



# Professionalism in Practice

A LOCAL PERSPECTIVE

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*DISCLAIMER: This document is written for general information only. It presents some considerations that might be helpful in your practice. It is not intended as legal advice or opinion. It is not intended to establish a standard of care for the practice of law. There is no guarantee that following these guidelines will eliminate mistakes. Law offices have different needs and requirements. Individual cases demand individual treatment. Due diligence, reasonableness and discretion are always necessary. Sound risk management is encouraged in all aspects of practice.*

## **The Chief Justice's Commission on Professionalism North Carolina**

The North Carolina Chief Justice's Commission on Professionalism (CJCP) was established on September 22, 1998, by order of the North Carolina State Supreme Court. The order established the Commission's membership and major responsibilities.

The North Carolina CJCP consists of a Chair, the Chief Justice of the North Carolina Supreme Court or his designee; two judges serving on trial benches of the courts of the state or the United States; and one appellate court judge either from the state or United States; two law school faculty members from accredited North Carolina law schools; seven practicing lawyers; and three non-lawyer citizens who are active in public affairs. All members, with the exception of the Chairman, serve for a term of three years.

The CJCP has no disciplinary authority. The CJCP meets quarterly. Nine members present constitute a quorum for the transaction of business, and the latest edition of Roberts Rules of Order govern the proceedings. Voting may be in person, by proxy, by letter or by telephone.

In November 1999, the CJCP hired an Executive Director to control and administer the day-to-day operations, Melvin F. Wright, Jr.

### **Major Responsibilities**

The major responsibilities of the Commission include its primary charge: to enhance professionalism among North Carolina's lawyers. In carrying out this charge, the CJCP is required to provide ongoing attention and assistance to ensure the practice of law remains a high calling, dedicated to the service of clients and the public good.

Other major responsibilities include:

1. Considering and encouraging efforts by lawyers and judges to improve the administration of justice;
2. Examining ways of making the system of justice more accessible to the public;
3. Monitoring and coordinating North Carolina's professionalism efforts in such institutional settings as the bar, the courts, the law schools and law firms;
4. Monitoring professionalism efforts in jurisdictions outside North Carolina;
5. Conducting a study and issue a report on the present state on lawyers professionalism within North Carolina;

6. Providing guidance and support to the Board of Continuing Legal Education and to the various CLE providers accredited by the Board, in the implementation and execution of a CLE professionalism requirement of not less than one hour per year;
7. Implementing a professionalism component in bridge-the-gap programs for new lawyers;
8. Making recommendations to the Supreme Court, the State Bar, the voluntary bars, and the Board of Continuing Legal Education concerning additional means by which professionalism can be enhanced among North Carolina lawyers;
9. Receiving and administering grants and making such expenditures therefrom as the Commission deems prudent in the discharge of its responsibilities.

### **Routine Activities**

- Law School programs on professionalism and assisting law schools with their own professionalism programs.
- Professionalism presentations provided throughout the state to voluntary bar associations, judicial district bar associations, civic organizations, and law firms.
- Participation and membership on professional boards and committees in order to help implement ideas that affect professionalism.
- Write and provide articles on professionalism for professional publications (legal, business and educational).
- Provide suggestions and lobby for changes to the State Bar CLE requirements in order to ensure lawyers have adequate professionalism related programs.
- Seek involvement in established programs or in establishing programs to further enhance professionalism in our state.

## **Programs and Projects**

- **The 3-Week Vacation Policy** – One of the first acts of the CJCP was the Supreme Court Order creating this policy. All North Carolina lawyers may secure vacation time, up to 3 weeks per year, to be honored by the Court in scheduling. This policy is meant to improve the quality of life for lawyers.
- **The Lawyer's Professionalism Creed** – Adopted by the CJCP in October 2000, this aspirational creed was endorsed by all North Carolina voluntary bar associations.
- **Principles of Professionalism for Attorneys and Judges** – Authored and circulated by a North Carolina Superior Court Judge, the CJCP encourages each district to adopt or amend and adopt these guidelines for professionalism.
- **Historical Video Series** – The CJCP conducts video interviews with distinguished lawyers, judges and professionals across the state in order to preserve their thoughts and commentary on the professionalism issue and its evolution throughout the years. These videos serve as historical memoirs for the purpose of spreading the professionalism message at law schools, law firms and voluntary bar associations.
- **Law School Orientation Program** – The CJCP provides a law school orientation program on professionalism for beginning first year law students. The program includes volunteer lawyer and judge alumni leading discussion groups on hypothetical situations related to professionalism and ethics.
- **The Chief Justice's Professionalism Award** – This annual award is given to an outstanding lawyer, judge, citizen or program that exhibits the principles of professionalism in all aspects of his or her career. Forms may be accessed by the CJCP website or by calling the CJCP office with a request to have them mailed. All nominations must be sent to the CJCP no later than June 1 each year. The CJCP staff compiles and prepares the nominations for review by the Professionalism Award Committee. The Committee makes a recommendation to the Chief Justice. The recipient of the award is notified and invited to receive the award at an October event for formal presentation. In 2006, the CJCP established the CJCP Award for Meritorious and Extraordinary Service, an

honor bestowed on members of the legal profession on an as nominated or recommended basis.

- **Professionalism Support Initiative (PSI)** – The PSI began its first year in April 2002 with the Wake County Bar Association and 10<sup>th</sup> Judicial District serving as the pilot program. With support from the North Carolina State Bar’s Client Assistance Program, the North Carolina Judicial Standards Commission, and judicial district bar associations, the PSI serves as a positive peer influence venue to improve professionalism among lawyers and judges. The CJCP has a PSI training video with manual and provides these materials to local bar associations and other groups throughout the Bar.
- **The State of the Profession Survey 2002-2003** – The CJCP sponsored this update to the 1991 North Carolina Bar Association Quality of Life Survey in conjunction with LAWLEAD/NIELLP.
- **Law School Grants for Professionalism Programs** – The CJCP has provided financial assistance to each North Carolina law school to be used for the development of professionalism programs in order to supplement their professionalism curriculum. Due to the success of these programs, three North Carolina law schools have been awarded the ABA Center for Professional Responsibility E. Smythe Gambrell Award.
- **Judicial Response Committee** – This committee is comprised of highly respected members of the legal community and responds to unwarranted attacks in the media on our judiciary.
- **Judicial District Bar Professionalism Programs** – In conjunction with Lawyer’s Mutual Liability Insurance Company, the CJCP has implemented district bar professionalism programs. Developed with the basic requirements for CLE credit and the local bar’s desires and needs, the program is very flexible and includes useful materials and help on starting the Professionalism Support Initiative and a voluntary Mentoring Program.
- **Voluntary Mentoring Programs** – In 2006, the Greensboro Bar Association and 18<sup>th</sup> Judicial District Bar served as the pilot program. The CJCP provides materials for assisting local bar associations to start voluntary mentoring programs. Each district bar is encouraged to start a voluntary mentoring program for its newly licensed attorneys.

- ***Enhancing Professionalism CLE Program*** - The *Enhancing Professionalism* CLE packages are available to all bar associations, law firms, and any legal organizations seeking CLE credit or for use as a resource or supplement to presentations and other CLE programs. The DVDs/videos focus on professionalism and ethics for lawyers who practice in civil cases and in criminal cases. Also enclosed in each packet are discussion questions.

**Chief Justice's Commission on Professionalism**

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## **Professionalism Support Initiative Program Description**

The Professionalism Support Initiative (herein after referred to as the PSI) is an informal voluntary local lawyer and judge assistance program that handles client-lawyer, lawyer-lawyer, and lawyer-judge issues. The purpose of the PSI is to promote professionalism and thereby bolster public confidence in the legal profession. PSI uses local volunteer peers to communicate privately and informally with lawyers and judges. The Chief Justice's Commission on Professionalism (hereinafter referred to as the CJCP) encourages judicial district bar associations to establish a professionalism committee with the PSI as a voluntary program under the committee's purview. The PSI offers counsel and assistance to lawyers and judges who receive repeated complaints at the State Bar, the Judicial Standards Commission, or through local bar associations that may not rise to the level of ethics or professional responsibility violations. The PSI is comprised of volunteers from the individual judicial district bar associations who seek to enhance professionalism by confidential peer influence.

No judge or lawyer is required to cooperate or counsel with the PSI volunteers. If the party against whom the inquiry is addressed refuses to cooperate by meeting voluntarily with PSI volunteers, the PSI volunteers will not take further action regarding the inquiry. Should the lawyer or judge agree to a meeting, the privacy and confidentiality of all inquiries will be maintained.

Specifically, inquiries include any query concerning "unprofessional conduct" as defined here: Unprofessional Judicial Conduct: Incivility, bias or conduct unbecoming a judge; lack of appropriate respect or deference to litigants, attorneys, court personnel, witnesses, clients, etc.; excessive delay in courtroom proceedings or filing court documents (orders, opinions); and consistent lack of preparation. Unprofessional Lawyer Conduct: Lack of appropriate respect or deference to litigants, attorneys, court personnel, witnesses, clients, etc.; abusive discovery practices; incivility, bias or other conduct unbecoming a lawyer; consistent lack of preparation; communication problems; deficient practice skills; consistent failure to return client telephone calls; and consistent failure to keep appointments and court dates. In addition, inquiries may include any rules or documents adopted by each judicial district's professionalism committee. Inquiries will not include any disciplinary charge, ethics violation, criminal conduct or any other matter falling under the provisions of Subchapter B: Discipline and Disability Rules of the Rules of the North Carolina State Bar or any sections of the Code of Judicial Conduct. In addition, inquiries will not include: Fee disputes - these can be handled by the Fee Arbitration Committee on local judicial district bar associations or similar programs at the State Bar; employment matters - examples include: lawyer uses racist or sexist language in the office, managing attorney sexually harasses associates and support staff; and lawyer/vendor disputes.

Inquiries will be referred to the PSI from the State Bar's Client Assistance Program, local bar associations, voluntary bar associations, the CJCP, and individual judges and lawyers (herein referred to as "complainants"). The PSI will not deal directly with client complainants. Client complainants who contact the PSI directly will be referred to the Client Assistance Program and/or judicial district bar association within their country of residence. Each judicial district's PSI will follow their own internal operating procedure to determine how to best address and

resolve the matter. PSI volunteers or local professionalism committee members have discretion to decide the appropriate professional to contact the lawyer or judge in question. The professionalism committees may also solicit assistance from any member of the Bar who is in the best position to be of assistance to the lawyer or judge in question. The PSI volunteers may determine that certain inquiries do not merit consideration or counseling, while others may warrant consideration and/or counseling. The PSI may inform the complainant that the PSI has received the inquiry, explain the nature of the PSI, and provide general information. The complainant should be informed that the process may take several weeks to complete, and he or she will not receive further information about the inquiry. Bar associations and the CJCP will maintain statistical records only.

The CJCP has advisory and oversight responsibility for the PSI. The CJCP has the authority to adopt additional operating procedures for the administration of the PSI. The CJCP has developed an orientation program for the purpose of having each judicial district bar association train their volunteers on how to handle professionalism inquiries. The training program may be given in conjunction with continuing legal education or professionalism committee meetings.

If your local bar is interested in implementing the PSI program, call the CJCP at (919) 890-1455 for any assistance.

## **Top Ten Elements (Embedded Values) of Professionalism**

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### 1. Competence

- ❑ Rule 1.1, Revised Rules of Professional Conduct of North Carolina State Bar.
- ❑ Learn your practice area – become an expert.
- ❑ Be a zealous and honorable advocate for your client while seeking justice and being respectful to the opposition.

### 2. Honesty & Integrity

- ❑ You have one chance to make a good first impression.
- ❑ Your reputation can be your greatest quality.

### 3. Civility

- ❑ The Golden Rule
- ❑ Take the “high road” the next time you are faced with incivility.
- ❑ If the Bar is too large, make it smaller, one lawyer at a time.
- ❑ Couch v. Duke University, 351 N.C.92 (1999), and 94 CVS 454 (Guilford).
- ❑ “And do as adversaries do in law. Strive mightily, but eat and drink as friends.” – William Shakespeare in *The Taming of the Shrew*

### 4. Respect for the Law and the Legal System

- ❑ Do not criticize law professors, lawyers or judges in front of others.
- ❑ Respect your clients, your opponents, the Court, the law, and the legal system.
- ❑ Rule 12, General Rules of Practice for the Superior and District Court – defines courtroom decorum and establishes a code of conduct that each lawyer needs to remember and follow.

### 5. Client Relations

- ❑ “No More Than 24” – Return all phone calls or emails within 24 hours
- ❑ “Attitude” (Nightingale) – To each client, his or her case is the most important one in your office.
- ❑ Be firm in advising what is in the client’s best interest.
- ❑ Do not be influenced by the client’s ability to pay.
- ❑ Even though you do your best, you may still be criticized or sued by your client. TV and client sophistication can result in unrealistic expectation – remember the “high road.”

## 6. Humility

- ❑ If you receive a law license, that does not mean you know how to practice law. It may open the door, but how you walk through the doorway is up to you.
- ❑ Be respectful of your assistants, employees at the clerk's office, and everyone you come in contact with in your community.
- ❑ People in the courthouse have a way of teaching humility.
- ❑ Humility leads to strength and not to weakness. It is the highest form of self-respect to admit mistakes and make amends for them. [John (Jay) McCloy]

## 7. Public Service

- ❑ There is a strong tradition in this nation of lawyers in public service. In 1945, twenty-four of the fifty North Carolina senators were lawyers.
- ❑ There is no higher calling than to give of your time and talents to others.
- ❑ Public Service – “To me, the essence of professionalism is a commitment to develop one's skills to the fullest and to apply that responsibly to the problems at hand. Professionalism requires adherence to the highest ethical standards of conduct and a willingness to subordinate narrow self-interest in pursuit of the more fundamental goal of public service. Because of the tremendous power they wield in our court system, lawyers must never forget that their duty to service their clients fairly and skillfully takes priority over the personal accumulation of wealth. At the same time, lawyers must temper bold advocacy for their clients with a sense of responsibility to the larger legal system which strives however imperfectly, to provide justice for all.” (Justice Sandra Day O'Connor)

## 8. Mentoring

- ❑ New lawyers need a mentor during the first few years of their practice.
- ❑ There will always be difficult ethical and legal questions you may find overwhelming.
- ❑ Select a mentor who has an excellent reputation and who exhibits professional qualities you wish to emulate.

## 9. Quality of Life

- ❑ Develop hobbies and interests outside the practice of law.
- ❑ Make the time to spend time with family and friends.
  - 3 Week Vacation Policy (N.C.G.S. 7A-33A)
- ❑ The State of the Profession 2002-2003 Survey, sponsored by the Chief Justice's Commission on Professionalism – shows we are happier in our work.

## 10. *Pro Bono* Service

- ❑ Atticus Finch in Harper Lee's *To Kill a Mockingbird*.
- ❑ Everyone, including the poor, deserves fair and adequate representation.

