

4-1-1991

## Malpractice and Ethical Considerations

Frances Patricia Solari

Follow this and additional works at: <https://archives.law.nccu.edu/ncclr>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

---

### Recommended Citation

Solari, Frances Patricia (1991) "Malpractice and Ethical Considerations," *North Carolina Central Law Review*: Vol. 19 : No. 2 , Article 4.  
Available at: <https://archives.law.nccu.edu/ncclr/vol19/iss2/4>

This Article is brought to you for free and open access by History and Scholarship Digital Archives. It has been accepted for inclusion in North Carolina Central Law Review by an authorized editor of History and Scholarship Digital Archives. For more information, please contact [jbeeker@nccu.edu](mailto:jbeeker@nccu.edu).

## MALPRACTICE AND ETHICAL CONSIDERATIONS\*

FRANCES PATRICIA SOLARI†

*"What is left when honour is lost?"*

Publilius Syrus

Maxim 262

[Circa 42 B.C.]

*"Honesty's the best policy."*

Miguel de Cervantes

[1547-1616]

From Don Quixote

Part II, Book III, Chap.

32

*"Do the right thing."*

Spike Lee

1989

### I. INTRODUCTION

The Preamble to the North Carolina Rules of Professional Conduct provides, "[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. . . . [The Rules] are not designed to be a basis of civil liability." In a legal malpractice action, the plaintiff is not required to prove that the defendant attorney violated the North Carolina Rules of Professional Conduct,<sup>1</sup> nor will such a showing alone give rise to a cause of action.

The converse, however, is not true. When a lawyer has acted negligently in representing his client such that the client has a cause of action

---

\* This paper was originally presented as a manuscript for one portion of a CLE program entitled "Legal Ethics" presented at NCCU School of Law on March 30, 1990.

† J.D. & M.L.S. NCCU, Assistant Dean for the Evening Program and Assistant Professor, NCCU School of Law.

1. The North Carolina Code of Professional Responsibility was adopted in 1974. It consisted of canons (statements of axiomatic norms), ethical considerations (objectives, aspirational in character), and disciplinary rules (mandatory, violation of which led to disciplinary proceedings). Following several amendments to the Code, the North Carolina Rules of Professional Conduct (hereinafter N.C. Rules) were promulgated in 1985 and superseded the earlier Code.

The House of Delegates of the American Bar Association adopted the American Bar Association's Model Rules of Professional Conduct (hereinafter Model Rules) on August 2, 1983. The forerunner to the Model Rules was the American Bar Association Code of Professional Responsibility (hereinafter Model Code). The Model Code was divided into canons, ethical considerations (EC's) and

against the lawyer for malpractice, the lawyer has almost invariably violated the Rules of Professional Conduct.<sup>2</sup> If nothing else, he has failed to represent his client competently as required by Canon VI of the North Carolina Rules.

Many ethical considerations arise in the area of legal malpractice; from those concerning attempts to avoid malpractice claims to those concerning how to deal with malpractice once it has occurred. These considerations will be addressed throughout this article. Related topics such as breach of fiduciary duty, maintenance of trust accounts, overzealously representing a client, concealing evidence, and excessive attorney's fees are beyond the scope of this article and therefore will not be addressed, except as they relate to malpractice and ethical considerations.

By way of introduction, the issue of what constitutes legal malpractice was definitively decided by the North Carolina Supreme Court in 1954 in *Hodges v. Carter*.<sup>3</sup> The court, in a much quoted passage, said:

Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action on behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.

An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed attorneys.

Conversely, he is answerable in damages for any loss to his client

---

disciplinary rules (DR's). The Model Rules consist only of the rules themselves and the official comment.

Although the N.C. Rules are in large part patterned after the Model Rules, the N.C. Rules include both canons and rules.

"CPR" signifies an ethics opinion rendered while the N.C. Code was in force. "RPC" signifies an ethics opinion rendered after the adoption of the N.C. Rules.

2. For detailed listings of cases dealing with an attorney's negligence, inattention or professional incompetence as grounds for disciplinary action, see the following A.L.R. annotations: 69 A.L.R.4th 410 (1989) (criminal matters); 68 A.L.R.4th 694 (1989 & Supp. 1989) (personal injury or property damage actions); 67 A.L.R.4th 415 (1989 & Supp. 1989) (family law matters); 66 A.L.R.4th 342 (1988 & Supp. 1989) (estate or probate matters); 66 A.L.R.4th 314 (1988 & Supp. 1989) (tax matters); 65 A.L.R.4th 24 (1988 & Supp. 1989) (matters involving real-estate transactions); 63 A.L.R.4th 656 (1988 & Supp. 1989) (matters involving formation or dissolution of business organization); 21 A.L.R.4th 76 (1983 & Supp. 1989) (delay in handling decedent's estate); 92 A.L.R.3d 655 (1979 & Supp. 1990) (conduct of attorney in capacity of executor or administrator of decedent's estate); 45 A.L.R.2d 5 (1956, Later Case Service 1980 & Supp. 1990) (preparing or conducting litigation).

3. 239 N.C. 517, 80 S.E.2d 144.

which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care.<sup>4</sup>

In a legal malpractice case, the plaintiff has the burden of proving "by the greater weight of the evidence: (1) that the attorney breached the duties owed to his client, as set forth by *Hodges*, and that this negligence (2) proximately caused (3) damage to the plaintiff."<sup>5</sup>

Once a plaintiff client has established a valid malpractice claim against his attorney,<sup>6</sup> he has also established the attorney's violation of one or more Rules of Professional Conduct.<sup>7</sup> It is not necessary to prove that the attorney acted willfully or dishonestly in order to establish an ethical violation.<sup>8</sup> "It is well settled that an attorney's negligence, inattention, or incompetence in connection with handling the legal affairs of a client is a ground for disciplinary action, even if the conduct was neither willful nor dishonest."<sup>9</sup> Once a violation is brought to the attention of the appropriate disciplinary or investigatory committee of the state bar, and that committee determines that a violation has occurred, the only question remaining is what discipline will be imposed.

Discipline imposed for negligence in handling a client's affairs has ranged from disbarment to suspension to censure.<sup>10</sup> Generally, the level

4. *Id.* at 519-20, 80 S.E.2d at 145-46 (citations omitted).

5. *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985) (citations omitted).

6. "The most frequent [malpractice] claims arise from blown statutes and notices, failure to communicate an offer, alleged inadequate settlement and dismissal for want of prosecution. Referral and withdrawal disputes are close behind." Gary A. Grasso, *How to Keep Your Clients From Suing You*, 75 A.B.A. J. 98, 98 (1989). While many persons may believe the high-risk areas for malpractice claims are business and tax related, "[p]robably no area of legal work has more, or deeper, malpractice risks than the divorce and child-custody specialties." *Id.* at 102.

7. *E.g.*, N.C. Rule 6(B)(3) requires an attorney to "[a]ct with reasonable diligence and promptness in representing the client."

8. However, courts have occasionally said that simple negligence is not enough to constitute a violation of a disciplinary rule. *See, e.g.*, *Gould v. State*, 99 Fla. 662, 127 So. 309 (1930). In reversing an order of disbarment, the Supreme Court of Florida said:

Malpractice is a broad term. It embraces every character of unprofessional conduct from a petty trespass to a high crime. It may be either willful, negligent, or ignorant. It would be a severe remedy to disbar an attorney for carelessness, inattention to duty, ignorance of his client's rights, and the remedies to enforce them, or even for an occasional equivocation in an effort to appear better informed and more alert than his client suspects, as it would be a precarious thing to accept the version which a disappointed and covetous client might give of his attorney's knowledge, activity, and character in the management of a case resulting in failure.

