

High Point Law's Annual CLE

September 24, 2024

Title: The Times, They Are A-Changin...An Ethics Update for North Carolina Lawyers

Presenters: Judge J.C. Cole

Brian Oten, North Carolina State Bar

Overview: This session will provide lawyers with an update on the ethical considerations facing the legal profession on pressing topics including artificial intelligence, succession planning, ex parte communications, and the State Bar's new rule prohibiting sexual conduct with clients.

Materials:

Proposed 2024 Formal Ethics Opinion 1

Article: Artificial Intelligence, Real Practice (2023)

North Carolina State Bar Report on Succession Planning

North Carolina State Bar Resource: Planning for the Unexpected Absence

2019 Formal Ethics Opinion 4

North Carolina Rule of Professional Conduct 1.19

Proposed 2024 Formal Ethics Opinion 1
Use of Artificial Intelligence in a Law Practice
July 18, 2024

Proposed opinion discusses a lawyer's professional responsibility when using artificial intelligence in a law practice.

Editor's Note: There is an increasingly vast number of helpful resources on understanding Artificial Intelligence and the technology's interaction with the legal profession. The resources referenced in this opinion are not exhaustive but are intended to serve as a starting point for a lawyer's understanding of the topic. Over time, this editor's note may be updated as additional resources are published that staff concludes would be beneficial to lawyers.

Background:

"Artificial intelligence" (hereinafter, "AI") is a broad and evolving term encompassing myriad programs and processes with myriad capabilities. While a single definition of AI is not yet settled (and likely impossible), for the purposes of this opinion, the term "AI" refers to "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments." Nat'l Artificial Intelligence Initiative Act of 2020, Div. E, sec. 5002(3) (2021). Said in another, over-simplified way, AI is the use of computer science and extensive data sets to enable problem solving or decision-making; often through the implementation of sophisticated algorithms. AI encompasses, but is not limited to, both extractive and generative AI,¹ natural language processing, large language models, and any number of machine learning processes.² Examples of law-related AI programs range from online electronic legal research and case management software to e-discovery tools and programs that draft legal documents (e.g., a trial brief, will, etc.) based upon the lawyer's input of information that may or may not be client-specific.

Most lawyers have likely used some form of AI when practicing law, even if they didn't realize it (e.g., widely used online legal research subscription services utilize a type of extractive AI, or a program that "extracts" information relevant to the user's inquiry from a large set of existing data upon which the program has been trained). Within the year preceding the date of this opinion, generative AI programs that *create* products in response

¹ For a better understanding of the differences between extractive and generative AI, see Jake Nelson, *Combining Extractive and Generative AI for New Possibilities*, LexisNexis (June 6, 2023), <https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/combining-extractive-and-generative-ai-for-new-possibilities> (last visited January 10, 2024).

² For an overview of the state of AI as of the date of this opinion, see *What is Artificial Intelligence (AI)?*, IBM, <https://www.ibm.com/topics/artificial-intelligence> (last visited January 10, 2024). For information on how AI relates to the legal profession, see *AI Terms for Legal Professionals: Understanding What Powers Legal Tech*, LexisNexis (March 20, 2023), <https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/ai-terms-for-legal-professionals-understanding-what-powers-legal-tech> (last visited January 10, 2024).

to a user's request based upon a large set of existing data upon which the program has been trained (e.g., Chat-GPT) have grown in capability and popularity, generating both positive and negative reactions regarding the integration of these technological breakthroughs in the legal profession.³ It is unquestioned that AI can be used in the practice of law to increase efficiency and consistency in the provision of legal services. However, AI and its work product can be inaccurate or unreliable despite its appearance of reliability when used during the provision of legal services.⁴

Inquiry #1:

Considering the advantages and disadvantages of using AI in the provision of legal services, is a lawyer permitted to use AI in a law practice?

Opinion #1:

Yes, provided the lawyer uses any AI program, tool, or resource competently, securely to protect client confidentiality, and with proper supervision when relying upon or implementing the AI's work product in the provision of legal services.

On the spectrum of law practice resources, AI falls somewhere between programs, tools, and processes readily used in law practice today (e.g. case management systems, trust account management programs, electronic legal research, etc.) and nonlawyer support staff (e.g. paralegals, summer associates, IT professionals, etc.). Nothing in the Rules of Professional Conduct specifically addresses, let alone prohibits, a lawyer's use of AI in her law practice. However, should a lawyer choose to employ AI in her practice, the lawyer must do so competently, the lawyer must do so securely, and the lawyer must exercise her independent judgment in supervising the use of such processes in her practice.

Rule 1.1 prohibits lawyers from "handl[ing] a legal matter that the lawyer knows or should know he or she is not competent to handle[.]" and goes on to note that "[c]ompetent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Comment 8 to Rule 1.1 recognizes the reality of advancements in technology impacting a lawyer's practice, and states that part of a lawyer's duty of competency is to "keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice[.]" Rule 1.6(c) requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Rule 5.3 requires a lawyer to "make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance

³ John Villasenor, *How AI Will Revolutionize the Practice of Law*, Brookings Institution (March 20, 2023), <https://www.brookings.edu/articles/how-ai-will-revolutionize-the-practice-of-law/> (last visited January 10, 2024); Steve Lohr, *AI is Coming for Lawyers Again*, New York Times (April 10, 2023), <https://www.nytimes.com/2023/04/10/technology/ai-is-coming-for-lawyers-again.html> (last visited January 10, 2024).

⁴ Larry Neumeister, *Lawyers Blame ChatGPT for Tricking Them Into Citing Bogus Case Law*, AP News (June 8, 2023), <https://apnews.com/article/artificial-intelligence-chatgpt-courts-e15023d7e6fdf4f099aa122437dbb59b> (last visited January 10, 2024).

that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer[.]” and further requires that “a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer[.]” Rules 5.3(a) and (b). The requirements articulated in Rule 5.3 apply to nonlawyer assistants within a law firm as well as those outside of a law firm that are engaged to provide assistance in the lawyer’s provision of legal services to clients, such as third-party software companies. *See* 2011 FEO 6 (“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.”).

A lawyer may use AI in a variety of manners in connection with her law practice, and it is a lawyer’s responsibility to exercise her independent professional judgment in determining how (or if) to use the product of an AI tool in furtherance of her representation of a client. From discovery and document review to legal research, drafting contracts, and aggregating/analyzing data trends, the possibilities for employing AI in a law practice are increasingly present and constantly evolving. A lawyer’s decision to use and rely upon AI to assist in the lawyer’s representation of a client is generally hers alone and one to be determined depending upon a number of factors, including the impact of such services, the cost of such services, and the reliability of the processes.⁵ This opinion does not attempt to dictate when and how AI is appropriate for a law practice.