# LAWYER'S PROFESSIONALISM CREED

**To my clients,** I offer competence, faithfulness, diligence, and good judgment. I will represent you as I would want to be represented and to be worthy of your trust.

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

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

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

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

## **ETHICS AND PROFESSIONALISM – WHERE LAWYERS GO ASTRAY**

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### **I. DEFINITIONS OF PROFESSIONALISM**

“The term refers to a group...pursuing a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.”

- Dean Roscoe Pound, Harvard University

“A professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service, and engaging in these pursuits as part of a common calling to promote justice and public good.”

- *Teaching and Learning Professionalism*,  
1996, ABA Professionalism Committee Report

“To me, the essence of professionalism is a commitment to develop one's skills to the fullest and to apply that responsibly to the problems at hand. Professionalism requires adherence to the highest ethical standards of conduct and a willingness to subordinate narrow self-interest in pursuit of the more fundamental goal of public service. Because of the tremendous power they wield in our court system, lawyers must never forget that their duty to serve their clients fairly and skillfully takes priority over the personal accumulation of wealth. At the same time, lawyers must temper bold advocacy for their clients with a sense of responsibility to the larger legal system which strives however imperfectly, to provide justice for all.”

- Justice Sandra Day O'Connor, US Supreme Court

“The legal profession is a group of people drawn by common needs, values, attitudes and interests to establish, maintain and continuously improve a just system of laws, within the context of which they help all others in their jurisdictions solve problems and maximize opportunities within the bounds of equity and civility.”

- Founding Dean F. Leary Davis, Jr., Elon University School of Law

“The rekindling and nurturing of those embedded values that brought each of us to the Bar.”

- E. Fitzgerald Parnell, III, Esquire, NC State Bar President, 2002-2003

## II. CASES INVOLVING UNPROFESSIONAL CONDUCT

### A. Improper Closing Argument

**Couch v. Duke University** - 133 N.C. App. 93, 97, 515, S.E.2d 30, 34-35, *affirmed*; 351 NC 92, 520 S.E.2d 785 (1999); Guilford – 94 CvS 454

An out of state counsel, licensed in New York and Florida, was admitted *pro hac vice* to represent plaintiff in a medical negligence case, and agreed to comply with all applicable rules, procedures and laws of North Carolina. The majority of the misconduct occurred during out of state counsel’s closing argument at trial. During her closing argument, the out of state counsel referred to the defense witnesses as liars and repeatedly used the words “lie,” “lies,” or “lied” in connection with the witnesses. At one point out of state counsel said, “[A]ll of these physicians came up here and told lies. In your face lies.” She also stated to the jury, “So you see, when I say a lie, okay, I want the record to reflect I mean a lie.” Out of state counsel also expressed her opinion that defense counsel had knowingly offered false testimony at trial. In all, the court found out of state counsel referred to the defense witnesses and opposing counsel as “liars” or that they “lied,” at least 19 times.

The court noted that North Carolina courts have long prohibited calling witnesses liars in closing arguments. *State v. Locklear*, 294 N.C. 210 (1978). *See also, State v. Allen*, 323 N.C. 208 (1988)(holding that an attorney may not employ closing arguments as a device to place before the jury incompetent and prejudicial matters by expressing his or her own knowledge, beliefs and opinions.) The court also looked to *State v. Vines*, 105 N.C. App. 147 (1992), which held that counsel may not attack the integrity of defense counsel in a closing argument.

The attorney referenced above in the *Couch* case was severely disciplined by the superior court at the direction of the North Carolina Supreme Court. The superior court ordered the following disciplinary actions: (1) the censure of the out of state counsel for grossly improper conduct during the trial violating the General Rules of Practice and the North Carolina Rules of Professional Conduct; (2) the revocation of permission allowing the out of state counsel to represent the plaintiff in the case; (3) the payment of \$53,274.50 to Duke University by the out of state counsel within 15 days of the order, in part to sanction and partially to reimburse Duke for fees incurred as a result of her unprofessional conduct; (4) the payment to plaintiff the costs incurred in defending the appeal of the case in the North Carolina Supreme Court; (5) within 15 days of the order the out of state counsel was ordered to withdraw from any cases pending in North Carolina and to not practice law in North Carolina for one year.

The out of state counsel also failed to disclose prior disciplinary action in other N.C. courts. When asked if she had ever been disciplined by a court or a state bar of any state, out of state counsel replied that she had been late once but that was all. Out of state counsel did not disclose an order filed by a judge of the Superior Court of Guilford County in December of 1999, in *Case v. Edwards*, 98 CVS 11386, finding that she had violated the Rules of Professional Conduct. She also failed to disclose that the judge’s order revoked her *pro hac vice* privilege.

**State v. Jones - 355 NC 117, 558 S.E.2d 97 (2002)**

Defendant was granted a new sentencing phase of his trial due to prejudicial and inflammatory comments made by the prosecutor in his closing argument before the jury.

The defendant was charged with first-degree murder. Defendant was capitally tried and convicted of first-degree murder in April of 2000 and was sentenced to death.

On appeal, the defendant argued that the trial court erred by: 1) failing to sustain defendant's objections to the State's comparative references to the Columbine school shooting and the Oklahoma City bombing, and 2) failing to intervene *ex mero motu* when the State disparaged defendant by engaging in name-calling and personal insults.

N.C.G.S § 15A-1230(a) gives guidelines applicable to closing arguments for criminal and civil jury trials. In closing arguments to the jury, an attorney may not: (1) become abusive, (2) express his personal belief as to the truth or falsity of the evidence, (3) express his personal belief as to which party should prevail, or (4) make arguments premised on matters outside the record.

Rule 12 of the General Rules of Practice for the Superior and District Courts provides: "Abusive language or offensive personal references are prohibited," "[t]he conduct of the lawyers before the court and with other lawyers should be characterized by candor and fairness," and "[c]ounsel are at all times to conduct themselves with dignity and propriety."

Professional conduct Rule 3.4(e) requires: a lawyer *shall not*, in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, ...or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of the accused.

In *State v. Gell*, 351 N.C. 192, 524 S.E.2d 332, the Court held that it is improper for a prosecutor to make Bible-based arguments. In *State v. Smith*, 279 N.C. 163, 181 S.E.2d 458 (1971), the Court reversed defendant's rape conviction due to prosecutor's "inflammatory and prejudicial" closing argument, where the prosecutor described defendant as "lower than the bone belly of a cur dog."

In *Berger v. United States*, 295 U.S. 78, 79 L. Ed. 1314 (1935), the Court held that when a trial court permits a prosecutor to become abusive, or to inject his personal experiences, the prejudice to the cause of the accused is so highly probable it must be reviewed.

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection."

In applying the standard of review to the present case, the Court found that the prosecutor's closing argument, where he referred to the Columbine shooting and the Oklahoma City bombing, was improper for the following reasons: 1) it referred to events and circumstances outside the record; 2) by implication, it urged jurors to compare defendant's acts with acts of others; 3) and it attempted to lead jurors away from evidence by appealing instead to their sense of passion and prejudice.

The prosecutor also said the following about the defendant during his closing argument: "You got this quitter, this loser, this worthless piece of – who's mean...He's as mean as they come. He's lower than the dirt on a snake's belly."

The Court held that the prosecutor's characterizations were outside the bounds of a proper closing argument and was little more than name-calling. The prosecutor did not argue the evidence or proper inferences that addressed the issues as to aggravating and mitigating

circumstances. “Such tactics risk prejudicing a defendant – and do so here – by improperly leading the jury to base its decision not on the evidence relating to the issues submitted, but on misleading characterizations, crafted by counsel, that are intended to undermine reason in favor of visceral appeal.”

A well-reasoned argument must: “1) be devoid of counsel’s personal opinion; 2) avoid name-calling and/or references to matters beyond the record; 3) be premised on logical deductions, not on appeals to passion or prejudice; and 4) be constructed from fair inferences drawn only from the evidence properly admitted at trial.”

The Court found that the trial court had abused its discretion by affording the prosecution undue latitude in its closing arguments at the sentencing phase. The Court then granted defendant a new sentencing hearing.

### **Nelson v. Freeland - 97 CvS 04715, Guilford County Superior Court**

Plaintiff’s counsel was sanctioned in the amount of \$300 for his improper closing argument.

During his closing argument plaintiff’s counsel expressed his personal opinion that defense counsel was intentionally trying to deceive the jury. Defense counsel objected to the closing argument and the objection was sustained. Defense counsel then moved for sanctions pursuant to Rule 12 of the General Rules of Practice.

In *State v. Vines*, 105 N.C. App. 147 (1992), the court held that counsel may not attack the integrity of defense counsel in closing argument. In *State v. Rivera*, 350 N.C. 285 (1999), the court stated, “This Court shall not tolerate, and our trial courts must not tolerate, comments in court by one lawyer tending to disparage the personality or performance of another. Such comments tend to reduce public trust and confidence in our courts and, in more extreme cases, directly interfere with the truth-finding function by distracting judges and juries from the serious business at hand. We admonish our trial courts to take seriously their duty to ensure that the mandates of Rule 12 are strictly complied with in all cases and to impose appropriate sanctions if they are not.”

Plaintiff’s counsel did openly apologize to the court, opposing counsel and parties to the case and did seem remorseful. However, the court still ordered sanctions to be paid to the Clerk of Court in the amount of \$300.

## **B. Improper Conduct During Discovery**

### **NCSB v. Brown - 00 DHC 11**

The Commission censured an attorney for several acts of abuse during discovery procedures.

During a deposition in May of 1997 in the case of *Renniger v. T.G.F. Socks, Inc.*, 95 CVS 1922, the Mr. Brown began harassing and interrupting the witness while the witness was trying to answer. When opposing counsel asked Mr. Brown to allow the witness to answer, he began raising his voice and said, “I’ll do whatever I want to.” Mr. Brown also repeatedly told opposing counsel to shut up. When opposing counsel tried to calm Mr. Brown, he said, “F\*\*\* you, you piece of s\*\*\*.” Opposing counsel suggested terminating the deposition and Mr. Brown said,

“Well terminate it or shut up...either terminate it or shut up, one way or the other.” Opposing counsel eventually terminated the deposition.

Mr. Brown also appeared in *Industrie Natuzzi Spa v. Klaussner Corporation and Klaussner Furniture Industries, Inc.*, 92 CV 00750, and at one point the opposing lawyer stated, “This is crap.” Mr. Brown responded, “I don’t give a damn. Go home and just run at the g\*\*damn mouth...Well, if you were not just sitting there on your a\*\*, I guess you could put one [a document] in front of her.”

In a deposition taken in *Wellfleet Communications, Inc. v. Dilan, Inc.*, Mr. Brown accused the opposing party of lying. He stated of the witness, “He’s just going to lie some more?...Come on, let’s get some more lies on the record, we need some, go ahead.” In talking to opposing counsel, he stated, “You really are an a\*\*hole, one of the worst a\*\*holes I’ve ever met.”

The Commission found that defendant violated Rules 1.2(d) and 8.4(d) of the Revised Rules of Professional Conduct. Mr. Brown’s abusive language, uncivil attitude, and unprofessional conduct warranted a censure. The Commission stated that, had other sanctions not already been imposed by other courts, the disciplinary measure might have been more substantial.

#### **In Re Bishop - 98G0325**

The Committee imposed a censure on an attorney for improper conduct during discovery.

In December of 1997, Mr. Bishop was the attorney in an action entitled *Thakkar v. Northern Telecom*. During the deposition of his client by defendant’s counsel, Mr. Bishop frequently interrupted defense counsel’s examination of the plaintiff with improper speaking objections to permissible questions and instructed plaintiff not to answer properly posed questions. Defendant’s counsel attempted to clarify Mr. Bishop’s objections for the record, but Mr. Bishop refused to answer any questions by opposing counsel on the grounds that it was not he who was being deposed. Due to the frequency and extent to which Mr. Bishop hindered the discovery procedures, the Committee concluded that Mr. Bishop’s conduct was a deliberate attempt to thwart defense counsel’s access to discoverable information. The Committee also found that Mr. Bishop created unnecessary and burdensome expenses on defendant by not filing timely responses and disregarding due dates. Mr. Bishop’s conduct did not allow defendant to obtain the properly discoverable information from the plaintiff.

The Committee found Mr. Bishop violated Rule 3.4(d), 3.2, and 8.4(d) of the Revised Rules of Professional Conduct. Rule 3.4(d) provides that during pretrial procedures, an attorney should make reasonably diligent efforts to comply with legally discoverable discovery requests. Rule 3.2 states that reasonable efforts should be made to expedite litigation consistent with the interests of the client. Rule 8.4(d) provides that an attorney should not create unnecessary and unduly burdensome expenses on the opposing party.

The Committee did however note that Mr. Bishop did not have any prior discipline on his record and used that as a mitigating factor in censuring him.

#### **In Re Sutton - 93G0380(IV)**

The Committee issued a reprimand to Mr. Sutton for his conduct arising from his representation of an individual in a juvenile matter in March 1993.

During the hearing Mr. Sutton used profanity in response to testimony of various witnesses and interrupted witnesses. Mr. Sutton also made a number of merit less objections during the hearing, repeated objections previously ruled on by the court, argued with the court, and made discourteous remarks to the court. Rule 7.6C(6) of the Rules of Professional Conduct provides that a lawyer shall not engage in undignified or discourteous conduct, which is degrading to a tribunal while appearing in a professional capacity before a tribunal. Rule 7.6C(8) of the Rules of Professional Conduct forbids attorneys to engage in conduct intended to disrupt a tribunal.

The Committee found that Mr. Sutton's conduct violated both rules of professional conduct and issued a reprimand.

### **C. Abusive Conduct and Frivolous Actions**

#### **Hayes v. Rogers - 155 NCA 220, 573 S.E.2d 775 (2002)**

In an action to quiet title to a strip of real property, the trial court denied defendant's motion to dismiss, granted summary judgment in favor of the plaintiff, and administered sanctions against defendant under Rule 11 in the amount of \$12,000 for plaintiff's attorney fees. On appeal, the North Carolina Court affirmed the trial court's ruling.

Plaintiffs and defendant are neighbors with a grassy strip of land dividing the two homes. Defendant planted a tree within the strip of land in 1972. In August of 2000, plaintiffs, wishing to build a fence and plant a hedgerow, had a surveyor identify and stake the property line. The tree defendant had planted was within plaintiff's property line. In September of 2000, plaintiffs planted the hedgerow on their side of the property line. Defendant removed some of the stakes from the property line and threw them in plaintiffs' yard. Defendant also wrote plaintiffs a letter alleging he owned the tree by adverse possession. Plaintiffs' attorney found deeds dated September 25, 1991 and July 14, 2000, which showed defendant transferred his interest in the property to his children. Defendant also sent a letter in October of 2000 stating he transferred his rights to his children, but that he was the agent and attorney-at-law for his children. Plaintiffs then brought the quiet title action against defendant's children. Defendant's children's Answer denied: 1) defendant was their attorney; 2) they asserted any claim of adverse possession; and 3) defendant ever conveyed his interest in property to them. Plaintiffs amended their complaint to add defendant as a necessary party. Plaintiffs served the complaint to defendant and his children in March of 2001. Defendant asked for an extension then moved to dismiss for insufficiency of process and insufficiency of service of process.

