But I Didn't Know!

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Introduction

This presentation will be a discussion of Ethics Opinions issued by the North Carolina State Bar since 2011 which should be of interest to real estate practitioners. Only three of the Opinions which we will discuss deal directly with real estate transactions. The rest are either more general opinions which would impact real estate practices, or opinions dealing with other areas of the law that state principles which may be applicable to the modern real estate practice. At least two of these opinions raise significant standard of care issues as real estate practitioners deal with the advantages and challenges of modern technology in the law practice. All of the opinions discussed in this presentation are promulgated by the North Carolina State Bar to govern ethical matters for ALL attorneys, including real estate practitioners. An overview of the more recent opinions, particularly with an eye to those that are not on their face specifically related to real estate transactions, hopefully will prevent wary practitioners from ever having to resort to the ineffectual excuse: "But I didn't know!" The opinions to be discussed are included and the material contained in them is the property of the North Carolina State Bar.

Real Estate Transactions

2011 Formal Ethics Opinion 5

Representation of Lender in Contested Foreclosure When Corporate Trustee Is Owned by Spouse and Paralegal

Adopted: July 15, 2011

Opinion rules that a lawyer may not represent the beneficiary of the deed of trust in a contested foreclosure if the lawyer's spouse and paralegal own an interest in the closely-held corporate trustee.

Inquiry:

Attorney A forms Corporation X in order that the corporation might be appointed substitute trustee on a deed of trust when a lender asks Attorney A to handle the foreclosure. Attorney A's wife and paralegal each own stock in Corporation X.

If Attorney A's wife and paralegal own any interest in Corporation X, may Attorney A represent the beneficiary/lender in a contested foreclosure proceeding if Corporation X is appointed substitute trustee?

Opinion:

No. As noted in N.C. Gen. Stat. §45-21.16(c), a trustee on a deed of trust is "a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding." Because of the conflict between the neutral, fiduciary role of trustee and the role of advocate, a number of ethics opinions also hold that a lawyer serving as a trustee in a contested foreclosure proceeding may not represent the beneficiary or the grantor in the proceeding. 2008 FEO 11 (listing opinions). Attorney A's indirect financial interest in Corporation X creates the appearance, if not the reality, that the corporation is the alter ego of Attorney A. Therefore, if Corporation X is appointed substitute trustee in a contested foreclosure, the neutrality of the trustee will be improperly impaired unless Attorney A is prohibited from representing the beneficiary or the lender in the proceeding. Id. (Lawyer may represent corporation partially owned by firm in its capacity as trustee but may not advocate for lender in contested foreclosure.) For an explanation of a contested foreclosure proceeding, see 2008 FEO 11.

If the corporate trustee is a publicly traded corporation in which Attorney A's wife and paralegal own non-controlling interests, the perceived neutrality of the corporate trustee is not impaired and Attorney A may represent the lender in a contested foreclosure proceeding. See, e.g., RPC 83 and RPC 185.

2013 Formal Ethics Opinion 4

Representation in Purchase of Foreclosed Property

Adopted: July 19, 2013

Opinion examines the ethical duties of a lawyer representing both the buyer and the seller on the purchase of a foreclosure property and the lawyer's duties when the representation is limited to the seller.

Editor's note: This opinion supplements and clarifies 2006 FEO 3.

Inquiry #1:

Bank A foreclosed its deed of trust on real property and was the highest bidder at the sale. Bank A listed the property for sale. Buyer entered into a contract to purchase the property.

An addendum to the Offer to Purchase and Contract ("Contract") signed by the parties states that the closing shall be held in Seller's lawyer's office by a date certain and that Seller, Bank A, "shall only pay those closing costs and fees associated with the transfer of the Property that local custom or practice clearly allocates to Seller ... and the Buyer shall pay all remaining fees and costs." Bank B is providing financing for the transaction.

Seller chose Law Firm X to close the residential real estate transaction. Law Firm X did not participate in the foreclosure of the property prior to the sale; however, Law Firm X regularly does closings for properties sold by Bank A.

Law Firm X proposes to send Buyer a letter advising Buyer that it has been chosen as settlement agent and advising Buyer that it will be representing both parties in the transaction. Law Firm X will charge Buyer $425 for the closing.

May Lawyer at Law Firm X participate in the joint representation of Buyer and Seller as contemplated by the Contract?

Opinion #1:

If a lawyer is named as the closing agent for a residential real estate transaction pursuant to an agreement such as the one set out above, the lawyer has a duty to ensure that he can comply with Rule 1.7 prior to accepting joint representation of the buyer and seller. When contemplating joint representation, a lawyer must consider whether the interests of the parties will be adequately protected if they are permitted to give their informed consent to the representation, and whether an independent lawyer would advise the parties to consent to the conflict of interest. Representation is prohibited if the lawyer cannot reasonably conclude that he will be able to provide competent and diligent representation to all clients. See Rule 1.7, cmt. [15]. As stated in

comment [29] to Rule 1.7, the representation of multiple clients "is improper when it is unlikely that impartiality can be maintained."

The Ethics Committee has previously concluded that, under certain circumstances, it may be acceptable for a lawyer to represent the borrower, the lender, and the seller in the closing of a residential real estate transaction. See, e.g. CPR 100, RPC 210. Joint representation may be permissible in a residential real estate closing because, in the usual transaction, the contract to purchase is entered into by the buyer and seller prior to the engagement of a lawyer. Therefore, the lawyer has no obligation to bargain for either party. Similarly, the buyer and the lender have agreed to the basic terms of the mortgage loan prior to the engagement of the closing lawyer. However, in CPR 100, the Ethics Committee specifically stated that:

[a] lawyer having a continuing professional relationship with any party to the usual residential transaction, whether the seller, the lender, or the borrower, should be particularly alert to determine in his own mind whether or not there is any obstacle to his loyal representation of other parties to the transaction, and if he finds that there is, or if there is any doubt in his mind about it, he should promptly decline to represent any other party to the transaction.

In addition to the above determination, Rule 1.7 requires that the lawyer obtain any affected client's informed consent to the joint representation and to confirm that consent in writing. Rule 1.7.

Comment [6] to Rule 1.0 (Terminology) provides that, to obtain "informed consent," a lawyer must "make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision." Comment [6] clarifies that, ordinarily, this will require: (1) communication that includes a disclosure of the facts and circumstances giving rise to the situation; (2) any explanation reasonably necessary to inform the individual of the material advantages and disadvantages of the proposed course of conduct; and (3) a discussion of the individual's options and alternatives.

To obtain Buyer's "informed" consent in the instant scenario, Lawyer must: (1) explain the proposed scope of the lawyer's representation; (2) disclose Lawyer's prior relationship with Seller; (3) explain the advantages and risks of common representation; and (4) discuss the options/alternatives Buyer has under the Contract, such as hiring his own lawyer at his own expense. See Rule 1.0, 97 FEO 8, 2006 FEO 3.

If the above requirements are met, Lawyer may proceed with the common representation. If Lawyer subsequently determines that he can no longer exercise his independent professional judgment on behalf of both clients, he must withdraw from the representation of both clients.

If Lawyer determines at the outset that the common representation will be adverse to the interests of either Buyer or Seller, or that his judgment will be impaired by loyalty to Seller, Lawyer may

not represent both parties. Similarly, if Buyer does not consent to the joint representation, Lawyer may not represent both parties.

Inquiry #2:

Buyer notifies Lawyer at Law Firm X that he wants to have his own lawyer represent him at the closing. Therefore, Law Firm X intends to limit its representation to Seller. To clarify its role in the transaction, Lawyer sends Buyer an Independently Represented Buyer Acknowledgement to sign agreeing that, although Law Firm X was providing services necessary and incidental to effectuating a settlement of the transaction, including providing an opinion of title for the Buyer's policy to the title insurance company chosen by and affiliated with Bank A, there will be no attorney-client relationship between Law Firm X and Buyer. Law Firm X informs Buyer that the charge for the closing will be reduced to $325.

May Law Firm X limit its representation to Seller and charge Buyer $325 for closing the real estate transaction?

Opinion #2:

Upon notice that Buyer wants to have his own lawyer represent him at the closing, Lawyer must first determine whether Buyer desires Law Firm X to continue to represent his interests in conjunction with his own lawyer. If Buyer desires Law Firm X to continue to represent his interests in the closing, then Law Firm X may continue to advise Buyer and the firm would not be required to adjust its fee.

If Buyer does not consent to the joint representation, Lawyer may limit his representation to Seller in the absence of a conflict of interest. Under the circumstances, it is incumbent upon Lawyer to clarify its role to Buyer. 2006 FEO 3 specifically holds that a lawyer may represent only the seller's interests in a transaction and provide services as a title and closing agent, as required by the contract of sale. There must, however, be certain robust and thorough disclosures to the buyer.

Pursuant to 2006 FEO 3, Lawyer must "fully disclose to Buyer that Seller is his sole client, he does not represent the interests of Buyer, the closing documents will be prepared consistent with the specifications in the contract to purchase and, in the absence of such specifications, he will prepare the documents in a manner that will protect the interests of his client, Seller, and, therefore, Buyer may wish to obtain his own lawyer." 2006 FEO 3.

If Lawyer limits his representation to Seller, Lawyer may not perform any legal services for Buyer. At the conclusion of the representation, Lawyer needs to consider the factors set out in Rule 1.5(a) and determine whether the fee of $325 is clearly excessive for the services performed for Seller.

Whether the contract to purchase the property requires Buyer to pay Lawyer's fee for representation of Seller is a legal question outside the purview of the Ethics Committee. However, a lawyer may be paid by a third party, including an opposing party, provided the lawyer complies with Rule 1.8(f) and the fee is not illegal or clearly excessive in violation of Rule 1.5(a). See RPC 196.

Similarly, Buyer's authority to renegotiate the terms of the Contract pertaining to the selection of the closing lawyer, and/or the payment of the closing costs and fees associated with the closing, are outside the purview of the Ethics Committee.

Inquiry #3:

May Lawyer provide an opinion of title to the title insurance company for Buyer's title insurance policy under the circumstances described in Inquiry #2?

Opinion #3:

In representing Seller, Law Firm X may provide an opinion on title to the title insurer sufficient and necessary to satisfy the requirements of the Contract and facilitate completion of the transaction on behalf of Seller. See CPR 100, RPC 210, 2006 FEO 3.

CPR 100 and RPC 210 provide that a lawyer who is representing the buyer, the lender, and the seller (or any one or more of them) may provide the title insurer with an opinion on title sufficient to issue a mortgagee title insurance policy, when the premium is paid by the buyer. CPR 100 further recommends that, because a buyer-borrower is usually inexperienced in the purchase of real estate and the securing of loans thereon, "any lawyer involved in the transaction, even though not representing the borrower, should be alert to inform the borrower of the availability of an owner's title insurance policy which is usually available to the borrower up to the amount of the loan at little or no expense to the borrower, and assist the borrower in obtaining an owner's title insurance policy."

2014 Formal Ethics Opinion 2

Dual Representation of Trustee and Secured Creditor in Contested Foreclosure

Adopted: April 25, 2014

Opinion rules that a lawyer may not represent both the trustee and the secured creditor in a contested foreclosure proceeding.

Inquiry:

A law firm has entered into a contract with an independent corporation to serve as substitute trustee in any foreclosure proceeding initiated by the law firm. No member of the law firm, or anyone related to any member of the law firm, has any affiliation with or financial interest in the corporation.

May the law firm represent the corporation serving as the trustee in a contested foreclosure proceeding, while also representing the secured creditor in the proceeding?

