosecutor presents an inaccurate driving record to the court provided the lawyer and client did not criminally or fraudulently misrepresent the driving record to the prosecutor or the court and, further provided, that on application for a limited driving privilege, there is no misrepresentation to the court about the prior driving record.

Inquiry #1:
Client was charged with driving while impaired (DWI). Attorney A represented him at trial where Client was convicted. At the sentencing hearing, the prosecutor informed the court that Client had no record of prior convictions for DWI. Attorney A

and Client were aware, however, that Client was convicted of DWI in federal court but the federal court failed to forward information regarding the conviction to the North Carolina Department of Motor Vehicles for inclusion in Client's driving record. Therefore, when the prosecutor checked the driving record, he found no record of the prior conviction. At the sentencing hearing, Attorney A and Client remained silent when the prosecutor informed the court that Client had no prior convictions for DWI. Neither Attorney A nor Client made any affirmative misrepresentations to the court about Client's driving record. The judge sentenced Client to punishment level three which can only be imposed if the court determines that the defendant has not been convicted of a prior DWI within the previous seven years.
Was it unethical for Attorney A to remain silent when he heard the prosecutor give erroneous information to the court?

Opinion #1:
No, it was not unethical for Attorney A to remain silent. The burden of proof was on the State to show that the defendant's driving record justified a more restrictive sentencing level. A defense lawyer is not required to volunteer adverse facts when the prosecutor fails to bring them forward. The duty of confidentiality to the client is paramount provided the defense lawyer does not affirmatively misrepresent the facts to the court. See Rule 1.6(c) and Rule 3.3(a)(1) of the Revised Rules of Professional Conduct; CPR 313 (lawyer may not volunteer to the court confidential information about a client's prior convictions); and RPC 33 (lawyer may not reveal confidential information about a client's prior criminal record to the court but may not misrepresent the client's criminal record). Although Rule 3.3(a)(2) prohibits a lawyer from failing to disclose a material fact to a tribunal "when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client," this rule was not violated because Client's driving record was inaccurate through no fault of Client and Client did not

criminally or fraudulently conceal the prior conviction from the prosecutor or the court.

Inquiry #2:
Client wants a limited driving privilege. To obtain the privilege, Client must petition the court by filing a form prepared by the Administrative Office of the Courts (AOC). To be eligible for a limited driving privilege under G.S. §20-179.3, the court must find that the defendant, within the preceding seven years, was not convicted of an offense involving impaired driving. Although the AOC form does not require the defendant to represent to the court that the defendant has no prior DWI convictions, the court must find, and so acknowledge on the form, that there is evidence that satisfies the statutory requirements for the issuance of a limited driving privilege.
Assuming that at no point in the process Attorney A or Client will be required to misrepresent Client's prior driving record to the court, may Attorney A petition the court for a limited driving privilege for Client?

Opinion #2:
No. Unlike the prior inquiry, in this situation the burden of showing eligibility for a limited driving privilege is on the defendant. By petitioning the court for the privilege, the defendant is making an implicit representation to the court that he has no prior convictions and is eligible for the privilege. Attorney A is aware that this is a false representation of a material fact and he may not participate in its presentation to a tribunal by filing the petition. Rule 3.3(a)(1).

2001 Formal Ethics Opinion 15

April 19, 2002

Ex Parte Communication with a Judge when Permitted by Law

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

Inquiry:

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

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

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

On more than one occasion, Attorney A has gotten a client's bond modified in a court proceeding only to have the prosecutor communicate with the judge *ex parte* and obtain a reinstatement of the original bond. The prosecutor, in reliance upon the statement "at any time" in G.S. 15A-539, presumes that he or she is permitted by

law to engage in these *ex parte* communications without notice to Attorney A or the client.

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

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

2003 Formal Ethics Opinion 5

Participating in Misrepresentation of Prior Record Level in Sentencing Proceeding
Opinion rules that neither a defense lawyer nor a prosecutor may participate in the misrepresentation of a criminal defendant's prior record level in a sentencing proceeding even if the judge is advised of the misrepresentation and does not object.

Introduction:
Chapter 15A, Article 81B of the North Carolina General Statutes provides for the structured sentencing of persons convicted of crimes (the "Structured Sentencing Act"). The Act requires the court to sentence an offender to a term of

imprisonment within the range specified in the Act for the class of offense and the offender's prior record level. *See* N.C. Gen. Stat. §15A-1340.13 and §15A-1340.20. An offender's prior record level is determined by the calculation of points assigned, by statute, to various kinds of convictions. *See* N.C. Gen. Stat. §15A-1340.14 and §15A-1340.21.

Inquiry #1:
Lawyer represents Defendant who is convicted of a crime. At the sentencing hearing, Prosecutor gives the court a sentencing worksheet showing a prior record level for Defendant. Lawyer knows that the worksheet does not include some prior convictions from other jurisdictions that would increase Defendant's point level. Defendant and Lawyer did not criminally or fraudulently conceal the prior convictions. When the court asks Lawyer, "Do you stipulate to the prior record level as shown on the worksheet," may Lawyer respond, "The State has the burden of proof to establish the defendant's prior record?"

Opinion #1:
Yes. Formal Ethics Opinion 98-5 rules that a defense lawyer may remain silent while the prosecutor presents an inaccurate driving record to the court provided the lawyer and the client did not criminally or fraudulently misrepresent the driving record to the prosecutor or the court.