*Id.* at 673, 127 So. at 313.

9. Annotation, *Negligence, Inattention, or Professional Incompetence of Attorney in Handling Client's Affairs in Estate or Probate Matters as Ground for Disciplinary Action—Modern Cases*, 66 A.L.R.4th 342, § 2 (1988) (citing 7 Am. Jur. 2d, *Attorney at Law*, § 56 (1980)). The annotation references Model Code DR 6-101(A)(1)-(3).

10. *See* 66 A.L.R.4th 342, 348-49. *See, e.g.*, *People v. James*, 180 Colo. 133, 502 P.2d 1105 (1972), cited in 66 A.L.R.4th at 350. The attorney in *James* had two prior private censures and a one year suspension from practicing law. A 75 year old client hired the attorney to prepare a will

of discipline imposed will depend on the facts and circumstances of each individual case. The North Carolina Rules of Professional Responsibility "presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations."<sup>11</sup> Cases interpreting various rules of professional conduct have developed several factors that may serve to mitigate or aggravate the offense and therefore impact on the discipline imposed.

Mitigating factors, those which would tend to lessen the discipline imposed, include lack of a prior disciplinary record, "personal problems or financial difficulties of an attorney, health problems of the attorney or the attorney's spouse, the attorney's psychological problems, the absence of any intent by the attorney to profit financially from the misconduct involved, the attorney's payment of, or willingness to pay, restitution, and the attorney's remorse."<sup>12</sup> The most common mitigating factor appears to be the attorney's state of mind. Although the attorney's mental condition is never a complete bar to disciplinary action, it may serve as a mitigating factor to reduce the severity of the penalty imposed.<sup>13</sup>

On the other hand, aggravating factors, those that would tend to increase the discipline imposed against the negligent attorney, include prior violations of the ethical rules,<sup>14</sup> ignoring the client's requests for information,<sup>15</sup> the loss suffered by the client,<sup>16</sup> and misrepresentation to the cli-

---

which the attorney failed to do during an eight month period despite repeated attempts on the part of the client to contact the attorney. The Colorado court found the attorney's actions amounted to gross negligence and ordered disbarment, rejecting the recommendation from the grievance committee that the attorney be indefinitely suspended. *Id.* at 134-35, 502 P.2d at 1106.

11. N.C. Rules Preamble: Scope.

The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation.

*Id.*

12. 66 A.L.R.4th at 349-50. For a discussion of substance abuse as a mitigating factor, see *infra* text accompanying notes 28-41. See also Annotation, *Mental or Emotional Disturbance as Defense to or Mitigation of Charges against Attorney in Disciplinary Proceeding*, 26 A.L.R.4th 995 (1983 & Supp. 1989).

13. 26 A.L.R.4th at 1000.

14. 66 A.L.R.4th at 350.

15. Annotation, *Negligence, Inattention, or Professional Incompetence of Attorney in Handling Client's Affairs as Ground for Disciplinary Action*, 96 A.L.R.2d 823, 843-45 (1964), superseded by 70 A.L.R.4th 786; 69 A.L.R.4th 410; 68 A.L.R.4th 694; 67 A.L.R.4th 415; 66 A.L.R.4th 342; 66 A.L.R.4th 314; 65 A.L.R.4th 24; 63 A.L.R.4th 656; 21 A.L.R.4th 75; 92 A.L.R.3d 655.

16. 96 A.L.R.2d 823, 848-50. Such a loss can be financial or can be the loss of rights, such as may occur upon entry of a default judgment. Other rights that may be lost include the right to a cause of action when the attorney misses the statute of limitations and the right to appeal when the attorney misses a deadline in the appellate process, such as filing the notice of appeal or record on appeal. *Id.* Note, however, that attorneys have been subject to discipline even when the client suffered no loss. See cases cited *id.* at 850-51.

ent or to the court regarding the status of a matter for which the attorney was retained to represent the client.<sup>17</sup>

Unlike malpractice actions, there is no statute of limitations for disciplinary proceedings. In *North Carolina State Bar v. Temple*,<sup>18</sup> the attorney was accused of trafficking in counterfeit money, fraudulently procuring the signature of a witness to a will after the testator's death, presenting fraudulent affidavits to the clerk of court, and fraudulently altering and recording a note and deed of trust payable to the attorney. A disciplinary action was commenced against the attorney four years after the alleged offenses.<sup>19</sup> The attorney argued to the court of appeals that the disciplinary proceedings should be dismissed based on the statute of limitations. The court responded:

The plea of the statute of limitations is not available to respondent . . .

[I]t is said:

"Disciplinary proceedings are not barred by the general statute of limitations. Nor is a disciplinary proceeding barred because it is grounded on acts that also constitute a crime that cannot be prosecuted in a criminal action because of limitations."<sup>20</sup>

Disciplinary actions may be barred, however, when the attorney's due process or other rights are compromised because of a lengthy lapse of time.<sup>21</sup> In such a case, the attorney has the burden of proving that his due process rights have been compromised. The Illinois Supreme Court has held that a ten year lapse between the offense and the disciplinary proceeding did not bar the proceeding when the attorney failed to demonstrate that the delay materially prejudiced his ability to present a substantial defense to the charges.<sup>22</sup>

## II. AVOIDING MALPRACTICE LIABILITY

### *Accepting the Difficult Case*

Under Canon VI of the North Carolina Rules of Professional Conduct, "A lawyer should represent his client competently." Rule 6(A) provides, "A lawyer shall not: (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it. Competent representa-

17. 66 A.L.R.4th at 350-51. Misrepresentation may also constitute a separate offense for which discipline may be imposed in addition to that imposed for the attorney's negligence. *Id.* See also *infra* notes 42-53 and accompanying text (misrepresentation as separate offense).

18. 2 N.C. App. 91, 162 S.E.2d 649 (1968).

19. *Id.* at 92-94, 162 S.E.2d at 650-51.

20. *Id.* at 95, 162 S.E.2d at 652 (quoting 7 Am. Jur. 3d, *Attorneys*, § 62, p. 86, superseded by 7 Am. Jur. 2d, *Attorneys*, § 89, pp. 157-58 (1980 & Supp. 1990)).

21. See 7 Am. Jur. 2d, § 90, pp 158-84.

22. *In re Teichner*, 75 Ill. 2d 88, 387 N.E.2d 265, cert. denied, 444 U.S. 917 (1979).

170 NORTH CAROLINA CENTRAL LAW JOURNAL [Vol. 19:165]

tion requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

An attorney who accepts employment in a matter which she is not competent to handle without associating someone who is, not only violates Rule 6(A), but also sets herself up for a malpractice claim. This does not mean that an attorney should not accept a case simply because it involves an area of the law in which the attorney has no prior experience. If the attorney has adequately evaluated the case and the time required to handle it competently, she may accept the case provided she is able to give it the necessary time and attention. Many times, the attorney's diligent preparation can more than compensate for a lack of experience, and even under Rule 6, "[a] lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation."<sup>23</sup>

The best course of action for the lawyer is to carefully evaluate the case in light of her own knowledge, experience, and time constraints. The relevant factors in this evaluation are

the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.<sup>24</sup>

If the lawyer has some question about whether to accept a difficult case or one in an area of law in which the lawyer has little experience, it is wise to seek advice from more experienced attorneys. They will often be able to enlighten the more inexperienced lawyer on just how much time such a case may require and the likelihood of ultimate success. A number of local bars have mentor programs whereby more experienced attorneys provide assistance and guidance to new attorneys. Anyone interested in learning more about the mentor program in a particular district should contact that district's bar officers.