The trial court found that defendant had fraudulently conveyed his property to his children to avoid paying a court judgment. The trial court also found that defendant misused his law license to threaten and intimidate plaintiffs and was dishonest throughout the process. Defendant first claimed that he owned the property and the tree through adverse possession. However, when the deeds purporting to convey title to his children arose he admitted his misrepresentation but claimed his children owned his interest. This also proved to be untrue, along with his allegation that he was his children's attorney. Defendant also threatened plaintiffs alleging he was going to be able to recover attorney's fees, but which is not authorized under any circumstances.

Defendant not only filed frivolous motions, but he did so with the intention to harass the plaintiffs, cause unnecessary delay, and to cause unnecessary costs. The North Carolina Court of

Appeals, applying the *de novo* standard of review, affirmed the trial court's ruling awarding plaintiffs the reasonable amount of their attorney's fees in the amount of \$12,000.

### **In Re Bourbeau - 94G0393**

The Committee disciplined respondent with a reprimand for filing frivolous claims as well as making inappropriate remarks towards three judges. The discipline would have been more serious had respondent not already been sanctioned monetarily under Rule 11.

A right of way dispute arose between the plaintiffs and the defendants. A consent judgment was entered in favor of the defendants in January of 1991. Between that date and February 1993, when respondent began representing the plaintiffs, the plaintiff wife was held in contempt three times for violating the consent order. The plaintiff wife was also found guilty of assaulting the defendant wife on four occasions. Subsequently, respondent filed a complaint on behalf of the plaintiffs in February of 1993, alleging that the defendants were obstructing the right of way. Respondent filed the claim knowing that the dispute had already been settled. Respondent also filed a complaint on behalf of the plaintiff's son, alleging that the defendant husband called the plaintiff's son's employer and told him the son was cursing and threatening the defendant wife. Respondent filed the claim after learning that the defendant husband had not called the son's employer and made the statements alleged in the complaint. Respondent also filed a malicious prosecution claim against each of the defendants. In the complaint, respondent alleged that the defendants had been aided and abetted by a magistrate and a district attorney. These allegations were made without any evidence, and the lawsuits were eventually dismissed. The only reason respondent filed the lawsuits was to harass the defendants and cause them to expend money to defend the lawsuits. Respondent also made disparaging comments about three judges stating that the judges were biased and prejudicial toward respondent's clients.

The Committee found that respondent's statements and actions arose to the level of professional misconduct and were it not for the monetary sanctions already imposed, respondent would have received more than a reprimand.

### **D. Redaction of Information**

#### **In Re DeMayo - 98G0201(IV)**

After a preliminary hearing by the Committee, a reprimand was issued to attorney Mr. DeMayo.

Between the years of 1994 and 1997, Mr. DeMayo represented various plaintiffs in personal injury actions. In preparing settlement packages for his clients, containing information concerning the plaintiffs' injuries, Mr. DeMayo would instruct his staff to redact information about pre-accident medical treatment and representation by previous attorneys. The redactions were performed by whitening out or covering the information to be left out, then recopying the documents. The settlement packages omitted relevant medical information relating to the extent and nature of his clients' injuries. This failure to disclose this relevant information was a violation of Rule 1.2(c) of the former Rules of Professional Conduct.

## **E. Improper Conduct of a Judge**

### **In Re Inquiry Concerning a Judge - 356 NC 278, 570 S.E.2d 102 (2002)**

Respondent was censured by the North Carolina Supreme Court for willful misconduct and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

The Judicial Standards Commission began a preliminary investigation of respondent in December of 1998. In July of 1999, the Commission filed a complaint alleging that respondent engaged in conduct inappropriate to his judicial offices on two occasions. The first of these instances was during a traffic court session in July of 1998, *State v. Debraeckleer*, where respondent dismissed a DWI charge against the defendant, but then declared defendant guilty of careless and reckless driving. Defendant was not charged with this offense, nor was this a lesser defense as provided by statute. Respondent entered the order over the state's objection. The second instance occurred in September of 1998, *State v. Podger*, also concerning a DWI. Defendant's counsel met with respondent prior to the actual hearing to discuss the dismissal of the DWI. Respondent agreed to dismiss the DWI and agreed to convict defendant of careless and reckless driving. While respondent was presiding over domestic violence court two days later, defendant's attorneys and the prosecutor met with respondent out in the hallway of the court, away from the clerk of court to discuss the case. After defendant's attorney recited the facts and the prosecutor agreeing the facts were correct, respondent stated he would convict defendant of careless and reckless driving, fine him \$1,000, give him probation and community service.

Canon 2A of the North Carolina Code of Judicial Conduct provides: "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3A provides: "A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism." The Commission found respondent's actions constituted willful misconduct that was prejudicial to the administration of justice such that they brought the judicial office into disrepute.

The North Carolina Supreme Court, agreeing with the Commission, censured respondent for violating Canons 2A and 3A (1) and (4) of the North Carolina Code of Judicial Conduct by overstepping his authority, engaging in misconduct, and bringing disrepute on the judicial office.

## **F. Improprieties in Court of Appeals Brief**

### **State v. Rollins - 131 N.C. App. 601, 508 S.E.2d 554 (1998)**

An attorney for the defendant was sanctioned for improprieties contained in his brief to the North Carolina Court of Appeals. The Court taxed the attorney the costs incurred from the appeal.

In his brief to the North Carolina Court of Appeals, the attorney representing the defendant stated, "What happened here, and what has happened all too often in previous cases with Judge \_\_\_\_\_, is that the Trial Court abandoned its neutrality." The attorney for the defendant also contended that the trial court judge "took it upon himself to find a non-statutory aggravator," and the judge "based his finding of the non-statutory aggravating factor upon

evidence elicited from a witness recalled and questioned by Judge\_\_\_\_\_ on the court's own motion and over defendant's objection, which objection 'obviously displeased Judge\_\_\_\_\_.'"

Rule 28(a) of the North Carolina Rules of Appellate Procedure states: "function of all briefs...is to define clearly the questions presented to the reviewing court." Rule 0.1[4] of the Revised Rules of Professional Conduct of the North Carolina State Bar provides: "a lawyer should demonstrate respect for the legal system and for those who serve it, including judges." Rule 34(a)(3) of the North Carolina Rules of Appellate Procedure authorizes the court to: "impose sanctions against a party on its own motion when a brief...filed in the appeal was so grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court."

The court applied Rule 34(a)(3) and found defendant's brief lacking in the requirements of propriety, violated multiple appellate rules, and contained materials outside the record and biased arguments. The court then taxed the costs of the appeal to the defendant.

### **G. Filing Order Not Agreed to by Opposing Attorney**

#### **In Re Hampton - 99G0332**

The Committee disciplined respondent by censure for filing an order that opposing counsel had not agreed to, violating Rule 8.4 of the North Carolina State Bar's Revised Rules of Professional Conduct.

Respondent represented plaintiff in a motion to have defendant increase child support payments. Respondent prepared an order to increase child support and faxed it to opposing counsel in November of 1998. After not receiving a response from opposing counsel, respondent sent another copy of the order to opposing counsel on December 15, 1998, along with a letter stating that if opposing counsel did not respond within three days respondent would assume opposing counsel agreed with the order. Opposing counsel answered by fax on the same day stating she was not in agreement with the order, but on January 19, 1999 respondent filed the order with the court anyway. The court, assuming both sides were in agreement, signed the order and respondent sent a copy of the signed order to opposing counsel on January 29, 1999.

The Committee found that respondent's misconduct violated Rule 8.4 of the North Carolina State Bar's Revised Rules of Professional Conduct and that the level of the misconduct was strong enough to warrant a censure.

### **H. Failure to Disclose**

#### **NCSB v. Dozier - 01 DHC 13**

The Commission suspended defendant's law license for two years, but stayed the suspension for two years provided the defendant perform a number of conditions set forth by the Commission.

Defendant was the Assistant District Attorney assigned to prosecute an individual in a murder case in February of 1998. The individual's attorney made discovery requests to defendant asking for any plea agreements, promises of leniency, or promises not to arrest, indict or prosecute made to the co-defendants, who were indicted on lesser charges. Defendant sent a packet of material to the individual's attorney, which did not contain any plea agreements with

the co-defendants. During the two-week period prior to the individual's trial, defendant made arrangements with the co-defendant's attorneys to dismiss the co-defendants charges provided they testify at trial. North Carolina General Statute § 15A-1054I requires a prosecutor to provide defense counsel with notice fully disclosing the terms of any arrangement with witnesses of charge reductions or sentence concessions. The information concerning the dismissal of the co-defendant's charges was never disclosed to the individual's attorney. At trial, one of the co-defendant's testified she was unaware that she had a deal with the prosecutor to dismiss the charges against her. After obtaining a second-degree murder conviction against the individual, the state dismissed the co-defendant's charges since they testified against the individual. On appeal, the Court found that a jury should be aware of any arrangements made between a prosecutor and a witness in regard to sentence reductions or dismissals. The individual was granted relief and pled guilty to voluntary manslaughter and received a probationary sentence.

The Commission found that defendant violated Rule 8.4(d) of the Revised Rules of Professional Conduct by engaging in conduct prejudicial to the administration of justice. The Commission also found that defendant violated Rule 3.3(a)(4) of the Revised Rules of Professional Conduct by failing to take remedial measures at trial to disclose the agreements between defendant and the co-defendants. Defendant did not have any prior discipline and the Commission noted that as a mitigating factor in determining the level of discipline issued.

\*\*For similar results, see NCSB v. Goodman [00DHC29 (2000)]

### **In Re Oguah - 97G0857(II)**

The Committee found that respondent violated Rules 7.2(a)(5, 7, & 8) and 1.2(d) of the Rules of Professional Conduct and issued a censure to respondent.

During respondent's employment as an Assistant Attorney General, she was assigned to defend the Equal Employment Opportunity office of the Department of Corrections in a sexual harassment case. An employee accused her male supervisor of sexual harassment. A case prospectus was submitted by an investigator, who did the initial investigation of the alleged sexual harassment. The prospectus included that the male supervisor had engaged in inappropriate conduct. The manager of the DOC's EEO office signed the prospectus. The director of the Division of Adult Probation asked the manager of the DOC's EEO office to determine whether the conduct was inappropriate under sexual harassment law. A new prospectus was completed stating that the male supervisor conduct did not amount to sexual harassment. Respondent expected collusion between the director of the Division of Adult Probation and the manager of the DOC's EEO office but failed to submit the original prospectus to plaintiff's counsel. The manager of the DOC's EEO office and the investigator failed to mention the original prospectus in their depositions with opposing counsel and respondent failed to correct the impropriety. Respondent also met with the director of the Division of Adult Probation and the manager of the DOC's EEO office and decided to deny the existence of the original prospectus.

The Committee found that: respondent concealed documents having potential evidentiary value; respondent counseled her client to conceal the document; and that respondent's conduct was prejudicial to the administration of justice. The Committee noted that respondent's punishment might have been more substantial had she not already lost her position as an Assistant Attorney General as a sanction for her conduct.

## **I. Neglect of Client's Affairs**

### **NCSB v. Littlejohn - 01 DHC 16 (2001)**

The Commission, finding defendant neglected numerous client affairs, suspended his law license for two years, but stayed the suspension for three years provided he comply with the conditions set forth by the Commission.

In reviewing the facts, the Commission noted that there were at least 17 instances where defendant failed to: take prompt action on behalf of his clients; communicate with his clients; or timely refund unearned portion of fees to his clients. This conduct resulted in violations of Rules 1.3, 1.4(a), 1.4(b), 1.16(d), 1.5(f), and 8.1(b) of the Rules of Professional Conduct.

The Commission found that the misconduct was aggravated by a pattern of misconduct, multiple offenses, and defendant had substantial experience in the practice of law. However, the misconduct was mitigated by an absence of a prior disciplinary record, personal or emotional problems, and physical or mental impairment.

### **NCSB v. Barnes - 00 DHC 13 (2000)**

The Commission suspended defendant's law license for six months, but stayed the suspension for three years provided defendant complied with conditions set forth by the Commission.

Defendant represented an individual who refused to pay her attorney's fees to a firm that represented her in a previous personal injury case. Defendant wrote to the firm and demanded they resolve the fee dispute or defendant was going to involve the State Bar. Defendant also threatened to damage the firm's reputation unless they agreed to a substantial fee reduction. The firm retained counsel and sought declaratory judgment against the individual. Defendant asserted frivolous defenses and counterclaims and advised the individual to verify the same frivolous defenses and counterclaims. The superior court granted summary judgment for the firm, and sanctioned the individual and defendant for asserting defenses and counterclaims for the improper purpose of harassment of the firm. Defendant and the individual were ordered to pay \$85,000 in attorneys' fees and court costs.

Less than a week after defendant was sanctioned, he undertook to represent another client on a claim arising from a tree limb striking the client on the head while walking down Hillsborough Street in Raleigh. Defendant requested the medical records for the client, but then took no further action for six months. Defendant was informed that the city was not responsible for the accident. After this notice, defendant took no further action for over one year. Defendant failed to keep the client informed of the status of his claim. The client requested his file be returned and defendant did so with only three months left on the statute of limitations causing the client to lose his claim.

Defendant also represented an individual in a child support dispute with her husband. Defendant made false representations to the court that the individual was incurring substantial legal bills at the fault of her husband, when in fact defendant had not attempted to collect any fees from the individual.

The Commission found that defendant violated Rules 3.1, 8.4(g), 1.4(a), 3.3(a)(1), and 8.4(d) of the Rules of Professional Conduct. The Commission also found aggravating factors,

consisting of: multiple offenses; defendant's substantial experience in the practice of law; and the \$750 in previous sanctions. Defendant's misconduct was mitigated by his personal problems, his cooperative attitude toward the proceedings, the imposition of other sanctions, and defendant's remorse.

## **J. Abuse of Subpoena Powers**

### **In Re Constantinou - 93G1212 (II)**

The Committee issued respondent a reprimand for violating Rule 1.2(d) of the Rules of Professional Conduct.

Respondent represented plaintiffs in an action against a Durham attorney. Respondent issued a subpoena duces tecum to UNC Hospital and Duke University Medical Center for the medical records of the defendant's deceased brother, who was not a party to the action. The information was sealed and sent to the clerk of court with instructions for the presiding judge to open the information. Respondent's employees took the information from the clerk's office and respondent showed the records to plaintiffs. The information was also leaked to a *Durham Herald Sun* newspaper reporter. The records were ordered to be returned to the clerk's office and respondent returned the originals, but respondent kept the copies that were made until another order had to be issued to retrieve the copies as well.

The Committee found that the subpoena of confidential medical records of a non-party and the disclosure of the records to the press constituted conduct prejudicial to the administration of justice. The Committee noted that respondent had already been ordered by the court to pay the attorney's fees and a reprimand was issued.