Opinion:

No. As noted in NC Gen. Stat. §45-21.16(c), a trustee on a deed of trust is "a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding." Because of the conflict between the neutral, fiduciary role of trustee and the role of an advocate for one of the parties to a contested foreclosure, a number of ethics opinions hold that a lawyer serving as a trustee in a contested foreclosure proceeding may not represent the secured creditor or the debtor in the proceeding. 2008 FEO 11 (listing opinions).

By extension, a lawyer representing the trustee in a contested foreclosure proceeding is also prohibited from representing the secured creditor or the debtor in the proceeding. This is because the lawyer must advise the trustee on maintaining a neutral role, and this representation would be materially limited by the advocacy required to represent either the secured creditor or the debtor. In fact, 2008 FEO 11 specifically prohibits the simultaneous representation in a contested foreclosure proceeding of the secured creditor and a corporate trustee specifically created by the lawyer's firm to serve in this capacity. 2008 FEO 11, Opinion #5.

The Ethics Committee has recognized a limited exception to the prohibition on representation of the secured creditor by a lawyer for the trustee in a contested foreclosure proceeding. This exception permits joint representation of both the trustee and the secured creditor, but not in the contested foreclosure itself. In 2004 FEO 3, a lawyer proposed to represent both the secured creditor and the trustee in an unfair debt collection action filed by the borrower against the secured creditor and the trustee. To enjoin the pending foreclosure proceeding, the trustee was named as a party-defendant in the action. The opinion holds that the lawyer may represent both

the secured creditor and the trustee as codefendants in this separate, tangential lawsuit brought by the borrower if the lawyer determines that his representation will not be impaired, and both the secured creditor and the trustee give informed consent. 2004 FEO 3 (applying a conflict of interest analysis under Rule 1.7).

Potentially Related Opinions

2011 Formal Ethics Opinion 6

Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property

Adopted: January 27, 2012

Opinion rules that a lawyer may contract with a vendor of software as a service provided the lawyer uses reasonable care to safeguard confidential client information.

Inquiry #1:

Much of software development, including the specialized software used by lawyers for case or practice management, document management, and billing/financial management, is moving to the "software as a service" (SaaS) model. The American Bar Association's Legal Technology Resource Center explains SaaS as follows:

SaaS is distinguished from traditional software in several ways. Rather than installing the software to your computer or the firm's server, SaaS is accessed via a web browser (like Internet Explorer or FireFox) over the internet. Data is stored in the vendor's data center rather than on the firm's computers. Upgrades and updates, both major and minor, are rolled out continuously…SaaS is usually sold on a subscription model, meaning that users pay a monthly fee rather than purchasing a license up front.1

Instances of SaaS software extend beyond the practice management sphere addressed above, and can include technologies as far-ranging as web-based email programs, online legal research software, online backup and storage, text messaging/SMS (short message service), voicemail on mobile or VoIP phones, online communication over social media, and beyond.

SaaS for law firms may involve the storage of a law firm's data, including client files, billing information, and work product, on remote servers rather than on the law firm's own computer and, therefore, outside the direct control of the firm's lawyers. Lawyers have duties to safeguard confidential client information, including protecting that information from unauthorized disclosure, and to protect client property from destruction, degradation, or loss (whether from system failure, natural disaster, or dissolution of a vendor's business). Lawyers also have a continuing need to retrieve client data in a form that is usable outside of a vendor's product.2 Given these duties and needs, may a law firm use SaaS?

Opinion #1:

Yes, provided steps are taken to minimize the risk of inadvertent or unauthorized disclosure of confidential client information and to protect client property, including the information in a client's file, from risk of loss.

The use of the internet to transmit and store client information presents significant challenges. In this complex and technical environment, a lawyer must be able to fulfill the fiduciary obligations to protect confidential client information and property from risk of disclosure and loss. The lawyer must protect against security weaknesses unique to the internet, particularly "end-user" vulnerabilities found in the lawyer's own law office. The lawyer must also engage in periodic education about ever-changing security risks presented by the internet.

Rule 1.6 of the Rules of Professional Conduct states that a lawyer may not reveal information acquired during the professional relationship with a client unless the client gives informed consent or the disclosure is impliedly authorized to carry out the representation. Comment [17] explains, "A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." Comment [18] adds that, when transmitting confidential client information, a lawyer must take "reasonable precautions to prevent the information from coming into the hands of unintended recipients."

Rule 1.15 requires a lawyer to preserve client property, including information in a client's file such as client documents and lawyer work product, from risk of loss due to destruction, degradation, or loss. >See also RPC 209 (noting the "general fiduciary duty to safeguard the property of a client"), RPC 234 (requiring the storage of a client's original documents with legal significance in a safe place or their return to the client), and 98 FEO 15 (requiring exercise of lawyer's "due care" when selecting depository bank for trust account).

Although a lawyer has a professional obligation to protect confidential information from unauthorized disclosure, the Ethics Committee has long held that this duty does not compel any particular mode of handling confidential information nor does it prohibit the employment of vendors whose services may involve the handling of documents or data containing client information. >See RPC 133 (stating there is no requirement that firm's waste paper be shredded if lawyer ascertains that persons or entities responsible for the disposal employ procedures that effectively minimize the risk of inadvertent or unauthorized disclosure of confidential information). Moreover, while the duty of confidentiality applies to lawyers who choose to use technology to communicate, "this obligation does not require that a lawyer use only infallibly secure methods of communication." RPC 215. Rather, the lawyer must use reasonable care to select a mode of communication that, in light of the circumstances, will best protect confidential client information and the lawyer must advise effected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality.

Furthermore, in 2008 FEO 5, the committee held that the use of a web-based document management system that allows both the law firm and the client access to the client's file is permissible:

provided the lawyer can fulfill his obligation to protect the confidential information of all clients. A lawyer must take steps to minimize the risk that confidential client information will be disclosed to other clients or to third parties. >See RPC 133 and RPC 215…. A security code access procedure that only allows a client to access its own confidential information would be an appropriate measure to protect confidential client information…. If the law firm will be contracting with a third party to maintain the web-based management system, the law firm must ensure that the third party also employs measures which effectively minimize the risk that confidential information might be lost or disclosed. >See RPC 133.

In a recent ethics opinion, the Arizona State Bar's Committee on the Rules of Professional Conduct concurred with the interpretation set forth in North Carolina's 2008 FEO 5 by holding that an Arizona law firm may use an online file storage and retrieval system that allows clients to access their files over the internet provided the firm takes reasonable precautions to protect the security and confidentiality of client documents and information.3

In light of the above, the Ethics Committee concludes that a law firm may use SaaS if reasonable care is taken to minimize the risks of inadvertent disclosure of confidential information and to protect the security of client information and client files. A lawyer must fulfill the duties to protect confidential client information and to safeguard client files by applying the same diligence and competency to manage the risks of SaaS that the lawyer is required to apply when representing clients.

No opinion is expressed on the business question of whether SaaS is suitable for a particular law firm.

Inquiry #2:

Are there measures that a lawyer or law firm should consider when assessing a SaaS vendor or seeking to minimize the security risks of SaaS?

Opinion #2:

This opinion does not set forth specific security requirements because mandatory security measures would create a false sense of security in an environment where the risks are continually changing. Instead, due diligence and frequent and regular education are required.

Although a lawyer may use nonlawyers outside of the firm to assist in rendering legal services to clients, Rule 5.3(a) requires the lawyer to make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer. The extent of this obligation when using a SaaS vendor to store and manipulate confidential client

information will depend upon the experience, stability, and reputation of the vendor. Given the rapidity with which computer technology changes, law firms are encouraged to consult periodically with professionals competent in the area of online security. Some recommended security measures are listed below.

• Inclusion in the SaaS vendor's Terms of Service or Service Level Agreement, or in a separate agreement between the SaaS vendor and the lawyer or law firm, of an agreement on how the vendor will handle confidential client information in keeping with the lawyer's professional responsibilities.

• If the lawyer terminates use of the SaaS product, the SaaS vendor goes out of business, or the service otherwise has a break in continuity, the law firm will have a method for retrieving the data, the data will be available in a non-proprietary format that the law firm can access, or the firm will have access to the vendor's software or source code. The SaaS vendor is contractually required to return or destroy the hosted data promptly at the request of the law firm.

• Careful review of the terms of the law firm's user or license agreement with the SaaS vendor including the security policy.

• Evaluation of the SaaS vendor's (or any third party data hosting company's) measures for safeguarding the security and confidentiality of stored data including, but not limited to, firewalls, encryption techniques, socket security features, and intrusion-detection systems.4

• Evaluation of the extent to which the SaaS vendor backs up hosted data.

Endnotes

FYI: Software as a Service (SaaS) for Lawyers, ABA Legal Technology Resource Center at abanet.org/tech/ ltrc/fyidocs/saas.html.

>Id.

Paraphrasing the description of a lawyer's duties in Arizona State Bar Committee on Rules of Professional Conduct, Opinion 09-04 (Dec. 9, 2009).

A firewall is a system (which may consist of hardware, software, or both) that protects the resources of a private network from users of other networks. Encryption techniques are methods for ciphering messages into a foreign format that can only be deciphered using keys and reverse encryption algorithms. A socket security feature is a commonly-used protocol for managing the security of message transmission on the internet. An intrusion detection system is a system (which may consist of hardware, software, or both) that monitors network and/or system activities for malicious activities and produces reports for management.

2011 Formal Ethics Opinion 7

January 27, 2012

Using Online Banking to Manage a Trust Account

Opinion rules that a law firm may use online banking to manage its trust accounts provided the firm's managing lawyers are regularly educated on the security risks and actively maintain end-user security.

Inquiry:

Most banks and savings and loans provide "online banking" which allows customers to access accounts and conduct financial transactions over the internet on a secure website operated by the bank or savings and loan. Transactions that may be conducted via on-line banking include account-to-account transfers, payments to third parties, wire transfers, and applications for loans and new accounts. Online banking permits users to view recent transactions and view and/or download cleared check images and bank statements. Additional services may include account management software.

Financial transactions conducted over the internet are subject to the risk of theft by hackers and other computer criminals. Given the duty to safeguard client property, particularly the funds that a client deposits in a lawyer's trust account, may a law firm use online banking to manage a trust account?

Opinion:

Yes, provided the lawyers use reasonable care to minimize the risk of loss or theft of client property specifically including the regular education of the firm's managing lawyers on the ever-changing security risks of online banking and the active maintenance of end-user security.

As noted in [Proposed] 2011 FEO 6, Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property, the use of the internet to transmit and store client data (or, in this instance, data about client property) presents significant challenges. In this complex and technical environment, a lawyer must be able to fulfill the fiduciary obligations to protect confidential client information and property from risk of disclosure and loss. The lawyer must protect against security weaknesses unique to the internet, particularly "end-user" vulnerabilities found in the lawyer's own law office. The lawyer must also engage in frequent and regular education about the security risks presented by the internet.

Rule 1.15 requires a lawyer to preserve client property, to deposit client funds entrusted to the lawyer in a separate trust account, and to manage that trust account according to strict recordkeeping and procedural requirements. See also RPC 209 (noting the "general fiduciary duty to safeguard the property of a client") and 98 FEO 15 (requiring a lawyer to exercise "due

care" when selecting depository bank for trust account). The rule is silent, however, about online banking.