Should a lawyer decide to employ AI in the representation of a client, however, the lawyer is fully responsible for the use and impact of AI in the client’s case. The lawyer must use the AI tool in a way that meets the competency standard set out in Rule 1.1. Like other software, the lawyer employing an AI tool must educate herself on the benefits and risks associated with the tool, as well as the impact of using the tool on the client’s case. Educational efforts include, but are not limited to, reviewing current and relevant resources on AI broadly and on the specific program intended for use during the provision of legal services. A lawyer that inputs confidential client information into an AI tool must take steps to ensure the information remains secure and protected from unauthorized access or inadvertent disclosure per Rule 1.6(c). Additionally, a lawyer utilizing an outside third-party company’s AI program or service must make reasonable efforts to ensure that the program or service used is compatible with the lawyer’s responsibilities under the Rules of Professional Conduct pursuant to Rule 5.3. Whether the lawyer is reviewing the results of a legal research program, a keyword search of emails for production during discovery, proposed reconciliations of the lawyer’s trust account prepared by a long-time assistant, or a risk analysis of potential borrowers for a lender-client produced by a AI process, the lawyer is individually responsible for reviewing, evaluating, and ultimately relying upon the work produced by someone – or something – other than the lawyer.

⁵ In certain circumstances a lawyer may need to consult a client about employing AI in the provision of legal services to that client, *see* Opinion #5, below.

Inquiry #2:

May a lawyer provide or input a client's documents, data, or other information to a third-party company's AI program for assistance in the provision of legal services?

Opinion #2:

Yes, provided the lawyer has satisfied herself that the third-party company's AI program is sufficiently secure and complies with the lawyer's obligations to ensure any client information will not be inadvertently disclosed or accessed by unauthorized individuals pursuant to Rule 1.6(c).

At the outset, the Ethics Committee does not opine on whether the information shared with an AI tool violates the attorney-client privilege, as the issue is a legal question and outside the scope of the Rules of Professional Conduct. A lawyer should research and resolve any question on privilege prior to engaging with a third-party company's AI program for use in the provision of legal services to a client, particularly if client-specific information will be provided to the AI program.

This inquiry is akin to any lawyer providing confidential information to a third-party software program (practice management, cloud storage, etc.), on which the Ethics Committee has previously opined. As noted above, a lawyer has an obligation to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client." Rule 1.6(c). What constitutes "reasonable efforts" will vary depending on the circumstances related to the practice and representation, as well as a variety of factors including the sensitivity of the information and the cost or benefit of employing additional security measures to protect the information. Rule 1.6, cmt. [19]. Ultimately, "[a] lawyer must take steps to minimize the risk that confidential client information will be disclosed to other clients or to third parties" when using technology to handle, communicate, analyze, or otherwise interact with confidential client information. 2008 FEO 5; *see also* 2005 FEO 10; 2011 FEO 6.

The Ethics Committee in 2011 FEO 6 recognized that employing a third party company's services/technology with regards to confidential client information requires a lawyer to exercise reasonable care when selecting a vendor. The opinion states:

[W]hile 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. 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 affected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality. . . . 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 [technology] that the lawyer is required to apply when representing clients.

2011 FEO 6 (internal citations omitted). In exercising reasonable care, the opinion discusses a sample of considerations for evaluating whether a particular third party company's services are compatible with the lawyer's professional responsibility, including:

- The experience, reputation, and stability of the company;
- Whether the terms of service include an agreement on how the company will handle confidential client information, including security measures employed by the company to safeguard information provided by the lawyer; and
- Whether the terms of service clarify how information provided to the company will be retrieved by the lawyer or otherwise safely destroyed if not retrieved should the company go out of business, change ownership, or if services are terminated.

2011 FEO 6; *see* Rule 5.3. A proposed ethics opinion from the Florida Bar on a lawyer's use of AI adds that lawyers should "[d]etermine whether the provider retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information" when determining whether a third party company's technological services are compatible with the lawyer's duty of confidentiality. *See* Florida Bar Proposed Advisory Opinion 24-1 (published Nov. 13, 2023). Furthermore, this duty of reasonable care continues beyond initial selection of a service, program, or tool and extends throughout the lawyer's use of the service. A lawyer should continuously educate herself on the selected technology and developments thereto – both individually and by "consult[ing] periodically with professionals competent in the area of online security" – and make necessary adjustments (including abandonment, if necessary) when discoveries are made that call into question services previously thought to be secure. 2011 FEO 6.

The aforementioned considerations – including the consideration regarding ownership of information articulated by the Florida Bar opinion – are equally applicable to a lawyer's selection and use of a third party company's AI service/program. Just as with any third-party service, a lawyer has a duty under Rule 5.3 to make reasonable efforts to ensure the third-party AI program or service is compatible with the lawyer's professional responsibility, particularly with regards to the lawyer's duty of confidentiality pursuant to Rule 1.6. Importantly, some current AI programs are publicly available to all consumers/users, and the nature of the AI program is to retain and train itself based on the information provided by any user of its program. Lawyers should educate themselves on the nature of any publicly available AI program intended to be used in the provision of legal services, with particular focus on whether the AI program will retain and subsequently use the information provided by the user. Generally, and as of the date of this opinion, lawyers should avoid inputting client-specific information into publicly available AI resources.

Inquiry #3:

If a firm were to have an AI software tool initially developed by a third-party but then used the AI tool in-house using law firm owned servers and related infrastructure, does that change the data security requirement analysis in Opinion #2?

Opinion #3:

No. Lawyer remains responsible for keeping the information secure pursuant to Rule 1.6(c) regardless of the program's location. While an in-house program may seem more secure because the program is maintained and run using local servers, those servers may be as much if not more vulnerable to attack because a lawyer acting independently may not be able to match the security features typically employed by larger companies whose reputations are built in part on security and customer service. A lawyer who plans to independently store client information should consult an information technology/cybersecurity expert about steps needed to adequately protect the information stored on local servers.

Relatedly, AI programs developed for use in-house or by a particular law practice may also be derivatives of a single, publicly available AI program; as such, some of these customized programs may continue to send information inputted into the firm-specific program back to the central program for additional use or training. Again, prior to using such a program, a lawyer must educate herself on the nuances and operation of the program to ensure client information will remain protected in accordance with the lawyer's professional responsibility. The list of considerations found in Opinion #2 offers a starting point for questions to explore when identifying, evaluating, and selecting a vendor.

Inquiry #4:

If a lawyer signs a pleading based on information generated from AI, is there variation from traditional or existing ethical obligations and expectations placed on lawyers signing pleadings absent AI involvement?

Opinion #4:

No. A lawyer may not abrogate her responsibilities under the Rules of Professional Conduct by relying upon AI. Per Rule 3.1, a lawyer is prohibited from bringing or defending "a proceeding, or assert[ing] or controvert[ing] an issue therein, unless there is a basis in law and fact for doing so that is not frivolous[.]" A lawyer's signature on a pleading also certifies the lawyer's good faith belief as to the factual and legal assertions therein. *See* N.C. R. Civ. Pro. 11 ("The signature of an attorney . . . constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of

litigation.”). If the lawyer employs AI in her practice and adopts the tool’s product as her own, the lawyer is professionally responsible for the use of the tool’s product. *See* Opinion #1.

Inquiry #5:

If a lawyer uses AI to assist in the representation of a client, is the lawyer under any obligation to inform the client that the lawyer has used AI in furtherance of the representation or legal services provided?

Opinion #5:

The answer to this question depends on the type of technology used, the intended product from the technology, and the level of reliance placed upon the technology/technology’s product. Ultimately, the attorney/firm will need to respond to each case and each client individually. Rule 1.4(b) requires an attorney to explain a matter to her client “to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Generally, a lawyer need not inform her client that she is using an AI tool to complete ordinary tasks, such as conducting legal research or generic case/practice management. However, if a lawyer delegates substantive tasks in furtherance of the representation to an AI tool, the lawyer’s use of the tool is akin to outsourcing legal work to a nonlawyer or other third-party resource or service, for which the client’s advanced informed consent is required. *See* 2007 FEO 12. Additionally, if the decision to use or not use an AI tool in the case requires the client’s input with regard to fees, the lawyer must inform and seek input from the client. As stated before, it is ultimately a lawyer’s professional responsibility to exercise independent judgment when deciding to use or rely upon the work product of any outsourced, third-party service. *See* 2007 FEO 12; Opinions #1 & 4.