## **K. Sexual Relations With Client**

### **NCSB v. Knight - 00 DHC 24 (2001)**

The Commission suspended defendant's law license for three years after defendant engaged in sexual relations with a client without having any relationship with the client prior to defendant becoming her attorney.

Defendant's client was sexually assaulted at her university. The school decided it would not pursue any action against the attacker. The client and her family agreed that the state should file criminal charges against her attacker. The family retained defendant for civil representation. The defendant's retainer of \$10,000 came from the client's father's retirement account, with him stating that was the only money they had. Defendant knew that the client was seeing a psychiatrist or a psychologist for the emotional difficulties she was having as a result of her sexual assault. After discovering the client was seeing a therapist, defendant engaged in sexual relations with the client three times within the three months he was retained to represent her. The client told her father that defendant had had sexual relations with her. The client's father requested a refund of the \$10,000 he paid as a retainer. Defendant, learning the client had informed her father of the sexual relationship, sent the client's father a disclaimer, releasing defendant from any future civil liability as a result of the relationship. Defendant conditioned the return of the \$10,000 on his signing of the waiver. The client's father did not sign the waiver

and retained new counsel. Defendant then reported his actions to the State Bar, but failed to disclose the waiver he had sent to the client's father.

The Commission found that defendant's sexual relationship with the client violated Rules 1.18, 1.7(b), and 8.4(g) of the Revised Rules of Professional. The Commission also found that defendant violated Rules 1.8(h) and 8.4(a) by conditioning the return of the fee on the execution of the waiver of liability, without advising them to seek new counsel. Defendant's misconduct was aggravated by his dishonest motive, his pattern of misconduct, the vulnerability of the victim, and the prejudice to his clients. Defendant's misconduct was mitigated by the absence of a prior disciplinary record, his full disclosure to the Hearing Committee, his character and reputation, and his remorse.

## **K. Fraudulent behavior**

### **In Re Drake – 02G1602 (2004)**

Defendant represented husband in a lawsuit brought by his ex-wife. One day before the trial, the defendant's helped his client, the husband, sign a deed transferring his home to his brother. The deed was filed four days later and after a jury verdict against the husband. The Committee found that the transfer of property was clearly done to try to keep the assets away from his client's ex-wife, which is fraud under N.C.G.S. 39-23.4. The defendant should have been aware that this action was fraud under North Carolina law, but he nevertheless assisted his client in violation of Rules 1.2(d), 4.4, and 8.4(c) of the Revised Rules of Professional Conduct. The Grievance Committee censured the defendant for his misconduct.

#### **A. Assisting in the unauthorized practice of law**

### **In Re Horgan – 06G1033 (2007)**

The defendant assisted the North Carolina Small Business Association, L.L.C. (NCSBA) in their formation. The company offered living trusts at seminars, and other estate planning services. In addition to helping in NCSBA's formation, defendant reviewed the company's advertising brochures and materials, spoke at their seminars, and provided legal services to their customers. NCSBA also gave customers a copy of defendant's usual estate planning agreement and collected his attorney fee from their customers. While defendant prepared the documents used to write the living trusts; NCSBA representatives would review the legal documents with the customers and assisted them with the actual execution of the living trust. Defendant violated Rule 5.5(d) of the Revised Rules of Professional Conduct for assisting NCSBA in the unauthorized practice of law. Further, he violated Rule 5.4(a) for sharing his fee with a non-attorney. The Committee censured the defendant for his misconduct.

## **L. Failure to reasonably supervise**

### **In Re Leigh – 04CRS4162 (2004)**

In Cleveland County, attorneys are provided mailboxes by the County Clerk's office that are used to notify attorneys of court appointments and receiving the published trial calendar. The

trial court found the defendant grossly negligent in the handling of a criminal case for not checking, or ensuring that his secretary checked his mailbox at the courthouse in a timely manner. For four weeks, defendant's secretary failed to check his mailbox. As a result of this failure, the defendant missed his appointment as counsel for a criminal defendant, as well as the weekly calendar which would have also alerted him of his assigned case. The trial court issued a censure to the defendant for his failure to properly supervise his employee.

#### **In Re Horn – 04DHC37 (2004)**

Defendant was a partner at Brown, Flebotte, Wilson & Horn. One of the associates at the firm had represented a client in connection with a domestic dispute which concluded on November 20, 2001. A previous judgment/order signed by the parties in September 2001, contained language releasing all attorneys as attorneys of record upon signing of the formal judgment. However, none of the orders from November 20 relieved the associate as attorney of record. A week after the conclusion of the domestic dispute, the associate received a contempt motion, scheduling a hearing from opposing counsel. The associate filed a motion with the Court to withdraw from further representation and attempted to contact his client. As of the January 8, 2002 contempt motion hearing date, the Court had not heard the associate's motion to withdraw from representation.

Prior to the January 8 hearing, the defendant instructed the firm's associate not to attend the hearing to represent the client. This directive was based on the defendant's incorrect belief that the firm no longer represented the client. Defendant was in violation of Rule 5.1(b) of the Revised Rules for failing to make reasonable efforts in the exercise of direct supervisory authority over another attorney. The Committee issued the defendant with an admonition for his misconduct.

#### **M. Conflict of Interest**

##### **In Re Church – 03G0935 (2004)**

Defendant was reprimanded for attempting to represent both sides in a marriage dissolution where the parties interests were clearly adverse. Defendant failed to advise the clients of the conflict, as well as their rights concerning support, alimony, attorney's fees, and rights surrounding their children. The agreement written by the defendant broke down shortly after being signed and the two parties had to retain separate counsel to work out a new agreement. The Committee's reprimand was for the defendant's violation of Rules 1.7, 8.4(d) and (g) of the Revised Rules of Professional Conduct. Defendant was subsequently disbarred in 2005 for misappropriating client's funds.

##### **In Re Corbett – 04DHC32 (2005)**

Defendant had a contract with Pender County, North Carolina, to provide legal services, primarily through the collection of outstanding property taxes owed to the County. In addition to his legal fees, defendant would receive a 'Commissioner's fee' for any sales he conducted in order to collect the money owed for taxes. On a few occasions, defendant purchased properties owned by former residents who just wanted their case closed. In these cases, defendant would buy the property, pay off the taxes owed by the seller, but did not report to the County that he had been

the purchaser of the land. Defendant did not, however, try to hide these transactions as the documents of the property transfers were all otherwise properly filed and in the public record. The Committee found that the defendant violated Rule 5.1(b) and Rule 1.7(b), as he "engaged in conduct in which the interests of his client may have been materially limited by his own personal interests." For his actions, the Committee reprimanded the defendant.

**In Re Forquer – 07G0641 (2008)**

Defendant prepared a deed for clients who were buying a property. However, the defendant prepared the deed not at the request of his clients, but at the request of a third party and forwarded the deed to the third party for execution. The Committee found defendant violated Rule 5.4(c) for allowing a third party non-client to direct the defendant's services without permission from his clients. This conduct was also a violation of 1.8(f) for the conflict of interest. Further, the defendant violated 1.4(a)(b) for failing to communicate with the client in the preparation of the deed.

Defendant's actions with the third party, a title and appraisal service company, was in violation of Rule 5.4(a) for splitting the fee he received with a non-attorney third party, and thus a violation of 5.5(d), for assisting the third party in the unauthorized practice of law. The Grievance Committee censured the defendant for his multiple misconduct violations.

**In Re Gibbs – 07G1159 (2008)**

In representing a client doing a home refinancing, the Committee found the defendant was negligent in her title search for failing to recognize a third parties interest in the property. This negligence was a violation of Rules 1.1, competence, and 1.3, diligence. Additionally, while attempting to correct her negligent conduct through mediation, the defendant failed to make clear to the third party that she represented her client and was not a disinterested party. Defendant should have informed the third party of her right to hire independent counsel. Her behavior through the mediation process was in violation of Rule 4.3(b), dealing with an unrepresented party. The Committee issued the defendant with a reprimand for her misconduct.

**In Re Simpson – 031GR001 (2004)**

Defendant took seventeen months to finalize a bankruptcy petition for a client. The Committee found the delay unreasonable and in violation of Rule 1.3 for failing to use due diligence. The defendant was also still owed \$3,700 from previous legal work done when he filed the bankruptcy petition, making him a creditor of his client's. Finalizing his client's bankruptcy, while also being a creditor was a conflict of interest in violation of Rule 1.7. The defendant also did not disclose on the bankruptcy form that he had an outstanding legal debt with his client and that the client had arranged to pay the defendant outside the Chapter 13 bankruptcy action. Skirting the bankruptcy action to receive his fee was in violation of Rules 3.3(a)(1) and (3), as well as Rules 8.4(c) and (d). Finally, the defendant charged a clearly excessive fee for handling the bankruptcy in violation of Rule 1.5(a) and did not even correctly file a complete bankruptcy petition. For his multiple violations, the Committee reprimanded the defendant.

## **N. Billing**

### **In Re Batchelor – 07G0198 (2007)**

Defendant quoted his client a flat fee of \$1,250 to help her seek visitation of her grandchildren. Four months later, the defendant unilaterally changed the fee from a flat fee to an hourly fee at a rate of \$200 per hour. The defendant's actions violated Rule 1.5 which states, "[o]nce a fee agreement has been reached between attorney and client, the attorney has an ethical obligation to fulfill the contract and represent the client's best interests regardless of whether the lawyer has struck an unfavorable bargain." According to the comments associated with Rule 1.5, "[a]n attorney may seek to renegotiate the fee agreement in light of changed circumstances or for other good cause, but the attorney may not abandon or threaten to abandon the client to cut the attorney's losses or to coerce an additional or higher fee." In this case, the defendant unilaterally changed his fee, sending letters to the client that she owed more money and withdrew his representation when the client did not pay all these extra fees. The Committee reprimanded the defendant for his misconduct.

See also **Clement – 03G0790 (2004)**, the defendant unilaterally changed his fee from the agreed upon hourly fee, to a contingent fee upon settlement of the case. The Committee took into account the defendant's remorse and full refund of the fee before the Committee had made its decision in the case, and thus only reprimanded the defendant for his misconduct.

### **In Re Osho – 06G0287 (2008)**

The Committee found the defendant acted with reckless disregard in his billing practices for indigent clients in violation of Rule 1.5(a). The defendant failed to properly attribute to each client the appropriate costs for mileage and parking associated with his visits to the jail. The Committee issued a reprimand to the defendant.

## **O. Decorum**

### **In Re: Marshall - 06 CRS 34734 (2008)**

The respondent and district court judge continuously sparred during pre-trial motions, including the respondent asking for the judge to recuse himself for showing bias. The sparring continued during the trial, and in reaction to a ruling by the judge, the respondent at one point threw up his hands and said "Lord" in a loud tone in front of the jury. The judge excused the jury and told the respondent that at the completion of the trial there would be a contempt hearing as a result of the respondent's outburst.

At the conclusion of the trial, the judge held a contempt hearing in which he found the '[r]espondent's conduct was willfully contemptuous and constituted criminal contempt of court'. The trial judge sentenced the respondent to a 30 day suspended jail sentence, with probation for a year. As part of probation, respondent would have to surrender his law license for 15-30 days, depending on some additional stipulations.

Respondent appealed the contempt ruling, arguing the trial court was in error by holding the criminal contempt hearing rather than sending it to a different judge not involved with the case. Under N.C. Gen. Stat. § 5A-15(a) (2005), "[i]f the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order

must be returned before a different judge." In this case, the Court of Appeals found the trial court judge erred in hearing his own contempt order and reversed the criminal contempt conviction.

**In Re Will, Jr. – 04G1148 (2004)**

The defendant was upset with the judge and directed an obscenity toward him. The judge responded by ordering the defendant into custody, at which time the defendant continued his tirade of obscenities, as well as challenging the judge's intelligence and competence. Defendant was later convicted for contempt of court. The Committee censured the defendant for his courtroom outburst.

**P. Improper communications with opposing party**

**In Re DeMayo – 04G0461 & 04G0617 (2005)**

A recently departed associate from the defendant's firm contacted her clients, informing them of her departure and telling them they could stay with the firm or go with the associate who was starting her own practice. Upon learning the former associate was contacting her clients; the defendant also began to contact these clients, sending at least two letters to one client who had decided to follow the associate. In those letters, defendant told the client that she was the firm's client and should not respond to the former associate. Defendant also told the client that she needed to "hear the truthful facts" about the associate. The Committee found that in a letter dated March 9, 2004, the defendant went further, and 'made material misrepresentations about [his firm's] services' in violation of 7.1(a) of the Rules of Professional Conduct.

Defendant also sent the former client a misleading news article intending to mislead her to think she could be sued by the law firm if she left and that they would be entitled to collect almost the entire contingency fee and claimed in the letter that defendant was sending this to the former client "simply to inform [her] of [her] rights." The Committee found this information to be misleading, as it was unclear whether the firm would actually be entitled to *any* portion of the fee. The defendant's raising of the fee division between the client and departed associate, as well as questioning whether the departed associate would be willing to do the work for the fee agreed upon were inappropriate communications with someone the defendant knew was represented by counsel in violation of 4.2(a) and 7.3(b)(2) of the Rules. The Committee censured the defendant for his misconduct.

**In Re Donnelly – 04G0920 (2005)**

Defendant was representing the mother in a child custody case. The father was also represented by counsel. Ten days before the next scheduled hearing, the defendant's client contacted him and informed him that the husband was going to sign a consent order granting her custody. The defendant knew the father was represented by counsel who was out of town at the time, but made arrangements with the father directly to sign the form at the courthouse anyways. The day opposing counsel was supposed to arrive back in town, the defendant met the father at the courthouse where he signed the document and filed the agreement with the Court.

Defendant did not make an effort to notify opposing counsel or the Court that the father was acting without the presence or knowledge of his counsel. When the defendant sent opposing counsel the order, opposing counsel demanded the order be set aside. The defendant refused,

forcing opposing counsel to go to court to get the agreement set aside. The Committee found that the defendant's conduct violated Rule 4.2, which prohibits an attorney from communicating with an opposing party when counsel knows the party is represented by counsel. Further, the defendant violated Rules 3.5, which prohibits *ex parte* communications with the Court; and Rule 8.4(d), for engaging in conduct prejudicial to the administration of justice. The defendant was reprimanded for his misconduct.

#### **Q. Making public statements during an ongoing litigation**

##### **In Re Britt – 06G0924 (2007)**

The defendant was elected the District Attorney of Robeson County in 2006. Shortly thereafter, a number of county deputy sheriffs were indicted after a joint federal and state investigation. The defendant made numerous public statements about the indictments, including information not yet in the public record. The defendant also expressed an opinion regarding the guilt of the accused to the media. This conduct was in violation of Rules 3.6(a) and 3.8(f). The Committee reprimanded the defendant for his misconduct.