Nevertheless, online banking may be used to manage a client trust account if the recordkeeping and fiduciary obligations in Rule 1.15 can be fulfilled. The recordkeeping requirements for trust accounts are set forth in Rule 1.15-3. Rule 1.15-3(b)(3) specifically requires a lawyer to maintain the following records relative to the transfer of funds from the trust account:

all instructions or authorizations to transfer, disburse, or withdraw funds from the trust account (including electronic transfers or debits), or a written or electronic record of any such transfer, disbursement, or withdrawal showing the amount, date, and recipient of the transfer or disbursement, and, in the case of a general trust account, also showing the name of the client or other person to whom the funds belong;

If the online banking software does not provide a method for making an official bank record of the required information when money is transferred from the trust account to another account, such transfers must be handled by a method that provides the required records.

To fulfill the fiduciary obligations in Rule 1.15, a lawyer managing a trust account must use reasonable care to minimize the risks to client funds on deposit in the trust account by remaining educated as to the dynamic risks involved in online banking and insuring that the law firm invests in proper protection and multiple layers of security to address those risks. See [Proposed] 2011 FEO 6.

A lawyer who is managing a trust account has affirmative duties to regularly educate himself as to the security risks of online banking; to actively maintain end-user security at the law firm through safety practices such as strong password policies and procedures, the use of encryption, and security software, and the hiring of an information technology consultant to advise the lawyer or firm employees; and to insure that all staff members who assist with the management of the trust account receive training on and abide by the security measures adopted by the firm. Understanding the contract with the depository bank and the use of the resources and expertise available from the bank are good first steps toward fulfilling the lawyer's fiduciary obligations.

This opinion does not set forth specific security requirements because mandatory security measures would create a false sense of security in an environment where the risks are continually changing. Instead, due diligence and frequent and regular education are required. A lawyer must fulfill his fiduciary obligation to safeguard client funds by applying the same diligence and competency to manage the risks of on-line banking that a lawyer is required to apply when representing clients.

2015 Formal Ethics Opinion 1

Preparing Pleadings and Other Filings for an Unrepresented Opposing Party

Adopted: April 17, 2015

Opinion rules that a lawyer may not prepare pleadings and other filings for an unrepresented opposing party in a civil proceeding currently pending before a tribunal if doing so is tantamount to giving legal advice to that person.

Background:

The Ethics Committee recently received several inquiries on whether a lawyer may prepare a pleading or other filing for an unrepresented opposing party in a civil proceeding. There are a number of rules and ethics opinions that address this issue, but not collectively. The purpose of this opinion is to provide guiding principles for when a lawyer may prepare a pleading or other filing for an unrepresented opposing party.

This opinion is limited to the drafting of pleadings and filings attendant to a proceeding that is currently pending before a tribunal (as that term is defined in Rule 1.0(n)), and to the drafting of any agreement between the parties to resolve the issues in dispute in the proceeding including a release or settlement agreement. The principles do not address the drafting of documents necessary to close a business transaction or other matters that are not the subject of a formal proceeding before a tribunal. "Pleading or filing" is used throughout the opinion to include any document that is filed with the tribunal and any agreement between the parties to settle their dispute and terminate the proceeding.

Survey of Rules and Opinions:

Rule 4.3(a) provides that, in dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment [2] to Rule 4.3 clarifies that Rule 4.3 does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. As long as the lawyer explains that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter and may prepare documents that require the unrepresented person's signature.

CPR 296, which was adopted in 1981 under the Code of Professional Responsibility which was then in effect, opines that a lawyer may not send to or directly make available to an unrepresented defendant an acceptance of service and waiver form waiving the right to answer

and to be notified of the date of trial. However, a lawyer may send to a defendant a form solely for acceptance of service. See CPR 121.

RPC 165, adopted in 1993, states that, "[i]n order to accomplish her client's purposes, the attorney may draft a confession of judgment for execution by the adverse party and solicit its execution by the adverse party so long as the attorney does not undertake to advise the unrepresented party concerning the meaning or significance of the document or to state or imply that she is disinterested." The opinion continues:

[a]lthough previous ethics opinions, CPRs 121 and 296, have ruled that it is unethical for a lawyer to furnish consent judgments to unrepresented adverse parties for their consideration and execution, there appears to be no basis for such a prohibition when the lawyer is not furnishing a document which appears to represent the position of the adverse party such as an answer, and the lawyer furnishing a confession of judgment or consent judgment does not undertake to advise the adverse party or feign disinterestedness. CPRs 121 and 296 are therefore overruled to the extent they are in conflict with this opinion.

2009 Formal Ethics Opinion 12 rules that a lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party provided the lawyer explains who he represents and does not give the unrepresented party legal advice; however, the lawyer may not prepare a waiver of exemptions for the adverse party.

2002 Formal Ethics Opinion 6 provides that the lawyer for the plaintiff may not prepare the answer to a complaint for an unrepresented adverse party to file pro se. The basis for this holding is also the prohibition on giving legal advice to a person who is not represented by the lawyer.

Guiding Principles

The survey of the existing opinions demonstrates that some pleadings or filings that solely represent the interests of one party to a civil proceeding may be prepared by a lawyer representing the interests of the opposing party.

However, because of the prohibitions in Rule 4.3, a lawyer may not draft a pleading or filing to be signed solely by an unrepresented opposing party if doing so is tantamount to giving legal advice to that person. A lawyer may draft a pleading or filing to be signed solely by an unrepresented opposing party if the document is necessary to settle the dispute with the lawyer's client and will achieve objectives of both the lawyer's client and the unrepresented opposing party. Pursuant to Rule 4.4(a), which prohibits the use of "means" that have no substantial purpose other than to embarrass, delay, or burden a third person, when presenting a pleading or filing for execution, the lawyer must avoid using tactics that intimidate or harass the unrepresented opposing party.

In applying these guiding principles, a lawyer must avoid the overreaching which is tantamount to providing legal advice to an unrepresented opposing party. The lawyer should consider whether (1) the rights, if any, of the unrepresented opposing party will be waived, lost, or otherwise adversely impacted by the pleading or filing, and the significance of those rights; (2) the pleading or filing solely represents the position of the unrepresented opposing party (e.g., an answer to a complaint); (3) the pleading or filing gives the unrepresented opposing party some benefit (e.g., acceptance of service to avoid personal service by the sheriff at the person's home or work place); (4) the legal consequences of signing the document are not clear from the document itself (e.g., the hidden consequences of signing a waiver of right to file an answer in a divorce proceeding has hidden consequences); (5) the pleading or filing goes beyond what is necessary to achieve the client's primary objectives; or (6) the pleading or filing will require the signature of a judge or other neutral who can independently evaluate the pleading or filing. If a disinterested lawyer would conclude that the unrepresented opposing party should not agree to sign the pleading or filing under any circumstances without advice of counsel, or the lawyer is not able to articulate why it is in the interest of the unrepresented opposing party to rely upon the lawyer's draft of the document, the lawyer cannot properly ask the unrepresented opposing party to sign the document.

Opinion:

Applying the guidelines and considerations above leads to the conclusion that a lawyer may prepare the following pleadings or filings for an unrepresented opposing party: an acceptance of service, a confession of judgment, a settlement agreement, a release of claims, an affidavit that accurately reflects the factual circumstances and does not waive the affiant's rights, and a dismissal with (or without) prejudice pursuant to settlement agreement or release. However, prior to obtaining the signature of the unrepresented opposing party on the pleading or filing, the person must be given the opportunity to review and make corrections to the pleading or filing. It is recommended that the pleading or filing include a written disclosure that indicates the name of the lawyer preparing the document, and specifies that the lawyer represents the other party and has not and cannot provide legal advice to the unrepresented opposing party except the advice to seek representation from independent counsel.

A lawyer should not prepare on behalf of an unrepresented opposing party a waiver of right to file an answer to a complaint, an answer to a complaint, or a waiver of exemptions. A waiver of notice of hearing should only be prepared for the unrepresented opposing party if the lawyer is satisfied that, upon analysis of the considerations indicated above, the lawyer is not asking the unrepresented opposing party to relinquish significant rights without obtaining some benefit.

Neither of the above lists of pleadings or filings is intended to be exhaustive. Before determining whether a pleading or filing may be prepared for an unrepresented opposing party, the lawyer must conclude that she is able to comply with the guiding principles above.

2015 Formal Ethics Opinion 2

Preparing Waiver of Right to Notice of Foreclosure for Unrepresented Borrower

Adopted: April 17, 2015

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

Inquiry #1:

N.C. Gen. Stat. §45-21.16(f) provides that in a nonjudicial power of sale foreclosure, any person entitled to notice of the foreclosure (including owners, borrowers, and guarantors) (the "Notice Parties") "may waive after default the right to notice and hearing by written instrument signed and duly acknowledged by such party." The statute provides that in foreclosures where the original debt was less than $100,000, only the clerk may send the waiver form to the Notice Parties and the form can only be sent "after service of the notice of hearing." In foreclosures where the original debt is $100,000 or more, the statute does not specify how the waiver form shall be provided to the Notice Parties or who can draft the waiver form.

It is common practice for lenders dealing with defaulted loans in excess of $100,000 to require Notice Parties to execute a N.C. Gen. Stat. §45-21.16(f) waiver in connection with a forbearance, modification, or reinstatement agreement.

The filing of a foreclosure notice of hearing does not require a Notice Party to file an answer or to attend the foreclosure hearing. See N.C.G.S. §45-21.16(c)(7)(a) (requiring foreclosure notice to inform debtor that "failure to attend the hearing will not affect the debtor's right to pay the indebtedness...or to attend the actual sale, should the debtor elect to do so.") The execution of a N.C. Gen. Stat. §45-21.16(f) waiver "waives" the right to receive notice of the foreclosure hearing and the right to require a foreclosure hearing to be held. The clerk is still required to receive evidence and make the findings required by N.C.G.S. § 45-21.16(d), but can do so based upon affidavits from the lender without holding a formal hearing.

May a lawyer who represents the lender on a debt of $100,000 or more draft a N.C. Gen. Stat. §45-21.16(f) waiver form and provide the waiver form to unrepresented Notice Parties for execution?

Opinion #1:

Yes, provided the lawyer complies with the requirements of N.C. Gen. Stat. §45-21.16 and with Rule 4.3 (Dealing with Unrepresented Persons). However, in the consumer context, when the property subject to foreclosure is the borrower's primary residence, compliance with Rule 4.3 prohibits a lawyer from drafting the waiver form for inclusion in a loan modification package for execution by the unrepresented borrower.

In dealing on behalf of a client with a person who is not represented by counsel, Rule 4.3(a) states that a lawyer shall not give legal advice to the person, other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client. In addition, paragraph (b) of the rule prohibits the lawyer from stating or implying that the lawyer is disinterested and requires the lawyer to make reasonable efforts to correct any misunderstanding that the unrepresented person may have in this regard.

The Ethics Committee has previously considered whether a lawyer may prepare documents for execution by an unrepresented person. 2004 FEO 10 rules that the lawyer for the buyer in a residential real estate closing may prepare a deed as an accommodation to the needs of her client, the buyer, provided the lawyer makes the disclosures required by Rule 4.3 and does not give legal advice to the seller other than the advice to obtain legal counsel. Similarly, 2009 FEO 12 holds that a lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party as long as the lawyer explains who he represents and does not give the unrepresented party legal advice. Accord RPC 165.

However, other opinions have held that a lawyer may not prepare an answer or an acceptance of service and waiver form for an unrepresented opposing party. See CPR 121, CPR 296, RPC 165. 2002 FEO 6 explains the rationale for these prior opinions as follows:

The committee has consistently held, however, that a lawyer representing the plaintiff may not send a form answer to the defendant that admits the allegations of the divorce complaint nor may the lawyer send the defendant an "acceptance of service and waiver" form waiving the defendant's right to answer the complaint. CPR 121, CPR 125, CPR 296. The basis for these opinions is the prohibition on giving legal advice to a person who is not represented by counsel.