Inquiry #2:
Prosecutor and Lawyer are negotiating a plea for Defendant #2. Prosecutor is unwilling to reduce the charge but she is willing to leave some of Defendant's prior convictions off of the worksheet. This will reduce the prior record level and thereby reduce Defendant #2's exposure to active prison time. Defendant #2 instructs Lawyer to accept the plea offer. At the plea hearing, Prosecutor

tenders a sentencing worksheet to the court that does not include some of Defendant #2's prior convictions. The court asks Lawyer to stipulate to the worksheet. May Lawyer do so? May Lawyer respond by telling the court that the prosecutor has the burden of proof?

Opinion #2:
No. Both the prosecutor and the defense lawyer are required by the duties of honesty and candor to the tribunal to disclose to the court all the material terms of the negotiated plea. RPC 152; Rule 3.3(b) of the Revised Rules of Professional Conduct (2003).

Inquiry #3:
Would the response to inquiry #2 be different if the judge was advised and agreed that Defendant #2's prior record level would exclude some of Defendant's known prior convictions?

Opinion #3:
No. Prosecutor and Lawyer may not collude with the judge to avoid the requirements of the Structured Sentencing Act. Such conduct violates Rule 8.4 (c) because it involves dishonesty and misrepresentation. It also violates the prohibitions in Rule 8.4(d) and (f) on conduct that is prejudicial to the administration of justice and on knowingly assisting a judge to violate the rules of judicial conduct or other law.

2009 Formal Ethics Opinion 7

Interviewing an Unrepresented Child Prosecuting Witness in a Criminal Case Alleging Physical or Sexual Abuse of the Child

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

Introduction:

This ethics opinion examines when a criminal defense lawyer or a prosecutor may interview a child who is the prosecuting witness in a criminal case alleging physical or sexual abuse of the child. The opinion is purposefully limited to this factual situation and does not address whether a lawyer may, for example, interview a child who is a witness to a crime but is not the victim of the crime. The absence of an opinion on the latter subject does not, however, mean that the Ethics Committee has concluded that such interviews are permissible without consent or authorization of a parent, guardian or the court. A lawyer should take into consideration the principles articulated in this opinion when considering whether to interview any child who was a witness to a violent crime especially one involving the child's family members.

The opinion addresses a difficult dilemma for a lawyer who has a duty to prepare competently by investigating each case and interviewing key witnesses but who does not wish to cause

further harm to a child who may have been traumatized by physical or sexual abuse. In preparing this opinion, the Ethics Committee received input from mental health professionals and child advocates. That input led to the committee's determination that the emotional and intellectual sophistication of a child cannot be determined by a lawyer or established by an opinion of the Ethics Committee. However, the General Assembly has determined that a child at a certain age is legally mature for the analogous purpose of responding to an in-custody interrogation. N.C. Gen. Stat. §7B-2101(b). In the absence of a better benchmark, the committee accepts the General Assembly's policy decision on this issue.

When a lawyer is considering whether to seek the consent or authorization of a parent or guardian or a court order allowing the lawyer to interview a child who is alleged to be the victim of physical or sexual abuse, the lawyer should keep in mind the following information provided to the committee by the experts it consulted. Excessive interviews of child victims lead to additional trauma for the child.A person who is not trained in techniques for forensic interviewing of children often makes grave errors that can taint the interview or add to the child's trauma. It is preferable for the interview to be performed by a professional. To avoid intimidating the child, a support person for the child (family member or other appropriate person) should be present at the interview. In light of the foregoing, a lawyer should investigate whether forensic interviews with the child have already taken place and are available on tape; if a tape of an interview with the child is available, the lawyer should consider forgoing further interviews.

Inquiry #1:
Attorney A represents a criminal defendant on a charge of taking indecent liberties with a child. To prepare for trial, Attorney A would like to interview the child who is the victim of the alleged crime. The child is not a party to the criminal action.

She does not have a lawyer and a guardian ad litem has not been appointed to represent her interests. May Attorney A interview the child without the consent of the child's parent or legal guardian?

Opinion #1:
Yes, if the child is older than the age of maturity for the purpose of an in-custody interrogation as determined by the General Assembly in N.C. Gen. Stat. §7B-2101(b) which provides that an in-custody admission of a child under the age of 14 is inadmissible if the interrogation was made outside the presence of the child's parent, guardian, custodian or attorney. Below the age designated in the statute, it is presumed that a child cannot understand the purpose of an interview with a lawyer, the lawyer's role, or the child's right to decline the interview or terminate the interview at any time. If the child is this age or older, Attorney A may seek an interview with the child without the consent of the child's parent or legal guardian, provided Attorney A respects the rights of the child and there is no legal requirement that the consent of the parent or legal guardian be obtained. If the General Assembly changes the designated age in N.C. Gen. Stat. §7B-2101(b), or a successor statute, this opinion shall be similarly changed.

It is Attorney A's professional duty to prepare competently and diligently to defend the client; a*priori*, in most cases this includes interviewing the victim of the alleged crime if the victim will consent to the interview. Nevertheless, a child frequently does not have the emotional or intellectual maturity to make an informed decision about whether to consent to the interview or the emotional or intellectual maturity to understand the role of the lawyer or the purpose of the interview.

