SELECTED ETHICAL ISSUES ESPECIALLY APPLICABLE TO WORKERS' COMPENSATION

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Ethical rules apply, of course, to workers' compensation practitioners just as they do to any other lawyers. There are, however, some situations that are more common in comp contexts than in others. There is also a phenomenon, of questionable cause, that ethical rules lap over into litigation in comp with apparently greater frequency than they do in other fields. This paper is intended to address some of those rules and situations that are selectively more common in comp.

I. Addressing contingency fees when cases move from one firm to another.

It is uncontroversial that fees for legal work performed by a lawyer employee of a firm are payable to the firm, while fees for work performed on the same case after that lawyer employee leaves the firm with that case are payable to the lawyer's subsequent employer. That subsequent employer can be another firm or the lawyer as a solo practitioner. The same structure applies when a client discharges one firm and contracts for representation with another. The only difference is that the subsequent work done on the case is performed by a lawyer that did not work on the case at a prior firm. Either way, the case leaves the original firm, and fees associated with that case after it leaves are due to somebody else.

In hourly billing environments, there is little trouble sorting out the fees; hours billed at the prior firm are owed to that firm, and hours billed after the case leaves the firm are payable to the firm billing those subsequent hours. However, things are much sloppier when the fee is a contingency, which fee is awarded after the case leaves the original firm and is payable for work performed both before and after the transition to another firm. Thus, this is an issue that only applies to plaintiffs' lawyers in workers' compensation. However, knowledge of it is useful, also, for lawyers, often in hourly-billing firms, who end up representing lawyers who fight over such fees.

While it is not completely clear why this issue came to the State Bar in a workers' compensation context, and the seminal case of Pryor v. Merten was not a comp case, the increased intensity of the issue in comp may arise from the relatively large amount of protracted, on-going work that occurs in plaintiffs' representation in comp cases, compared to other kinds of plaintiffs' cases. Many hours, spread relatively evenly over long periods of time, may be spent on a case that then settles or generates a litigation result suddenly. Other fields do not involve the grind of vocational rehabilitation, constant tension over authorization of medical treatment, repeated telephone calls over late checks and the potential for multiple litigation processes within a single case. The more hours there are, and the more diverse they are in how they are spent, the more confusing the value of them is, and the more irritated a firm is likely to be to have to fight to get paid for the time spent by its employees.

The State Bar stepped into the fray with 2003 Formal Ethics Opinion 11. Following are that Opinion and comments made by this author, both during the formative stages of the Opinion and then as comment after it was formally proposed. (As explained in the letters, the first

comment was sought as input by the chairs of the Ethics Committee of the NC Bar Association's Workers' Compensation Section, neither of whom were in a position to be sensitive to the special problems created by contingency fees.) The letters are condensed by removing letterhead, addresses and page numbering. It is fair to advise that contrary input was submitted by letter from a prominent plaintiffs' workers' compensation practitioner, who focused on the disruptive effect of allowing subsequent counsel (in his specific case being a separate law firm and not a prior employee of the original firm) to ignore the prior firm's claim for a fee, without providing the prior firm with leverage to protect its interests. It may not be fair to mention that the same lawyer later admitted that he had had a later case in which his was the subsequent firm, which had caused him to change his mind. In any event, it is safe to presume that both clients received better service when being represented by the commenting lawyer than by the other ones.

The context of the Bar's Opinion was a request by a firm that was in the process of fighting with an associate over fees in workers' compensation cases that left the firm with her when she left the firm. As such, it fits into the category of opinions that one side to potential litigation seeks as a weapon to use in that litigation. The summary of the Opinion stated under the title is not an accurate reflection of its importance. Most lawyers would agree that the duty to deal honestly with others is not controversial. In the important part of the Opinion, the Bar opined that disputed contingency fees, under those circumstances, must be kept in trust during the pendency of proceedings to determine what amount, if any, of a fee is due to the prior firm. As is obvious from the letters below, this author disagrees with that decision and considers it to be contrary to the law pertinent to the issue. Suffice it to say that I was ignored completely by the Bar. The good news (in my apparently erroneous opinion) is that, from relatively recent conversations with advisory personnel at the Bar, it appears that the Bar is interpreting the ability of subsequent counsel to withdraw from trust amounts that are "not in dispute" as allowing withdrawal of amounts that the subsequent lawyer believes, in good faith, are in excess of the amount that prior counsel will ultimately be entitled to recover. That simple step of interpretation prevents most of the practical problems that arise from the Opinion.

2003 Formal Ethics Opinion 11

April 23, 2004

Duty of Departed Lawyer When Dividing Fee with Former Firm

Opinion rules that a lawyer must deal honestly with the members of her former firm when dividing a legal fee.