Inquiry #6:

Lawyer has an estate planning practice and bills at the rate of \$300 per hour. Lawyer has integrated an AI program into the provision of legal services, resulting in increased efficiency and work output. For example, Lawyer previously spent approximately three hours drafting standard estate planning documents for a client; with the use of AI, Lawyer now spends only one hour preparing those same documents for a client. May Lawyer bill the client for the three hours of work that the prepared estate documents represent?

Opinion #6:

No, Lawyer may not bill a client for three hours of work when only one hour of work was actually experienced. A lawyer’s billing practices must be accurate, honest, and not clearly excessive. Rules 7.1, 8.4(c), and 1.5(a); *see also* 2022 FEO 4. If the use of AI in Lawyer’s practice results in greater efficiencies in providing legal services, Lawyer may enjoy the benefit of those new efficiencies by completing more work for more clients; Lawyer may

not inaccurately bill a client based upon the “time-value represented” by the end product should Lawyer not have used AI when providing legal services.

Rather than billing on an hourly basis, Lawyer may consider billing clients a flat fee for the drafting of documents – even when using AI to assist in drafting – provided the flat fee charged is not clearly excessive and the client consents to the billing structure. *See* 2022 FEO 4.

Relatedly, Lawyer may also bill a client for expenses incurred related to Lawyer’s use of AI in the furtherance of a client’s legal services, provided the expenses charged are accurate, not clearly excessive, and the client consents to the charge, preferably in writing. *See* Rule 1.5(b). Such costs include:

- a lawyer’s use of AI that is specifically identified and directly related to the legal services provided to the client during the representation; or
- a general administrative fee to cover the costs of generic expenses incurred during the representation for the benefit of the client, e.g., copies, printing, postage, or general technology-related expenses – including AI – that are implemented to improve services or client convenience.

Artificial Intelligence, Real Practice

Brian Oten, Ethics Counsel

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“We have only bits and pieces of information, but what we know for certain is that at some point in the early 21st Century all of mankind was united in celebration. We marveled at our own magnificence as we gave birth...to A.I.”¹

These lines, spoken by heroic Captain Morpheus in the 1999 movie *The Matrix*, tell the story of [spoiler alert, though it’s arguable that no such warning is needed when talking about a 24-year-old movie because, well, if you haven’t seen it by now you probably aren’t planning on seeing it anyway] the war between humans and artificial intelligence driven machines. *The Matrix* itself turns out to be a computer program created by machines that is used to create a fictitious reality for humans as a means of control. Morpheus utters this dreary description of mankind’s history during his explanation to newly freed Neo about how the world he once knew is gone, and how he must now embrace the reality that artificial intelligence changed everything about human existence.

Fast-forward to today, what is now appropriately described as the early part of the 21st Century – on March 13, 2023, the fourth version of ChatGPT was released for public use, and with it a barrage of comments, news reports, and articles spawning reactions from extreme excitement to absolute dread. For the uninitiated, ChatGPT is a version of generative artificial intelligence (AI). (Think of ChatGPT as the Bitcoin of AI projects, i.e., it’s the most popular one out there, but it’s not the only one out there.) “Generative artificial intelligence” is different from “semantic artificial intelligence,” which most readers will recognize they have employed quite often in their own lives and practices. Very broadly, semantic AI programs can sort through and organize existing data sets or libraries of information. For example, when a lawyer uses an online legal research tool to find a relevant case on a particular topic or point of law, the lawyer is using a semantic AI program to sort through thousands (millions?) of cases and organize the results from most relevant to least relevant. Generative AI, on the other hand, goes beyond the already complex and sophisticated search of semantic AI programs and actually creates/generates plain language answers and analysis in response to prompts or questions provided by human users.

ChatGPT has gone through several iterations thus far and will continue to develop further in the coming months and years. The most recent version, however, made headlines due to its advances in those aforementioned “generative” AI capabilities. Most notably, it was recently reported that ChatGPT obtained a passing score on the Uniform Bar Exam, with the program responding to the exam’s narrative essay prompts with apparently accurate and organized legal analysis. And just in case you were wondering – no, the program does not rely on an active Internet connection to function. Rather, the program was trained (educated?) by its programmers

¹ THE MATRIX (Warner Bros. 1999).

using a vast amount of text databases from the Internet; and it produced correct answers to bar exam questions in a “closed universe” scenario.

Are you scared yet?

Needless to say, these advances in AI are remarkable. And over the past weeks, the ethics staff has received a number of calls from lawyers asking how ChatGPT and the emergence of artificial intelligence impacts a law practice. After all, ChatGPT has been proven to effectively complete tasks ranging from drafting college-level essays to template contracts and wills. It’s also been reported to be unreliable at times: In June 2023, a federal judge in New York fined two lawyers for relying upon ChatGPT to draft a legal argument that the lawyers then included in their brief filed with the court; the AI-generated analysis, it turned out, was full of fictitious case citations created by the program to support its argument, and the lawyers did nothing to review or validate the work product of the program.² That instance led a federal judge in Texas to prohibit lawyers from using ChatGPT or other generative AI programs in drafting legal briefs; when filing a brief with the court, lawyers in that district now have to also file a certificate attesting that their work product was not created by AI.³

The range of benefits and detriments is vast, but before your head explodes, take comfort in knowing that lawyers have been using AI for some time. (As noted before: has anyone out there ever searched for a relevant case on Westlaw or Lexis?) Our use of yet another new, evolving technological tool need not be met with fear or discouragement — we’ve adapted before, and we need to adapt again. But there are a handful of ethical considerations to note as we venture into this new world of employing AI in a law practice. So, let’s dive in: What are the ethical considerations for a lawyer’s use of artificial intelligence in a law practice?

Answer:

The use of artificial intelligence (AI) in the legal profession raises several ethical considerations for lawyers. While AI can provide valuable support to legal practitioners, it is essential for lawyers to remain mindful of their professional obligations and ethical duties. Some of the key ethical considerations include:

1. **Competence:** Lawyers have an ethical duty to provide competent representation to their clients. As AI becomes more integrated into the practice of law, lawyers should maintain a basic understanding of AI technologies to leverage them effectively and appropriately. This includes knowing the strengths and limitations of AI tools and recognizing when human intervention is necessary to ensure the quality of legal services.
2. **Supervision:** Lawyers have a responsibility to supervise the work of non-lawyers, including AI systems, to ensure compliance with ethical obligations. This involves

² Lawyers Fined for Filing Bogus Case Law Created by ChatGPT, CBS News, June 23, 2023, <https://www.cbsnews.com/news/chatgpt-judge-fines-lawyers-who-used-ai/>

³ Texas Judge Bans Filings Solely Created by AI After ChatGPT Made Up Cases, CBS News, June 2, 2023, <https://www.cbsnews.com/news/texas-judge-bans-chatgpt-court-filing/>

monitoring the AI's performance, understanding the AI's decision-making process, and validating its output to ensure accuracy and reliability.