Rule 4.3(b) states that, when dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not 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**.**

As noted in comment [1] to Rule 4.3, "[a]n 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."

2009 Formal Ethics Opinion 15

January 15, 2010

Dismissal of DWI Charge by Prosecutor When Insufficient Evidence Due to Suppression Order

Opinion rules that a prosecutor must dismiss a DWI charge when the prosecutor fails to appeal a court order suppressing evidence from the traffic stop thereby eliminating the evidence necessary to prove the charge.

Inquiry:

In a Driving While Impaired (DWI) case in district court, a defendant makes a pretrial motion to suppress all evidence obtained from the stop of his vehicle pursuant to N.C. Gen. Stat. A720-38.6(a). After considering the evidence offered at the pretrial hearing, the district court judge enters an order pursuant to N.C. Gen. Stat. A720-38.6(f) indicating his/her preliminary inclination to grant the defendant's pretrial motion because the stop was unconstitutional in violation of the Fourth Amendment. The prosecutor does not appeal this preliminary ruling to superior court and the district court judge's decision becomes a final judgment pursuant to the statute. The district court judge enters a final order suppressing the evidence from the vehicle stop. The evidence from the vehicle stop was the only evidence of the alleged crime. The case is re-calendared.

May the prosecutor call the case for trial, arraign the defendant (who pleads not guilty), call no witnesses or otherwise offer evidence, and rest the case, thus requiring the judge to dismiss the case; or does the prosecutor have an ethical duty to dismiss the case after all evidence of guilt is suppressed pursuant to the pretrial motion?

Opinion:
A lawyer has an ethical duty, under Rule 3.1, not to bring a proceeding unless there is a basis in law and in fact for doing so that is not frivolous. In light of this duty, a prosecutor who knows that she has no admissible evidence supporting a DWI charge to present at trial must dismiss the charge prior to calling the case for trial.

2011 Formal Ethics Opinion 12

October 21, 2011

Disclosing Clerk's Error to Court
Opinion rules that a lawyer must notify the court when a clerk of court mistakenly dismisses a client's charges.

Inquiry:
Lawyer has a client in custody who has numerous cases pending in district court. Lawyer negotiates a plea agreement with the assistant district attorney (ADA) whereby all but two of the charges will be dismissed. Lawyer asks for the client to be brought into the courtroom to enter his plea. At that time, Lawyer is informed that the client has already been taken back to the jail. Lawyer and the ADA agree to continue the case to the next business day. When Lawyer subsequently goes to visit his client in jail, he is told that the client was released because all of his charges were dismissed.

Upon investigation, Lawyer confirms that all of the client's charges had been voluntarily dismissed. The dismissals are

clearly the result of an error by the clerk of court and do not reflect the plea agreement entered into by Lawyer and the ADA.

Must lawyer inform the clerk of court of the error?

Opinion:
Yes. The preamble to the Rules of Professional Conduct provides that as a member of the legal profession, a lawyer is an "officer of the legal system." Rule 0.1. Rule 8.4(d) states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." Similarly, Comment [2] to Rule 3.3 (Candor Toward the Tribunal) refers to the special duties of lawyers as officers of the court to "avoid conduct that undermines the integrity of the adjudicative process."

Under Rule 3.3, for example, a lawyer has a duty to disclose a client's false testimony even though it may have grave consequences for the client, where the alternative is that the lawyer cooperate in deceiving the court thereby subverting the truth-finding process which the adversary system is designed to implement. Rule 3.3, Cmt. [11]. Thus, if a conflict arises between a lawyer's duty to his client and his duties as an officer of the court, the lawyer's duty to the court must prevail.

This inquiry differs from that addressed in 98 FEO 5, which provides that a defense lawyer does not have a duty to inform the court of an inaccurate driving record presented by the prosecutor. In the situation addressed in 98 FEO 5, both advocates are present in court and each is expected to present evidence and carry his burden of proof. The opinion states that the burden of proof is on the state to show that the defendant's driving record justifies a more restrictive sentencing level and that the defense lawyer is not required to volunteer adverse facts when the prosecutor fails to bring them forward.

In the instant inquiry, Lawyer knows that his client's charges were dismissed in error and that "justice" (in the form of a negotiated plea to which Lawyer and the client agreed) was not carried out. Therefore, Lawyer has an obligation to inform the court or the clerk of court of the apparent error.*Accord* Wis. Formal Ethics Op. E-84-7 (1984)(defense attorney has obligation to inform the court or the court's staff of clerk of court's error).

2011 Formal Ethics Opinion 16

January 27, 2012

Responding to Ineffective Assistance of Counsel Claim Questioning Representation

Opinion rules that a criminal defense lawyer accused of ineffective assistance of counsel by a former client may share confidential client information with prosecutors to help establish a defense to the claim so long as the lawyer reasonably believes a response is necessary and the response is narrowly tailored to respond to the allegations.

Inquiry #1:

The ABA recently issued Formal Opinion 10-456, which holds that a criminal defense lawyer accused of ineffective assistance of counsel by a former client cannot share confidential information with prosecutors to help establish a defense to the former client's claim of ineffective assistance of counsel unless the disclosure is made in a court-supervised setting.