##### **In Re Brown – 05G0732 (2006)**

After filing a lawsuit on behalf of his client, the defendant told a reporter for the Winston-Salem Journal that the suit was for "several million dollars." The defendant claimed to have an expert stating the target of the civil suit committed malpractice and that he had "crossed a well-defined ethical line." The Committee found these comments violated Rule 3.6(b) of the Rules of Professional Conduct as they were not matters contained in the public record. The defendant also threatened the target of the suit during a break in a deposition, saying "[y]ou want some of me?" The Committee found these comments to be 'unnecessary' and 'unprofessional' in violation of Rule 8.4(d). The defendant received a censure for his misconduct. Defendant has been reprimanded and censured previously for prior misconduct.

#### **R. Improper use of Advertising**

##### **In Re Campbell – 07G1041 (2008)**

Defendant placed an advertisement in the telephone book that said "CALL US IT'S JUST THAT EASY! Get the money you deserve." Included with the telephone book was a magnet for the firm that said, "HURT? CALL US, It's Just That Easy!" and a little man holding what appears to be a check. The Committee found these advertisements violated Rule 7.1 of the Rules of Professional Conduct. The statements in the advertisements give the implication that the reader deserves compensation regardless of the merit of his or her case, and that everyone will receive something. The little man holding the check is not identified as a spokesperson or actor and thus violates 7.1(b). The advertisement gives examples of "past results" or "cases settled" without providing any context, and as such, was misleading under Rules 7.1(a)(1) and (2). Finally, the phrase, "[i]mmediate assistance with lost wages, medical bills, transportation", violates Rules 1.8(c) for leading the reader to believe that the defendant will provide financial assistance to a client in connection with pending litigation which is prohibited of the Rules of Professional Conduct. The Committee issued the defendant a reprimand.

**N.C. State Bar v. Culbertson - 177 N.C. App 89 (2006)**

Defendant's firm letterhead contained an asterisk next to his name. The asterisk led to the phrase: "Published in Federal Reports, 3d Series." In addition, the defendant's bio on his website said, "[h]e is also one of the elite percentage of attorneys to be published in Federal Law Reports -- the large law books that contain the controlling caselaw [sic] of the United States." The Committee found the statement on the letterhead to be misleading and in violation of Rules 7.1 and 7.5 of the Rules of Professional Conduct. The Committee similarly concluded the statement on the website violated Rule 7.1 for being misleading, as all published federal opinions are printed in the Federal Reports.

The Court of Appeals affirmed the Committee's decision. The COA rejected the defendant's First Amendment claim, citing *In Re R.M.J.*, 455 U.S. 191, 203 (1982), "Truthful advertising related to lawful activities is entitled to the protection of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely." In this case, the COA agreed with the Grievance Committee that the defendant's use of the asterisk and accompanying phrase on the letterhead, as well as the claim on his website, were inherently misleading. The defendant received an admonishment from the Committee.

**In Re Goldsmith, Jr. – 04G1013 (2005)**

The defendant advertised "I can GUARANTEE that you will pay NO CLOSING COSTS! When you Finance Through the Mortgage Lawyer". The Committee found this ad to be misleading; as defendant even admitted some buyers *would* in fact have to pay closing costs. The advertisement violated Rule 7.1(a)(1) of the Revised Rules of Professional Conduct and the defendant was reprimanded for his misconduct.

**In Re Hance - 04G1187 (2005)**

The Grievance Committee sent the defendant a warning letter on April 22, 2004, for an advertisement he placed in the yellow pages listing a telephone number for his law office in Shelby, North Carolina. However, the defendant did not have a law office in Shelby, thus his advertisement was misleading under Rule 7.1(a)(1). While the defendant contacted the telephone company and they could not remove the ad until 2005, the Committee found the defendant did not expeditiously disconnect the offending phone number. The Committee also found the defendant was in violation Rule 8.4(d) for failing to comply with the letter and spirit of the warning letter. The defendant was reprimanded for this violation.

**In Re Kelly - 06G0438 (2006)**

The defendant's law firm ran an online advertisement declaring a person needs "the best Winston-Salem personal injury lawyer available." The ad also said the defendant's firm was the "top choice" in Winston-Salem and throughout the State for personal injury lawsuits. Both of these statements violated Rule 7.1(a)(3) for being comparative statements with other lawyers' services that cannot be shown to be factually true. The Committee also found the ad to be a

'material misrepresentation of fact' in violation of Rule 7.1(a)(1) since the defendant's firm does not even have an office in Winston-Salem. The defendant was issued a reprimand.

#### **In Re Robbins - 07G0323 (2007)**

The defendant owned the web domain name tixfixer.com and used it as his firm's website. The Grievance Committee found this to be a trade name that must be registered with the Bar and meet the requirements set forth in Rule 7.5(a). The defendant failed to register the domain name with the State Bar as required.

The Committee also determined that tixfixer.com violates Rule 7.1(a)(2) for being misleading, as the URL leads a person to believe the defendant can assist a client in a way that may be unethical or improper. Finally, the Committee found that the defendant violated Rule 7.4(d) by using meta data on search engines that identified him as a 'traffic law specialist', when no such specialist designation exists in North Carolina. The defendant was issued a reprimand by the Committee.

#### **S. The case of Mike Nifong**

##### **In Re Nifong - 06DHC35 (2007)**

The defendant served in the Durham District Attorney's office for nearly twenty-nine years before his disbarment. During the Duke Lacrosse investigation, Nifong made multiple and repeated statements to local and national news media outlets, including, according to the Committee, 'statements he knew or reasonably should have known...would have a substantial likelihood of materially prejudicing' the case in violation of Rule 3.6(a). The Committee found these statements were also in violation of 3.8(f) because of their 'substantial likelihood of heightening public condemnation of the accused.' The Committee found the defendant also violated Rule 3.4(c) for instructing one of the DNA labs to prepare a misleading report. The defendant was in violation of Rule 3.8(d) for not making timely disclosure of evidence to a proper request filed by the defendants. His conduct violated Rule 3.4(d) for failing to comply with this proper discovery request.

Further, the defendant violated Rule 3.3(a)(1) when he made false statements of material fact to the Court by representing that he had turned over all discoverable material. The defendant had not in fact turned over all discoverable material, as he withheld the full report on the DNA evidence collected. According to the Committee, Nifong's acts violated 8.4(c) for conduct involving dishonesty, fraud, deceit, or misrepresentation. Further, the Committee ruled Nifong violated 8.1(a) by knowingly making false statements of material fact to the Committee when he claimed he did not realize he had not turned over the full DNA report to the defendants. The defendant was disbarred for his violations of the Rules of Professional Conduct.

#### **T. Petition for reinstatement denied**

##### **In Re Byrd, Jr. - 03BCR3 (2005)**

The petitioner entered practice in North Carolina in 1974. In 1990, his wife developed breast cancer which she battled until her death in 1999. In 1992, the petitioner's wife's health insurance was cancelled, placing the financial burden solely on the family. At the same time, the

petitioner had three daughters in college. In 1993, the petitioner took up an offer he knew was "too good" to be true for an outside contracting business with one of his brothers. In 1994, one of his former clients approached him about helping to move some marijuana. On the nineteenth time the former client approached him, the petitioner finally agreed to help distribute the drugs—this turned out to be a police sting. After the arrest, in October 1994, the petitioner surrendered his law license. In March 1995, the petitioner was sentenced to thirty-four months in jail and three years of supervised release.

In early 1998, the petitioner was released to a halfway house and completed 100 hours of community service with the Food Bank, as well as worked for a landscaping business. Later that year, he worked as a paralegal for former U.S. Senator Robert Morgan's law office and continued his volunteer work at the Food Bank even though he had completed his required community service commitment. In 1999, the petitioner was named the first winner of the Golden Pallet Award from the Food Bank for being the 'most outstanding volunteer.'

In 1999, the petitioner was indicted for 'aiding and abetting in the transportation of stolen goods in interstate commerce.' This charge related to the equipment purchased back in 1993. In July 1999, he pled guilty, received credit for time already served and given two more years of supervised release, and was ordered to pay restitution.

Late in 1999, the petitioner moved back to Drexel, North Carolina, and worked as a paralegal for two different law offices, moving to the second office for a pay raise. He remained at the law office until 2004. Beginning in 2004, and until the hearing for reinstatement, the petitioner had been a self-employed contractor/carpenter. For the past 5+ years the petitioner was active in his Baptist Church, a member of the choir and chaired a number of church committees. In addition, he formed a group within the church that reaches out to 'at risk' teens in the community. As part of this work, he shared the story of his 'downfall' so others could benefit from the lessons he had learned.

The petitioner has been elected a Deacon at his church. He also helps the elderly repair their homes, takes them shopping, and keeps them company. Senator Morgan, three judges, two attorneys and a Burke County resident all spoke on behalf of the petitioner's reinstatement at his hearing. The Grievance Committee also received more than sixty letters or recommendation from elected officials, lawyers, and citizens of Burke County encouraging them to reinstate the petitioner's law license. The Committee found that the petitioner complied with all the proper procedures in closing down his law practice and applying for reinstatement. *Nevertheless*, the Committee found the petitioner had failed to prove by "clear and convincing evidence" that he is reformed and possesses the necessary moral character required under Rule .0125(a)(3)(C). The Committee thus denied the petitioner's request for reinstatement.

### III. ZEALOUS AND HONORABLE ADVOCATE

#### The 2008 North Carolina State Bar Lawyer's Handbook

#### Title 27 of the North Carolina Administrative Code

#### The North Carolina State Bar

#### Chapter 2

#### Revised Rules of Professional Conduct of the North Carolina State Bar as Comprehensively Amended in 2006

#### PREAMBLE: A LAWYER'S PROFESSIONAL RESPONSIBILITIES

[13] Although a matter is hotly contested by the parties, a lawyer should treat opposing counsel with courtesy and respect. The legal dispute of the client must never become the lawyer's personal dispute with opposing counsel. A lawyer, moreover, should provide *zealous but honorable* representation without resorting to unfair or offensive tactics. The legal system provides a civilized mechanism for resolving disputes, but only if the lawyers themselves behave with dignity. A lawyer's word to another lawyer should be the lawyer's bond. As professional colleagues, lawyers should encourage and counsel new lawyers by providing advice and mentoring; foster civility among members of the bar by acceding to reasonable requests that do not prejudice the interests of the client; and counsel and assist peers who fail to fulfill their professional duties because of substance abuse, depression, or other personal difficulties

*\*Bold Italics* added by author for emphasis

## V. Citations

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27. In Re Will, Jr. [04G1148 (2004)]
28. In Re DeMayo [04G0461 & 04G0617 (2005)]
29. In Re Donnelly [04G0920 (2005)]
30. In Re Britt [06G0924 (2007)]
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35. In Re Hance [04G1187 (2005)]
36. In Re Kelly [06G0438 (2006)]
37. In Re Robbins [07G0323 (2007)]
38. In Re Nifong [06DHC35 (2007)]
39. In Re Byrd, Jr. [03BCR3 (2005)]
40. The 2008 North Carolina State Bar Lawyer's Handbook, pages 74-75



# That “Oh No” Moment: Malpractice Claims Errors and How to Avoid the Same Fate

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## Preventing Malpractice Claims

Solos and small-firm attorneys are particularly vulnerable to charges of legal malpractice. According to the American Bar Association, most malpractice lawsuits are filed against lawyers in firms with one to five attorneys. Without the information technology departments, big administrative budgets and large support staffs that large firms may have at their disposal, solos and small firms must be proactive in avoiding common malpractice traps. We will review some of the more common legal malpractice traps that we at Lawyers Mutual encounter in our handling of claims.

### I. Litigation – Missed Deadlines

Litigation errors consistently show up among the top causes of malpractice claims reported to Lawyers Mutual each year. In 2009, errors arising out of litigation accounted for 23% of all claims reported. In the vast majority of cases, the statute of limitation on the client's case expired and there was nothing left to do but assess the damages. Here's a look at a few of the common problems and suggestions to make your office safer.

#### 1) Failing to Maintain a Comprehensive Calendaring/Docket Control System

Lawyers miss deadlines for a variety of reasons, but the most common is the lack of a good calendaring and docket control system. The brand of case management and calendaring system is not as important as assuring that the necessary events are entered and executed. The basis of a well-designed docket system is the use of a central system, i.e., one controlled by someone who is not the person responsible for meeting the deadlines. There is double security when responsibility for compliance rests with both the lawyer or staff person responsible for meeting time limitations **and** with the person responsible for the central system. Having the person responsible for the central system verify compliance is critical in achieving a well-designed system. Both the person responsible for the central system and the person responsible for meeting the deadline should verify compliance with important deadlines. Lawyers Mutual handles numerous claims every year resulting from missed deadlines caused by the one person in charge of docket control being sick or otherwise away from the office when the deadline passes, so make sure this important responsibility is delegated to a back-up person for emergency situations.

#### 2) Waiting Until the Last Minute to File the Complaint

One of the biggest mistakes we see at Lawyers Mutual is the lawyer filing complaints at the eleventh hour – on the eve of the statute of limitation deadline. Although the lawyer believes he is within the “safety zone” because the limitation period has not yet expired, filing at the last minute is often a risky practice. In many cases, the plaintiff's lawyer may be unable to perfect service of the summons and must file an alias and pluries summons to keep the action alive. Sometimes the lawyer and/or his support staff forget to calendar the date the original summons expires. As a result, the action is barred because the statute of limitation expires before the summons is renewed.

Other times, the lawyer inadvertently names the wrong defendant, and the opposing party files a motion to dismiss on that basis. If the complaint is filed at the last minute, the lawyer has little or no time left to investigate and determine the name of the proper party before the deadline passes. For these reasons, we strongly encourage plaintiffs' attorneys to file the complaint well in advance of the statute of limitation deadline. Filing early will give you more time to fix mistakes such as improper service or naming the wrong party. Hopefully, this extra time will give you an opportunity to correct mistakes before a malpractice claim develops.

### 3) Failing to Know the Correct Statute of Limitation

Sometimes, even with proper docket control systems, the lawyer fails to determine the correct statute of limitation applicable to the case. For example, the limitation period in North Carolina for bringing an action for personal injuries resulting from an automobile accident is three years, but the limitation period is shorter in other jurisdictions. You should always verify the statute applicable to such actions, especially those that arise outside of North Carolina.

**For additional information on setting up a calendaring and docketing system, visit our website found at [www.lawyersmutualnc.com](http://www.lawyersmutualnc.com) and click on "client services/risk management resources/risk management handouts." You will also find a North Carolina Statute of Limitation Index there.**

## II. Real Property Errors

Real property errors breed the largest number of malpractice claims reported to Lawyers Mutual. In 2009, real property claims comprised about 49% of all claims reported to Lawyers Mutual.