3. Confidentiality: Lawyers must protect client confidentiality and maintain attorney-client privilege when using AI tools. This includes ensuring that any AI tools or systems used in the practice have adequate security measures in place to protect sensitive client information from unauthorized access or disclosure.
4. Communication: Lawyers have an ethical duty to keep their clients informed about the status of their matters and to communicate with them in a manner that allows the clients to make informed decisions. When using AI tools, lawyers should be transparent with clients about the extent of AI involvement in their work and should communicate any potential risks or limitations associated with the use of AI.
5. Diligence: Lawyers have an ethical obligation to act diligently in representing their clients. Relying solely on AI without human input or oversight may lead to mistakes or oversights, potentially resulting in inadequate representation. Lawyers must exercise due care when using AI tools to ensure they are fulfilling their ethical duties.
6. Avoiding Unauthorized Practice of Law (UPL): Lawyers must ensure that the use of AI does not result in the unauthorized practice of law by non-lawyers. While AI can assist with various tasks, lawyers should be cautious not to delegate tasks that require legal judgment or expertise to AI systems, as this may constitute UPL.
7. Billing: Lawyers have a responsibility to bill clients fairly and transparently. When incorporating AI tools into their practice, lawyers should consider how the use of AI affects billing practices and ensure that clients are not overcharged for services provided by AI.
8. Bias and fairness: AI systems may inadvertently perpetuate or exacerbate biases present in the data used for training the algorithms. Lawyers must be vigilant in identifying and addressing potential biases in AI tools to ensure they provide fair and unbiased legal services to their clients.
9. Responsibility and accountability: Lawyers must remain responsible and accountable for the work they produce, even when using AI tools. This includes acknowledging errors that may arise from the use of AI and taking corrective measures as needed.

By addressing these ethical considerations, lawyers can harness the potential of AI in their practice while maintaining their professional obligations and upholding the highest ethical standards.⁴

By the way, everything written above between the word “Answer” and the footnote ending the preceding paragraph was drafted by ChatGPT in response to the prompt, “What are the ethical considerations for a lawyer’s use of artificial intelligence in a law practice?”

Now are you REALLY scared?

Generally, I don’t disagree with the answers listed above, though I think the nuance of a lawyer’s professional responsibility when it comes to artificial intelligence needs a bit more exploration. I also shudder at the idea of ChatGPT assigning personhood to itself when reflecting that lawyers “have a responsibility to supervise the work of non-lawyers, including AI systems[.]” To that end, the State Bar’s Ethics Committee intends to delve into this topic in the coming months. Whether the committee produces a new formal ethics opinion or some other guidance on this ever-evolving issue remains to be seen, but keep an eye out for future updates on the committee’s efforts regarding AI.

For those that are anxiously awaiting an answer on the interaction between a lawyer’s professional responsibility and AI, let’s cut to the chase: Nothing in the Rules of Professional Conduct prohibits a lawyer from using machine learning or artificial intelligence tools in a law practice. However, like other law practice resources, a lawyer must use these tools competently (Rule 1.1), ensure that confidentiality is preserved (Rule 1.6), and review/supervise the work product generated (similar to a lawyer’s duty of supervision per Rule 5.3). A lawyer needs to be particularly careful when using a public artificial intelligence tool (like ChatGPT) because any client-specific information provided to the public tool could be subsequently used or potentially revealed by the program, breaching the lawyer’s duty of confidentiality. Depending on the circumstances of the representation, a lawyer may also need to consult with a client prior to delegating certain tasks to an AI program or process, similar to a lawyer’s responsibilities when outsourcing legal support services to foreign assistants. *See* 2007 FEO 12. And, of course, a lawyer must be transparent with a client when billing for work assisted by AI. After all, AI may very well reduce a previous 60-minute task to 6 minutes (or less); in such a scenario, a lawyer must accurately and honestly bill based upon the time actually spent on the task, and any efficiencies created by the lawyer’s use of AI must be passed on to the client. *See* Rules 1.5, 7.1, and 8.4(c).

There is no way to un-ring this bell. The issues will incessantly evolve and grow in complexity, but Ethics Committee and staff counsel will continue to explore the integration of AI into the legal profession. In the meantime, be careful out there: If you’re going to employ AI in your practice, be sure to do so competently and securely, and review the program’s work product as if it were done by a summer intern (there’s potential, yes, but it’s not quite there and may even be riddled with errors). Ultimately, every lawyer that relies upon AI will be responsible for its

⁴ “What are the ethical considerations for a lawyer’s use of artificial intelligence in their law practice?” ChatGPT-4, April 4, 2023, chat.openai.com/chat.

product and the implications thereof. And if this technology ever evolves into the equivalent of a first-year associate or higher, we can collectively “marvel at our own magnificence”...while also updating our resumes.

DRAFT



Image credit: Robyn Kern

NORTH CAROLINA STATE BAR

Issues Subcommittee on Succession Planning: Report and Recommendations



NORTH CAROLINA
STATE BAR

**January
2024**

Introduction

In January 2023, then-State Bar President Marci Armstrong announced the creation of a new subcommittee of the State Bar Council's Issues Committee focused on studying the topic of succession planning for lawyers.

The subcommittee was tasked with exploring the potential positive impact of succession planning for lawyers and, conversely, the negative impact a lack of succession planning can have on lawyers, clients, coworkers, the public, and the administration of justice. At the conclusion of its study, the subcommittee was expected to offer an opinion on whether the legal profession would benefit from greater awareness on the topic of succession planning and what – if any – efforts the State Bar should undertake to promote succession planning for lawyers and law firms.

Ashley Campbell, Councilor for the 10th Judicial District Bar (Wake County), was appointed to chair the subcommittee. The following members of the State Bar Council were appointed to serve on the subcommittee:

- Clark Bell (District / County)
- Robert "Bobby" Bowers (District 26/Mecklenburg County)
- Daryl Davidson (District / County)
- Dionne Fortner (District / Johnston County)
- Alan LeCroy (District / County)
- Michael Neece (District / Gaston County)
- Eben Rawls (District 26/Mecklenburg County)

The subcommittee met a total of five times beginning in April 2023 and ending in December 2023. During these meetings, the subcommittee educated itself on and discussed a variety of topics and perspectives concerning succession planning, ranging from the State Bar's trustee appointment process to other jurisdictions' rules and local organizations' resources on succession planning. All subcommittee meetings were livestreamed via the State Bar's YouTube channel. Requests for subcommittee meeting agendas and materials should be directed to staff.

Overview of Study

Lawyers in North Carolina are not required to create or implement a succession plan for their law practices, though succession planning is encouraged in the Rules of Professional Conduct. See Rule 1.3, cmt. [5] (“To prevent neglect of client matters in the event of a sole practitioner’s death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer’s death or disability, and determine whether there is a need for immediate protective action.”). Nevertheless, law practices inevitably arrive at a transitional stage – be it the transfer of the practice from one lawyer to another or the termination of the practice altogether – regardless of the existence of a succession plan. And yet, the common understanding is that lawyers largely do not have a succession plan in place for their own practices.