Except as noted below, the waiver form contemplated by the current inquiry is like a deed or a confession of judgment: it is prepared to accommodate the needs of the lawyer's client and usually prepared in conjunction with negotiations between the lender and the borrower relative to avoiding the consequences of a default by execution of a forbearance, modification, or reinstatement agreement. A foreclosure notice of hearing does not require a Notice Party to take any action prior to a foreclosure hearing or to attend the hearing. After execution of a waiver form, the borrower may still pay the indebtedness or attend the foreclosure sale. Therefore, except as noted below, preparing a N.C. Gen. Stat. §45-21.16(f) waiver form for unrepresented Notice Parties is not tantamount to giving legal advice to an unrepresented person and the

lender’s lawyer may draft the waiver and give it to unrepresented Notice Parties if the lawyer does not undertake to advise the unrepresented Notice Parties concerning the meaning or significance of the waiver form or state or imply that the lawyer is disinterested.

There is an exception to this holding in the consumer context. When the property subject to foreclosure is the borrower’s primary residence, compliance with Rule 4.3 prohibits a lawyer from drafting a waiver form for inclusion in a loan modification package for execution by the unrepresented borrower. In this context, preparation of the waiver form is tantamount to giving legal advice to an unrepresented person because the waiver prospectively eliminates a significant right or interest of the unrepresented person—the borrower’s right to notice of foreclosure upon default on the new or modified loan—and there is a substantial risk that an unsophisticated, distressed borrower will not understand this. See Proposed 2015 FEO 1.

Inquiry #2:

Does it make a difference if the waiver is executed in conjunction with other lender prepared documents, such as a forbearance agreement, modification agreement, or reinstatement agreement?

Opinion #2:

Subject to the limitation noted in the last paragraph of Opinion #1 on drafting a waiver form for inclusion in a loan modification package for a loan secured by the unrepresented borrower’s primary residence, this does not make a difference. Comment [2] to Rule 4.3 clarifies that Rule 4.3 does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party, the lawyer may inform the unrepresented person of the terms on which the lawyer's client will enter into an agreement or settle a matter and may prepare documents that require the unrepresented person's signature. In dealing with unrepresented Notice Parties, however, the lender’s lawyer must fully disclose that the lawyer represents the interests of the lender and will draft the documents consistent with the interests of the lender. The lawyer may not give any legal advice to the Notice Parties except the advice to obtain legal counsel. Rule 4.3.

2014 Formal Ethics Opinion 1

Protecting Confidential Client Information When Mentoring

Adopted: February 01, 2016

Opinion encourages lawyers to become mentors to law students and new lawyers ("protégés") who are not employees of the mentor's firm, and examines the application of the duty of confidentiality to client communications to which a protégé may be privy.

Editor's Note: This opinion does not apply to law students certified pursuant to the Rules Governing the Practical Training of Law Students (27 N.C.A.C 1C, Section .0200) or to law students who are participating in formal law school pro bono programs, externship programs, and clinics in which students participate in client representation under the supervision of a lawyer. In addition, the opinion does not apply to lawyers, employees, or law clerks (paid or volunteer) being mentored or supervised by a lawyer within the same firm. This opinion addresses issues pertaining to informal mentoring relationships between lawyers, or between a lawyer and a law student, as well as to established bar and/or law school mentoring programs. Mentoring relationships between a lawyer and a college or a high school student are not addressed by this opinion because such relationships require more restrictive measures due to these students' presumed inexperience and lack of understanding of a lawyer's professional responsibilities, particularly the professional duty of confidentiality.

For a legal analysis of whether a third party is an agent of the lawyer or the client such that the attorney-client privilege is not waived although the third party is privy to client-lawyer communications, see Berens v. Berens, No. COA15–230, 2016 WL 1569215 (N.C. April 19, 2016)(applying State v. Murvin, 304 N.C. 523, 284 S.E.2d 289 (1981)).

Inquiry #1:

May a lawyer who is mentoring a law student ("protégé") allow the student to observe confidential client consultations between the lawyer and the lawyer's client?

Opinion #1:

Yes, if the client gives informed consent.

The duty of confidentiality is set forth in Rule 1.6. It provides that all communications relative to a client's matter are confidential and cannot be disclosed unless the client consents, the client's consent is implied as necessary to carry out the representation, or one of the specific exceptions to the duty of confidentiality in Rule 1.6(b) applies. If a law student/protégé is not an agent of the lawyer for the purpose of representing the client, there is no implied client consent to disclosure of the client's confidential information to the student. Moreover, none of the specific exceptions

to the duty of confidentiality apply in this situation. Only the express informed consent of the client will permit disclosure of confidential client information to a law student/protégé.

"Informed consent," as defined in Rule 1.0, Terminology, "denotes the agreement by the person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate under the circumstances." Rule 1.0(f). Informed consent must be given in writing by the client or confirmed in writing by the lawyer. See Rule 1.0(c). In the mentoring situation, obtaining the client's informed consent requires the lawyer to explain the risks to the representation of the client that will be presented by the law student's knowledge of client confidential information and the law student's presence during client consultations.

One such risk is the possibility that the law student, who is not subject to the Rules of Professional Conduct, will intentionally or unintentionally reveal the client's confidential information to unauthorized persons. To minimize this risk, it is recommended that the law student be required to sign a confidentiality agreement that emphasizes the duty not to disclose any client confidential information unless the client and the lawyer give express consent.

The lawyer should also explain to the client any risk that the attorney-client privilege1 will not attach to client communications with the lawyer because of the presence of the law student during the lawyer's consultation with the client. If the lawyer concludes that the student's presence will jeopardize the attachment of the privilege and the resulting harm to the client's interests is substantial, the lawyer should consider carefully whether it is appropriate to ask the client to consent to the student's presence during the consultation.

Inquiry #2:

A lawyer wants to be a mentor to a new lawyer ("protégé") who is not employed by or affiliated with the lawyer/mentor's law firm. The lawyer/mentor wants to allow the new lawyer to observe his consultations with clients and he also wants to observe the new lawyer's consultations with the new lawyer's clients in order to critique and advise the new lawyer.

May the lawyer/mentor allow the lawyer/protégé to observe confidential client consultations between the lawyer/mentor and his client? May the lawyer/protégé allow the lawyer/mentor to observe confidential client consultations between the lawyer/protégé and his client?

Opinion #2:

Yes, these observations are allowed with the client's informed consent. See Opinion #1. The observing lawyer should sign an agreement to maintain the confidentiality of the information of the other lawyer's client, in accordance with Rule 1.6, and to avoid representations adverse to the client in accordance with Rule 1.7 and Rule 1.9.

Both the lawyer/protégé and the lawyer/mentor should avoid the creation of a conflict of interest with any existing or former clients by virtue of the mentoring relationship. For example, the

lawyer/protégé should not consult with a lawyer he knows has represented the opposing party in the past without first ascertaining that the matters are not substantially related and that the opposing party is not represented in the current matter by the lawyer/mentor. Similarly, the lawyer/mentor should obtain information sufficient to determine that the lawyer/protégé's matter is not one affecting the interests of an existing or former client. Rule 1.7 and Rule 1.9.

Inquiry #3:

When a lawyer seeks advice from a lawyer/mentor, what actions should be taken to protect confidential client information?

Opinion #3:

If possible, the lawyer/protégé should try to obtain guidance from the lawyer/mentor without disclosing identifying client information. This can often be done by using a hypothetical. If the consultation is general and does not involve the disclosure of identifying client information, client consent is unnecessary.

If the consultation is intended to help the lawyer/protégé comply with the ethics rules, client consent is not required because Rule 1.6(b)(5) allows a lawyer to reveal protected client information to the extent that the lawyer reasonably believes necessary "to secure legal advice about the lawyer's compliance with [the Rules of Professional Conduct]." Pursuant to Comment [10] to Rule 1.6:

A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with [the Rules of Professional Conduct.] In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

If the consultation is for the client's benefit, limited disclosure of client information may be "impliedly authorized to carry out the representation." See Rule 1.6(a). The lawyer should only disclose client information to a colleague if the lawyer has determined that the confidentiality of the consultation is adequately protected. Once the lawyer makes that determination, the client's express consent is unnecessary.

If the consultation does not involve advice about the lawyer's compliance with the Rules of Professional Conduct, a hypothetical is not practical, or the consultation is not for the client's benefit, the lawyer/protégé must obtain client consent. See Opinion #2.

Under all circumstances, the lawyer/protégé and the lawyer/mentor should avoid the creation of a conflict of interest with any existing or former clients by virtue of the mentoring relationship. See Opinion #2; Rule 1.7 and Rule 1.9.

Endnote

1. The attorney-client evidentiary privilege to avoid compelled testimony applies to client communications with a lawyer if (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated, and (5) the client has not waived the privilege. State v. McIntosh, 336 N.C. 517, 444 S.E.2d 438 (1994).

2013 Formal Ethics Opinion 8

Responding to the Mental Impairment of Firm Lawyer

Adopted: July 25, 2014

Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

Introduction:

As the lawyers from the "Baby Boomer" generation advance in years, there will be more instances of lawyers who suffer from mental impairment or diminished capacity due to age. In addition, lawyers suffer from depression and substance abuse at approximately twice the rate of the general population.1This opinion examines the obligations of lawyers in a firm who learn that another firm lawyer suffers from a mental condition that impairs the lawyer's ability to practice law or has resulted in a violation of a Rule of Professional Conduct. This opinion relies upon ABA Commission on Ethics and Professional Responsibility, Formal Opinion 03-429 (2003) [hereinafter ABA Formal Op. 03-429] for its approach to the issues raised by the mental impairment of a lawyer in a firm. For further guidance, readers are encouraged to refer to the ABA opinion.

Inquiry #1:

Attorney X has been practicing law successfully for over 40 years and is a prominent lawyer in his community. In recent years, his ability to remember has diminished and he has become confused on occasion. The other lawyers in his firm are concerned that he may be suffering from the early stages of Alzheimer's disease or dementia.

What are the professional responsibilities2of the other lawyers in the firm?

Opinion #1:

The partners in the firm must make reasonable efforts to ensure that Attorney X does not violate the Rules of Professional Conduct.

Mental impairment may lead to inability to competently represent a client as required by Rule 1.1, inability to complete tasks in a diligent manner as required by Rule 1.3, and inability to communicate with clients about their representation as required by Rule 1.4. Although a consequence of the lawyer's impairment, these are violations of the Rules of Professional Conduct nonetheless. As noted in ABA Formal Op. 03-429, "[i]mpaired lawyers have the same obligations under the [Rules of Professional Conduct] as other lawyers. Simply stated, mental impairment does not lessen a lawyer's obligation to provide clients with competent representation." Under Rule 1.16(a)(2), a lawyer is prohibited from representing a client and, where representation has commenced, required to withdraw if "the lawyer's physical or mental

condition materially impairs the lawyer's ability to represent the client." Unfortunately, an impaired lawyer may not be aware or may deny that his impairment is negatively impacting his ability to represent clients. ABA Formal Op. 03-429.