### *Contracting for Arbitration*

The question here is whether an attorney can include in a retainer agreement a provision that any dispute arising from the attorney's malpractice shall require arbitration. Although this precise question has not been addressed, two rules give guidance to the attorney contemplating using such a clause.

North Carolina Rule 5.4(A) provides,

A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to ex-

---

23. N.C. Rule 6 comment.

24. *Id.*

ercise his professional judgment therein for the protection of the client unless the client has consented after full disclosure. A lawyer shall not enter into a business transaction with a client under any circumstances unless it is fair to the client.

The comment to Rule 5.4(A) says that in transactions between client and lawyer, "a review by independent counsel on behalf of the client is often advisable."

A client's retainer of an attorney's services is a "business transaction," and a retainer agreement containing an arbitration clause would appear to be a transaction in which the lawyer and the client have "differing interests." If the lawyer negligently handled the matter for which he was retained, the client would have a claim against the attorney for malpractice. Once a malpractice claim arose, the lawyer's interest in keeping his liability for any alleged malpractice to a minimum (possibly by keeping the question out of the hands of jury) would conflict with the client's interest in receiving the fullest damage award to which he may be entitled. A client who entered a retainer agreement with a lawyer would certainly expect "the lawyer to exercise his professional judgment . . . for the protection of the client" within the meaning of Rule 5.4(A).

Nonetheless, if the client consents to the transaction after full disclosure, Rule 5.4(A) allows business transactions between the attorney and the client even when their interests conflict and even when the client expects the lawyer to exercise his professional judgment for the client's protection. An attorney who contemplates including an arbitration clause in the retainer agreement should fully discuss with the client all ramifications which may flow from an agreement to arbitrate. For example, the attorney should make it clear that if she negligently causes damage to the client, the client may have a claim against the attorney for malpractice but that under the arbitration clause, the claim would be decided by an arbitrator rather than by a jury.

ABA Model Rule 1.8(a), regulating business transactions with clients, permits such transactions only if the transaction is fair and reasonable to the client, the terms are fully disclosed and transmitted in writing to the client, the client is given a reasonable opportunity to seek the advice of independent counsel, and the client consents to the transaction in writing. The Model Rule thus takes a more restrictive approach than North Carolina Rule 5.4(A).

Rule 5.8 of the North Carolina Rules of Professional Conduct, also relevant to this issue, provides:

A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a disputed claim for such liability with an unrepresented client or former



client without first advising the person in writing that independent representation may be appropriate in connection therewith.

Rule 5.8 is almost identical to ABA Model Rule 1.8(h), except that the Model Rule requires the attorney to advise the client in writing that independent representation "is" appropriate, rather than "may be" appropriate as provided under the North Carolina Rule.

Under Rule 5.8, the question arises whether an arbitration clause would be "an agreement prospectively limiting the lawyer's liability to a client." If so, the Rule would require that the client be independently represented before signing the retainer agreement. At best, this would be awkward and would put a strain on the attorney/client relationship before it was even established. As a practical matter, an attorney who includes an arbitration clause with respect to a possible malpractice claim and who fully discloses the consequences of the clause to her client, may very well lose the client before the retainer agreement is signed.

When the dispute between the attorney and the client is simply one regarding attorney's fees, and the client has no malpractice claim pending against the attorney, it may be possible to submit the dispute to arbitration even in the absence of an arbitration clause in the retainer agreement. The North Carolina State Bar approved a Pilot State Bar Fee Arbitration Plan and Model District Bar Rules on July 15, 1988.<sup>25</sup> It is thus possible to arbitrate disputes of fees if both the client and the attorney agree to arbitration. There is no current procedure for arbitration of disputes involving possible legal malpractice.

### *Communicating with the Client*

Communication with the client is key to maintaining a good attorney-client relationship. The North Carolina State Bar has said, "Poor communication is the source of a majority of complaints filed with the State Bar's Grievance Committee."<sup>26</sup> Poor communication with the client can also constitute a separate violation of the Rules of Professional Conduct.<sup>27</sup> North Carolina Rule of Professional Conduct 6(B)(1) requires a lawyer to "[k]eep the client reasonably informed about the status of a matter and promptly comply with requests for information." The comment to Rule 6 says, "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent

---

25. *The North Carolina State Bar Fee Arbitration Plan and Model District Bar Rules*, 13 N.C. ST. B. NEWSL., Summer 1988, at 12.

26. *Professional Responsibility: Duty to Communicate*, 13 N.C. ST. B. NEWSL., Spring 1988, at 1.

27. For a detailed list of cases where disciplinary action has been taken for failure to communicate with a client, see Annotation, *Failure to Communicate with Client as Basis for Disciplinary Action against Attorney*, 80 A.L.R.3d 1240 (1977 & Supp. 1990).

the client is willing and able to participate.” As examples of information which should be immediately and fully relayed to the client, the comment cites settlement offers in civil cases and proffered plea bargains in criminal cases.

What can the lawyer do to help protect himself from malpractice claims in addition to adequately representing his client in the first place? It is imperative to build the client file. A thin file, even in a relatively simple matter, offers little in the way of defense to either a malpractice claim or a charge that the attorney has violated the Rules of Professional Conduct by failing to competently represent his client. Decisions should be reduced to writing. Correspondence with the client is necessary, not only to communicate with the client as required by Rule 6(B)(1), but also to document that the communication has occurred. Without such documentation, a malpractice claim may come down to a credibility battle between the lawyer and the client. Such a risk is unnecessary and can be avoided by keeping in touch with the client and documenting all communication.

After the client has been fully informed, any important decision made with respect to the case should be followed up by a letter to the client setting forth the details of the decision. Notes should be made to the file documenting each and every telephone conversation or office conference with the client and the substance of the communication.

### *Substance Abuse*

Substance abuse is a problem among lawyers as well as in society in general. The responsibilities and stress associated with maintaining a law practice may contribute to the problem. In 1977, the North Carolina State Bar Disciplinary Hearing Commission determined that in the two preceding years, sixty-five per cent of the cases that came before the Commission involved attorneys who had substance abuse problems.<sup>28</sup> It is not clear how widespread the problem is in North Carolina, and no empirical study has yet been conducted concerning substance abuse among North Carolina attorneys. However, the State Bar of Washington conducted a survey in 1987 that produced some alarming results. The survey showed that twenty-five percent of the licensed lawyers in the State of Washington had tried cocaine. One per cent admitted having cocaine abuse problems. Eighteen per cent admitted to alcoholism.<sup>29</sup>

Because of the criminal implications, any use of illegal substances has

---

28. Ernest Machen & Edward Murrelle, *Getting off the Ride: Positive Action for Lawyers*, 36 N.C. St. B.Q. 11, 11 (Fall 1989).

29. Stephanie B. Goldberg, *Drawing the Line*, 76 A.B.A. J. 49, 50 (1990).

ethical consequences.<sup>30</sup> Moreover, lawyers who suffer from abuse problems often see the consequences in their practice. Work is not done or is not done well or on time.