Our Rule 1.6(b)(6) provides that a lawyer may reveal information protected from disclosure by Rule 1.6(a) 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.
This exception, also found in ABA Model Rule 1.6, allows a lawyer to reveal confidential information to respond to claims of ineffective assistance of counsel, provided the lawyer narrowly tailors the disclosure to that which is reasonably necessary to respond to the facts of the specific claim.

Under the ABA opinion, however, a lawyer would not be permitted to make such limited disclosure outside of a "court-supervised setting." The opinion provides that disclosure may not occur until a court directs the lawyer to disclose, presumably after considering any objections or claims of privilege raised by the former client. The opinion states:

Although an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by [Model] Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under [Model] Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer “reasonably believes [it is] necessary” to do so in the lawyer's self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

Outside of the court-supervised setting contemplated by the ABA opinion, may a North Carolina lawyer accused of ineffective assistance of counsel disclose information about the former representation to the extent that lawyer believes it is reasonably necessary to establish a defense to the accusation? For example, in response to prosecutors' inquiries, but before a

court has ordered the lawyer to do so, may the lawyer disclose information about the representation of a former client that the lawyer believes is reasonably necessary to respond to a claim of ineffective assistance of counsel in the former client's post-conviction motion for appropriate relief?

Opinion #1:
Yes. We decline to adopt ABA Formal Op. 10-456 (2010).

Rule 1.6(b)(6), which applies to state and federal criminal representations, specifically provides that a lawyer may reveal confidential information protected from disclosure by Rule 1.6(a) to the extent the lawyer reasonably believes necessary to respond to allegations concerning the lawyer's representation of the client. Rule 1.6(b)(6) also affords the lawyer discretion to determine what information is reasonably necessary to disclose, and there is no requirement that the lawyer exercise that discretion only in a "court-supervised setting."

We take additional guidance from the North Carolina General Assembly in reaching this conclusion. Regarding state court post-conviction actions, N.C. Gen. Stat. § 15A-1415(e) provides that where a defendant alleges ineffective assistance of prior trial or appellate counsel as a ground for the illegality of his conviction or sentence, the client “shall be deemed to waive the attorney-client privilege with respect to both oral and written communications between such counsel and the defendant to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness.” The statute further provides that the waiver of the attorney-client privilege “shall be automatic upon the filing of the motion for appropriate relief alleging ineffective assistance of prior counsel, and the superior court need not enter an order waiving the privilege.”

Adoption of the ABA opinion would contradict the legislature's determination that lawyers should have the

discretion, *without* court direction or supervision, to disclose privileged information in response to such claims in the narrowly-tailored fashion contemplated by Rule 1.6(b)(6). Adoption of the opinion would also contradict the language of Rule 1.6(b)(6) itself, which does not require a court-supervised setting to make a narrowly-tailored disclosure of confidential information in response to such claims. We decline to adopt an opinion that contradicts existing state law and rules governing disclosure of otherwise confidential and privileged information under these limited circumstances.

In reaching this conclusion, however, we are also relying on the fact that both N.C. Gen. Stat. § 15A-1415(e) and Rule 1.6(b)(6) clearly admonish lawyers who choose to respond to claims of ineffective assistance of counsel, regardless of the setting, to respond in a manner that is narrowly tailored to address the specific facts underlying the specific claim. Simply put, the pursuit of an ineffective assistance of counsel claim by a former client does not give the lawyer *carte blanche* to disclose all information contained in a former client's file. Comment [15] to Rule 1.6 emphasizes that Rule 1.6(b) permits disclosure only to the extent the lawyer reasonably believes necessary to accomplish one of the purposes specified in the exceptions set out in paragraph (b). Disclosure should be no greater than what is reasonably necessary to accomplish the purpose. Therefore, once a lawyer has determined that disclosure of confidential or privileged information is necessary to respond to a claim of ineffective assistance of counsel, and once the lawyer has decided to make that disclosure, the lawyer still has a duty to avoid the disclosure of information that is not responsive to the specific claim. In the same vein, a prosecutor requesting information from defense counsel in relation to an ineffective assistance of counsel claim must limit his request to information relevant to the defendant's specific allegations of ineffective assistance. *See* Rule 3.8; Rule 4.4.

2013 Formal Ethics Opinion 1

October 15, 2013

Release/Dismissal Agreement Offered by Prosecutor to Convicted Person

Opinion rules that, subject to conditions, a prosecutor may enter into an agreement to consent to vacating a conviction upon the convicted person's release of civil claims against the prosecutor, law enforcement authorities, or other public officials or entities.

Inquiry:
Defendant was convicted of a crime in a North Carolina state court and sentenced to the North Carolina prison system. Ten years later, the parties learned of exculpatory evidence. Defendant, with the advice of two defense counsel, signed a release that provided, in pertinent part, as follows:

> [Defendant] for and in consideration of release from the North Carolina Department of Corrections, do[es] hereby voluntarily agree without any threat, coercion, or prosecutorial misconduct, that he will never...bring legal action of any kind against the State of North Carolina, the County of..., the...County Sheriff's Department, Detective...of the...County Sheriff's Department, any and all members and employees of the...County District Attorney's Office.... This Release is given and executed with due knowledge [and] cognizance of the Supreme Court's recognition of the validity and enforceability of Releases of this nature in the case of *Town of Newton v. Rumery*, 480 U.S. 386 (1987).