Inquiry #1:

Attorney X worked for ABC Law Firm when she began the representation of Client in a workers' compensation claim. Prior to the resolution of the workers' compensation claim, Attorney X left the firm to join another firm. Client chose to continue to be represented by Attorney X. The Industrial Commission entered an order releasing ABC Law Firm from further representation and acknowledged ABC's entitlement to a portion of any legal fee ultimately awarded in the case by the Industrial Commission.

Client's workers' compensation case settled. An order was entered by the Industrial Commission approving the settlement and the total attorney's fee to be paid from the settlement. The settlement proceeds have not been delivered to Attorney X for disbursement. Separate checks for the client's settlement proceeds and the approved legal fee will be sent to Attorney X. Is Attorney X required to notify ABC Law Firm that the Industrial Commission has awarded a legal fee in the case and to notify the firm of the amount of the fee?

Opinion #1:

Yes, the Rules of Professional Conduct require lawyers to deal honestly with each other and to comply with the law and court orders. Rule 8.4(c) and (d).

Inquiry #2:

When the check for the legal fee is received by Attorney X, where should it be deposited?

Opinion #2:

Rule 1.15-2(g) requires mixed funds to be deposited in a lawyer's trust account intact: "When funds belonging to the lawyer are received in combination with funds belonging to the client or other persons, all of the funds shall be deposited intact."

Inquiry #3:

Should Client's consent be obtained prior to disbursing any of the legal fees from the money deposited into Attorney X's trust account?

Opinion #3:

No, if the Industrial Commission has already approved the total amount of the legal fee and Client has no liability to ABC Law Firm for the fee, the dispute is between ABC and Attorney X and Client's consent is irrelevant

Inquiry #4:

Is Attorney X required to advise Client of Client's obligations relative to ABC Law Firm or any other party with a claim against the settlement funds?

Opinion #4:

Yes. Rule 1.4(b) requires a lawyer to explain a matter to a client to the extent reasonably necessary to make informed decisions about the representation. If Client is liable to ABC for litigation expenses or to a provider for medical expenses, Attorney X should advise Client of and may withhold the funds to pay medical liens as provided in 2001 Formal Ethics Opinion 11.

Inquiry #5:

May Attorney X determine the amount of her share of the legal fee and disburse that

amount to herself without the specific consent of ABC Law Firm

Opinion #5:

Yes, if Attorney X, acting in good faith, determines that her entitlement to a specified portion of the legal fee is undisputed, she may withdraw this amount from the trust account and pay it to herself. She should also disburse any undisputed portion of the remaining fee to ABC Law Firm. The disputed portion of the legal fee must remain on deposit in the trust account until the dispute with ABC Law Firm is resolved by agreement or litigation. In determining the amount of her fee, Attorney X must be guided by her duty of honesty to the members of ABC Law Firm. *See* opinion #1 above.

LETTERS:

The first letter is actually the later one and contains more directed commentary regarding the Opinion. The second letter contains more discussion of legal foundation, including case law. However, there is significant overlap.

FIRST, LATER LETTER

January 5, 2004

Re: Ethics Inquiry and Proposed 2003 Formal Ethics Opinion 11

Please pass this on to the State Bar Ethics Committee as my objection to the referenced proposed rule concerning the "Duty of Departing Lawyer When Dividing Fee with Former Firm." As a workers' compensation practitioner who has been on both sided of the situation described, I believe that I can add practical and balanced perspective to the issue. I also believe that the Ethics Committee, in its proposed Opinion, has come to the incorrect conclusion.

As you may recall, I have previously written, at the request of Jeri Whitfield, whom the Bar contacted for input. She recognized that neither she, an hourly billing defense attorney, nor the Deputy Commissioner who co-chairs that committee with her, were in a very good position to advise on an issue they never face. This letter will be somewhat different in focus than the previous one was. I am enclosing a copy of that previous letter, which contains more detail concerning the case law and other research materials, to the extent that reference is necessary. In this letter, I will address the Proposed Opinion directly.

The basic problem with the approach the Ethics Committee has taken is that, without any foundation in the Rules of Professional Conduct, it allows the prior firm, whether it be a prior employer or some other firm that has been discharged by the client, entirely too much leverage with respect to disputed fees. As a practical matter, the Ethics Committee sets up a system that requires the attorney that is representing the client at the time the case is resolved to keep the whole fee in trust until agreement is reached as to how to divide the fee or until litigation over the fee has been concluded. This would have the further effect, in some cases, of interfering with clients' ability to choose their attorneys and forcing them to remain with firms that may not be serving them well. It may be important to members of the Committee to recognize that whatever

opinion is issued as to a departing attorney situation may apply equally to a case in which a client discharges an incompetent attorney and seeks representation by one at the top of the field.

