

EMERGING ETHICS

**Durham County Bar Association
Rhythms Live Music Hall**

February 12, 2020

Warren Savage, Sr. Claims Attorney



- Government agency responsible for regulation of attorneys in NC
- Membership is mandatory and the organization regulates 27,000+ licensed attorneys
- Governance is by a 60+ member council whose members are elected by their local bar jurisdictions
- The public's interests are represented by 3 members of the council who are not lawyers and are appointed by the governor
- Council elects 4 officers to leadership
- Staff of 85 lawyers, paralegals, investigators and other employees carry out the daily operations
- Council members serve on various standing committees (including Ethics) and meet quarterly
- 22 members serve on the Ethics Committee along with 12 advisory members who are appointed by NCSB President

Informal Ethics Advice & Ethics Advisories





Formal Opinions



DISHONEST LAWYERS?



- **2014 FEO 9 USE OF TESTER IN AN INVESTIGATION THAT SERVES A PUBLIC INTEREST** -- *Opinion rules that a private lawyer may supervise an investigation involving misrepresentation if done in pursuit of a public interest and certain conditions are satisfied.*
- **This opinion does not apply to the conduct of a government lawyer.**
- In addition, this opinion is limited to private lawyers who advise, direct, or supervise conduct involving dishonesty, deceit, or misrepresentation as opposed to a lawyer who personally participates in such conduct.
- A lawyer may not advise, direct, or supervise the use of misrepresentation to pursue the purely personal interests of the lawyer's client, where there is no public policy purpose, **such as the interests of the principal in a family law matter.**

ETHICAL DUTY WHEN WRONGFUL CONVICTION



- **Amendments to the RPC require a prosecutor or a lawyer to disclose post-conviction information or evidence that may exonerate a convicted defendant.**
- **New Rule 3.8(g) for Prosecutors** – *When prosecutor knows of new, credible evidence or information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall promptly disclose that evidence to the defendant, the defendant’s counsel, or NC Office of IDS.*
- **New Rule 8.6 for All Lawyers** – *When a lawyer knows of credible evidence or information (even if protected confidential information), that creates a reasonable likelihood that a defendant did not commit an offense for which the defendant was convicted, the lawyer shall promptly disclose that evidence to the appropriate prosecutor and to the NC Office of IDS.*
 - **Exception** – *Shall NOT disclose if disclosure would criminally implicate a present or former client or would violate the attorney-client privilege.*

RESPONDING TO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM QUESTIONING REPRESENTATION



- 2011 FEO 16 -- Criminal defense lawyer accused of ineffective assistance of counsel by a former client may share confidential client information with prosecutors to help establish a defense to the claim so long as the lawyer reasonably believes a response is necessary and the response is narrowly tailored to respond to the allegations.
- Common question to Lawyers Mutual – We treat this like a subpoena for lawyer’s testimony or file
- NC ethics opinion declines to adopt ABA Formal Op. 10-456
 - ABA only allows disclosure in “court-supervised setting.”



Lawyer Beware! – Virtual currency is yours for the losing 8



- **2014 FEO 1 Protecting Confidential Client Information When Mentoring**

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

DISCLOSING POTENTIAL MALPRACTICE



- **2015 FEO 4 Disclosing Potential Malpractice to Client** – *Opinion analyzes a lawyer’s professional responsibilities when she discovers that she made an error that may adversely impact client’s case.*
 - Material Error vs. Harmless Error – a spectrum
 - If it is a material error, lawyer is not required to withdraw unless error creates an unwaivable conflict
 - Lawyer must inform client of the facts surrounding the mistake and its effects on representation, and that client has right to seek new counsel.
 - Lawyer should not advise client about whether client has a malpractice claim against her.
 - Lawyer not required to disclose malpractice carrier or limits.
 - Lawyer should call her malpractice carrier.

THIRD PARTY THEFT FROM TRUST ACCOUNT



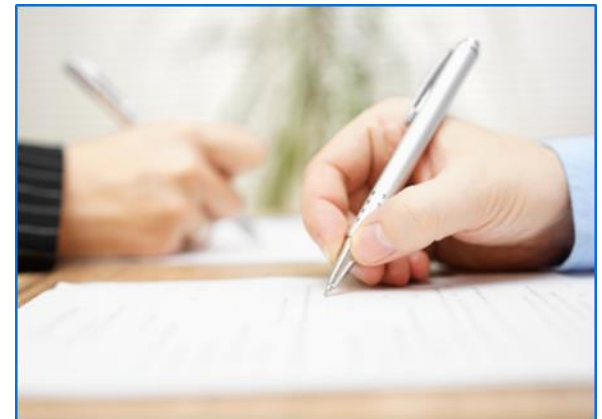
- **2015 FEO 6 Lawyer's Professional Responsibility When Third Party Steals Funds from Trust Account**
 - *Opinion rules that when funds are stolen from a lawyer's trust account by a third party who is not employed or supervised by the lawyer, and the lawyer was managing the trust account in compliance with the Rules of Professional Conduct, the lawyer is not professionally responsible for replacing the funds stolen from the account.*
 - **NOTE:** This opinion is limited to a lawyer's professional responsibilities and is not intended to opine on a lawyer's legal liability.



- Opinion rules that pursuant to Rule 3.3(a)(2) a lawyer has a duty to disclose to a tribunal adverse legal authority that is controlling as to that tribunal if the legal authority is known to the lawyer and is not disclosed by opposing counsel.
- Does not have a duty to inform the tribunal of authority that is not controlling.
- Unanimous assent by all interested parties.



- Opinion rules that a lawyer may not jointly represent clients and prepare a separation agreement.





- 2019 FEO 3 – Opinion rules that “ongoing” “sexual” relationship between opposing counsel creates a conflict of interest
- Duh
- Started as inquiry re an ADA and a PD atty.
- Opinion applies to all attorneys
- Ongoing? Sexual? Stay tuned for future inquiries exploring boundaries
- May hank and pank with informed consent from both attorneys’ clients – Good luck with that

CURRENTLY-PENDING ETHICS INQUIRY



Currently assigned to subcommittee for further study:

Inquiry of Staff – Advancing Client Portion of Settlement

Opinion will determine if the Rules of Professional Conduct permit a lawyer to advance the client's portion of settlement funds prior to actually receiving the funds.





- New Special Committee to Study the Advertising Rules 7.1 through 7.5.
- In response to ABA House of Delegates official Resolution to amend the Model Rules on Advertising.
- National study of states' advertising rules found:
 - Insignificant, technical reqmts. overshadow guiding principle of advertising rules that lawyers must avoid false or misleading communications.
 - Also noted that most complaints to regulatory agencies about lawyer advertising are filed by other lawyers, not members of the public.

PROACTIVE MANAGEMENT BASED REGULATION (PMBR) – PUBLIC PROTECTION BEFORE REACTIVE DISCIPLINE



- The State Bar should design measures to complement traditional, reactive disciplinary processes, usually through the use of ‘self-assessment tools.’
- The State Bar should educate lawyer/firm management to develop and employ an ethical ‘infrastructure’ of policies, programs, and systems to prevent misconduct and unsatisfactory service.
- **Illinois PMBR Program** – Required for all solo practitioners that do not carry legal malpractice insurance. 41% of private practice, solos in Illinois are uninsured.
- Required 4 hours of CLE provided free by the Illinois State Bar through interactive online self-assessment tools.
- Self-assessment requires lawyers to demonstrate that they have reviewed the operations of their firm based upon lawyer ethics rules and best business practices.
- Self-assessments are confidential and not discoverable.
- NC State Bar Study-Committee formed to study Illinois experience.

CONTACT Us



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