Rule 5.1(a) requires partners in a firm and all lawyers with comparable managerial authority in the firm to "make reasonable efforts to ensure that the firm or the organization has in effect measures giving reasonable assurance that all lawyers in the firm or the organization conform to the Rules of Professional Conduct." Similarly, Rule 5.1(b) requires a lawyer having direct supervisory authority over another lawyer to "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." Taken together, these provisions require a managerial or supervisory lawyer who suspects or knows that a lawyer is impaired to closely supervise5the conduct of the impaired lawyer because of the risk that the impairment will result in violations of the Rules.

When deciding what should be done in response to a lawyer's apparent mental impairment, it may be helpful to partners and supervising lawyers to consult a mental health professional for advice about identifying mental impairment and assistance for the impaired lawyer. Id. As observed in ABA Formal Op. 03-429,

[t]he firm's paramount obligation is to take steps to protect the interest of its clients. The first step may be to confront the impaired lawyer with the facts of his impairment and insist upon steps to assure that clients are represented appropriately notwithstanding the lawyer's impairment. Other steps include forcefully urging the impaired lawyer to accept assistance to prevent future violations or limiting the ability of the impaired lawyer to handle legal matters or deal with clients.

Id. If the lawyer's mental impairment can be accommodated by changing the lawyer's work environment or the type of work that the lawyer performs, such steps also should be taken.6 "Depending on the nature, severity, and permanence (or likelihood of periodic recurrence) of the lawyer's impairment, management of the firm has an obligation to supervise the legal services performed by the lawyer and, in an appropriate case, prevent the lawyer from rendering legal services to clients of the firm." Id. Making a confidential report to the State Bar's Lawyer Assistance Program (LAP) (or to another lawyers assistance program approved by the State Bar7) would also be an appropriate step. The LAP can provide the impaired lawyer with confidential advice, referrals, and other assistance.

Inquiry #2:

Attorney X's mental capacity continues to diminish. Apparently as a consequence of mental impairment, Attorney X failed to deliver client funds to the office manager for deposit in the trust account. It is believed that he converted the funds to his own use. In addition, Attorney X failed to complete discovery for a number of clients although he declined assistance from the other lawyers in the firm. Some clients may face court sanctions as a consequence. Although

Attorney X is engaging and articulate when he meets with clients, he no longer seems able to prepare for litigation and, on more than one occasion, Attorney X's presentation in court was muddled, meandering, and confused.

What are the professional responsibilities of the other lawyers in the firm?

Opinion #2:

Attorney X has violated Rule 1.15 by failing to place entrusted funds in the firm trust account. He has also violated Rule 1.1 and Rule 1.3 by providing incompetent representation and by failing to act with reasonable promptness in completing discovery. These are violations of the Rules of Professional Conduct that may have to be reported to the State Bar or to the court. In addition, steps may have to be taken to provide additional ongoing supervision for Attorney X or to change the circumstances or type of work that he performs to avoid additional violations of his professional duties. The other lawyers in the firm must also take steps to mitigate the adverse consequences of Attorney X's past conduct including replacing client funds.

Rule 8.3(a) requires a lawyer "who knows 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] inform the North Carolina State Bar or the court having jurisdiction over the matter." Only misconduct that raises a "substantial question" as to the lawyer's honesty, trustworthiness, or fitness must be reported. As noted in the Comment,

[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 possible offense and not the quantum of evidence of which the lawyer is aware.

Rule 8.3, cmt. [4].

If an impaired lawyer's misconduct is isolated and unlikely to recur because the mental impairment has ended or is controlled by medication or treatment, no report of incompetent or delinquent representation may be required. See RPC 243 (an "isolated incident resulting from a momentary lapse of judgment" does not raise a substantial question about honesty, trustworthiness, or fitness). "Similarly, if the firm is able to eliminate the risk of future violations of the duties of competence and diligence under the [Rules] through close supervision of the lawyer's work, it would not be required to report the impaired lawyer's violation." ABA Formal Op. 03-429.

However, reporting is required if the misconduct is serious, such as the violation of the trust accounting rules described in this inquiry, or the lawyer insists upon continuing to practice although his mental impairment has rendered him unable to represent clients as required by the

Rules of Professional Conduct.8In either situation, a report of misconduct may not be made if it would require the disclosure of confidential client information in violation of Rule 1.6, and the client does not consent to disclosure. See Rule 8.3(c).

Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." If the managing lawyers determine that the impaired lawyer cannot provide competent and diligent representation and should be removed from a client's case, the situation must be explained to the client so that the client can decide whether to agree to be represented by another lawyer in the firm or to seek other legal counsel.

Rule 5.1(c) requires a partner or a lawyer with comparable managerial authority or with supervisory authority over another lawyer to take reasonable remedial action to avoid the consequences of the lawyer's violation of the Rules. Even if the impaired lawyer is removed from a representation, the firm lawyers must make every effort to mitigate any adverse consequences of the impaired lawyer's prior representation of the client.

Inquiry #3:

If the firm partners determine that Attorney X has violated the Rules and there is a duty to report under Rule 8.3, may they fulfill the duty by reporting Attorney X to the State Bar's Lawyer Assistance Program (LAP)?

Opinion #3:

No. 2003 Formal Ethics Opinion 2 addressed this issue in the context of reporting opposing counsel as follows:

The report of misconduct should be made to the Grievance Committee of the State Bar if a lawyer's impairment results in a violation of the Rules that is sufficient to trigger the reporting requirement. The lawyer must be held professionally accountable. See, e.g., Rule .0130(e) of the Rules on Discipline and Disability of Attorneys, 27 N.C.A.C. 1B, Section .0100 (information regarding a member's alleged drug use will be referred to LAP; information regarding the member's alleged additional misconduct will be reported to the chair of the Grievance Committee).

Making a report to the State Bar, as required under Rule 8.3(a), does not diminish the appropriateness of also making a confidential report to LAP. The Bar's disciplinary program and LAP often deal with the same lawyer and are not mutually exclusive. The discipline program addresses conduct; LAP addresses the underlying illness that may have caused the conduct. Both programs, in the long run, protect the public interest.

Inquiry #4:

Attorney X announces his intent to leave the firm to set up his own solo practice and to take all of his client files with him. The other lawyers in the firm are concerned that, absent any supervision or assistance, Attorney X will be unable to competently represent clients because of his mental impairment.

What are the duties of the remaining lawyers in the firm if Attorney X leaves and sets up his own practice?

Opinion #4:

In addition to any duty to report, the remaining lawyers may have a duty to any current client of Attorney X to ensure that the client has sufficient information to make an informed decision about continuing to be represented by Attorney X.

As noted in Opinion #2, Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The clients of an impaired lawyer who leaves a firm must decide whether to follow the departed lawyer to his new law practice. To make an informed decision, the clients must be informed of "the facts surrounding the withdrawal to the extent disclosure is reasonably necessary for those clients to make an informed decision about the selection of counsel." ABA Formal Op. 03-429.9There is no comparable duty to former clients of the impaired lawyer as long as the firm avoids any action that might be interpreted as an endorsement of the services of the departed, impaired lawyer, including sending a joint letter regarding the lawyer's departure from the firm.

The remaining lawyers in the firm may conclude that, while under their supervision and support, the impaired lawyer did not violate the Rules and, therefore, there is no duty to report to the State Bar under Rule 8.3. Nevertheless, subject to the duty of confidentiality to clients under Rule 1.6, voluntarily reporting the impaired lawyer to LAP (or another lawyer assistance program approved by the State Bar) would be appropriate. The impaired lawyer will receive assistance and support from LAP and this may help to prevent harm to the interests of the impaired lawyer's clients.

Inquiry #5:

Associate lawyers and staff members are often the first to observe behavior indicating that a lawyer has a mental impairment. If an associate lawyer or a staff member reports behavior by Attorney X that indicates that Attorney X is impaired and may be unable to represent clients competently and diligently, what is a partner's or supervising lawyer's duty upon receiving such a report?

Opinion #5:

If a partner or supervising lawyer receives a report of impairment from an associate lawyer or a staff member, regardless of whether the lawyer suspected of impairment is a senior partner or an associate, the partner or supervising lawyer must investigate and, if it appears that the report is meritorious, take appropriate measures to ensure that the impaired lawyer's conduct conforms to the Rules of Professional Conduct. See Opinion #1 and Rule 5.1(a). It is never appropriate to protect the impaired lawyer by refusing to act upon or ignoring a report of impairment or by attempting to cover up the lawyer's impairment.

Inquiry #6:

If an associate lawyer in the firm observes behavior by Attorney X that indicates that Attorney X is not competent to represent clients, what should the associate lawyer do?

Opinion #6:

The associate lawyer must report his or her observations to a supervising lawyer or the senior management of the firm as necessary to bring the situation to the attention of lawyers in the firm who can take action.

Inquiry #7:

An associate lawyer in the firm reports to his supervising lawyer that he suspects that Attorney X is mentally impaired. He also describes to the supervising lawyer conduct by Attorney X that violated Rules 1.1 and 1.3. The supervising lawyer tells the associate to ignore the situation and to not say anything to anyone about his observations including clients, other lawyers in the firm, or staff members. The associate concludes that no action will be taken to investigate or address Attorney X's behavior. Does the associate lawyer have any further obligation?

Opinion #7:

A subordinate lawyer is bound by the Rules of Professional Conduct notwithstanding that the subordinate lawyer acts at the direction of another lawyer in the firm. Rule 5.2(a). If the associate lawyer believes that the duty to report professional misconduct under Rule 8.3 may be triggered by the conduct of Attorney X, the associate lawyer should discuss this concern with his supervising lawyer. If the supervising lawyer declines to address the situation, the associate lawyer should seek guidance as to his professional responsibilities from the lawyers at the State Bar who provide informal ethics advice.

Inquiry #8:

Assume that Attorney X is the sole principal in the firm and there is one associate lawyer. Attorney X displays behavior that may indicate that he is in the early stages of Alzheimer's disease or dementia. There is no senior management to whom the associate lawyer can report. What should the associate lawyer do?

Opinion #8:

If the associate lawyer believes that the duty to report professional misconduct under Rule 8.3 may be triggered by the conduct of Attorney X, the associate lawyer should seek guidance as to his professional responsibilities from the lawyers at the State Bar who provide informal ethics advice. See Opinion #7. Regardless of whether Attorney X's conduct triggers the duty to report, the associate lawyer may seek advice and assistance from the LAP or from another approved lawyer assistance program, or may contact a trusted, more experienced lawyer in another firm to serve as a mentor or advisor on how to address the situation.

Inquiry #9:

Assume Attorney X is a sole practitioner and the lawyers in his community observe behavior that may indicate that he is in the early stages of Alzheimer's disease or dementia. What is the responsibility of the lawyers in the community?

Opinion #9:

The Rules of Professional Conduct impose no specific duty on other members of the bar to take action relative to a potentially impaired fellow lawyer except the duty to report to the State Bar if the other lawyer's conduct raises a substantial question about his honesty, trustworthiness, or fitness to practice law and the information about the lawyer is not confidential client information. See Opinion #7. Nevertheless, as a matter of professional responsibility, attendant to the duties to seek to improve the legal profession and to protect the interests of the public that are articulated in the Preamble to the Rules of Professional Conduct, the lawyers in the community are encouraged to assist the potentially impaired lawyer to find treatment or to transition from the practice of law. A mental health professional, the LAP, or another lawyer assistance program can be consulted for advice and assistance.

Inquiry #10:

Do the responses to any of the inquiries above change if the lawyer's impairment is due to some other reason such as substance abuse or mental illness?

Opinion #10:

No.

Endnotes

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-429 (2003) (citing George Edward Bailly, Impairment, the Profession, and Your Law Partner, 11 No.1 Prof. Law. 2 (1999)) [hereinafter ABA Formal Op. 03-429].