### 1) Failure to Properly Cancel an Equity Line of Credit

The most common preventable real estate error we see at Lawyers Mutual involves the failure to properly cancel an equity line of credit after a house has been sold. For example, in many cases the buyer purchases a home that is subject to an equity line of credit that was acquired by the seller. The closing attorney presents a pay-off check to the lender with oral instructions to cancel the equity line of credit and the deed of trust. In some cases the lender fails to cancel the deed of trust per the attorney's instructions, and the seller continues to use the line of credit attached to the home he sold. The innocent buyer and his lender, who thought they had a first lien mortgage, are eventually threatened with foreclosure proceedings when the seller fails to make the payments on the equity loan. See, e.g., Raintree Realty and Constr., Inc. v. Kasey, 116 N.C. App. 340, 447 S.E.2d 823 (1994), aff'd, 341 N.C. 195, 459 S.E.2d 273 (1995). The equity line lender is not required to cancel the deed of trust securing the line of credit unless (1) the balance of all outstanding amounts secured by the mortgage or deed of trust is zero, and (2) the borrower (seller) has made a request that the lender cancel the deed of trust by means of "written entry upon the security instrument showing payment and satisfaction." Id. at 342, 447 S.E.2d at 825. In the absence of written notice from the seller to the seller's lender, there is no tangible evidence that such a request was ever made. The buyer, buyer's lender or the title insurer will look to the closing attorney to cover the loss.

**It is the responsibility of the closing attorney to obtain a letter from the seller requesting that all deeds of trust be cancelled at the time of closing.**

Recently, we have seen situations in which attorneys hand-deliver pay-off checks to the local branch of the lender (usually to a bank teller rather than the loan department) without providing a cancellation letter. A cancellation letter should be presented to the lender along with the check. In addition, because a cancellation letter can disappear from the lender's file, **we suggest taking two copies of the letter to the lender and asking the party receiving the check to sign one copy for the attorney's file.**

2) **Disbursement of Uncollected Funds**

Attorneys who conduct real estate closings must be extremely cautious when disbursing the proceeds of a real estate transaction from funds deposited in the attorney trust account. The Good Funds Settlement Act, Chapter 45A of the North Carolina General Statutes, states the general rule that the closing attorney is prohibited from disbursing funds deposited in the attorney trust account until those funds have been collected. See N.C. Gen. Stat. § 45A-4 (1999). Notwithstanding the general rule, the Act sets out certain exceptions under which the attorney may disburse uncollected funds in reliance upon the deposit of provisionally credited funds. For example, the Act permits the disbursement of uncollected funds if the check is drawn on the escrow account of a licensed real estate broker or is issued by a lender who is approved by the U.S. Department of Housing and Urban Development "HUD."

In ethics opinion RPC 191, the North Carolina State Bar concludes that failure to comply with the Good Funds Settlement Act constitutes professional misconduct, whether or not the funds are eventually collected. The real danger arises in those cases where the closing attorney disburses in reliance on provisional credit in compliance with The Good Funds Settlement Act, and later learns that the lender has stopped payment on the check or the check has been dishonored.

For example, some years ago Lawyers Mutual received reports that Island Mortgage Company, a HUD approved lender, had stopped payment on a mortgage check after it had been deposited in the attorney's trust account. Unfortunately, the closing attorney had already disbursed the funds as allowed by the Good Funds Settlement Act. The State Bar mandates that under these circumstances the closing attorney must personally pay the amount of the failed deposit by either using personal funds or by obtaining sufficient credit to cover the shortfall in the trust account. The attorney may not use the trust account funds of other clients to cover the deposit. Failure to cover the lost funds constitutes professional misconduct.

**It is the position of Lawyers Mutual that a closing attorney should never disburse uncollected funds, even if it is permissible under The Good Funds Settlement Act. The attorney should demand wired funds or a cashier's check prior to making any disbursements from the trust account.**

3) **Failure to Comply with Lien Waiver Requirements**

Lawyers Mutual has received several claims involving real estate attorneys who failed to comply with lien waiver and affidavit requirements imposed by title insurance companies. Recently, several title companies changed their standard lien waiver

provisions to require a “long form” lien waiver and affidavit (including certifications by all suppliers of materials or services to the property) instead of the “short form” lien waiver commonly used in the past.

Where a long form lien waiver is required by the title insurance commitment but not executed at closing, the final title policy will include an exception stating that the title company assumes no liability for unfiled Mechanic’s or materialmen’s liens. Title insurance companies have also revised the terms of their Insured Closing Protection Letter (ICL) to reflect this new lien waiver requirement. The ICL may now include an exclusion relieving the title company of any liability for losses arising out of Mechanics’ or materialmen’s liens unless coverage is also provided under the title policy. Although the ICL generally provides coverage to owners and lenders for errors made by the attorney in connection with closing, if the attorney’s error is a failure to submit the proper lien waiver and affidavit, there will be no coverage under the title policy or the ICL. If claims of lien are later filed against the property and not covered by the title insurance policy, the owner and lender may look to the closing attorney to resolve these claims.

**A closing attorney should carefully review the terms of the title insurance commitment regarding lien waiver requirements and should confirm that the proper form is used. Visit our website at [www.lawyersmutualnc.com](http://www.lawyersmutualnc.com) to read the May 2010 newsletter article “Failure to Comply with Lien Waiver Requirements.”**

### **III. Family Law – Substantive Errors**

In 2009, about 8% of all claims reported to Lawyers Mutual originated as a family law matter. The most common errors pertain to (1) a failure to preserve equitable distribution and/or alimony claims prior to the entry of a divorce judgment; (2) errors related to the division of retirement benefits; and (3) acting as “scrivener” preparing transaction paperwork that both parties will use to consummate their agreement.

#### **1) Failing to Preserve Equitable Distribution and/or Alimony Claims Prior to Entry of Divorce Judgment**

In North Carolina, all equitable distribution and alimony claims must be pled prior to the entry of a divorce judgment. See N.C. Gen. Stat. § 50-11. Failure to “specifically apply for equitable distribution prior to a judgment of absolute divorce will destroy the statutory right to equitable distribution.” Lockamy v. Lockamy, 111 N.C. App. 260, 261, 432 S.E.2d 176, 177 (1993). In Lockamy, the Court of Appeals held that neither the husband nor wife asserted valid claims for equitable distribution prior to the entry of divorce. The wife attempted to preserve her right to equitable distribution by alleging in her initial complaint, “that the plaintiff anticipates that an action for an absolute divorce and equitable distribution shall be filed when it is appropriate to do so.” Id. at 261, 432 S.E.2d at 177. No action for equitable distribution was ever filed, and the court held that the language referring to

equitable distribution in the plaintiff's complaint was insufficient to assert jurisdiction over the subject matter. See Id. at 260, 432 S.E.2d at 176.

In Lockamy, both the husband and wife lost their rights to seek equitable distribution of their marital estate because neither asserted a claim for such relief prior to the entry of divorce. In some cases, however, one party, the husband for example, asserts a claim for equitable distribution and the wife, through her attorney, fails to specifically assert a counterclaim for equitable distribution. The husband or wife's attorney then drafts the divorce judgment and requests that the court retain jurisdiction over "all pending claims for equitable distribution." The wife's attorney may mistakenly assume that her client's right to equitable distribution is protected by the divorce judgment. Unfortunately, if the husband voluntarily dismisses his pending equitable distribution claim following the entry of the divorce judgment, the wife's right to receive equitable distribution of the marital estate is forever barred. The wife is then entitled to seek recovery of the lost marital assets by filing a malpractice claim against her attorney.

**In a divorce proceeding, the attorney must carefully review the pleadings and the divorce judgment to determine whether the client's claims for equitable distribution and/or alimony have been preserved prior to the entry of divorce.**

2) Failing to Investigate and/or Protect Retirement and Other Benefits

Family law practitioners are often sued for failure to investigate and/or protect retirement or other benefits to which their clients may have been entitled. For example, several claims reported to Lawyers Mutual involve an attorney failing to properly file a qualified domestic relations order "QDRO" protecting the client's interest in a retirement account. In these cases, a separation agreement or equitable distribution order may specifically provide for a distribution from one party's retirement account. Sometimes the attorney forgets to draft the required QDRO or simply neglects to follow all the specific requirements necessary to give it legal effect. For example, in Sippe v. Sippe, 101 N.C. App. 194, 398 S.E.2d 895 (1990), cert. denied, 329 N.C. 271, 407 S.E.2d 840 (1991), the Court of Appeals held that a QDRO entered by the court was nevertheless ineffective because it had not been approved by the pension administrator as required by the Employee Retirement Security Act of 1974 "ERISA."

In one claim handled by Lawyers Mutual, the parties agreed, pursuant to a consent judgment, to distribute half of the husband's pension plan to the wife upon his impending retirement. The consent judgment also provided that the wife would continue to be named the sole surviving pension plan beneficiary. The attorney representing the wife had a duty to protect the wife's interest in the pension plan by filing a QDRO and by notifying the husband's employer

of the restriction with respect to the survivor beneficiary status. Unfortunately, the wife's attorney did nothing to protect her client's interests. As a result the husband was free to change the beneficiary of this retirement income to his new wife's name, which he did immediately upon remarriage. He died shortly after his remarriage and retirement, and the first wife lost all rights to the benefits she had bargained for through her attorney. The wife's attorney was on the hook for her clients lost benefits.

**Family law practitioners must be careful to identify all available retirement benefits and to take all necessary steps to protect their client's interest in those benefits.**

- 3) Acting as "scrivener" preparing transaction paperwork that both parties will use to consummate their agreement.

A lawyer can be sued by a non-client for professional negligence. This happens often. Likely the most common example is the claim made by a title insurance company or lender against an attorney who provided a mistaken title opinion or erroneous title search. However, it is not at all uncommon for claimants to contend that they were represented by defendant attorneys, who in turn would wholeheartedly assert that they only represented other persons and not the claimant. The dilemma for lawyers arises from the fact that the existence and scope of an attorney-client relationship may be implied. The beginning of the relationship can be fuzzy if steps are not taken to clarify any possible misunderstandings. The relationship of attorney and client may arise where the circumstances and conduct of the attorney and others make it reasonable for the putative client to believe that an attorney-client relationship exists. The key focus will be on whether the attorney by her conduct could appear to a reasonable person to be acting as a counsel for the putative client. The formation of an attorney-client relationship does not require a formal oral or written agreement or payment of a fee. Gratuitous advice can establish the relationship.

The most typical danger arises when an attorney who represents one party has undertaken the role of scrivener and will prepare transaction paperwork that both parties will use to consummate their deal. The other party has not hired counsel. North Carolina appellate courts have issued opinions stating that the evidence about the conduct of the attorney/scrivener gave rise to a jury issue as to whether the conduct created a reasonable belief that an attorney/client relationship existed. If you represent one party to a transaction, whether a real estate deal or a settlement of a domestic law matter, do not act like the attorney for the other party who has not hired counsel. Do not give him advice. Rather, tell him in writing that you do not represent him and that your work and input will be solely for the protection and benefit of your client. Tell him to get a lawyer.

The boundary between scrivener and advisor is difficult to maintain, particularly where the negotiations continue during the draft process. Assistance given to one party and not the other spawns “conflict of interest” accusations when things do not go as envisioned by a party. Pre-nuptial agreements become problematic when one party later discovers that the other party had more assets than he knew about when entering into the agreement. Experience shows that the unhappy party will claim that the lawyer was supposed to reveal to him all assets to his knowledge or advise the party to take steps to find out all of his future bride’s assets. Stated simply, it is the lawyer who often gets blamed if the deal does not turn out as envisioned by the unhappy party. Do not be surprised if the unhappy party claims that the lawyer should have advised him at a minimum to hire personal counsel.

Marriage involves two people (and the end of marriage involves three or more). Often, the lawyer is asked to prepare separation agreements and pre-nuptial agreement for the spouses. Conflict of interest and fiduciary duty issues abound in this area. Malpractice claims arise. If you venture into this arena, you must make your role abundantly clear and in writing. If you are only to be a scrivener, then your job is merely to put on paper what has been agreed upon and you must stick to that role. You must describe your limited role to the spouses and make clear in writing to them that you do not represent as an advocate either one of them and inform them that they should consider separate counsel. If in fact you do represent one party only, then you need to make it crystal clear to the other spouse that you will actively represent and assist your client only and that anything you do by way of drafting documents will only be with approval of your client and for his protection. Also, make sure that separation agreements are properly executed regardless of your capacity.

Often, lawyers are approached by newlyweds, flush with passion, wanting to discuss a pre-nuptial agreement because the passion has not gone completely to their heads. Again, make clear whom you represent and the consequences on your loyalty that follows from that fact. Attempting to assist the couple jointly by suggesting provisions to put in the agreement is fraught with dangers. If the union of love rips apart and a provision that you suggested is problematic for one ex-lover, then a claim is likely if your role was left unclear. Hopefully, the marriage will have lasted more than four years and any claim will be barred by the four-year repose period in G.S. § 1-15 (c).

In fact, any lawyer involved in representing a party to any transactional matter, a contract, a lease, a merger, whatever, is very well advised to send a letter to the other party stating plainly who is his/her client, telling that party that he/she does not represent the party, and that he/she will only protect the interest of his/her client. One might go so far as to suggest that this be done even if the other party has counsel. We have heard of situations where a court determined that there was a genuine issue of fact whether the other

party, represented by counsel to review the proposed transaction, had a reasonable belief that the lawyer representing the other side represented that party, too. In short, if the deal goes badly, then the nooses are first fitted for the lawyers.

#### **IV. Poor Client Relations**

The attorney-client relationship is the most important aspect of any engagement. Unfortunately, this is probably one of the areas most ignored by attorneys and staff. Maintaining good attorney-client relations can help prevent malpractice claims. A client who feels satisfied that you have used your best efforts will be more understanding and willing to forgive if you commit an error.

Dissatisfied clients complain that their lawyer never explained the legal process or billing system, did not return phone calls, did not attend to their case in a timely manner, failed to keep them informed and failed to involve them in important decisions affecting their case. Unhappy clients are most likely to blame their lawyer when the case turns out badly. Listen to your clients. Strive to make them feel comfortable and important. Never be condescending. A lawyer with a good “bedside manner” is much less likely to be sued than a curt, discourteous, or distant one. It is expensive, time consuming, and stressful to defend a malpractice suit – even if it has no merit.

Foster good client relations by putting the terms of your employment agreement in writing. Define carefully the scope of engagement. If you are handling only a part of the whole case, state specifically what you are obligations you are undertaking and even more importantly what obligations you are not undertaking. Lawyers Mutual handles many claims every year in which the client contends the lawyer failed to do this or that and the lawyer’s defense is that he was not engaged to do this or that.

The above discussion begs the question whether a lawyer should undertake to do only one piece of the legal pie. We call this the “unbundling of legal services.” This has become increasingly popular in recent years and many commentators applaud the practice. One cannot deny, however, that the risk of being the target of a legal malpractice claim increases if you choose to assume responsibility for only a part of the case and lose control over other matters that if done incorrectly or untimely, can be fatal to the case. That is unless the lawyer is careful to outline in writing what he is assuming responsibility for and what he is not.

In addition to outlining the scope of the representation, describe to your client the objectives and risks involved in pursuing the matter. If the result is not what you and your client had hoped for, it will be helpful to be able to show that you explained the risks of an adverse result early on.

Have your client sign the engagement letter. Give the client time to review the terms of the engagement and explain anything the client does not understand. You do not want to hear later that the client did not understand what he was signing, or was rushed into signing it.

Don't ever lie to a client for any reason. You will have no credibility if a claim is ever brought against you.