Adding to the concern, some practices reach this transitional stage unexpectedly due to a lawyer’s death, disability, disappearance, or disciplinary action, resulting in the abandonment of a law practice. In such cases, the State Bar has historically been called upon to wind down abandoned law practices of solo practitioners to protect the interests of clients, the public, and the administration of justice. To this end, the State Bar Council in 2014 adopted a policy affirming its role in winding down abandoned law practices of solo practitioners. This role, while appropriate, expends a great deal of State Bar resources every year.

Ultimately, the lack of a succession plan can result in significant turmoil, confusion, and even harm to a lawyer, the lawyer’s family, the lawyer’s coworkers, the lawyer’s clients, the public, the court system, and the profession. Accordingly, the subcommittee first recognized that succession planning should be strongly encouraged in the legal profession to assist in the regulation of the profession and to improve the quality of legal services in North Carolina. The subcommittee then proceeded to explore a variety of questions as well as existing rules and resources within and outside of North Carolina concerning succession planning; the recommendations on the following pages reflect the subcommittee’s conclusions and recommendations.

Recommendations

1 Lawyers should be encouraged – but not required – to have a succession plan

The subcommittee explored whether succession planning should be mandated for every lawyer in North Carolina. The subcommittee reviewed a variety of other jurisdictions' approach to the subject, including states that require succession planning (e.g., Iowa, Florida, Maine, Michigan, New Mexico), states that offer a voluntary opportunity for lawyers to designate some type of "successor" lawyer with their regulatory agency (e.g., Delaware, Georgia, Indiana, Wisconsin), and states that offer substantial educational resources to empower lawyers to develop and implement a succession plan (e.g., California, Connecticut, Kentucky, Illinois, Oregon). The subcommittee also considered the amount of State Bar resources annually spent appointing trustees and assisting with the winding down abandoned practices of solo practitioners who had no succession plan in place. Specifically, over the past seven years, the State Bar has appointed 21 trustees annually to wind down abandoned law practices, spending an average of \$48,902 per year on trustee fees and expenses. A mandatory rule, in theory, might reduce the amount of resources spent identifying, appointing, and assisting trustees during the wind-down process.

After significant discussion, the subcommittee unanimously concluded that, although succession planning should be encouraged, a mandatory rule requiring lawyers to create, implement, and report the existence of a succession plan should not be pursued. The subcommittee observed that lawyers already have a great deal of administrative requirements to address in maintaining their membership with the State Bar, and any requirement on succession plans could be negatively perceived to the detriment of the purpose underlying the rule; especially if the requirement had to be enforced through the Administrative Committee. Additionally, regarding the hoped reduction in resources expended by the State Bar on the trustee process, the subcommittee concluded that any reduction in resources would be eclipsed by the resources spent on enforcing a mandatory succession plan rule on the entire membership of the North Carolina State Bar (over 32,000 members as of the date of this publication).

Accordingly, the subcommittee does not recommend succession planning be mandatory for lawyers. Instead, as discussed below, the subcommittee recommends the State Bar encourage voluntary succession planning, both through educational efforts and a new opportunity for lawyers to voluntarily identify a "proposed trustee" in their membership information.

Recommendations

2 Educate lawyers on the need to plan for unexpected absences

Considering the significant resources annually spent by the State Bar winding down abandoned law practices, and after reviewing the existing educational material on succession planning, the subcommittee concluded that there was a lack of existing awareness by lawyers of the potentially dire consequences when a lawyer unexpectedly becomes unavailable or unable to resume the practice of law. To remedy this issue, the subcommittee recommends the publication of a new State Bar resource entitled, **“Planning for the Unexpected Absence.”** A copy of this proposed resource is included at the end of this report.

The purpose of the proposed resource is to alert lawyers of the need to plan for an unexpected absence. The resource encourages lawyers to take a handful of initial steps to take account of and organize their law practice, with the hope that these steps will empower coworkers and peers who may be called upon to assist with an unavailable lawyer’s law practice. Steps include:

- Identifying and writing down the lawyer’s practice area(s) and pending client matters,
- Writing down a description of the lawyer’s file organization method, and
- Communicating this information (or its location) to someone who may be called upon for assistance or who is willing to assist in the event of an emergency or the lawyer’s unavailability.

For lawyers interested in creating a full succession plan, the resource contains hyperlinks to the existing materials on succession planning published by other jurisdictions as well as those published by local organizations such as Lawyers Mutual of North Carolina and the North Carolina Bar Association. The resource also notes the services offered by Lawyers Mutual Consulting and the Law Practice Exchange for those who need more hands-on assistance in the succession planning process.

Recommendations

3 Provide lawyers with an opportunity to identify a “proposed trustee” with the State Bar’s membership department for emergency situations

The aforementioned resource, “Planning for the Unexpected Absence,” also describes a new proposed service to be offered by the State Bar whereby a lawyer may voluntarily identify a “proposed trustee” with the State Bar’s membership department. This idea originated after reviewing the approaches taken by other jurisdictions (see, e.g., State Bar of Georgia) to encourage lawyers to think about what would happen if they were unable to return to their practice and to enable lawyers to take a minimal succession planning-step by designating a peer who was familiar with the lawyer’s practice to serve as a point of contact should an emergency befall the lawyer.

The proposed trustee is described as an individual who understands a lawyer’s practice, who knows where critical information is kept, and who is willing to assist the State Bar or others in the event of the lawyer’s unexpected absence. The subcommittee recommends the creation and inclusion of this new data field within the State Bar’s membership portal for lawyers to utilize voluntarily, and recommends the section of the membership portal containing this new data field include relevant educational materials on the proposed trustee and succession planning in general. The subcommittee also recommends incorporating this voluntary designation opportunity into a lawyer’s annual dues process.

Finally, the subcommittee recommends delaying publication of the “Planning for the Unexpected Absence” resource until the proposed trustee designation function has been deployed in the membership portal, but no later than April 2024.

Recommendations

4 Explore and support additional educational opportunities on the topic of succession planning

The subcommittee recognizes that the State Bar can play an important role in promoting the need for and available resources concerning succession planning. Accordingly, the subcommittee recommends the State Bar continue to explore opportunities to educate lawyers on succession planning, including incorporating the topic in the various CLE presentations given by staff. The subcommittee also discussed the possibility of creating a module through the PMBR Committee/online platform to offer an interactive educational experience for lawyers. The subcommittee recommends the State Bar monitor the release of the pending PMBR module on cybersecurity, and revisit the possibility of a succession planning module if the cybersecurity module is successful and favorably received.

5 Encourage all lawyers to create and implement a succession plan

The subcommittee discussed and concluded that succession plans are necessary for all lawyers, and not just solo practitioners as mentioned in comment 5 to Rule 1.3. While solo practitioners experience a greater need for a succession plan given that no other lawyer is immediately available to assist clients when the solo practitioner decides to retire or is unexpectedly unavailable, lawyers in law firms may be unfamiliar with their partners' or associates' practices and may be unprepared to assist clients should the need arise. Succession planning will look different for every lawyer depending on circumstances including their practice structure and practice area(s), but all lawyers will benefit from developing, implementing, and updating a succession plan for their practice. The subcommittee recommends incorporating this message into the State Bar's future educational efforts on the subject.