This opinion does not address the issues that may arise under the Americans with Disabilities Act of 1990, 42 US C. §§12101 et seq. (2003) (the ADA) relative to an employer's legal responsibilities to an impaired lawyer. Lawyers are advised to consult the ADA and the Equal Employment Opportunity Commission's website, eeoc.gov, for guidance.

"Firm" as used in the Rules of Professional Conduct and this opinion denotes "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation, government entity, or other organization." Rule 1.0(d).

"Partner" as used in the Rules of Professional Conduct and this opinion denotes "a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law." Rule 1.0(h).

It is improper for a firm to charge a client for additional supervision for an impaired lawyer if the supervision exceeds what is normally required to ensure competent representation unless the client is advised of the reason for the additional supervision and agrees to the charges. See Rule 1.5(a).

ABA Formal Op. 03-429 provides the following examples of accommodation: A lawyer who, because of his mental impairment, is unable to perform tasks under strict deadlines or other pressures, might be able to function in compliance with the [Rules] if he can work in an unpressured environment. In addition, the type of work involved, as opposed to the circumstances under which the work occurs, might need to be examined when considering the effect that an impairment might have on a lawyer's performance. For example, an impairment may make it impossible for a lawyer to handle a jury trial or hostile takeover competently, but not interfere at all with his performing legal research or drafting transaction documents.

One such program is the Transitioning Lawyers Commission (or "TLC") of the North Carolina Bar Association, which considers issues of aging and cognitive impairment and helps lawyers to wind down their law practices to "retire gracefully." See more at: tlc.ncbar.org.

ABA Formal Op. 03-429 cautions that when reporting an impaired lawyer pursuant to Rule 8.3, disclosure of the impairment may be necessary; however, the reporting lawyer should be careful to avoid violating the ADA.

ABA Formal Op. 03-429 counsels that, when providing a client with information about the departed lawyer, a firm lawyer "must be careful to limit any statement to ones for which there is

a reasonable factual foundation." This will avoid violating the prohibition on false and misleading communications in Rule 7.1 and the prohibition on deceit and misrepresentation in Rule 8.4(c).

2013 Formal Ethics Opinion 15

Return of Electronic Records to Client upon Termination of Representation

Adopted: January 24, 2014

Opinion rules that records relative to a client's matter that would be helpful to subsequent legal counsel must be provided to the client upon the termination of the representation, and may be provided in an electronic format if readily accessible to the client without undue expense.

Inquiry #1:

In the age of electronic records, what information must be given to a departing client when the client requests the file?

Opinion #1:

Rule 1.16(d) of the Rules of Professional Conduct requires a lawyer, upon termination of representation, to "take steps to the extent reasonably practicable to protect a client's interests, such as...surrendering papers and property to which the client is entitled..."

Comment 10 to Rule 1.16 specifically provides that copies of "all correspondence received and generated by the withdrawing or discharged lawyer should be released; and anything in the file that would be helpful to successor counsel should be turned over."

Competent representation includes organized record-keeping practices that safeguard the documentation and information necessary to enable the lawyer to (1) readily retrieve information required for the representation; (2) remain abreast of the status of the case; and (3) be adequately prepared to handle the client's matter. 2002 FEO 5; Rule 1.1, cmt. [6]. The standards for record-keeping, including record retention, for electronic communications, documents, records, and other information ("records") are the same as the standards for paper records. As stated in 2002 FEO 5 on the retention of email in a client's file, "[a] lawyer must exercise his or her legal judgment when deciding what documents or information to retain in a client's file." Whether a lawyer should retain an electronic record that relates to a client's representation "depends upon the requirements of competent representation under the circumstances of the particular case." Id.

A lawyer must also exercise legal judgment, subject to the duty of competent representation, when deciding which format (electronic or paper) is the most appropriate for the retention of records generated during the representation of a client. 2002 FEO 5; see also RPC 234 (paper documents in client's file may be converted and saved in an electronic format if original documents with legal significance, such as wills, are stored in a safe place or returned to the client, and documents stored in electronic format can be reproduced in a paper format).

If an electronic record relative to a client's matter would be helpful to successor counsel, the electronic record is a part of the client's file. As explained in CPR 3, a client file does not include "the lawyer's personal notes and incomplete work product," or "preliminary drafts of legal instruments or other preliminary things which, unexplained, could place a lawyer in a bad light without furthering the interest of his former client." Therefore, a lawyer may omit from the records that are considered a part of the client's file the following: (1) email containing the client's name if the email is immaterial, represents incomplete work product, or would not be helpful to successor counsel; (2) drafting notes saved in preliminary versions of a filed pleading since these are incomplete work product; (3) notations or categorizations on documents stored in a discovery database since these are incomplete work product; and (4) other items that are associated with a particular client such as backups, voicemail recordings, and text messages unless the items would be helpful to successor counsel.

If the lawyer determines that an electronic record is a part of a client's file, then the lawyer has a duty to provide a copy of the record to the client upon the termination of the representation. Conversely, if the lawyer, in the exercise of legal judgment, determines that the electronic record is not a part of the client's file, then the lawyer is not required, but may, provide a copy of the electronic record to the client.

Inquiry #2:

Are lawyers required to organize or store electronic records relative to a specific client matter in any particular manner?

Opinion #2:

An organized record-keeping system designed to safeguard client information must include electronic records. See Opinion #1. The electronic records must be organized in a manner that can be searched and compiled as necessary for the representation of the client and for the release of the file to the client upon the termination of the representation. A document management system to track records by client and matter is recommended.

Because of the potential for electronic records to accumulate, one important aspect of an organized record-keeping system is a procedure for regularly exercising legal judgment as to whether to retain an electronic record in the client's virtual file. Such a procedure would, for example, require the regular identification of emails that should be retained and made a part of the client's virtual file. Waiting until the representation has ended and the client has requested the file to identify electronic records that are a part of the client's file may increase the likelihood that an important electronic record will not be identified properly.

Inquiry #3:

When the representation terminates and the client requests the file, is the lawyer or law firm required to provide the records in the format (electronic or paper) requested by the client?

Opinion #3:

Many clients, or successor counsel, will have the technical expertise and financial ability to receive client records in an electronic format without experiencing any problem or undue expense in opening, using, or reproducing the records. These clients will probably prefer to receive the records in an electronic format. However, there are clients, such as individuals or small businesses with limited financial means or technical expertise, that cannot afford to purchase expensive software or computer equipment simply to gain access to the records in their own legal files. There must be a weighing of the interests of the lawyer or law firm in producing the client's file in an efficient and cost-effective manner against the client's interest in receiving the records in a format that will be useful to the client or successor counsel.

Therefore, records that are stored on paper may be copied and produced to the client in paper format if that is the most convenient or least expensive method for reproducing these records for the client. If converting paper records to an electronic format would be a more convenient or less expensive way to provide the records to the client, this is permissible if the lawyer or law firm determines that the records will be readily accessible to the client in this format without undue expense. Similarly, electronic records may be copied and provided to the client in an electronic format (they do not have to be converted to paper) if the lawyer or law firm determines that the records will be readily accessible to the client in this format without undue expense. See 2002 FEO 5 ("in light of the widespread availability of computers," emails may be provided to a departing client in an electronic format even if the client requests paper copies).

A lawyer should in most instances bear the reasonable costs of retrieving and producing electronic records for a departing client. However, a lawyer or law firm may charge a client the expense of providing electronic records if the client asks the lawyer or law firm to do any of the following: (1) convert electronic records from a format that is already accessible using widely used or inexpensive business software applications; (2) convert electronic records to a format that is not readily accessible using widely used or inexpensive business software applications; or (3) provide electronic records in a manner that is unduly expensive or burdensome.

Nevertheless, if the usefulness of an electronic record in a client file would be undermined if the document is provided to the client or successor counsel in a paper format, the record must be provided to the client in an electronic format unless the client requests otherwise. For example, providing a spreadsheet without the underlying formulas or providing a complex discovery database printed in streams of text on reams of paper would destroy the usefulness of such data to both the client and successor counsel. Similarly, a video recording cannot be reduced to a paper format and therefore must be provided to the client in its original format.

Lawyers are encouraged to discuss with a client at the beginning of a representation the records that will be retained as a part of the client's file, and the format in which the records will be produced at the termination of the representation.

2015 Formal Ethics Opinion 4

Disclosing Potential Malpractice to a Client

Adopted: July 17, 2015

Opinion analyzes a lawyer's professional responsibilities when she discovers that she made an error that may adversely impact the client's case.

Introduction:

Lawyers will, inevitably, make errors, mistakes, and omissions (referred to herein as an "error" or "errors") when representing clients. Such errors may constitute professional malpractice, but are not necessarily professional misconduct. This distinction between professional or legal negligence and professional misconduct is explained in comment [9] to Rule 1.1, Competence:

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

Although an error during the representation of a client may not constitute professional misconduct, the actions that the lawyer takes following the realization that she has committed an error should be guided by the requirements of the Rules of Professional Conduct. This opinion explains a lawyer's professional responsibilities when the lawyer has committed what she believes may be legal malpractice.

This opinion does not address requirements under a lawyer's malpractice insurance policy to give the insurer notice or to report a potential claim. Lawyers are encouraged to read their policies. This opinion also does not address settlement of a malpractice claim. Lawyers are reminded that Rule 1.8(h)(2) prohibits settlement of a malpractice claim with an unrepresented client or former client unless the person is advised in writing of the desirability of seeking and given a reasonable opportunity to seek the advice of independent legal counsel.

Inquiry #1:

When the lawyer determines that an error that may constitute legal malpractice has occurred, is the lawyer required to disclose the error to the client?

Opinion #1:

Disclosure of an error to a client falls within the duty of communication. Rule 1.4(a)(3) requires a lawyer to "keep the client reasonably informed about the status of the matter," while paragraph (b) of the rule requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Comment [3] to the rule explains that paragraph (a)(3) requires that the lawyer keep the client reasonably informed about "significant developments affecting the timing or the substance of the representation." Comment [7] to Rule 1.4 adds that "[a] lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person."

In the spectrum of possible errors,1 material errors that prejudice the client's rights or claims are at one end. These include errors that effectively undermine the achievement of the client's primary objective for the representation, such as failing to file the complaint before the statute of limitations runs. At the other end of the spectrum are minor, harmless errors that do not prejudice the client's rights or interests. These include nonsubstantive typographical errors in a pleading or a contract or missing a deadline that causes nothing more than delay. Between the two ends of the spectrum are a range of errors that may or may not materially prejudice the client's interests.

Whether the lawyer must disclose an error to a client depends upon where the error falls on the spectrum and the circumstances at the time that the error is discovered. The New York State Bar Association, in a formal opinion, described the duty as follows:

[W]hether an attorney has an obligation to disclose a mistake to a client will depend on the nature of the lawyer's possible error or omission, whether it is possible to correct it in the present proceeding, the extent of the harm resulting from the possible error or omission, and the likelihood that the lawyer's conduct would be deemed unreasonable and therefore give rise to a colorable malpractice claim.

N.Y. State Bar Ass'n Comm. Prof'l Ethics, Op. 734 (2000). Under this analysis, it is clear that material errors that prejudice the client's rights or interests as well as errors that clearly give rise to a malpractice claim must always be reported to the client. Conversely, if the error is easily corrected or negligible and will not materially prejudice the client's rights or interests, the error does not have to be disclosed to the client.