Be careful not to create unrealistic expectations for the client. Legal malpractice claims inevitably result from actions that were not initially successful in the eyes of the client. Optimistic lawyers often invite the potential for legal malpractice claims. This frequently occurs during the initial client intake consultation. During client intake, the lawyer's desire to get the business leads him to opine optimistically as to the value of the case in terms that the client wants to hear. This can come back to haunt even the most experienced lawyer. Lawyers are advised to respond to the frequently asked question "What's the case worth?" with nothing but the most conservative estimate, all the while couching that estimate in the reality that all cases proceed differently and anything can happen.

Keep the client informed of the status of his case by showering him with paperwork. Send the client a copy of all meaningful correspondence, including memoranda, pleadings, and briefs. If the case is dormant, send the client a letter explaining why there is no activity. Return all phone calls promptly, at least within twenty-four hours. Be on time for meetings and keep a neat office environment. Protect client confidentiality and train your staff to do the same.

Don't procrastinate. Delay is usually found in every legal malpractice claim. Moreover, while it sounds simplistic and perhaps unattainable, do not leave any file in your office unattended. It is the neglected file, more than any other, that probably needs your attention and that may result in a subsequent legal malpractice claim.

Above all else, choose your clients wisely. Lawyers should look at their client-screening policies and decide if they need to say "no" more often to potential clients. According to the ABA, ineffective client screening is one of the major causes of legal malpractice claims. By declining to represent a "high-risk client" – one who is most likely to sue you and will never be satisfied with your hard work and effort - you could be avoiding a potential lawsuit in the future. "Red Flags" to look for are clients who have been rejected by other lawyers, or who have fired other lawyers in the case; clients who have unrealistic expectations; uncontrollable anger; or clients who have made claims against prior attorneys or other professionals. The general background of the client, financial condition, history of personal legal problems and business background of the client may also be relevant areas of inquiry when evaluating a potential client. Learn to trust your gut about potential clients.

Sometimes good client relations involve knowing when to terminate the attorney-client relationship. Lawyers sometimes think they are not free to fire a client. A wise lawyer once said, “Unless he had missed something, the practice of law is not involuntary servitude.” Indeed, it is not. If the representation is becoming unsatisfactory for either party, consider terminating the representation. You may have to seek permission from the court if you are attorney of record in the case, and you cannot prejudice your client by abandoning him, but in many cases, ending the attorney-client relationship is the thing to do to avoid a claim down the road. Just remember to do it courteously and document the withdrawal properly. Another wise lawyer once said, “The happiest day of my life was when I learned how to fire a client.” If your client requests their file or documents in their file, give it to him, but do not forget to keep a copy for yourself. At Lawyers Mutual, we occasionally have to request a copy of our insured’s file from the plaintiff because our insured has simply turned over his file to the client without keeping a copy. At worst, that is embarrassing. Finally, when you provide your client with his file, get a receipt noting the date and time and it was transferred to the client and stating that no further action will be taken by the lawyer on behalf of the client in the case.

**For more information on unbundling legal services and client relations, visit our website found at [www.lawyersmutualnc.com](http://www.lawyersmutualnc.com) and click on “client services/risk management resources/risk management handouts.”**

## **V. Inadequate Documentation**

Many malpractice claims against lawyers can be avoided or quickly resolved through careful documentation. Lawyers Mutual processes numerous claims each year where the client and attorney have different recollections about either the scope of the representation or the content of a conversation. Remember that if an event is not made a part of the written file, an argument can be made later by the client that it never happened. When the client says the lawyer told him one thing and the lawyer says another, the only available options are to try the case or reach a settlement. If we try the case, we run the risk that the jury will believe that the attorney is lying to cover up his negligence. The attorney may be right, but without adequate documentation to support his version of events, it is usually less costly to go ahead and settle a claim than to defend the lawyer’s integrity. Keep copious notes. An attorney who extensively documents client communications and events related to the matter provides himself with substantial evidence in defense of his competence, but he also does much to avoid a legal malpractice claim in the first place. In addition, use certified mail, faxes, registered mail or overnight delivery services when it is necessary to document important decisions in the case.

- 1) Failure to Use Engagement, Disengagement, and Nonengagement Letters

All too often attorneys enter into an agreement to represent a client without documenting in writing the scope of the representation. In these cases, a misunderstanding may later arise between the client and the attorney as to what matters the attorney agreed to undertake.

In other cases the attorney concludes service to the client but fails to send the client a disengagement letter documenting the termination of the attorney-client relationship. Representation may cease, for example, because the client informs the attorney that he has insufficient resources to continue the matter. Unfortunately, if the attorney fails to send the client a letter memorializing this understanding, the client may later allege that the attorney failed to follow up on the case before the expiration of the statute of limitation.

**The disengagement letter provides powerful evidence of the date the attorney-client relationship terminated. If a legal malpractice claim is later filed, this evidence is important for purposes of establishing the date the statute of limitation began to run.**

Whenever an attorney declines to represent a prospective client or when a prospective client decides he does not want to pursue the matter further, it is important for the attorney to send the client a nonengagement letter documenting the fact that an attorney-client relationship does not exist. This letter will protect the attorney in the future if the prospective client brings suit alleging that the attorney was supposed to be handling the case and neglected to do so.

**For more information on client engagement, nonengagement, and disengagement letters, visit our website found at [www.lawyersmutualnc.com](http://www.lawyersmutualnc.com) and click on “client services/risk management resources/risk management handouts.”**

## 2) Failure to Document the Client’s Instructions

Another error attorneys commonly make is failing to document all advice given to the client. For example, in one malpractice claim a real estate lawyer discovered the day before closing a transaction that an easement ran through the property his client intended to purchase. The lawyer notified the client that an easement existed and warned that the easement owner could build a road through the property. The client told the lawyer not to worry about it because no path or road existed on the property. The client wanted to go ahead and make the purchase despite the warning, so, at the client’s request, the lawyer went ahead and closed the transaction. Sure enough, sometime later the easement owner decided to build a road running right through the property. The client then pointed the finger at his lawyer, alleging that he never informed him that an easement existed on the property.

The lawyer had nothing but his word to support his assertion that he had in fact told the client about the easement. A dated letter sent to the client, with receipt acknowledged, could have avoided the headache and cost of a malpractice claim.

Don't settle or agree to settle a client's case without specific authority from the client. Document the authority to settle. One of the most common mistakes we see at Lawyers Mutual is lawyers substituting their own judgment for their client's on decisions that are wholly the clients to make (with the lawyer's assistance, of course). In other words, don't forget whose case it is! Whether or not to settle, and for how much, is the client's decision to make. A lawyer should discuss with his client whether to take a voluntary dismissal and should document that authority. It is a good idea to have the client sign the voluntary dismissal. Although the line between tactical decisions for the lawyer and proprietary decisions for the client may be gray, the lawyer should consult the client on all significant matters. Moreover, important discussions should be memorialized in writing for the client's understanding and to record the lawyer's compliance. Lawyers Mutual receives a number of claims every year from claimants asserting that their lawyer took actions in their case that they, the clients, did not authorize.

**The attorney should document all conversations with the client and opposing counsel. Written documentation is powerful evidence that can be used to defend or resolve allegations of legal malpractice.**

## **VI. Conflicts of Interest and Conflicts of Matter**

An attorney may not serve two masters. Claims arising out of conflicts represent an increasing area of malpractice. If a conflict of interest or matter exists before an attorney undertakes representation or develops after representation commences, the attorney must respectively decline or withdraw from representation. Every attorney should be familiar with Rules 1.7, 1.8, 1.9, and 1.10 of the Revised Rules of Professional Conduct. If you are unsure whether a conflict exists, you should contact the State Bar and request their advice.

**It is imperative for every law office to maintain a good conflicts system and for all staff and members of the firm to utilize it.**

A conflict of interest arises when there is a chance of influence on the attorney-client relationship that may affect the attorney's (1) duty of loyalty to the client, (2) duty to render independent judgment to the client, or (3) duty to protect the client's interests.

Conflicts are most likely to result in a malpractice claim when the attorney (1) represents more than one person on the same matter; (2) has a personal interest, other than professional fees, in the matter she is handling on behalf of the client; (3) represents one client against another client; or (4) represents one client against a former client. To identify and avoid conflict situations, every law office should have a conflict checking system, whether it is manual or computerized.

Under certain circumstances the Revised Rules of Professional Conduct permit an attorney to undertake a matter even though a conflict exists. However, the attorney is required to comply with certain safeguards, which include getting the consent of the parties involved and obtaining a formal written waiver. It is important to note that simply obtaining a client's permission to proceed after disclosure of a conflict may not be sufficient to relieve the attorney of potential disciplinary action or civil liability. Consentability is typically determined by considering whether the interests of the client will be adequately represented if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. Comment [15] to Rule 1.7 of the Revised Rules of Professional Conduct.

In any case, obtaining the client's consent to proceed in spite of a conflict does not always insulate the attorney from a malpractice claim. Although the client initially agrees to the representation, the client may nevertheless later accuse his attorney of treating him unfairly. The client may feel that the lawyer is unable to render independent advice due to the perceived influence caused by the conflict of interest.

**It is advisable to avoid all conflicts, regardless of whether the client consents to the representation after full disclosure. Don't take any case with even the slightest hint of a conflict of interest. Don't become personally involved with a client. This can often lead to conflicts of interest. Never go into business with a client; that is almost always an automatic conflict of interest. Visit our website [www.lawyersmutualnc.com](http://www.lawyersmutualnc.com) and click on "client services/risk management resources" and read the article on Conflicts of Interest.**

## **VII. Fee Disputes**

The practice of law is a highly competitive business. It is not uncommon for solo practitioners and attorneys in small law offices to undertake representation for a client on a "pay as you" go basis. Although it is good practice to obtain a trust deposit to cover legal services before they are rendered, many clients simply do not have the resources to pay in advance. Many attorneys would go out of

business if they demanded such deposits from all of their clients. Lawyers need to be explicit with clients about fees. Put everything in writing so there will be no misunderstanding later.

It is inevitable that sometimes a client will fail to pay his bill for legal services in a timely fashion or will simply refuse to pay because he is unhappy with the outcome of his case. In these circumstances, the lawyer may feel his only recourse is to sue the client for the cost of the unpaid services.

**Lawyer beware! A client who is sued for legal fees will often respond by filing a counterclaim for malpractice.**

Before you decide to sue a client for fees ask yourself the following questions:

1) **Is the amount collectible?**

You cannot get blood from a turnip, and you cannot get fees from a client who is broke. You might get a judgment against the client, but you will probably also find yourself defending a malpractice suit.

2) **Is the amount substantial?**

Is the amount of money owed significant enough to cover the costs, loss of reputation, time, and aggravation associated with a malpractice suit? If not, you may be better off letting it ride and claiming the tax deduction.

3) **Did you obtain a good result for the client?**

If not, it is more likely than not that the client will blame you. The jury hearing the malpractice suit might think that you not only failed to do a good job for the client, but that you are greedy as well. As the public becomes increasingly cynical about the legal profession, it is less likely that jurors will sympathize with an unpaid lawyer who sues his client for fees after an unfavorable result.

4) **Has another attorney gone through the file to see if there are any weak links that could lead to a malpractice claim?**

If you are going to take a chance on being sued for malpractice, you will want to be sure that you can argue that the counterclaim for malpractice is without merit. An independent peer review can help you decide whether the attorney fees are worth pursuing in light of the risk.

If, after answering these questions, you still decide to pursue a lawsuit against your client, you must first comply with Rule 1.5 of the Rules of Professional Conduct regarding the State Bar's program of fee dispute resolution.

### **VIII. Practice Outside of Jurisdiction or Expertise**

It is difficult to turn away a client when you need the business. However, practicing outside your jurisdiction or area of expertise is an easy way to invite a malpractice claim.

#### 1) Out of State Claims

Every year Lawyers Mutual receives numerous claims resulting from a missed statute of limitation in another jurisdiction. What usually happens is that a resident of North Carolina is injured in a car accident in another state and hires a North Carolina attorney to negotiate a settlement with the tortfeasor's insurance carrier. The attorney erroneously applies the North Carolina statute of limitation date to the accident that occurred in another state. The attorney does not realize that although North Carolina has a three-year statute of limitation for personal injury actions, the foreign state only has one year. Settlement is not reached within the applicable statute of limitation period, a lawsuit is never filed, and the client seeks to recover his damages from his attorney.

If you choose to undertake a case in a foreign jurisdiction, request an opinion letter from an attorney in that state as to the applicable statute of limitation period. Be sure and docket the proper filing date. If this is done, you will have discharged your due diligence requirement and will be able to shift responsibility to someone else if an error is made. You should expect to pay for the attorney's services. If you feel the claim does not warrant the payment of a fee for receiving this advice, the claim is not worth pursuing.

#### 2) Practicing Outside Area of Expertise

We have all been approached by a family member or friend who would like a little free or low-cost legal assistance. It can be difficult to say, "I'm sorry but I just don't practice in that area, let me refer to you someone who does." The friend or family member may not be able to afford the services of a lawyer or may just feel entitled to have you take care of the matter as a favor. Agreeing to assist someone with a case that is outside of your practice area, even if done for little or no cost, will not relieve you of your duty to use reasonable care when representing the client. If you are not familiar with workers' compensation, do not agree to handle a claim in that area, even for a friend. If you have never practiced family law, do not let your sister talk you

in to handling her divorce. If you have never handled a medical malpractice case, do not take one just because you successfully represented the client with his traffic violation. At least do not attempt to do it alone. When the client loses money because of a mistake you made in handling the case, he is not going to care that it was your first case of that kind or that you were only doing him a favor and did not charge him anything. He is only going to expect you to make good on his losses.

Rule 1.1 of the Professional Rules of Conduct prohibits a lawyer from handling a “legal matter which the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter.” **By taking cases you are not competent to handle, you may be exposing yourself to a malpractice suit and professional discipline.** Either refer the potential client to someone else or obtain the client’s permission to associate counsel.

## **IX. Breach of Fiduciary Duty to Third Party**

An increasing number of malpractice claims involve a breach of fiduciary duty to a non-client. These cases arise most often in the context of estate planning, but they may arise in any situation where the lawyer has a duty to protect the interests of a third party.

In some cases the client may pressure the lawyer in to doing something that results in a breach of fiduciary duty. Although the client is in charge of making the final decisions about his case, the lawyer has a responsibility to refuse to follow a client’s instructions if those instructions will result in the lawyer committing professional misconduct or violating the law.

### 1) Estate Planning

Lawyers Mutual handled a breach of fiduciary claim that had its origins in the insured providing limited legal assistance to a client who appeared to be unable to afford adequate representation. The lawyer met with an elderly client at the residence of one of her relatives. The relative lived in a mobile home with modest accommodations.

The client asked the lawyer to draft a will that would provide her children with some money during their lifetimes, with the remainder ultimately going to the grandchildren. The lawyer explained to the elderly client that she would need to set up a trust that would give the income to the children while they were alive and leave the corpus to the grandchildren. He told her he could set up this trust for a fee of one thousand dollars. The elderly client said she could not afford such an exorbitant fee and asked the lawyer to just write

up something for her so she could prepare her own will. The lawyer and client agreed that he would do this for one hundred dollars, all that the client could apparently afford.