May a state or federal prosecutor prepare, offer, negotiate, or execute an agreement (a "release/dismissal agreement") that conditions the prosecutor's agreement not to object to or

contest a motion for appropriate relief initiated by the convicted person upon the convicted person's agreement to release civil claims against public officials or entities arising from the convicted person's arrest, prosecution, or imprisonment?

Opinion:
Yes, but the prosecutor must take great care not to transgress existing ethical rules.

A *per se* ethical rule against prosecutors negotiating post-conviction release/dismissal agreements would effectively prohibit a defense lawyer from offering on behalf of his or her client a waiver of potential civil claims to persuade a prosecutor to support the prisoner's motion to vacate the conviction. Some defense lawyers wish to have this option available when the extent to which new exculpatory evidence casts doubt on the defendant's guilt is debatable.

In negotiating such an agreement, however, a prosecutor must be mindful of his or her ethical obligations. For instance, if recently discovered exculpatory evidence shows that the prisoner was innocent of the charge(s) for which he is currently incarcerated and he files a legally meritorious motion with the appropriate court to vacate his conviction, the prosecutor may not make his or her consent to the motion contingent on the prisoner waiving potential civil claims arising from his wrongful conviction. Rule 3.1 ("A lawyer shall not... defend a proceeding...or...controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous..."). *See also* Rule 3.8, *Special Responsibilities of a Prosecutor*, cmt. [1] (responsibility as minister of justice carries with it specific obligations to see that defendant is accorded procedural justice and that guilt is decided upon sufficient evidence).

In the fact pattern giving rise to this inquiry, the prisoner was represented by counsel in the negotiation of the release-

dismissal agreement. A prosecutor should not negotiate such an agreement with an unrepresented prisoner unless the prisoner insists upon proceeding *pro se*. *Cf.*Rule 3.8(c) (prosecutor shall not seek to obtain from an unrepresented accused a waiver of important pretrial rights). Before negotiating such an agreement with a *pro se* prisoner, judicial approval of the *pro se* representation should be obtained. *Cf.* Rule 3.8, cmt. [3].

Even if the ethical concerns identified above have been addressed, a prosecutor may only negotiate an agreement that includes a waiver of the prisoner's potential civil claims against the sovereign or public officials if the prosecutor has the legal authority to represent the interests of the sovereign or those officials with respect to such civil claims. It would be unethical for the prosecutor explicitly or implicitly to misrepresent the scope of the prosecutor's authority to negotiate with respect to such civil claims. Rule 4.1; Rule 8.4(c).

In communicating with the court regarding the prosecution's position on whether the conviction should be vacated, the prosecutor should disclose the existence of any agreement conditioning the prosecutor's position on the prisoner's agreement to waive potential civil claims. *Cf.* RPC 152 (prosecutor must ensure that all material terms of negotiated plea are disclosed in response to direct questions).

Endnote

1. There is no general legal prohibition against a prosecutor negotiating or entering into a "release-dismissal agreement" in the pre-conviction context. *See Town of Newton v. Rumery*, 480 US 386, 395-97 (1987) (rejecting the assumption "that all–or even a significant number–of release-dismissal agreements stem from prosecutors abandoning 'the independence of judgment required by [their] public trust'" and concluding that a *per se* rule of invalidity of such agreements would fail to credit other relevant public interests and improperly assume prosecutorial misconduct). *See also Rodriguez v. Smithfield*

Packing Co., 338 F.3d 348, 353-54 & n.3 (4th Cir. 2003) (applying *Rumery* to enforce a release-dismissal agreement and noting that such agreements serve the legitimate public interest of avoiding future litigation); and *Senator v. Baltimore County*, 917 F.2d 1302, 1990 WL 173827 (4th Cir. 1990) (unpub.) ("the release agreement serves the public interest").

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July 19, 2013

State Prosecutor Seeking Order for Arrest for Failure to Appear When Defendant is Detained by ICE

Opinion rules that a state prosecutor does not violate the Rules of Professional Conduct by asking the court to enter an order for arrest when a defendant detained by ICE fails to appear in court on the defendant's scheduled court date.

Inquiry #1:

A defendant is an undocumented alien who is arrested for a crime. He is given a secured bond by the magistrate, placed in custody in the jail, and served with a US Immigration and Customs Enforcement (ICE) detainer. The defendant hires a bondsman to pay the secured bond and the bondsman does so. ICE comes to the jail and takes the defendant into custody, transporting him to a federal holding facility. The defendant's court-appointed lawyer brings verification of the defendant's detention by ICE to the prosecutor handling the case. Later, the defendant's lawyer appears in court on the defendant's court date and explains to the court that the defendant is in the custody of ICE. The defense lawyer asks the state to have the defendant brought to trial, enter a voluntary dismissal, or dismiss the case with leave pursuant to N.C. Gen. Stat.§15A-932.

The prosecutor asks the judge to call the defendant for failure to appear and to issue an order for his arrest pursuant to N.C. Gen. Stat.§15A-305(b)(2) which provides that "[a]n order for arrest may be issued when:...[a] defendant who has been arrested and released from custody pursuant to Article 26 of this Chapter, Bail, fails to appear as required."