State bar associations and courts have dealt differently with the problems of substance abuse. Some courts have allowed drug and alcohol addiction to serve as a mitigating factor when lawyers are disciplined for misappropriation of funds or client neglect.<sup>31</sup> The New York court, for example, has allowed addiction to cocaine to serve as a mitigating factor. In one case, the attorney was accused of misappropriating over \$12,000 in client escrow funds.<sup>32</sup> The Appellate Division of the New York State Supreme Court did not disbar the attorney, but instead suspended his license to practice for three years. The court noted that the attorney was in a state of cocaine-induced psychosis at the time he misappropriated the client funds.<sup>33</sup> On the other hand, the California Supreme Court has refused to allow substance abuse to serve as a mitigating factor when the attorney is accused of misappropriation of client funds.<sup>34</sup> Some commentators go so far as to argue that drug abuse should be an aggravating factor in disciplinary proceedings.<sup>35</sup>

North Carolina Rule of Professional Conduct 1.2(B) provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The comment to Rule 1.2 says, "a lawyer should be professionally answerable only for offenses that indicate a lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category."<sup>36</sup> However, neither the Rule nor the comment directly addresses use or possession of illegal sub-

30. See Annotation, *Narcotics Convictions as Crime of Moral Turpitude Justifying Disbarment or Other Disciplinary Action Against Attorney*, 99 A.L.R.3d 288 (1980 & Supp. 1990).

31. See, e.g., cases cited in Annotation, *Misconduct Involving Intoxication as Ground for Disciplinary Action Against Attorney*, 17 A.L.R.3d 692, § 6 (Supp. 1990).

32. *In re Winston*, 137 A.D.2d 385, 528 N.Y.S.2d 843 (1988).

33. *Id.* at 386, 528 N.Y.S.2d at 844.

34. See, e.g., *Twohy v. State Bar of California*, 48 Cal. 3d 502, 769 P.2d 979, 256 Cal. Rptr. 794 (1989).

35. Hal Lieberman, Chief Counsel of New York's Departmental Disciplinary Commission for the First Judicial District has argued, "rather than being a mitigating factor, drug use ought to be an aggravating factor in disciplinary violations." Goldberg, *supra* note 29, at 50.

36. At least one North Carolina lawyer has been disbarred for conspiracy to manufacture, distribute and possess amphetamines. 77 DHC 11. "DHC" refers to the record of the proceedings before the North Carolina State Bar Disciplinary Hearing Commission. N.C. Gen. Stat. section 84-32 (1985) requires the records of proceedings before the Commission to be preserved in the Office of the Secretary-Treasurer of the State Bar. Final judgments of suspension or disbarment are also entered on the judgment dockets of the superior court in the county or counties where the attorney lives or practices law. Brief synopses of the Commission reports can be found in The North Carolina State Bar, *Lawyer's Handbook, Annotated Rules of Professional Conduct* (1988) (commonly referred to as the Blue Book).

stances as a violation of the Rules of Professional Conduct.<sup>37</sup>

The North Carolina State Bar has recognized that substance abuse can be a problem. In July, 1979, the North Carolina State Bar created the "Positive Action Committee" for the purpose of "implementing a program of intervention for lawyers with a substance abuse problem which affects their professional conduct."<sup>38</sup> The Committee was given jurisdiction to "investigate and evaluate allegations of substance abuse by lawyers."<sup>39</sup> The investigatory function includes conferring with the lawyer and making recommendations to the lawyer regarding sources of help if it is determined that the lawyer has a substance abuse problem. Unless it appears that the lawyer is "engaging in conduct detrimental to the public, the courts, or the legal profession," communications with the Committee are confidential.<sup>40</sup> If such a finding is made, the Committee is empowered to take appropriate action, including filing a grievance with the State Bar. This Committee has become known as PALS. Each issue of the North Carolina State Bar Quarterly contains a list of PALS Committee members.<sup>41</sup>

### III. ETHICAL CONSIDERATIONS ARISING AFTER THE FACT

#### *The Duty to Inform the Client*

North Carolina Rule of Professional Conduct 6(B) provides: "A lawyer shall: (1) Keep the client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (2) Explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>42</sup> The comment to Rule 6 says, "A lawyer may not withhold information to serve the lawyer's own interests."

If an attorney discovers that she has been negligent in representing a client, the best course of action is to immediately inform the client in writing of the error and the client's possible malpractice claim. Breach of the attorney's duty to represent his client competently is only exacerbated by a failure to disclose the circumstances to the client.<sup>43</sup> Failure to

37. N.C. Gen. Stat. § 84-28(b)(1) (1983 & Supp. 1989) also provides, "Conviction of, or a tender and acceptance of a plea of no contest to, a criminal offense showing professional unfitness" constitutes misconduct and grounds for disciplinary action.

38. Amendments to the State Bar Rules, 302 N.C. 637 (1979).

39. *Id.* at 637.

40. *Id.*

41. The ABA maintains a clearinghouse of information on lawyer-impairment issues, case law, disciplinary agency procedure, and confidentiality and immunity rules. The clearinghouse can be reached through Donna Spilis, Director, Commission on Impaired Attorneys, 750 N. Lake Shore Drive, Chicago, Ill. 60611. The phone number is (312) 988-5359. Goldberg, *supra* note 29, at 51.

42. These two provisions of Rule 6(B) are the same as Model Rules 1.4(a) and 1.4(b), respectively.

43. See 81 DHC 1 (attorney who falsely represented to client that he had obtained signed judg-

advise the client of the potential liability may result in further violations of the Rules of Professional Conduct as well as additional causes of action for fraud.

In a recent case before the North Carolina Court of Appeals, the affidavits of the parties filed at the trial court level tended to show that the attorney filed a voluntary dismissal of the plaintiff's personal injury claim without the plaintiff's knowledge or consent.<sup>44</sup> When the client later inquired about the status of the case, the attorney wrote a letter to the client leading him to believe that the case was still pending and that it simply needed to be rescheduled for trial. The attorney then failed to refile the action within one year from the date of the voluntary dismissal as required by Rule 41(a)(1) of the North Carolina Rules of Civil Procedure.<sup>45</sup>

When the plaintiff subsequently sued the attorney for legal malpractice, the trial court entered summary judgment for the defendant attorney.<sup>46</sup> The court of appeals reversed the trial court's decision, not only on the issue of malpractice, but also as to plaintiff's separate claims for breach of fiduciary duty and fraud.

The court of appeals stated the elements of actionable fraud as follows: "'(1) [A] false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with intent to deceive; (4) and which does, in fact, deceive; (5) to the hurt of the injured party.'" <sup>47</sup> Moreover, where "a relation of trust and confidence exists between the parties 'there is a duty to disclose all material facts, and failure to do so constitutes fraud.'" <sup>48</sup> The attorney-client relationship is one of trust and confidence. The court of appeals held the evidence presented at the trial level raised an issue of whether the attorney "falsely failed to inform plaintiff that his case had been dismissed rather than continued; whether that act was calculated and intended to deceive; and finally whether the plaintiff was injured by the alleged false representation."<sup>49</sup>

The Supreme Court of North Carolina reversed the decision of the

---

ment in client's behalf received one year suspension); 77 DHC 13 (attorney who failed to perfect an appeal and failed to inform his client received public censure). See also Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990) (thorough discussion of ethical considerations raised by an attorney's mendacity).