Planning for the Unexpected Absence

A Resource from the
North Carolina State Bar



NORTH CAROLINA
STATE BAR

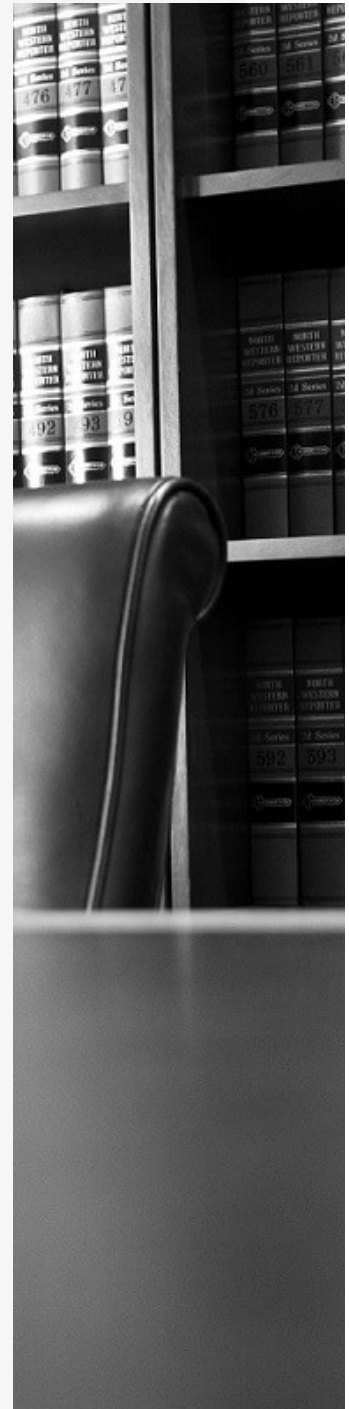
2024

Planning for the Unexpected: The Responsible Thing For ALL Lawyers To Do

What would happen if you could not come to the office tomorrow? If someone walked into your office due to your absence, would that person be able to figure out which clients needed attention, and what action was required to protect their interests?

Lawyers play an important role in the lives of their clients and their coworkers. As a result, a lawyer's unavailability -- temporary or permanent, planned or unexpected -- can have a significant impact on the provision of legal services, the stability of a law office, and the administration of justice itself. Accordingly, lawyers should consider creating and implementing a succession plan to ensure legal services are minimally disrupted in the event of a lawyer's unavailability.

Rule 1.3 of the Rules of Professional Conduct outlines a lawyer's duty of diligence in representing clients. Comment 5 to Rule 1.3 recognizes that, in carrying out the duty of diligence, lawyers need to implement a plan "[t]o prevent neglect of client matters in the event of a sole practitioner's death or disability[.]" While the comment to Rule 1.3 focuses on solo practitioners, all lawyers should pursue and implement a plan to ensure the continuity of legal services in the event of their unavailability.



FIRST STEPS

Planning for an unexpected absence can feel overwhelming, and the design and substance of such a plan may vary depending on a variety of circumstances, including the lawyer's practice area(s) and whether the lawyer has any partners or associates. But there are some simple first steps that every lawyer can (and should) take to start this important process. This guide serves as a launching point for every lawyer to contemplate, design, and implement an emergency plan for the protection of clients, coworkers, and ultimately the administration of justice.



No. 01 – Describe Your Practice

Think about your practice -- what types of cases do you handle? What types of cases have you handled in the past? Write down the areas of law that you have practiced during your career, especially if you still have client files from those prior days.



No. 02 – Who Are Your Clients?

Who are your active clients? What are the goals of the representation, and how far along are you in accomplishing those goals? After listing your active clients, summarize the goals and status of the representation, along with any next steps.



No. 03 – Talk With Someone

Your organization methods do not need to be secret. Take an afternoon and talk with your staff about what you produced in the first two steps listed above. Discuss how you keep things organized in your head and on your desk, and ask for input on how you can improve your organization for everyone's benefit.



No. 04 – Identify a Proposed Trustee

If you were unexpectedly unable to continue practicing, the State Bar may need to appoint a trustee to wind-down your practice. To this end, all lawyers should identify a "proposed trustee" -- someone who understands your practice, who knows where you kept critical practice-specific information (e.g., where is your list of active clients; where are your passwords; where is your trust account located), and who would be willing to help if such an emergency arose. Log-in to the State Bar's membership portal to find more information about this vital role, then ask a trusted colleague to serve in this capacity. After you have equipped your "proposed trustee" with the information needed to serve, log back in to the State Bar's membership portal and identify this person in your membership profile as your proposed trustee or fill out the form at the end of this resource and send it back to the State Bar. Although the State Bar -- or your proposed trustee -- may request a different lawyer be formally appointed to wind-down your practice, this trusted person will play a vital role in assisting all parties during the process.

Planning for an unexpected absence is but one aspect of a larger succession plan.

All lawyers should develop and implement a general succession plan to ensure the continuity of legal services to clients and to maximize their enjoyment of retirement when the time comes. Succession planning can be basic or incredibly detailed. Fortunately, lawyers have at their fingertips an abundance of helpful resources from North Carolina-based organizations as well as from other jurisdictions that can aid with all aspects of succession planning. Below you will find a sample of these available resources (all resources are hyperlinked). Lawyers may also want to consult with their malpractice carrier when creating a succession plan, as carriers may have specific requirements or resources for their insureds.

Print Resources:

[North Carolina Bar Association](#) - Retire, Reset, Reinvent: Planning for the Next Stage of Your Law Practice

[Lawyers Mutual of North Carolina](#) - Buying or Selling a Law Practice

[The Connecticut Bar Association](#), [Kentucky Bar Association](#), [State Bar of Michigan](#), [State Bar of New Mexico](#), and [the Oregon State Bar Professional Liability Fund](#) offer a variety of checklists and forms to assist in developing a succession plan

Direct Assistance:

[Lawyers Mutual Consulting Services](#) and [the Law Practice Exchange](#) offer individual assistance with the creation of a succession plan or the sale/transfer of a law practice

[The North Carolina Bar Association's Transitioning Lawyers Committee](#) offers support to lawyers exploring when and how a transition can (or must) be made

In need of advice about your professional responsibility? Contact the State Bar's Ethics Staff for free advice!

ethicsadvice@ncbar.gov
919-828-4620



NORTH CAROLINA
STATE BAR

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Designation of Proposed Trustee

In the event of an attorney's unexpected unavailability, the State Bar may need to seek the appointment of a trustee to assist in winding down an attorney's law practice or take other steps as needed to protect client interests. The trustee is not tasked with continuing or absorbing the unavailable attorney's practice, and the trustee does not replace the unavailable attorney as the client's new attorney. Rather, the trustee facilitates the return of client property and the potential transfer of client matters to new counsel, and generally works to wind down the unavailable attorney's law practice. When a trustee is needed, the State Bar seeks assistance from the local bar to identify potential candidates to serve as trustee and petitions the local senior resident superior court judge for the appointment of a trustee. This form allows an attorney to designate a "proposed trustee" who the State Bar and others may contact to potentially serve as trustee or otherwise assist in understanding the law practice of an unavailable attorney.

Attorney Name: _____ **Bar #:** _____

I hereby designate the attorney listed below as my proposed trustee to be contacted in the event of my unexpected unavailability. I understand that designating a proposed trustee does not guarantee their appointment as trustee of my law practice should a trustee be needed.

Name of Proposed Trustee: _____ **Bar #:** _____

I have communicated with my proposed trustee about serving in this capacity, and my proposed trustee has agreed to do so. Without sharing client confidences, I have provided my proposed trustee with information about the structure and organization of my law practice so that my proposed trustee can assist with the wind-down of my law practice should the need arise. Such information includes, but is not limited to:

The range of practice areas/case types encompassed by my practice, both past and present.