The court enters a forfeiture of the bond pursuant to N.C. Gen. Stat.§15A-544.3(a), which provides that when a defendant who was released upon execution of a bail bond fails to appear before the court as required, the court shall enter a forfeiture for the amount of the bail bond in favor of the state and against the defendant and the surety on the bail bond. Nevertheless, N.C. Gen. Stat.§15A-544.3(b)(9) provides that a forfeiture of a bail bond will be set aside if, on or before the final judgment date, "satisfactory evidence is presented to the court" that one of a number of listed "events" has occurred. That list includes the following "event" at subparagraph (vii):

> the defendant was incarcerated in a local, state, or federal detention center, jail, or prison located anywhere within the borders of the United States at the time of the failure to appear, and the district attorney for the county in which the charges are pending was notified of the defendant's incarceration while the defendant was still incarcerated and the defendant remains incarcerated for a period of 10 days following the district attorney's receipt of notice, as evidenced by a copy of the written notice served on the district attorney via hand delivery or certified mail and written documentation of date upon which the defendant was released from incarceration, if the defendant was released prior to the time the motion to set aside was filed.

N.C. Gen. Stat.§15A-544.3(b)(9); *accord* N.C. Gen. Stat.§15A-544.5(b)(7).

If ICE decides to release the defendant from custody and there is an outstanding order for his arrest from a North Carolina court, ICE will detain the defendant until he can be released to the custody of the State.
See N.C. Gen. Stat.§15A-761.

Is the prosecutor's conduct a violation of Rule 3.8 or any other Rule of Professional Conduct?

Opinion #1:
No. Rule 3.8, on the special responsibilities of a prosecutor, prohibits a prosecutor from prosecuting a charge that the prosecutor knows is not supported by probable cause. The comment to the rule, moreover, emphasizes the prosecutor's duty to seek justice. However, there is no legal requirement that a defendant's failure to appear in court be willful. In the instant inquiry, the legal requirements for requesting an order of arrest were satisfied and there was a procedural reason for seeking the order of arrest. Therefore, although the prosecutor knows that the defendant's failure to appear is not willful, the prosecutor's exercise of his professional discretion within the requirements of the law does not violate the Rules of Professional Conduct.

Inquiry #2:
Did the judge violate the Rules of Professional Conduct or the Code of Judicial Conduct by issuing the order for arrest and forfeiting the bond?

Opinion #2:
Opining on the professional conduct of judicial officers is outside the purview of the Ethics Committee. Therefore, no opinion will be offered in response to this question.

Endnote

As a practical matter, however, a person who is detained by ICE is rarely released. Deportation or federal incarceration is more likely.

State Bar Disciplinary Process

Katherine E. Jean, Counsel, North Carolina State Bar

The Grievance Committee and the Disciplinary Hearing Commission

The purposes of the State Bar's disciplinary process are to protect the public from harm that could result from unethical conduct of lawyers and to protect the integrity of the justice system. The process begins when allegations of possible professional misconduct come to the State Bar's attention. Grievances come to the State Bar from many sources: clients of the lawyer who is the subject of the grievance, other parties to a controversy, lawyers, judges or members of the public. Frequently the Office of Counsel initiates a grievance based upon information available from the press or other sources. Grievances are investigated by one of the lawyers in the State Bar's Office of Counsel assisted by one more more of its investigators. Investigations are summarized in a "Report of Counsel" that is prepared in each grievance file.

The State Bar's Grievance Committee acts upon alleged violations of the North Carolina Rules of Professional Conduct. The Grievance Committee has fifty five members, all appointed to serve on the Committee by the President of the State Bar. Thirty eight members of the Committee are also members of the State Bar's governing body, called the Council. Of those, thirty five are lawyers elected by their peers from each judicial district and three are non-lawyers. There are also twelve advisory members, who are both

lawyers and non-lawyers but are not members of the Bar Council. The Grievance Committee is divided into three subcommittees. Each subcommittee has direct responsibility for reviewing the Reports of Counsel and supporting and recommending appropriate full Committee votes upon the subcommittees' recommended resolutions. The State Bar's legal department, the Office of Counsel, serves as counsel to the Grievance Committee.

In addition to the State Bar's Grievance Committee, several judicial districts have established judicial district grievance committees. NC Admin. Code title 27, r. § 1B.0201(a). The district committees help the Grievance Committee by investigating some of the grievances filed against lawyers who practice in those particular judicial districts. Grievances are filed directly with the district committees or are referred to the districts after they are filed with the State Bar. The district committees submit reports to the Office of Counsel detailing their investigations and recommending whether the Grievance Committee should or should not find probable cause to believe the respondent lawyers violated one or more Rules. District committees only make recommendations and do not impose discipline or dismiss grievances. 27 N.C.A.C. §1B .0202.

The Disciplinary Hearing Commission (DHC) is an independent tribunal that hears all contested disciplinary cases. The DHC is composed of twelve lawyers appointed by the State Bar Council and eight nonlawyers appointed by the Governor and the General Assembly. The DHC sits in panels of three; two lawyers and one non-lawyer. In addition to disciplinary cases, the DHC hears cases involving contested allegations that a lawyer is disabled and petitions from disbarred lawyers seeking reinstatement.