44. *Bamberger v. Bernholz*, 96 N.C. App. 555, 386 S.E.2d 450 (1989), *rev'd*, 326 N.C. 589, 391 S.E.2d 192 (1990).

45. N.C. Gen. Stat. § 1A-1 (1983).

46. The trial court's ruling was based, at least in part, on a finding that, even if the defendant attorney was negligent, his negligence did not proximately cause harm to the plaintiff since plaintiff's underlying claim was not actionable as a matter of law. 96 N.C. App. at 559, 386 S.E.2d at 452. This view ultimately prevailed in the North Carolina Supreme Court. 326 N.C. 589, 391 S.E.2d 192.

47. *Id.* at 562, 386 S.E.2d at 454 (quoting *Vail v. Vail*, 233 N.C. 109, 113, 63 S.E.2d 202, 205 (1951)).

48. *Id.* (quoting *Vail*, 233 N.C. at 114, 63 S.E.2d at 206).

49. *Id.*

court of appeals for the reasons stated in Judge Lewis' dissent to the court of appeals opinion.<sup>50</sup> According to Judge Lewis, whether the cause of action against the defendant attorney was fraud, negligence, breach of fiduciary duty or breach of contract, the plaintiff had failed to establish one essential element — that the claim against the original defendants was valid.<sup>51</sup> The supreme court agreed, and the action against the defendant attorney was dismissed.

Even though the defendant attorney ultimately prevailed on the malpractice claim, there is a lesson to be learned from *Bamberger*. An attorney should keep the client fully aware of the status of any pending matter. Although there was evidence in *Bamberger* that the attorney had falsely represented that the case was still pending, the court of appeals made it clear that, in addition to active misrepresentation, a failure to inform the client of a material fact may also give rise to a cause of action for fraud.<sup>52</sup> Thus, the best policy is to fully and frankly disclose all material facts regarding the client's case to him as soon as possible, especially if those facts would tend to establish a possible claim for legal malpractice.

*Bamberger* does not address the issue of whether the defendant attorney violated any Rules of Professional Conduct and, if so, what disciplinary action should be taken against him. It is readily apparent, however, that an attorney who lets the statute of limitations run against his client and then actively misrepresents the status of case to his client has violated several disciplinary rules<sup>53</sup> and that some form of discipline against the attorney is in order.

### *Cooperating with the Disciplinary Committee*

North Carolina Rule of Professional Conduct 1.1 provides:

[A] lawyer in connection with a disciplinary matter, shall not:

Knowingly make a false statement of material fact; or

Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond

50. 326 N.C. 589, 391 S.E.2d 192.

51. 96 N.C. App. at 563, 386 S.E.2d at 454-55. In the original action, plaintiff was injured when he fell from a loft at his girlfriend's home. His girlfriend's mother owned the home, and both the girlfriend and her mother were named as defendants. According to Judge Lewis, the case turned on whether plaintiff was in his girlfriend's home as a licensee or invitee. In Judge Lewis' opinion, plaintiff was a licensee as a matter of law. Since the only duty owed to a licensee is to refrain from willful, wanton or intentional conduct, plaintiff could not recover from the original defendants nor from the defendant attorney in the malpractice case. *Id.* at 564, 386 S.E.2d at 455. This case demonstrates the "case within a case" nature of legal malpractice claims.

52. *Id.* at 562, 386 S.E.2d at 454.

53. *E.g.*, N.C. Rules 1.2(C) (conduct involving dishonesty, fraud, deceit, or misrepresentation); 6(B) (a lawyer shall keep the client informed); 7(A)(3) (a lawyer shall not intentionally prejudice his client).

to a lawful demand for information from [a] disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 4.<sup>54</sup>

Once the disciplinary committee commences an investigation of an attorney's alleged violation of the Rules of Professional Conduct, it is vitally important that the attorney cooperate fully with the committee. Courts have held that failure to cooperate with the disciplinary committee may be an aggravating factor as well as a separate disciplinary rule violation.<sup>55</sup> Indeed, the comment to North Carolina Rule 1.1 specifically notes,

it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

North Carolina General Statute section 84-28(b)(3)<sup>56</sup> provides that failure to answer a formal inquiry of the North Carolina State Bar is misconduct for which discipline is appropriate. The North Carolina Court of Appeals has held that an attorney violated section 84-28(b)(3) when he failed to produce documents required under a subpoena issued by the State Bar Grievance Committee.<sup>57</sup> The court found that a subpoena issued by the Grievance Committee was a "formal inquiry" within the meaning of the statute.<sup>58</sup>

In jurisdictions that treat failure to cooperate as a separate disciplinary rule violation from the underlying negligence, discipline imposed on attorneys has included disbarment, suspension, censure and reprimand.<sup>59</sup> In jurisdictions that do not treat noncooperation as a separate offense, failure to cooperate or to respond to inquiry from the disciplinary committee may result in the entry of a default judgment on the underlying

---

54. N.C. Rule 4 requires preservation of confidential information obtained from a client. Rule 1.1 is virtually identical to ABA Model Rule 8.1.

55. See Annotation, *Failure to Co-operate with or Obey Disciplinary Authorities as Ground for Disciplining Attorney—Modern Cases*, 37 A.L.R.4th 646 (1985 & Supp. 1989). See also Annotation, *Attorney's Delay in Handling Decedent's Estate as Ground for Disciplinary Action*, 21 A.L.R.4th 75, § 2[b] (1983).

56. (1985 & Supp. 1989).

57. North Carolina State Bar v. Speckman, 87 N.C. App. 116, 360 S.E.2d 129 (1987).

58. *Id.* at 124, 360 S.E.2d at 134.

59. See cases cited at 37 A.L.R.4th 646, § 2[a]. Types of noncooperation that have resulted in further disciplinary actions against the attorney include failure to answer communications from the disciplinary committee even when the attorney appeared at the hearing, *id.* at § 6, p. 663, failure to produce requested records, *id.* at § 9, p. 689, written or oral misrepresentation to the investigating authority, *id.* at §§ 10-11, pp. 694-710, harassment or attempted influence of the complainant, *id.* at § 12, pp. 710-13, and harassment or attempted influence of a member of the disciplinary body. *Id.* at § 13, p. 713.

charges.<sup>60</sup> If nothing else, the attorney's failure to fully cooperate would indicate that the attorney was indifferent to a possible adverse determination of the proceeding. Full cooperation, on the other hand, has been treated as a mitigating factor in disciplinary proceedings.<sup>61</sup>

In 1967, the United States Supreme Court held in *Spevack v. Klein* that the fifth amendment privilege against self incrimination applies to attorney disciplinary proceedings.<sup>62</sup> In *Spevack*, the Appellate Division of the New York Supreme Court ordered an attorney disbarred after he refused to produce financial records subpoenaed during the course of a disciplinary proceeding.<sup>63</sup> That court held that the constitutional privilege against self-incrimination did not apply to attorneys in disbarment proceedings.<sup>64</sup> The New York Court of Appeals affirmed,<sup>65</sup> and the Supreme Court granted *certiorari*.<sup>66</sup> In reversing the order of disbarment, the Court said that the self-incrimination clause of the fifth amendment, made applicable to the states by the fourteenth amendment,<sup>67</sup> "extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it."<sup>68</sup>

### *Continued Representation after Malpractice*

Rule 2.8(B)(2) of the North Carolina Rules of Professional Conduct mandates that an attorney withdraw from employment if "[h]e knows or it is obvious that his continued employment will result in violation of a Rule of Professional Conduct." Rule 5.1(B) provides that a lawyer shall not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests, unless: (1) The lawyer reasonably believes the representation will not be adversely affected; and (2) The client consents after full disclosure which shall include explanation of the implications . . . and the advantages and risks involved.