The lawyer proceeded to give the client a few standard trust forms to fill out and told her to put her name on every form and to delete any paragraphs she did not want. The client agreed. When the client later died it was discovered that her estate was worth seven million dollars! The will was submitted to probate, and the clerk of court could not make heads or tails of what the elderly client had intended. The trust that was supposed to be set up for the grandchildren was ineffective, and the assets consequently passed directly to the children. The grandchildren, who had been told by the elderly client of their anticipated fortune, sued the lawyer for their losses.

## 2) Medical Provider Liens

Recent case law makes it clear that an attorney who fails to protect a valid medical lien in accordance with N.C. Gen. Stat. § 44-50 can be held liable for the medical provider's losses. See Triangle Park Chiropractic v. Battaglia, 139 N.C. App. 201, 532 S.E.2d 833 (2000), review denied, 352 N.C. 683, 545 S.E.2d 728 (2000) N.C. Gen. Stat. § 44-50 imposes a duty on attorneys who collect personal injury settlements to protect liens asserted by medical providers. A lien is perfected under N.C. Gen. Stat. § 44-49 when the attorney requests and receives without charge medical records AND a written notice to the attorney of the lien claimed. In cases where the amount demanded for medical services is in dispute, however, the attorney is not compelled to make payment on the claim until the dispute is resolved. See N.C. Gen. Stat. § 44-51. Since this area of the law is particularly complicated, you should take time to familiarize yourself with the relevant statutory sections and case law.

## **X. Inadequate Research and Investigation**

According to the ABA, substantive errors account for 46% of all malpractice claims. Lawyers are sued for malpractice because they (1) failed to know or properly apply the law, (2) failed to know or ascertain deadlines, or (3) conducted inadequate discovery or investigation. There is no substitute for careful and comprehensive legal research. The state of the law is constantly in flux and every lawyer has a duty to keep up with changes in the law that affects the cases he undertakes. If uncertainty about a point of law exists, consult an expert. If you are not sure how to proceed, contact an attorney with more experience. Attend seminars, join the section of the bar that addresses your area of practice, and attend CLE seminars (even if you do not need the credits).

A common preventable error resulting from a lack of adequate research is in the area of personal injury claims arising out of automobile accidents. For example, the client is in a wreck and there is a \$ 25,000 limit on the defendant's auto insurance. Since the client has \$100,000 worth of damages, the defendant's carrier readily issues a check for the limits of the policy, \$25,000. The lawyer neglects to investigate whether any other coverage exists. The client later learns that he could have recovered an additional \$75,000 from his own insurance policy that included underinsured motorist ("UIM") coverage. By then it is too late because the lawyer did not properly preserve the UIM claim.

In addition, do not begin a lawsuit without doing a thorough investigation of the claim. Even well meaning clients can state "facts" that are not true. It is better to learn the holes in the client's story before you begin a lawsuit than after.

Faced with an unsatisfied client, or worse yet service of a complaint for legal malpractice, the first reaction of many attorneys will be to contact their former client in an attempt to remedy what must surely be just a misunderstanding. This is often the attorney's first mistake in dealing with a claim for legal malpractice. Once the client threatens or files a claim for malpractice, an important change has occurred in the relationship. While good client communications is important in preventing malpractice claims, once a claim is threatened or filed, further communication with the client can do more harm than good. For example, communications with a disgruntled client are not privileged. Anything you say can and will be used against you. Honest attempts to cure what must surely be a simple misunderstanding can become testimonial nightmares when brought out later in a malpractice trial. It is essential that the attorney seek outside help in dealing with this situation. The best place to turn is to your professional liability insurance carrier. We have the expertise and resources to assist you in responding appropriately to first notice of a claim or potential claim.

## I Made a Mistake. What Now?

### DON'T MAKE IT WORSE!

After instituting appropriate risk management practices and procedures, even the most competent, diligent attorneys may still make a mistake. Fortunately, most attorney mistakes are minor, resulting in little consequence to the client. There also may be ways to remedy the mistake before the client is adversely affected. However, when a material mistake does occur, many attorneys make matters worse by mishandling the matter with their client or their professional liability insurer. The potential consequences of mishandling a material mistake may subject an attorney to significant consequences such as: 1) disciplinary proceedings at the State Bar; 2) additional causes of action (beyond mere negligence) and damages in a legal malpractice claim; 3) fee disgorgement; and 4) potential loss of coverage under your malpractice policy. Of course, all the attorneys here want to behave ethically and avoid these outcomes, so what should an attorney do after discovering that a mistake may adversely affect a client?

#### **I. Ethical Considerations to Client**

After becoming aware of a mistake that may prejudice your client's interests, you should first remember your ethical obligation to keep the client apprised of information that is material to the representation. Rule 1.4 of the N.C. Rules of Professional Conduct requires a lawyer to "keep the client reasonably informed about the status of the matter." Comment 3 clarifies further that the client be kept abreast of "significant developments affecting the timing or the substance of the representation." Certainly, any actual material mistake by the lawyer is a significant development that affects the representation and should be discussed with the client as soon as practicable after learning of the circumstances.

Additionally, an attorney must always remember that his client's interest is paramount to his own interest. A lawyer should not withhold information from a client to serve the lawyer's own interest (N.C. Rules of Professional Conduct R 1.4, Comment 7), and the lawyer must avoid impermissible conflicts of interest. A "conflict of interest exists if . . . the representation of one or more clients may be materially limited . . . by a personal interest of the lawyer." N.C. Rule of Professional Conduct R 1.7(a)(2). Therefore, if you continue to represent and advise your client without adequate disclosure of your mistake, assuming it is a material mistake, you are likely to run afoul of Rule 1.7 due to the possibility that your representation is limited by your own person interest, *i.e.* avoiding a malpractice claim against yourself.

If you know that you have made a material mistake that cannot be fixed, you should **promptly inform the client of the mistake and tell them that due to a conflict of interest you may no longer advise him on the subject of your representation.** You should also tell the client that he may have a malpractice claim against you, and that he should seek independent legal advice regarding his rights. Do not give the client any further advice on the case or its value. You may also tell your client you have informed Lawyers Mutual of the matter, and that the client may call us if he wants to make a malpractice claim.

Of course, if a mistake is correctable or has no real effect on the client's interests, there is no conflict of interest between the lawyer and the client. Should you be unsure whether the mistake has created a conflict of interest with your client, **make sure to contact Lawyers Mutual immediately so that we can advise you under our claims repair program.** For instance, service problems are often correctable and default judgments may be set aside for excusable neglect. With a prompt and effective claims repair effort, such problems may get corrected and get your client's matter back on course. Lawyers Mutual frequently engages outside claims repair counsel to assist our insureds and their clients with pleadings, motions, hearings, and appeals where it appears that a mistake may be fixed.

In determining whether an attorney mistake creates a conflict of interest with his client, the attorney should ask herself whether there is a real likelihood that the mistake will result in a malpractice claim by the client against the attorney. Relevant factors to this question are whether it is clear-cut that the attorney was negligent, whether the error can be fixed, and whether the potential consequences to the client might be severe. Furthermore, if a client has threatened to sue you, there is a clear conflict, and you must immediately withdraw.

When informing your client that you may have made a mistake, keep in mind that the ethics rules prohibit a lawyer from settling a legal malpractice claim "with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel in connection therewith." N.C. Rules of Professional Conduct R 1.8(h)(2). This may often come up when a disgruntled client says to an attorney that the client is inclined to sue for malpractice unless the attorney returns or gives up a fee. If the attorney agrees to do so without meeting the ethical requirements of Rule 1.8(h)(2), it may not only result in an ethical violation, but also add fuel to the fire in a subsequent malpractice claim.

If the mistake is one that requires you to withdraw as counsel due to the conflict of interest with your client, you should also provide your client with their file, **keeping a copy for yourself.** N.C. Rules of Professional Conduct R. 1.16(d) says that a lawyer "shall 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 the rule specifies as follows:

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

You also should keep your notes and correspondence from communications with Lawyers Mutual claim staff about reporting the potential legal malpractice claim separate from your client's file. Your correspondence with Lawyers Mutual is yours, not your client's.

## **II. Mishandling a Mistake May Result in Disciplinary Proceedings, Increased Damages, and Fee Disgorgement**

A review of the N.C. State Bar Journal's monthly announcements of attorney discipline illustrates the severe disciplinary consequences to an attorney who mishandles a mistake in violation of the ethics rules. Attorneys have been disciplined for hiding their mistakes from clients, lying about the mistakes to clients, and misappropriating funds to cover their mistakes. Newsworthy instances of such attorney conduct in North Carolina include an attorney whose negligence resulted in the dismissal of several client cases that he subsequently covered up by telling the client that he had settled the cases for them. Of course, he had done no such thing, and the money for the "settlements" was misappropriated from other clients' funds. While such egregious conduct is clearly unethical, sticking your head in the sand after discovering a mistake and failing to inform your client may rise to an ethical breach also.

Beyond the potential for discipline from the State Bar, mishandling duties to the client after discovering a mistake may also result in increased malpractice exposure for the attorney. A client who is promptly informed of a mistake and dealt with honestly may decide not to pursue a legal malpractice claim, especially if there is a good history with the attorney. At Lawyers Mutual, we frequently see potential claims that never materialize because of the honesty of the attorney with his client and the good will the attorney established with the client in prior representations. However, when a client discovers that his attorney has not been

honest about making a mistake, the likelihood of the client suing for malpractice is increased tremendously.

Obviously, evidence that the attorney was hiding things from a client is also red meat for a legal malpractice attorney before a jury. Evidence that an attorney was not forthcoming about a mistake with his client can inflame a jury, especially given the public misperception of attorneys already existing. Many times this evidence will be presented by an expert in legal ethics who opines on all the ways the defendant-attorney violated the ethics rules.

Equally serious may be the increased damages and theories of liability that are opened up where an attorney mishandles his duties after making a mistake. Mere negligence may turn into claims for double damages for breach of fiduciary duty and punitive damages where such claims would not otherwise exist except for the attorney's post-mistake conduct. Some jurisdictions have held that emotional distress damages may be recoverable for post-mistake misconduct of the attorney that rises to a breach of fiduciary duty. Not only will these types of claims increase the damages in a legal malpractice case, but they are likely excluded from coverage under your malpractice insurance policy.

Breach of fiduciary duty may also give rise to a claim for disgorgement or forfeiture of fees. For example, in Booher v. Frue, 86 N.C. App. 390, 358 S.E.2d 127 (1987), the North Carolina Court of Appeals recognized a claim for constructive trust against an attorney for disgorgement of a fee where the Court found that an attorney was unjustly enriched based on a breach of fiduciary duty to the client. Again, the potential damage to an attorney from such a claim is magnified because legal malpractice insurance policies typically exclude coverage for claims seeking reimbursement of a fee.

Hiding a mistake from your client may also toll the statute of limitations on a legal malpractice case against you. Typically, the statute of limitations on a legal malpractice claim is three years and starts to run on the date of the "occurrence of the last act giving rise to a cause of action". N.C. Gen. Stat. § 1-15(c). However, if the lawyer is not forthcoming with the client about the mistake, the statute of limitations may be extended as much as one additional year, depending on when the client finally learns of the mistake. N.C. Gen. Stat. § 1-15(c) does contain a four-year statute of repose that states that no professional malpractice claim may be brought more than four years after the last act giving rise to the cause of action.

### **III. Call Lawyers Mutual Promptly and Report a Potential Claim**

You purchased legal malpractice insurance to protect yourself from personal monetary liability for your mistakes. Make sure that you do not jeopardize such coverage by failing to give prompt notice of a claim to your legal malpractice insurer. One of the most common consequences of trying to hide a mistake or just hoping that it will magically go away is that an attorney will fail to give timely and proper notice of the claim to the insurance company. Such delay may jeopardize your coverage for an otherwise covered claim under your policy.

For instance, your Lawyers Mutual policy is a “Professional Liability Claims-Made Policy” that provides that Lawyers Mutual will pay money damages you become legally obligated to pay as a result of your rendering of legal services while licensed to practice law. As a claims-made policy, only claims that are first made to the company during a policy year will be covered. Therefore, regardless of when an attorney mistake occurs, if a claim is first presented to Lawyers Mutual after a policy has expired there most likely will be no coverage.

Furthermore, every year when you apply for a re-issue of your professional malpractice policy you are responsible to report any potential claim of which you are aware. Failure to do so may result in loss of coverage for a claim that is first presented to the insurance company after the effective date of the new policy year if that claim should have been reported on the application or during the prior policy year. Just because you think that you may be able to fix a mistake does not mean that you do not have to report it to your insurer. If you have reason to think that you breached a professional duty to your client, then you most likely have reason to foresee that such breach could be the basis for a malpractice claim against you.

Promptly reporting mistakes to your professional liability insurer will avoid any uncertainty about timeliness of the claim under your policy. Prompt reporting to Lawyers Mutual may also result in a **claims repair** opportunity that remedies the situation before a malpractice claim by the client. Remember that the Lawyers Mutual claims attorneys and the outside counsel that we employ have extensive experience in claims repairs that fix attorney errors and mitigate damages to the client from those mistakes. We work with our insured attorneys everyday in claims repair efforts both large and small.

### **IV. Cooperate in Your Defense and Be a Good Client**

After you have reported a claim to Lawyers Mutual, our claims staff will ask you to provide us with a written narrative that summarizes the nature of your representation of the client and the circumstances of the mistake. More than likely, we will also ask you to provide us with a complete copy of your file so

that we may conduct our investigation and determine whether the claim has merit. It is important for you to provide us with the information and materials we request in a prompt manner so that we may determine as soon as possible whether there is a chance for a successful claims repair or mitigation of damages that might be lost after a delay.

Providing the necessary information to Lawyers Mutual quickly also allows us to evaluate claims and determine whether there is a good prospect for settling the matter earlier and before incurring defense costs. In many claims, our claims counsel are dealing directly with your former clients who may want to avoid hiring another attorney if the claim can be settled without litigation. If our claims attorneys cannot adequately investigate and evaluate the claim due to an attorney's delay in providing the requested file, the likelihood that the case will settle before a malpractice suit is filed is greatly diminished.

Should Lawyers Mutual retain defense counsel to defend you against a legal malpractice action, please remember that you are a client of that attorney, and treat him or her as you would want to be treated by your clients. You best assist in your defense by fully disclosing all available information to your defense counsel and promptly responding to his requests. As a lawyer, you know what makes a good client and what makes a difficult client, so act accordingly.

Finally, a legal malpractice defendant frequently has experience and training that may be valuable to Lawyers Mutual's claims staff and your defense counsel when investigating and evaluating a claim. The lawyer-defendant usually knows the former client better than claims staff or defense counsel and may also have expertise in the area of law for which he or she is being sued. Your insight into the substance of the claim against you may be very helpful in reaching a determination of the validity and value of a claim.

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