Initiation of a Grievance

Grievances come to the State Bar from many sources. All are carefully reviewed by lawyers in the Office of Counsel. In 2013, the Grievance Committee addressed 1,193 grievance files. Rule of Professional Conduct 8.3 requires a lawyer to report to the State Bar when he or she knows of professional misconduct by another lawyer that "raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." A lawyer who fails to report misconduct as required by Rule 8.3 is subject to discipline. Because of this mandatory reporting requirement, administrative rules allow the State Bar to hold in confidence the identity of a lawyer or a judge who reports alleged misconduct by another lawyer. 27 N.C.A.C. §1B .0111(d). The identity of a reporting lawyer or judge will only be revealed when disclosure is required by law or due process or when identification is essential to the respondent lawyer's ability to present a defense.

There is no time limit for initiation of a grievance based upon a plea of guilty to a felony or upon conviction of a felony, a grievance based upon allegations of conduct that constitutes a felony, without regard to whether the lawyer is charged, prosecuted, or convicted of a crime, or a grievance based upon conduct found by a court to be intentional. All other grievances must be initiated within six years after the last giving rise to the grievance. 27 N.C.A.C. §1B .0111(f).

The existence and substance of a grievance are confidential unless and until one of several things happens, most commonly that the Grievance Committee imposes public discipline or the State Bar files a complaint in the Disciplinary Hearing Commission. 27 N.C.A.C. §1B .0129(a). Additional

exceptions to the confidentiality rule come into play less frequently. N.C.G.S. §84-32.1 clarifies that documents in the State Bar's possession relating to grievances are not public records.

The Grievance Process and Disposition of Grievances

When the allegations of a grievance, even if true, fail to state a violation of the Rules of Professional Conduct or if available evidence conclusively disproves the allegations, the Committee recommending dismissal with no further action. If the Chair agrees with that recommendation, the grievance is dismissed. 27 N.C.A.C. §1B .0105(a)(18). In such cases, the respondent lawyer is not asked to respond and is often not even aware that the grievance was filed.

When the allegations, if true, state a violation of the Rules of Professional Conduct and available evidence does not conclusively disprove the allegations, the Office of Counsel sends the respondent lawyer a Letter of Notice and accompanying Substance of Grievance detailing the allegations of misconduct. 27 N.C.A.C. §1B .0107(2). The respondent must submit a written response within 15 days from receipt of the Letter of Notice, although extensions of time to respond are regularly granted. 27 N.C.A.C. §1B .0112(c). After it receives the written response and conducts any necessary additional investigation, the Office of Counsel prepares a Report of Counsel to the Grievance Committee. The Report of Counsel contains summaries of the complaint and the response, analysis of the evidence, the respondent's disciplinary history and a recommended resolution. 27 N.C.A.C. §1B .0107(4).

If the evidence does not support a finding of probable cause that the respondent violated one or more of the Rules of

Professional Conduct, the Office of Counsel recommends that the grievance be dismissed without further action. If the Chair of the Grievance Committee and the Chair of the subcommittee assigned the case agree, the grievance is dismissed. 27 N.C.A.C. §1B. .0105(a)(19). If the Office of Counsel concludes there is probable cause to believe the respondent violated one or more of the Rules of Professional Conduct, the grievance will be considered by the full Grievance Committee at its next quarterly meeting. The full Grievance Committee also considers every grievance in which the Office of Counsel concludes that the evidence does not support a finding of probable cause but recommends that the respondent be cautioned that his or her conduct was not in conformity with accepted standards of professional practice. 27 N.C.A.C. §1B .0106(4).

At the Grievance Committee's quarterly meetings, each grievance is considered on the written record, consisting of the complaint with any attachments, the response with any attachments, the results of any additional investigation conducted by the Office of Counsel and the Report of Counsel. Live testimony is not received. 27 N.C.A.C. §1B .0113(e). Initially, each grievance is considered by one of three subcommittees. The subcommittee makes a recommendation to the full Grievance Committee, which either adopts the subcommittee's recommendation or reaches a different resolution.

Grievances considered at the quarterly meetings are resolved in one of the following ways:

> Sometimes the Grievance Committee disagrees with the Office of Counsel's recommendation that Committee action is warranted and dismisses the

grievance. The Committee can also dismiss a grievance with a Letter of Caution when no Rule violation occurred but the lawyer's conduct was inconsistent with accepted professional practice or can dismiss a grievance with a Letter of Warning when the respondent committed a technical or inadvertent Rule violation. Letters of Caution and Letters of Warning do not constitute discipline. 27 N.C.A.C §§1B .0113(i) and (j)(1).

When it finds probable cause to believe that more than a technical or inadvertent Rule violation occurred, the Grievance Committee can either impose discipline or refer the grievance to the DHC for trial. 27 N.C.A.C. §§1B .0106(2), (6), (7) and (8).

When it believes the appropriate discipline is less than suspension or disbarment, the grievance Committee can impose three levels of discipline - admonition, reprimand and censure, in ascending order of severity. 27 N.C.A.C. §§1B .0106(6), (7) and (8).

The respondent may reject an admonition or a reprimand and may, by failing affirmatively to accept it, also effectively reject a censure. 27 N.C.A.C. §1B .0113(1) (3). Even though the respondent has an opportunity to respond fully to the allegations in writing and by written exhibits, and in fact is required by Rule of Professional Conduct 8.1 to do so, the respondent does not have an opportunity before the Grievance Committee for a full evidentiary hearing with live witnesses. A respondent who disagrees with the Grievance Committee's determination on the written record can obtain a full evidentiary hearing by rejecting the Grievance

Committee's discipline. If the respondent rejects an admonition or reprimand or does not affirmatively accept a censure, the Office of Counsel will file a complaint in the Disciplinary Hearing Commission. 17 N.C.A.C. §1B .0113(1)(4).