When an attorney negligently performs his duty toward his client, the client may have a cause of action for malpractice against the attorney.

60. See, e.g., *Loughry v. New York State Bar Assoc.*, 37 App. Div. 2d 187, 324 N.Y.S.2d 478 (1971), cited in 37 A.L.R.4th at 660.

61. 21 A.L.R.4th 76, 80-81. For a discussion of mitigating and aggravating factors, see *infra* notes 10-17 and accompanying text.

62. 385 U.S. 511 (5-4 decision). See also Annotation, *Extent and Determination of Attorney's Right or Privilege Against Self-Incrimination in Disbarment or other Disciplinary Proceedings*, 30 A.L.R.4th 243 (1984 & Supp. 1989).

63. 24 A.D.2d 653 (1965).

64. *Id.*

65. 16 N.Y.2d 1048, 213 N.E.2d 457, 266 N.Y.S.2d 126 (1965), modified and *aff'd on reh'g*, 17 N.Y.2d 490, 214 N.E.2d 373, 267 N.Y.S.2d 210 (1966).

66. 383 U.S. 942 (1966)

67. See *Malloy v. Hogan*, 378 U.S. 1 (1964)(5-4 decision) (self-incrimination clause of fifth amendment applicable to states by reason of fourteenth amendment).

68. 385 U.S. at 514.



After a possible malpractice claim has arisen, the question becomes whether the lawyer's own interests may materially limit his representation of his client. Even though Rule 5.1(B) does not address this specific problem, the comment does provide, "If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."

North Carolina CPR 112 addressed the situation where the plaintiff's attorney had sued four defendants. One defendant was considering an action against the attorney for abuse of process and fraudulent joinder of parties in the action. The question was raised whether it would be ethical for the lawyer to require the defendant to drop the claims against the attorney as a condition of settlement. A second question raised was whether it would be ethical for the lawyer to merely request that the defendant drop the claim. The opinion cites DR 5-105(A)(2) for the proposition that an attorney's personal interests should not be permitted to dilute his loyalty to his client. The opinion states that before settlement negotiations are completed, the attorney should:

inform his client fully of the asserted intention of one of the defendants to sue the lawyer personally for abuse of process and fraudulent joinder of parties and proceed with settlement negotiations only if the lawyer, in his own mind, feels that he can loyally represent his client irrespective of the claim against him personally.

The test, as set out in the opinion, reflects the same dual considerations now found in Rule 5.1(B). Once it has become apparent that a client may have a malpractice claim against the attorney, the attorney clearly has a stake in the outcome of the case, and the lawyer's representation "may be materially limited . . . by [his] own interests."<sup>69</sup> Therefore, when a possible malpractice claim has arisen, representation of the client should be continued only after a full and frank disclosure to the client of the circumstances leading to the possible claim and the advantages and disadvantages of continued representation. In addition, the lawyer should satisfy herself that her independent representation of the client's interests will not be adversely affected by the knowledge that the client has a malpractice claim against her.

### *Withdrawing from Employment*

Withdrawal from employment is governed by Rule 2.8 of the North Carolina Rules of Professional Conduct. The Rule provides guidelines which must be followed if it becomes apparent that a claim for malpractice may exist, and the attorney finds it necessary to withdraw from representation, either because continued representation will violate other

---

69. N.C. Rule 5.1(B).

Rules or because the client wishes the attorney to withdraw. Subsection 2.8(A)(2) provides that an attorney may not withdraw

until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

Once a potential malpractice claim arises and the attorney decides that withdrawal from the case is necessary or advisable, the attorney should fully inform the client that the attorney intends to withdraw and the consequences of the withdrawal. The client should be placed in the best possible position with respect to the matter from which the attorney is withdrawing.

The attorney has an ongoing duty to protect the interests of his client. If the attorney decides to withdraw from a matter or if there is some question as to whether the attorney-client relationship exists, the attorney should communicate fully with the client. Even before a complaint has been filed, the attorney should not withdraw until he fully advises the client of his intention to do so and the consequences of his withdrawal. Failure to do so may result in violations of the Rules of Professional Conduct and in liability for malpractice, as when the attorney withdraws and the statute of limitations runs against the client's claim. *North Carolina State Bar v. Sheffield*<sup>70</sup> is illustrative.

The attorney was suspended from the practice of law for three years following a grievance by a former client. The attorney represented the client in a number of matters, including criminal charges for murder. The administratrix of the murder victim's estate filed a wrongful death action against the client, and the client's father contacted the attorney regarding representation of the client in the civil action. Although the complaint in the civil action was delivered to the attorney's office, he never took action on the matter, and a default judgment for \$200,000 was ultimately entered against the client.

Following his suspension, the attorney challenged several of the grievance committee's findings of fact. One challenge related to the finding that defendant failed to advise the client that he would not represent him in the wrongful death action after accepting the complaint from the client's father. The attorney argued that either he had never accepted employment in the wrongful death action or, if he had, that he withdrew once he learned that his client intended to perjure himself.<sup>71</sup>

The court noted that the attorney-client relationship "may be implied

70. 73 N.C. App. 349, 326 S.E.2d 320, cert. denied, 314 N.C. 117, 332 S.E.2d 482, cert. denied, 474 U.S. 981 (1985).

71. *Id.* at 357-58, 326 S.E.2d at 325.

from the conduct of the parties, and is not dependent on the payment of a fee, nor upon the execution of a formal contract."<sup>72</sup> According to the court, the dispositive question was not whether there was an express oral or written agreement with respect to representation, but rather "whether [the attorney's] conduct was such that an attorney-client relationship could reasonably be inferred."<sup>73</sup> Evidence presented at the grievance committee hearing showed that the client's father had delivered the wrongful death complaint to the attorney's office. Later, the attorney wrote two letters concerning the wrongful death action to the client. The first letter advised the client against filing a counterclaim in the wrongful death action and suggested that the client file for bankruptcy. The second letter said in part, "I do not see that I can handle this for you for a number of reasons . . . . Please come by the office sometime this week or next so we can discuss this." The court found that this evidence supported findings that the attorney accepted employment in the wrongful death action and did not withdraw.<sup>74</sup>

Once the decision to withdraw is made, the attorney should follow the rules of court with respect to withdrawal,<sup>75</sup> should fully inform the client, and should take all reasonable steps to protect the client's interests. Such actions by the lawyer will avoid violations of the Rules of Professional Conduct and prevent a malpractice claim from arising after the attorney's withdrawal.

### *Turning Over the Client's File*

North Carolina Rule of Professional Conduct 2.8(A)(2) provides that an attorney may not withdraw from employment until he has "taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including . . . delivering to the client all papers and property to which the client is entitled . . . ." North Carolina CPR 3<sup>76</sup> requires an attorney, upon request by a client, to turn over the client's file to the client or to the client's new attorney regardless of whether the former attorney has been paid in the case. The opinion cites North Carolina Code DR 2-110A(2) which required a lawyer, before withdrawing, to deliver to the client "all papers and property to which the client is entitled." The opinion does not specifically address the situation in which the client requests

72. *Id.* at 358, 326 S.E.2d at 325.