The general structure of my practice, including but not limited to:

- The location of my law office(s)
- Staff names and roles
- The location and organization of client files (both paper and electronic)
- The location of my trust account(s) and all records pertaining to entrusted funds received and disbursed by my law office(s)
- The location of or person(s) in possession of passwords needed to access any computer(s) or account(s) used in my law practice or containing client information

Signature of Attorney

**Complete this form in the
State Bar Membership Portal,
or email the form to:
membership@ncbar.gov.**

2019 FORMAL ETHICS OPINION 4

Search Adopted Opinions

COMMUNICATIONS WITH JUDICIAL OFFICIALS

Adopted: July 16, 2021

Opinion discusses the permissibility of various types of communications between lawyers and judges.

In connection with the adoption by the Council of the opinion below on July 16, 2021, the following prior ethics opinions were withdrawn: RPC 237, 97 FEO 3, 97 FEO 5, 98 FEO 12, 98 FEO 13, 2001 FEO 15, 2003 FEO 17.

The Ethics Committee has issued a number of opinions interpreting and applying the Rules of Professional Conduct to various lawyer-judge communications. *See* RPC 237, 97 FEO 3, 97 FEO 5, 98 FEO 12, 98 FEO 13, 2001 FEO 15, 2003 FEO 17. However, these opinions—spanning 30 years—were based upon different iterations of the Rules of Professional Conduct. This opinion addresses and clarifies a lawyer’s responsibilities under the current Rules of Professional Conduct in communicating with a member of the judiciary while acting in a representative capacity. As a result, upon adoption of the present opinion, the State Bar Council withdrew the aforementioned opinions.

This opinion addresses a lawyer’s professional responsibility in communicating with a member of the judiciary during the course of litigation where the opposing party is represented by counsel. While this scenario is common, it is very possible that a lawyer may need to communicate with a member of the judiciary during the course of litigation where the opposing party is self-represented. A lawyer’s professional responsibility to avoid improper communications with the tribunal applies equally to situations where the opposing party is represented and where the opposing party is *pro se*. To preserve the integrity of and instill confidence in the justice system, a lawyer should take great care to ensure his or her conduct in communicating with a tribunal is compatible with the Rules of Professional Conduct, particularly when dealing with an unrepresented party.

Lawyers communicate with judges on a daily basis. Communicating with members of the judiciary is required for the effective representation of clients and the administration of justice. Lawyers’ communications with judges generally fall into one of three categories: 1) clearly permissible communications, e.g., formal pleadings and arguments during public proceedings and other communications authorized by law or court order; 2) clearly prohibited communications, e.g., spontaneous, in-person *ex parte* communications about the merits of a case; and 3) informal communications (e.g., email communications about scheduling dilemmas). This opinion primarily addresses informal communications.

Communication between lawyers and the courts by way of formal filings are the backbone of an effective justice system. The submission to a tribunal of formal written communications, such as pleadings and motions, pursuant to the tribunal’s rules of procedure does not create the appearance of granting undue advantage to one party. Presuming the filings comply with the Rules of Civil Procedure, the local rules, and any other requirements imposed by law or court order, such communication is entirely permitted under the Rules of Professional Conduct.

The Rules of Professional Conduct impose some limits on lawyers’ communications with judges. These limits are designed to ensure fair and equal access to the presiding tribunal by the parties and their representative counsel. To this end, Rule 3.5(a)(3) prohibits a lawyer from communicating *ex parte* with a judge or other official unless authorized to do so by law or court order. Rule 3.5(d) defines “*ex parte* communication” as “a communication on behalf of a party to a matter pending before a tribunal that occurs in the absence of an opposing party, without notice to that party, and outside the record.”

The following are some common scenarios involving informal communications with judges.

Inquiry #1:

Lawyer A represents Wife in a domestic case against Husband, who is represented by Lawyer B. Lawyer A’s young child is sick, requiring Lawyer A to stay home to care for his child for the rest of the week. Lawyer A is scheduled to appear in court for a hearing in Wife and Husband’s domestic case tomorrow but can no longer attend the hearing due to childcare issues. May Lawyer A inform the court of his inability to attend court and informally request that the hearing be continued by email or text message to the judge presiding in the domestic case, without copying Lawyer B?

Opinion #1:

No. The definition of *ex parte* communications encompasses all communications concerning a matter that is pending before a tribunal, including scheduling issues. Rule 3.5(d). The Rules of Professional Conduct do not exempt scheduling matters from the prohibition on *ex parte* communications. Accordingly, although *ex parte* communications concerning scheduling matters are often limited and innocent in nature, they are prohibited unless authorized by law or court order. In this instance, Lawyer A’s communication is sent a) on behalf of himself and his client, b) concerning a matter pending before the tribunal (the domestic proceeding), c) outside of the record, d) without notice to the opposing counsel, and e) in the absence of opposing counsel. Accordingly, Lawyer A’s communication is an *ex parte* communication with the court, and thus prohibited unless authorized by law or court order. *See* Rules 3.5(a)(3) and (d).

Inquiry #2:

Same scenario as Inquiry #1. Does Lawyer A cure the *ex parte* nature of his communication by sending an email or text message to all judges in his district concerning his inability to attend court that week and requesting all hearings for which he is responsible during the week be continued, without copying Lawyer B or any other opposing counsel or party?

Opinion #2:

No. If Lawyer A has a matter pending and the communication is sent to the judge presiding in that matter, amongst other judges, the communication remains ex parte and is prohibited. *See* Opinion #2. If Lawyer A has multiple cases pending, the single, generic communication described in this inquiry may constitute multiple instances of prohibited ex parte communication.

Inquiry #3:

Same scenario as Inquiry #1. May Lawyer A inform the court of his inability to attend the day's hearing and informally request that the hearing be continued via email or text message to the presiding judge, with Lawyer B copied on the email or text message?

Opinion #3:

Yes, provided the communication is not prohibited by law, local rules, or the presiding judge, and does not address the merits of the underlying case (see Opinion #4, below). Pursuant to Rule 3.5(d), a communication by a lawyer to a judge is a prohibited ex parte communication if made "in the absence of an opposing party" (or in the absence of opposing counsel). A communication to a judge that is simultaneously provided to the opposing party/counsel is not made "in the absence of an opposing party" and therefore is not an "ex parte communication" as defined in Rule 3.5. This is true of both hard copy communications and electronic communications, including text messaging and emails.

Lawyers are encouraged to remember that simultaneous provision of a communication does not necessarily result in simultaneous receipt of that communication. When possible and appropriate, a lawyer should provide reasonable advance notice to opposing counsel of the need and intention to communicate with the presiding judge about the subject of the communication.

However, even a communication that is not a prohibited ex parte communication may nevertheless be prohibited by law or court order, including local rules or administrative orders entered by the tribunal. A presiding judge or the rules of a tribunal may also provide guidance and/or instruction to lawyers concerning such communications, as the Rules of Professional Conduct are not meant to disable or abridge "the inherent powers of the court to deal with its attorneys." N.C. Gen. Stat. § 84-36. Lawyers are advised to review all relevant laws and court orders, including local rules, prior to engaging in such communication.