Admonitions are permanent, private discipline which do not appear on the judgment docket of the State Bar, although they may be considered in any later disciplinary proceedings against the respondent. 27 N.C.A.C.§1B .0123(a)(1).

Reprimands and censures are permanent discipline and are recorded in the State Bar's judgment book and sent to the complainant. 27 N.C.A.C. §§1B .0123(a)(2) and (3). Censures are also sent to the Clerk of Superior Court in the respondent's home county and any county in which respondent maintains a law office and to the clerks of the North Carolina Court of Appeals, the North Carolina Supreme Court, the United States District Courts in North Carolina, the Fourth Circuit Court of Appeals, and the United States Supreme Court. 27 N.C.A.C. §1B .0123(a)(3). Notices of both reprimands and censures appear in the State Bar Journal and on the State Bar's website.

Finally, the Grievance Committee can directly refer a grievance to the Disciplinary Hearing Commission when it believes an evidentiary hearing is necessary to determine whether misconduct has occurred or when it believes a suspension or disbarment is likely the appropriate discipline. 27 N.C.A.C. §1B .0113(H). The Grievance Committee does not have the authority to impose suspension or disbarment. *Id.* The Grievance Committee most often refers to the DHC cases involving misappropriation of client or fiduciary funds, criminal acts or other acts of dishonesty, sexual misconduct,

serial neglect of professional responsibilities, including failing to communicate with clients and failing to respond to inquiries from the State Bar.

The Disciplinary Hearing Commission

The Disciplinary Hearing Commission is comprised of 20 members, twelve lawyers and eight non-lawyers. The lawyer members are appointed by the State Bar Council. The nonlawyer members are appointed by the Governor and the General Assembly upon recommendations of the President Pro Tempore of the Senate and the Speaker of the House. N.C.G.S. § 84028.1. The DHC hears cases in panels of three made up of two lawyers and one non-lawyer. DHC actions follow the procedures contained in the North Carolina Rules of Civil procedure, with minor exceptions. 27 N.C.A.C. §§1B. .0114(b) and (n). The State Bar is the plaintiff in disciplinary proceedings before the DHC. The Office of Counsel represents the State Bar. 27 N.C.A.C. §1B .0107(5). The defendant is the lawyer against whom the DHC case is brought. The defendant is entitled to be represented by counsel. 27 N.C.A.C. §1B .0114(r). DHC trials are open to the public and are conducted according to the North Carolina Rules of Evidence. 27 N.C.A.C. §§1B .0114(m) and (t). The plaintiff's complaint and a summons issued by the Clerk of the DHC are served on the defendant according to the requirements of the North Carolina Rules of Civil Procedures. 27 N.C.A.C. §§1B .0114(a) and (b). The complaint must "allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint." 27 N.C.A.C. §1B .0014 (c). The defendant must file an answer within 20 days of service of the complaint. 27 N.C.A.C. §1B .0114(e). Discovery procedures are available to both parties. 27 N.C.A.C. §1B .0114(g). Both parties have the right to compel the production of documents and the

attendance of witnesses by subpoena. 27 N.C.A.C. §1B .0114(s).

Hearings are divided into two phases. In phase one, the State Bar has the burden of proving each alleged violation of the Rules of Professional Conduct by clear, cogent and convincing evidence. Any alleged Rule violation the State Bar fails to prove by clear, cogent and convincing evidence is dismissed. 27 N.C.A.C. §1B .0114(u). If the DHC finds that some or all of the alleged violations have been proven, the DHC moves immediately to phase two. 27 N.C.A.C. §1B .0114(w). In phase two, the DHC hears "evidence relevant to the discipline to be imposed," determines the existence of aggravating and mitigating factors including those expressly identified in 27 N.C.A.C. §1B .0114(w), considers all of the factors mandated by the *North Carolina State Bar v. Talford,* 356 N.C. 626, 576 S.E.2d305(2003), and determines the appropriate discipline. 27 N.C.A.C. §1B .0114(w). The hearing panel must issue a written order containing its findings of fact and conclusions of law. 27 N.C.A.C. §1B .0114(u).

The DHC can dismiss the charges or can admonish, reprimand, censure, suspend (for up to five years), or disbar a defendant. N.C. G.S. § 84-28(c); 27 N.C.A.C. §§1B .0123(a)(1), (2) and (3). The DHC can stay all or part of a suspension upon compliance with stated conditions. N.C.G.S. §84-28(c)(2) N.C.A.C. §1B .0114(x). It can also impose conditions precedent to reinstatement of a suspended or disbarred lawyer. N.C.G.S. §84028(c). A disbarred lawyer is eligible to apply for reinstatement five years after the effective date of disbarment.

Either party can appeal an order of discipline issued by the DHC to the North Carolina Court of Appeals. Disbarments and suspensions exceeding eighteen months are stayed on appeal only upon writ of supersedeas. All other discipline imposed by the DHC is automatically stayed on appeal. N.C.G.S. §84-28(h).

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