73. *Id.*

74. *Id.* at 359, 326 S.E.2d at 326.

75. See, e.g., General Rules of Practice for the Superior and District Courts, Rule 16 (1989). If no action has been filed, the attorney should have the client sign an acknowledgement that the attorney is withdrawing and that the attorney has fully discussed the withdrawal and its possible ramifications with the client. But see *infra* notes 87-90 and accompanying text.

76. August 16, 1973.

the file because he is contemplating a malpractice claim against his former attorney, but the same considerations will apply.

The opinion notes that many things in the file "may be necessary to be kept for the lawyer's own protection." Although it does not indicate what such items may be, the opinion does provide a list of items which should be delivered upon request. Those items include papers and other things delivered to the discharged lawyer by the client, correspondence to and from the discharged lawyer with respect to the matter, and any documents filed with the court. Notes made for the discharged attorney's own future reference and study need not be turned over. The opinion specifically indicates that it is *not* improper for the discharged lawyer to retain copies of anything delivered to the client or his new lawyer.<sup>77</sup>

Even if the attorney may have acted negligently in a matter or believes that a client may have a cause of action against her, she must deliver the client's file to him upon request. For the attorney's own protection and as an aid in any future litigation, however, she should retain copies of any documents delivered to the client.

### *Providing a Second Opinion*

Because of the publicity regarding attorney malpractice claims, clients are generally well informed that such claims may arise. What can or should an attorney do when approached for a second opinion by the client of another attorney?

North Carolina Rule 7.4 provides:

During the course of his representation of a client a lawyer shall not:

(A) Communicate or cause another to communicate about the substance of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The Rule does not directly address the situation where a client, already represented by an attorney, approaches another attorney for a second opinion. This situation is, however, directly addressed by the comment to Rule 7.4:

This Rule does not prohibit a lawyer who does not have a client relative to a particular matter from consulting with a person or entity who, though represented concerning the matter, seeks another opinion as to his legal situation. A lawyer from whom such an opinion is sought should, but is not required to, inform the first lawyer of his participation and advise.<sup>78</sup>

77. The substance of CPR 3 is now included in the comment to Rule 2.8.

78. N.C. Rule 7.4 is an amalgam of N.C. Code DR 7-104 and Model Rules 4.2 and 4.3. N.C. Rule 7.4 Editor's Notes. Model Rule 4.2 provides, "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is author-

Several considerations are raised when an attorney is approached for a second opinion. Every effort should be made not to interfere with the original attorney-client relationship, and the second attorney should take care not to use the consultation as a means of soliciting the client.

The most troubling aspect of this issue is the apparent conflict between the comment to Rule 7.4 and Rule 4, respecting preservation of confidential information.<sup>79</sup> Since the attorney-client privilege arises when the client discusses the matter with the second attorney, Rule 4 would seem to proscribe contact with the original attorney regarding the matter without the client's express permission. However, subsection 4(C)(3) allows a lawyer to reveal confidential information "when permitted under the Rules of Professional Conduct or required by law or court order." Although Rule 7.4 does not expressly permit revealing the substance of the client's discussion to the original attorney, the comment does suggest that the second attorney "should" discuss the consultation with the original attorney. The best course of action is to ask the client if it is permissible to speak with the original attorney and then do so only if the client gives his permission.

Should the attorney discover that another attorney has breached his duty to the client and thereby violated the Rules of Professional Conduct, a duty may arise under North Carolina Rule 1.3 to report the violation to the State Bar. Subsection 1.3(A) provides: "A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a *substantial* question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the North Carolina State Bar or other appropriate authority."<sup>80</sup> Rule 1.3 does not mandate that every violation of the Rules of Professional Conduct be reported. The operative word is "substantial," which refers "to the seriousness of the alleged offense and not to the quantum of evidence of which the lawyer is aware."<sup>81</sup>

---

ized by law to do so." Neither the Model Rules nor the comments directly address situations where the client is seeking a second opinion. However, since the proscription in Rule 4.2 against speaking with a client who is represented by another attorney is limited to situations where the attorney is representing someone else with respect to the subject matter, the Rule does not proscribe providing a second opinion.

79. N.C. Rule 4(B) provides: "Except when permitted under Rule 4(C), a lawyer shall not knowingly: (1) Reveal confidential information of the client, . . . ." "Confidential information" is defined in N.C. Rule 4(A) as "information protected by the attorney-client privilege under applicable law, and other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

80. Emphasis added. Subsection 1.3(C) provides that the Rule does not require disclosure of information otherwise protected by Rule 4 (confidential information). Rule 1.3 is virtually identical to Model Rule 8.3.

81. N.C. Rule 6 comment.

In *Williams v. Council of the North Carolina State Bar*,<sup>82</sup> the plaintiff alleged that his attorney failed to perfect his appeal in a prior action. Plaintiff sought injunctive relief requiring, among other things, that counsel who file motions to dismiss for failure to perfect an appeal report the failure to the State Bar. Plaintiff also sought a requirement that district court judges inquire about the reasons for such dismissals in their courts.

In reaching its decision, the North Carolina Court of Appeals relied on DR 1-102(A), the equivalent to Rule 1.3. DR 1-102(A) provided, "A lawyer possessing unprivileged knowledge of a clear violation of DR 1-102 should report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."<sup>83</sup> The court held that plaintiff's complaint failed to state a claim for injunctive relief. The court said, "The allegation that these defendants knew that plaintiff's attorney had failed to perfect an appeal does not, without more, support the inference that they 'had knowledge of a clear violation of DR 1-102.'"<sup>84</sup> The plaintiff had made no allegation that the defendants knew his attorney had failed to perfect the appeal without plaintiff's knowledge or consent. The court noted there were a number of legitimate reasons why an appeal may not be perfected.<sup>85</sup>

In light of *Williams*, should an attorney gain knowledge that another attorney has acted negligently with respect to his client's claim or defense, it may become incumbent upon the attorney to report the other's negligence if that negligence also constitutes a substantial violation of the Rules of Professional Conduct. The duty to report is even more clear if the other attorney, in conjunction with the negligence, has made false statements to his client or failed to disclose the circumstances of the negligence.<sup>86</sup>

### *Settling a Malpractice Claim*

Rule 5.8 of the North Carolina Rules of Professional Conduct provides that an attorney may not "settle a disputed claim for [malpractice] liability with an unrepresented client or former client without first advising that person in writing that independent representation may be appropriate in connection therewith." Once it is apparent that a malpractice claim has arisen, the attorney should not make any attempt to settle the claim until she has fully advised the client in writing that a malpractice

82. 46 N.C. App. 824, 266 S.E.2d 391 (1980).

83. DR 1-102 provided: "A lawyer shall not . . . [e]ngage in professional conduct that is prejudicial to the administration of justice."

84. 46 N.C. App. at 826, 266 S.E.2d at 392.

85. *Id.*

86. See *supra* notes 42-53 and accompanying text (misrepresentation as violation of Rules of Professional Conduct).

186 NORTH CAROLINA CENTRAL LAW JOURNAL [Vol. 19:165]

claim may exist and that it may be advisable to seek independent representation with respect to settling that claim. Any attempt to circumvent Rule 5.8 may result in disciplinary action against the attorney.