Errors that fall between the two extremes of the spectrum must be analyzed under the duty to keep the client reasonably informed about his legal matter. If the error will result in financial loss to the client, substantial delay in achieving the client's objectives for the representation, or material disadvantage to the client's legal position, the error must be disclosed to the client. Similarly, if disclosure of the error is necessary for the client to make an informed decision about the representation or for the lawyer to advise the client of significant changes in strategy, timing,

or direction of the representation, the lawyer may not withhold information about the error. Rule 1.4. When a lawyer does not know whether disclosure is required, the lawyer should err on the side of disclosure or should seek the advice of outside counsel, the State Bar's ethics counsel, or the lawyer's malpractice carrier.2

Inquiry #2:

Applying the analysis in Opinion #1, the lawyer has determined that her error must be disclosed to the client. Is the lawyer also required to withdraw from the representation?

Opinion #2:

No, unless the conditions in Rule 1.7, Conflict of Interest: Current Clients, that allow a representation burdened with a conflict to proceed cannot be satisfied.

Rule 1.7(a)(2) states that a lawyer may not represent a client if the representation of a client may be materially limited by a personal interest of the lawyer. When a lawyer realizes that she made an error that may give rise to a malpractice claim against her, the lawyer's personal interest in avoiding liability may materially impair her professional judgment. Specifically, she may take actions that are contrary to the interests of the client to protect herself from liability. This is the essence of a conflict of interest.

Nevertheless, in many instances the lawyer may reasonably believe that she can mitigate or avoid any loss to the client by taking corrective action.3 For example, an error made in a title search may be readily repaired or a motion in limine may prevent the use of privileged communications that were improperly produced in discovery. It is often in the best interest of both the lawyer and the client for the lawyer to attempt such repair. When the interests of the lawyer and the client are aligned in this way, withdrawal is not required if the conditions for consent in Rule 1.7(b) are satisfied.

Rule 1.7(b) allows a lawyer to proceed with a representation burdened by a conflict if the lawyer reasonably believes that she will be able to provide competent and diligent representation to the client and the client gives informed consent, confirmed in writing. If the lawyer reasonably concludes that she is still able to provide the client with competent and diligent representation—that she can exercise independent professional judgment to advance the interests of the client and not solely her own interests—the lawyer may seek the informed consent of the client to continue the representation.

Of course, when an error is such that the client's objective can no longer be achieved, as when a claim can no longer be filed because the statute of limitations has passed, the lawyer must disclose the error to the client and terminate the representation.

Inquiry #3:

If an error must be disclosed to a client, what must the lawyer tell the client?

Opinion #3:

The lawyer must candidly disclose the material facts surrounding the error, including the nature of the error and its effect on the lawyer's continued representation. If the lawyer believes that she can take steps to remedy the situation or mitigate or avoid a loss, the lawyer should discuss these with the client while informing the client that the client has the right to terminate the representation and seek other counsel. Rule 1.4.

Whether a lawyer must inform the client that the client may have a malpractice action against the lawyer was addressed in Colorado Formal Ethics Opinion 113. The opinion states that

The lawyer need not advise the client about whether a claim for malpractice exists, and indeed the lawyer's conflicting interest in avoiding liability makes it improper for the lawyer to do so. The lawyer need not, and should not, make an admission of liability. What must be disclosed are the facts that surround the error, and the lawyer should inform the client that it may be advisable to consult with an independent lawyer with respect to the potential impact of the error on the client's rights or claims.

Co. Formal Ethics Op. 113 (November 19, 2005). The Colorado approach appropriately limits the possibility that a lawyer will attempt to give legal advice to a client about a potential malpractice claim against the lawyer. To do so would place the lawyer squarely in a nonconsentable conflict between the client's interest and the lawyer's personal interest. However, the lawyer is required to tell the client the operative facts about the error and to recommend that the client seeking independent legal advice about the consequences of the error.

Under this approach, the lawyer is not required to inform the client of the statute of limitations applicable to legal malpractice actions, nor is she required to give the client information about the lawyer's malpractice insurance carrier or information about how to file a claim with the carrier. Nevertheless, the lawyer should seek the advice of her malpractice insurance carrier prior to disclosing the error to the client, and should discuss with the carrier what information, if any, should be provided to the client about the lawyer's malpractice coverage or how to file a claim.

Inquiry #4:

Is there any information that the lawyer should not provide to the client when disclosing her error to the client?

Opinion #4:

The lawyer should not disclose to the client whether a claim for malpractice exists or provide legal advice about legal malpractice. See Opinion #3.

Inquiry #5:

When is the lawyer required to inform the client of the error?

Opinion #5:

The error should be disclosed to the client as soon as possible after the lawyer determines that disclosure of the error to the client is required. See Rule 1.4(a)(1) (lawyer shall promptly inform the client of any decision requiring consent).

Inquiry #6:

Is filing a motion to undo the error based upon excusable neglect sufficient disclosure to the client if the client is copied with the motion? May the lawyer wait until the court has ruled on the motion to send a copy of the motion and order to the client?

Opinion #6:

As noted above, comment [3] to Rule 1.4 explains that a lawyer must keep the client reasonably informed about "significant developments affecting the timing or the substance of the representation." If the client will lose a significant right or interest if the motion fails, the client is entitled to know about the error in order to determine whether the client is willing to allow the lawyer to attempt to correct the error or would prefer that the motion be handled by another lawyer. The client must be advised of the error prior to filing the motion to allow the client to make an informed decision about the representation. Rule 1.4(b).

Inquiry #7:

When disclosing the error to the client, may the lawyer refer the client to another lawyer for advice?

Opinion #7:

Yes, if the lawyer concludes that she can exercise impartial, independent professional judgment in recommending other counsel to the client. See Opinion #2.

Inquiry #8:

If the client has paid legal fees to the lawyer, is the lawyer required to return some or all of the fees that she received?

Opinion #8:

Rule 1.5(a) prohibits a lawyer from collecting a clearly excessive fee. As stated in 2000 FEO 5,

there is always a possibility that a lawyer will have to refund some or all of any type of advance fee, if the client-lawyer relationship ends before the contemplated services are rendered. At the conclusion of the representation, the lawyer must review the entire representation and determine whether, in light of the circumstances, a refund is necessary to avoid a clearly excessive fee.

Therefore, the lawyer must determine whether, in light of the lawyer's error and its consequences for the client's interests and legal representation, a refund is necessary to avoid a clearly excessive fee. In addition, the lawyer should never charge or collect legal fees for any legal work or expenses necessitated by the lawyer's attempts to mitigate the consequences of the lawyer's error.

Endnotes

The "spectrum" concept of legal errors is borrowed from Colorado Formal Ethics Op. 113 (November 19, 2005).

Rule 1.6(b)(5) allows a lawyer to disclose confidential client information to secure legal advice about the lawyer's compliance with the Rules of Professional Conduct.

Insurance carriers are experienced at repairing malpractice. A lawyer should seek the advice and assistance of her carrier.

2015 Formal Ethics Opinion 6

Lawyer's Professional Responsibility When Third Party Steals Funds from Trust Account

Adopted: October 23, 2015

Opinion rules that when funds are stolen from a lawyer's trust account by a third party who is not employed or supervised by the lawyer, and the lawyer was managing the trust account in compliance with the Rules of Professional Conduct, the lawyer is not professionally responsible for replacing the funds stolen from the account.

NOTE: This opinion is limited to a lawyer's professional responsibilities and is not intended to opine on a lawyer's legal liability.

Inquiry #1:

John Doe, a third party unaffiliated with Lawyer, created counterfeit checks that were identical to Lawyer's trust account checks. John Doe made the counterfeit checks, purportedly drawn on Lawyer's trust account, payable to himself and presented the counterfeit checks for payment at Bank. Bank honored some of the counterfeit checks. As a consequence, client funds held by Lawyer in his trust account were utilized for an unauthorized purpose. Lawyer properly supervised all nonlawyer staff participating in the record keeping for the trust account. Lawyer also maintained the trust account records and reconciled the trust account as required by Rule 1.15-3. Lawyer had no knowledge of the fraud and had no opportunity to prevent the theft.

Does Lawyer have a professional responsibility to replace the stolen funds?

Opinion #1:

No.

A lawyer who receives funds that belong to a client assumes the responsibilities of a fiduciary to safeguard those funds and to preserve the identity of the funds by depositing them into a designated trust account. Rule 1.15-2, RPC 191, and 97 FEO 9. The responsibilities of a fiduciary include the duty to ensure that the funds of a particular client are used only to satisfy the obligations of that client. RPC 191 and 97 FEO 9. Rule 1.15-3 requires a lawyer to keep accurate records of the trust account and to reconcile the trust account. A lawyer has an obligation to ensure that any nonlawyer assistant with access to the trust account is aware of the lawyer's professional obligations regarding entrusted funds and is properly supervised. Rule 5.3.

If Lawyer has managed the trust account in substantial compliance with the requirements of the Rules of Professional Conduct (see Rules 1.15-2, 1.15-3, and 5.3) but, nevertheless, is victimized by a third party theft, Lawyer is not required to replace the stolen funds. If, however, Lawyer failed to follow the Rules of Professional Conduct on trust accounting and supervision of staff, and the failure is a proximate cause of theft from the trust account, Lawyer may be

professionally obligated to replace the stolen funds. Compare RPC 191 (if a lawyer disburses against provisionally credited funds, the lawyer is responsible for reimbursing the trust account for any losses caused by disbursing before the funds are irrevocably credited).

Under all circumstances, Lawyer must promptly investigate the matter and take steps to prevent further thefts of entrusted funds. Lawyer must seek out every available option to remedy the situation including researching the law to determine if Bank is liable;1 communicating with Bank to discuss Bank's liability; asking Bank to determine if there is insurance to cover the loss; considering whether it is appropriate to close the trust account and transfer the funds to a new trust account; and working with law enforcement to recover the funds.

Inquiry #2:

Prior to learning of the fraud and theft from the trust account, Lawyer issued several trust account checks to clients and/or third parties for the benefit of a client. Despite the theft, there are sufficient total funds in the trust account to satisfy the outstanding checks. However, because of the theft, funds belonging to other clients will be used if the outstanding checks are cashed.

What is Lawyer's duty to safeguard the remaining funds in the trust account?

Opinion #2:

Lawyer must take reasonable measures to ensure that funds belonging to one client are not used to satisfy obligations to another client. Such reasonable measures include, but are not limited to, requesting that Bank issue stop payments on outstanding trust account checks; providing Bank with a list of outstanding checks and requesting that Bank contact Lawyer before honoring any outstanding checks; and determining if Bank is liable and, if so, demanding the outstanding checks be covered by Bank. If Lawyer determines Bank is not liable or liability is unclear, Lawyer must maintain the status quo and prevent further loss by not issuing new trust account checks. If payment will be stopped on the outstanding checks, Lawyer must contact the payees and alert them to the problem.

Inquiry #3:

Assume the same facts in Inquiry #2 except there are insufficient funds in the trust account to satisfy the outstanding checks. Must Lawyer deposit funds into the trust account to ensure that the outstanding checks are not presented against an account with insufficient funds?

Opinion #3:

No. In addition to the remedial measures listed in Opinion #2, Lawyer should notify the payees if Lawyer knows that the checks will not clear.

Inquiry #4:

Hacker gains illegal access to Lawyer's computer network and electronically transfers the balance of the funds in Lawyer's trust account to a separate account that is controlled by Hacker. Lawyer's trust account now has a zero balance. Lawyer has written several trust account checks to clients and/or third parties for the benefit of clients. Because of the theft, there are insufficient funds in the trust account to satisfy the outstanding checks.