Inquiry #4:

Same scenario as Inquiry #2. May Lawyer A communicate his inability to attend the hearing and informally request a continuance via email or text message to the presiding judge, with Lawyer B copied on the email or text message, if the email or text message contains additional argument from Lawyer A on the matter to be heard by the court in the upcoming proceeding?

Opinion #4:

No. Even though such a communication may not be a prohibited ex parte communication, it is still improper. Unsolicited communications addressing the merits of the underlying matter made outside the ordinary or approved course of communication with the court are prejudicial to the administration of justice in violation of Rule 8.4(d). As noted above, the purpose of the prohibition on ex parte communications is to ensure fair and equal access to the presiding tribunal by parties and their counsel. Allowing one party unfettered access to make off-the-record arguments to the presiding judge via electronic communication undermines the principle of fair and equal access to the presiding judge. *See* Rule 3.5 cmt. [8] ("All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party."). It is also antithetical to the notion that cases are tried in a public forum rather than in private discussions behind closed doors. Providing notice and copying the opposing party/counsel on such a communication does not remedy these problems. Unless the communication is authorized by law or court order, or unless the communication is solicited by the presiding judge, informal communications that address the merits of the case are improper and constitute misconduct under Rule 8.4(d).

Inquiry #5:

Judge has instructed Lawyers A and B to send trial briefs concerning a pending motion to the judge via email, with a copy to opposing counsel. May Lawyers A and B submit substantive argument on the merits of a pending matter via email as the court has requested?

Opinion #5:

Yes. If the presiding judge has instructed counsel to communicate directly with the court, the communication is not a prohibited ex parte communication under Rule 3.5 and is not prejudicial to the administration of justice under Rule 8.4(d) even if the requested communication will be on the merits of a pending matter. This conclusion applies to any appropriate request from a judge to all counsel for communication, including trial briefs and proposed orders. Again, the Rules of Professional Conduct are not meant to disable or abridge "the inherent powers of the court to deal with its attorneys." N.C. Gen. Stat. § 84-36. The presiding judge has the authority to determine how counsel are to communicate with the court; except as prohibited by law or court rule, such communications are within the discretion and preference of the tribunal and the presiding official.

CLIENT-LAWYER RELATIONSHIP

Search Rules

RULE 1.19 SEXUAL CONDUCT WITH CLIENTS PROHIBITED

(a) A lawyer shall not engage in sexual activity with a client. For purposes of this Rule, “sexual activity” means:

- (1) sexual intercourse; or
- (2) any touching of a person or causing such person to touch the lawyer for the purpose of arousing or gratifying the sexual desire of either party.

(b) A lawyer shall not engage in sexual communications with a client. For purposes of this Rule, “sexual communications” means:

- (1) requesting or actively participating in sexually explicit conversation; or
- (2) requesting or transmitting messages, images, audio, video, or other content that contain nudity or sexually explicit material.

Communications that contain nudity or sexually explicit content but are relevant to the client’s legal matter and are made in furtherance of the representation are not “sexual communications” for purposes of this Rule.

(c) A lawyer shall not request, require, or demand sexual activity or sexual communications with a client incident to or as a condition of any professional representation.

(d) Scope.

(1) The prohibitions in this Rule apply to:

- (A) current clients;
- (B) an individual or a representative of an organization who is consulting with a lawyer about the possibility of forming a client-lawyer relationship, until the lawyer declines the representation; and
- (C) representatives of a current client with whom the lawyer is authorized to communicate regarding the representation.

(2) Paragraph (a) shall not apply if a consensual sexual relationship existed between the lawyer and the person identified in (d)(1) before the legal representation or consultation commenced.

(3) Paragraph (b) shall not apply if the lawyer and the person identified in (d)(1) consensually engaged in sexual communications before the legal representation or consultation commenced.

(4) For purposes of this rule, “lawyer” means any lawyer who assists in the representation of the client but does not include other lawyers in a firm who provide no such assistance.

Comment

[1] Rule 1.7, the general rule on conflict of interest, has always prohibited a lawyer from representing a client when the lawyer's ability competently to represent the client may be impaired by the lawyer's other personal or professional commitments. Under the general rule on conflicts and the rule on prohibited transactions (Rule 1.8), relationships with clients, whether personal or financial, that affect a lawyer's ability to exercise his or her independent professional judgment on behalf of a client are closely scrutinized. The rules on conflict of interest have always prohibited the representation of a client if a sexual relationship with the client presents a significant danger to the lawyer's ability to represent the client adequately. The present rule clarifies that sexual conduct with a client is damaging to the client-lawyer relationship and creates an impermissible conflict of interest that cannot be ameliorated by the consent of the client.

Exploitation of the Lawyer's Fiduciary Position

[2] The relationship between a lawyer and client is a fiduciary relationship in which the lawyer occupies the highest position of trust and confidence. The relationship is also inherently unequal. The client comes to a lawyer with a problem and puts his or her faith in the lawyer's special knowledge, skills, and ability to solve the client's problem. The same factors that led the client to place his or her trust and reliance in the lawyer also have the potential to place the lawyer in a position of dominance and the client in a position of vulnerability.

[3] Sexual conduct between a lawyer and a client may involve unfair exploitation of the lawyer's fiduciary position. Because of the dependence that so often characterizes the attorney-client relationship, there is a significant possibility that sexual conduct with a client resulted from the exploitation of the lawyer's dominant position and influence. Moreover, if a lawyer permits the otherwise benign and even recommended client

reliance and trust to become the catalyst for sexual conduct with a client, the lawyer violates one of the most basic ethical obligations; i.e., not to use the trust of the client to the client's disadvantage. This same principle underlies the rules prohibiting the use of client confidences to the disadvantage of the client and the rules that seek to ensure that lawyers do not take financial advantage of their clients. See Rules 1.6 and 1.8.

Impairment of the Ability to Represent the Client Competently

[4] A lawyer must maintain his or her ability to represent a client dispassionately and without impairment to the exercise of independent professional judgment on behalf of the client. Sexual conduct between lawyer and client, under the circumstances proscribed by this rule, presents a significant danger that the lawyer's ability to represent the client competently may be adversely affected because of the lawyer's emotional involvement. This emotional involvement has the potential to undercut the objective detachment that is demanded for adequate representation. Sexual conduct also creates the risk that the lawyer will be subject to a conflict of interest. For example, a lawyer who is sexually involved with his or her client risks becoming an adverse witness to his or her own client in a divorce action where there are issues of adultery and child custody to resolve. Finally, a blurred line between the professional and personal relationship may make it difficult to predict to what extent client confidences will be protected by the attorney-client privilege in the law of evidence since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship.

No Prejudice to Client

[5] The prohibition on sexual conduct with a client applies regardless of whether it prejudices the client and regardless of whether the conduct is consensual.

Prior Consensual Relationship

[6] Sexual conduct that predates the client-lawyer relationship is not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are not present when the sexual conduct exists prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should be confident that his or her ability to represent the client competently will not be impaired.

No Imputed Disqualification

[7] The other lawyers in a firm are not disqualified from representing a client with whom the lawyer has engaged in sexual conduct. The potential impairment of the lawyer's ability to exercise independent professional judgment on behalf of the client with whom he or she is engaging in sexual conduct is specific to that lawyer's representation of the client and is unlikely to affect the ability of other members of the firm to competently and dispassionately represent the client.

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

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; November 2, 2022