In *North Carolina State Bar v. Frazier*,<sup>87</sup> after an apparent claim for malpractice had arisen, the attorney's client requested the attorney to withdraw from the case. The attorney prepared a release which provided that his services were terminated and which purportedly released him "from any and all liability and professional responsibility in these matters."<sup>88</sup> The State Bar Disciplinary Committee found, in part, "By having his client sign the release . . . the defendant attempted to exonerate himself from or limit his liability to his client for his personal malpractice in violation of Disciplinary Rule 6-102(A) [the forerunner of Rule 5.8]."<sup>89</sup> After reviewing the language of the release, the North Carolina Court of Appeals found "that it [was] a clear attempt by defendant to exonerate himself from personal malpractice. This is forbidden by Disciplinary Rule 6-102(A)."<sup>90</sup> It is also forbidden by Rule 5.8 of the North Carolina Rules of Professional Conduct.

*Defending a Malpractice Claim*

May an attorney reveal client confidences to her attorney or to her professional liability insurer if a malpractice action has been or may be instituted against her? Rule 4(C)(5) of the North Carolina Rules of Professional Conduct provides that a lawyer may reveal

Confidential information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

This Rule has been the subject of at least two ethics opinions. In Proposed RPC 62 (April 13, 1989), the following facts and questions were presented:

Insurance Company A hired law firm N to represent client Z in a lawsuit. This representation of Z was provided under reservation of rights, since Insurance Company A contended that various claims in the complaint against Z were not covered by its policy. Z also retained private

---

87. 62 N.C. App. 172, 302 S.E.2d 648, *petition for discretionary review denied*, 308 N.C. 677, 303 S.E.2d 546 (1983).

88. *Id.* at 174, 302 S.E.2d at 650.

89. *Id.* at 176, 302 S.E.2d at 651. DR 6-102(A) provided: "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." The Editor's Notes to Rule 5.8 point out that "DR 6-102(A), read literally, had the effect of totally discouraging not only prospective limitations of liability, but also settlements of actual malpractice claims." Rule 5.8 has cured that problem.

90. 62 N.C. App. at 179, 302 S.E.2d at 653.

counsel. Eventually the lawsuit was settled. Thereafter, Z sought to recover damages against Insurance Company A for, *inter alia*, alleged inadequate representation of Z by law firm N. What confidences of Z, if any, may law firm N reveal to Insurance Company A? Does the answer change if law firm N is still representing Z for the purpose of getting an escrow agreement signed as part of the settlement of the original lawsuit?<sup>91</sup>

Citing North Carolina Rule 4(C)(5), the opinion states that the lawsuit between client Z and Insurance Company A is a "proceeding concerning [Law Firm N's] representation" of Z. The opinion provides that it is not necessary that Law Firm N be named a party to the suit, and the firm "may therefore reveal confidences *to the extent necessary* to clear its name of the charge of inadequate representation, *but should take care not to reveal confidences that are not necessary to its defense.*"<sup>92</sup> The opinion further says that Rule 4(C)(5) applies to both current and former clients, so that the law firm could ethically reveal client confidences necessary to defend itself even while still representing Z with respect to the escrow agreement.

In Proposed RPC 77,<sup>93</sup> the facts presented were: Attorney B has represented Company X for a number of years in connection with tax and other matters. It was discovered that Company X had failed to file certain information returns, which could subject Company X to significant criminal and civil penalties. Attorney B could, in turn, be liable to Company X for any penalties assessed against it. Company X has not made any formal claim against Attorney B and has not retained separate counsel to represent its interests against Attorney B.

Attorney B's professional liability insurance policy contains the following clause:

#### V. Notice of Claim or Suit

As a condition precedent to coverage afforded by this policy, upon any Insured becoming aware of any act or omission which could reasonably be expected to be the basis of a claim or suit covered hereby, written notice shall be given to the Company or any of its authorized agents as soon as practicable, together with the fullest information obtainable. If claim is made or suit is brought against any Insured, such Insured shall immediately forward to the Company every demand, notice, summons or other process received by that Insured . . .

The Insured shall cooperate with the Company and at the Company's request make available all records and documents and submit to examination(s) under oath by a representative of the Company.

Attorney B reports Company X's potential claim to Insurance Com-

91. 14 N.C. ST. B. NEWSL., Spring 1989, at 12.

92. *Id.* (emphasis added).

93. 14 N.C. ST. B. NEWSL., Summer, 1989, at 11.



pany, but fails to disclose the name of Company X on the grounds that such disclosure would constitute disclosure of confidential information. Insurance Company hires Attorney C to assist Attorney B against any claims asserted by Company X. Attorney C then asks Attorney B for more information regarding the potential claim.

The questions presented were:

1. May Attorney B disclose the identity of Company X and other relevant background information about Company X, such as the number of its employees and nature of its business to Insurance Company without obtaining Company X's consent?
2. May Attorney B disclose this information to Attorney C without obtaining Company X's consent?
3. If the answer to (1) is no and the answer to (2) is yes, may Attorney C then reveal the information to Insurance Company?

The opinion first notes that normally the identity of a client is not confidential information. However, in this case, Attorney B had already revealed the failure to file returns to Insurance Company. Therefore, Company X's identity is confidential since by revealing its identity, Attorney B would disclose its secret for the first time.

The opinion, citing the comment to Rule 4, says that a lawyer need not wait until an action is filed against him before responding to a claim. On the other hand, any disclosure should be "closely tailored to the attorney's need to defend him or herself."<sup>94</sup> The opinion provides that Attorney B may reveal confidential information to Attorney C, but Attorney B "should only reveal that which is absolutely required under the policy."<sup>95</sup> Attorney C's primary responsibility is to his client Attorney B. Therefore, Attorney C should not reveal information received from Attorney B to the Insurance Company without Attorney B's consent.

The crux of this is that an attorney facing a malpractice claim may reveal confidential information to her attorney or to her professional liability insurance carrier. That information, however, should be carefully tailored to the end which justifies the revelation in the first place; that is, defense of the malpractice claim. The attorney should be very careful not to reveal any information not necessary to a defense of that claim.

#### IV. CONCLUSION

Nothing strikes greater fear in the hearts of practicing lawyers than the thought of being sued for malpractice, except perhaps the thought of being disciplined by the State Bar. Although there is a plethora of literature on how to avoid malpractice claims, and no one believes they will be

---

94. *Id.*

95. *Id.*

sued for malpractice, it does happen. That is precisely why practicing lawyers carry malpractice insurance.

There is a great difference, however, between simple negligence such as occurs when the wrong date is inadvertently entered in the tickler system and an answer is not timely filed, and gross or willful negligence or deceit. Faced with the possibility of a malpractice claim, the attorney should do the honorable (and smart) thing. After the first call is placed to the liability insurance carrier, notify the client of the error in writing. Do whatever is possible to minimize the damage to the client. Offer to return any unearned, or even earned, attorney's fees. If contacted by the State Bar Disciplinary Committee, cooperate fully.

Most malpractice claims as well as disciplinary proceedings can be avoided by following a few simple suggestions:

- Don't take a case you are not prepared to handle.

- Develop a calendar system and use it religiously.

- Communicate with your clients.

- Document your communication.

- Return phone calls.

- Guard your trust account with your life.

- Don't overcharge.

- Don't make promises you can't keep.

- And don't ever, ever tell a lie.