Does Lawyer have a professional responsibility to replace the stolen funds?

Opinion #4:

No, Lawyer is not obligated to replace the stolen funds provided he has taken reasonable care to minimize the risks to client funds by implementing reasonable security measures in compliance with the requirements of Rule 1.15.

Rule 1.15 requires a lawyer to preserve client property, to deposit client funds entrusted to the lawyer in a separate trust account, and to manage that trust account according to strict recordkeeping and procedural requirements. To fulfill the fiduciary obligations in Rule 1.15, a lawyer managing a trust account must use reasonable care to minimize the risks to client funds on deposit in the trust account. 2011 FEO 7.

In 2011 FEO 7 the Ethics Committee opined that a lawyer has affirmative duties to educate himself regularly as to the security risks of online banking; to actively maintain end-user security at the law firm through safety practices such as strong password policies and procedures, the use of encryption and security software, and the hiring of an information technology consultant to advise the lawyer or firm employees; and to insure that all staff members who assist with the management of the trust account receive training on and abide by the security measures adopted by the firm.

If Lawyer has taken reasonable care to minimize the risks to client funds, Lawyer is not ethically obligated to replace the stolen funds. If, however, Lawyer failed to use reasonable care in following the Rules of Professional Conduct on trust accounting and supervision of staff, and the failure is a proximate cause of theft from the trust account, Lawyer may be professionally obligated to replace the stolen funds.

Inquiry #5:

Lawyer is retained to close a real estate transaction. Prior to the closing, Lawyer obtains information relevant to the closing, including the seller's name and mailing address. Lawyer also receives into his trust account the funds necessary for the closing. Lawyer's normal practice after the closing is to record the deed and disburse the funds. Lawyer then mails a trust account check to the seller in the amount of the seller proceeds.

Hacker gains access to information relating to the real estate transaction by hacking the email of one of the parties (lawyer, realtor, or seller). Hacker then creates a "spoof" email address that is

similar to realtor's or seller's email address (only one letter is different). Hacker emails Lawyer with disbursement instructions directing Lawyer to wire funds to the account identified in the email instead of mailing a check to seller at the address included in Lawyer's file as previously instructed.2 Lawyer follows the instructions in the email without first implementing security measures such as contacting the seller by phone at the phone number included in Lawyer's file to confirm the wiring instructions. After the closing and disbursement, the true seller calls Lawyer and demands his funds. Lawyer goes to Bank to request reversal of the wire. Bank refuses to reverse the wire and will not cooperate or communicate with Lawyer without a subpoena.

While pursuing other legal remedies, does Lawyer have a professional responsibility to replace the stolen funds?

Opinion #5:

Yes. Lawyers must use reasonable care to prevent third parties from gaining access to client funds held in the trust account. As stated in Opinion #4, Lawyer has a duty to implement reasonable security measures. Lawyer did not verify the disbursement change by calling seller at the phone number listed in Lawyer's file or confirming seller's email address. These were reasonable security measures that, if implemented, could have prevented the theft. Lawyer is, therefore, professionally responsible and must replace the funds stolen by Hacker. If it is later determined that Bank is legally responsible, or insurance covers the stolen funds, Lawyer may be reimbursed.

Inquiry #6:

While pursuing the remedies described in Opinion #2, may Lawyer deposit his own funds into the trust account?

Opinion #6:

Yes.

Generally, no funds belonging to a lawyer shall be deposited in a trust account or fiduciary account of the lawyer. Rule 1.15-2(f). The exceptions to the rule permit the lawyer to deposit funds sufficient to open or maintain an account, pay any bank service charges, or pay any tax levied on the account. Id. The exceptions were expanded in 1997 FEO 9 to include the deposit of lawyer funds when a bank would not route credit card chargeback debits to the lawyer's operating account. These exceptions to the prohibition on commingling enable lawyers to fulfill the fiduciary duty to safeguard entrusted funds.

Therefore, notwithstanding the prohibition on commingling, Lawyer may deposit his own funds into the trust account to replace the stolen funds until it is determined whether the Bank is liable for the loss, insurance is available to cover the loss, or the funds are otherwise recovered. If Lawyer decides to deposit his own funds, he must ensure that the trust accounting records

accurately reflect the source of the funds, the reason for the deposit, the date of the deposit, and the client name(s) and matter(s) for which the funds were deposited.

Inquiry #7:

With regard to all of the situations described in this opinion, what duties does Lawyer owe to the clients whose funds were stolen?

Opinion #7:

Lawyer must notify the clients of the theft and advise the clients of the consequences for representation; help the clients to identify any source of funds, such as bank liability and insurance, to cover their losses; defer a client's matter (by seeking a continuance, for example) if necessary to protect the client's interest; and explain to third parties or opposing parties as necessary to protect the client's interests. If stop payments are issued against outstanding checks, Lawyer must take the remedial measures outlined in Opinions #1 and #2 to protect the client's interest. Finally, Lawyer must report the theft to the North Carolina State Bar's Trust Accounting Compliance Counsel.

Endnotes

See e.g. N.C. Gen. Stat. §25-4-406.

The inquiry assumes that Lawyer believed that, by wiring the funds to the account designated in the email, he was disbursing the funds to the seller as required by the settlement statement. This opinion does not address the issues of professional responsibility raised when a lawyer knowingly makes disbursements contrary to a settlement statement.

2016 Formal Ethics Opinion 3

Negotiating Private Employment with Opposing Counsel

Adopted: January 27, 2017

Opinion rules that a lawyer may not negotiate for employment with another firm if the firm represents a party adverse to the lawyer's client unless both clients give informed consent.

Note: This opinion is limited to the explanation of the professional responsibilities of a lawyer moving from one place of private employment to another. Rule 1.11(d)(2)(B) governs the conduct of a government lawyer seeking private employment.

Inquiry:

May a lawyer negotiate for employment with a law firm that represents a party on the opposite side of a matter in which the lawyer is also representing a party?

Opinion:

Yes, with client consent.

A lawyer shall not represent a client if the representation of a client may be materially limited by a personal interest of the lawyer unless the lawyer reasonably believes that he can provide competent and diligent representation to the affected client and the client gives informed consent, confirmed in writing. Rule 1.7(b)(2). As observed in Rule 1.7, cmt. [10], when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client.

On the same issue, ABA Formal Ethics Op. 96-400 (1996) advises that there are two overriding factors affecting the "likelihood that a conflict will eventuate" and "materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclosing courses of action": the nature of the lawyer's role in the representation of the client; and the extent to which the lawyer's interest in the firm is concrete, and has been communicated and reciprocated. The ABA opinion states:

[t]he likelihood that a lawyer's job search will adversely affect his "judgment in considering alternatives or foreclosing courses of action" is far greater when the lawyer has an active and material role in representing a client. Thus, if the posture of the case is such that there is no call on the lawyer's judgment in representing a client during the period of his job search, it is not likely that his search and negotiations will adversely affect his judgment. Furthermore, if a lawyer's interest in another firm, or its interest in him, is not reciprocated, it seems unlikely, in most cases, that such unreciprocated interest will have a material effect on a lawyer's judgment in a matter between them.

While the exact point at which a lawyer's own interest may materially limit his representation of a client may vary, the committee believes that clients, lawyers, and their firms are all best served by a rule that requires consultation and consent at the earliest point that a client's interests could be prejudiced.

The ABA opinion concludes that a lawyer who is interested in negotiating employment with a firm representing a client's adversary must obtain the client's consent before engaging in substantive discussions1 with the firm or the lawyer must withdraw from the representation.

The Restatement (Third) of the Law Governing Lawyers advises that once the discussion of employment has become concrete and the interest is mutual, the lawyer must promptly inform the client; without effective client consent, the lawyer must terminate all discussions concerning the employment, or withdraw from representing the client. Restatement (Third) of the Law Governing Lawyers: A Lawyer's Personal Interest Affecting the Representation of a Client, §125, cmt. d (2000). See also Kentucky Ethics Op. E-399 (1998) (lawyer may not negotiate for employment with another firm where firms represent adverse parties and lawyer is involved in the client's matter or has actual knowledge of protected client information, unless the client consents to negotiation).

We agree: a job-seeking lawyer who is representing a client, or has confidential information2 about the client's matter, may not engage in substantive negotiations for employment with the opposing law firm without the client's informed consent.

To obtain the client's informed consent, the job-seeking lawyer must explain to the client the current posture of the case, including what, if any, additional legal work is required, and whether another firm lawyer is available to take over the representation should the lawyer seek to withdraw. If the client declines to consent, the job-seeking lawyer must either cease the employment negotiations until the client's matter is resolved or withdraw from the representation but only if the withdrawal can be accomplished without material adverse effect on the interests of the client. Rule 1.16(b)(1). Because personal conflicts of interests are not imputed to other lawyers in the firm, another lawyer in the firm may continue to represent the client. Rule 1.10(a).

Similarly, the hiring law firm must not engage in substantive employment negotiations with opposing counsel unless its own client consents. If the client does not consent, the firm must cease the employment negotiations or withdraw from the representation. The firm may only withdraw if the withdrawal can be accomplished without material adverse effect on the interests of the client. Rule 1.16(b) (1).

Endnote

A substantive discussion entails a communication between the job-seeking lawyer and the hiring law firm about the job-seeking lawyer's skills, experience, and the ability to bring clients to the firm; and the terms of association. ABA Formal Ethics Op. 96-400 (1996). Thus there is a

two-prong test for “substantive discussions.” There must be (1) a discussion/negotiation that is (2) substantive. Sending a resume blind to a potential employer is not a “discussion.” Speaking generally with a colleague at a social event about employment opportunities is not “substantive.”

2016 Formal Ethics Opinion 4

Disclosing Confidential Information to Execute on a Judgment for Unpaid Legal Fees

Adopted: January 27, 2017

Opinion rules that lawyer may not disclose financial information obtained during the representation of a former client to assist the sheriff with the execution on a judgment for unpaid legal fees.

Inquiry:

A lawyer with Firm represents Client in a domestic matter. Client fails to pay Firm for legal services and Firm withdraws from representation. Firm provides Client written notice of the North Carolina State Bar's Fee Dispute program. Client waives the right to participate in the program. Firm files a lawsuit against Client to recover the unpaid legal fees and obtains a default judgment against Client. Firm now wants to execute on its judgment against Client.

During the course of Firm's representation of Client, Firm learned financial information about Client, including the location of Client's bank accounts and the account numbers. Firm does not know if that information is still accurate. Firm would like to provide this information to the sheriff to aid the sheriff in executing on a writ of execution.

May Firm provide the sheriff with information about Client's bank accounts to execute on Firm's judgment for unpaid fees against Client?

Opinion:

No. Disclosing Client's financial information to the sheriff would violate Rule 1.6(a) of the Rules of Professional Conduct.

Rule 1.6(a) provides that a lawyer "shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly

authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).” None of the exceptions set out in Rule 1.6(b) applies to the instant scenario.

It is true that Rule 1.6(b)(6) allows a lawyer to disclose information 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.” Comment [12] to Rule 1.6 specifically addresses actions to collect legal fees and provides that “[a] lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services rendered in an action to collect it.”

The instant scenario does not fall within the Rule 1.6(b)(6) exception because the action to collect the unpaid legal fees has concluded. Firm has proven the legal services rendered and has obtained a default judgment against Client. The purpose of the exception to the duty of confidentiality having been fulfilled, Firm may not now use Client’s confidential information to collect on the judgment. Firm may utilize post-judgment procedures to obtain information about Client’s assets without breaching the duty of confidentially set out in Rule 1.6.