A. The individual opinions, lack of support in the rules and a potential amelioration.

If Opinion #5 were correct, then the other opinions would also be correct, as they flow from it and the citations to specific rules are appropriate. The problem is that Opinion #5 is not correct. No specific rule or general principle in the Rules of Professional Conduct supports it, as is implied by the lack of specific reference to a rule. Indeed, Opinion #5 runs contrary to applicable case law. The case law holds explicitly that there is no lien attached to the fees obtained by the lawyer who resolves the case. The only right a prior firm can have is to be paid, by the resolving lawyer, the quantum meruit value of the services rendered by that firm. The claim by the prior firm is no different than any other potential debt. There is no connection to a specific pool of money, and there is no implicit duty on the part of the resolving lawyer to hold the fees in trust, pending resolution of the amount due the prior firm. Opinion #5 creates such a duty out of whole cloth, with no foundation in law or ethics.

The ability, in Opinion #5, of the resolving attorney to take out any amount that is believed not to be in dispute is illusory. All the prior firm need do to freeze the entire fee is to write a letter saying that it disputes the entire amount of the fee, so that the resolving lawyer will be unable to have a good-faith belief that any of the fee is undisputed. If Opinion #5 were amended to allow the resolving attorney to withdraw an amount that she, in good faith, believes to be a reasonable estimate of the amount in excess of what will be due the prior firm, then the Opinion becomes less objectionable, though still technically incorrect.

The error in Opinion #5 pulls the foundation from under the other opinions in the Proposed Opinion, to the extent the other opinions rely on Opinion #5. As described above, the fees are not mixed funds. Therefore, while the opinion stated in Opinion #2 as to "mixed funds" is correct, it is inapplicable to the situation posed in the inquiry. Opinions 1, 3 and 4 stand independently and are, I think, correct.

B. Specific ethical problems created by Proposed Opinion.

The non-tactical problem with the Proposed Opinion is that it actively promotes a condition that is contrary to the Rules of Professional Conduct. Related to the pressures that can be brought to bear against a departing or subsequent lawyer, the most ethically significant problem with allowing fees to be tied up for years is interference with the client's choice of counsel. The practical problem that is created by giving prior firms the power to freeze fees is that a subsequent attorney may be forced to take that into account in deciding whether to take a case and may decline the case, because of the expected difficulty of getting paid. Paragraph 6 of the Preamble of the Rules of Professional Conduct states that "a lawyer should seek improvement of…access to the legal system." Rendering it more difficult for a client to leave a firm with which he is dissatisfied works against that principle. The fact that the potential resolving attorney will likely owe money to the prior firm is enough of an impediment to obtaining new counsel. We should not, through ethical rulings, add the potential for a years-long freezing of the fee, which would increase the severity of that impediment.

The situation is worse when remaining with the original firm would expose the client to less competent representation. Rule 1.1 requires competent representation. Comment

paragraphs 1, 5 and 6 make clear that an attorney with limited experience in workers' compensation, in which subject the State Bar certifies specialists, should not be messing around in a complex workers' compensation case. It is not uncommon for only one attorney in a firm to do comp work. If that person leaves, and her clients want to go with her, and she is excessively selective as to which clients she will accept in her new practice, out of concern that she will be unable to stay in business if she has to wait several years for fees in those case, then some clients may be stuck at the prior firm, which may have no one capable of handling the cases.

Further, the principles established for departing attorneys are not distinguishable from those for other subsequent attorneys. Thus, if a highly qualified and experienced workers' compensation practitioner were to receive a call from someone who has fired an attorney who has botched his case, the attorney would be placed in the position of considering his financial ability to wait for litigation of the potential fee when deciding whether he would take the case and clean up the mess the prior attorney had made. Poorly represented clients should not be faced with that kind of impediment to obtaining new counsel. While there are certainly times when a client fires his attorney without justification, experience shows that that is less common than reasonable firings, and we must let clients make their own choices, even if they are wrong.

C. **Practical concerns and policy.**

I am not blind to the irritation suffered by a firm that perceives that it trains an attorney, uses its marketing abilities to attract clients for that attorney and then watches her leave, "stealing" the clients she obtained while there. But that problem is, in my experience, probably less common than the mirror image, in which the employee attorney is in an untenable position (with or without the fault of the firm), so that the only healthy thing for the firm, the employee attorney and the pertinent clients is for the employee lawyer to leave. The employer's concerns also do not present any ethical issue, unlike a system that would make it more difficult for a client to leave a firm that is not providing quality representation.

There may be unintended consequences. There has been increasing discussion, at least on a national level, as to the ethical ramifications of law practices that essentially sign up clients, then pass on the handling of their cases to other lawyers. If that kind of practice grows in North Carolina, do we really want to empower the firms that do it by giving them a stranglehold on the fees that arise from those cases?

Furthermore, the prior firm has some control over the pace of litigation, in that it can sue immediately for the fee. In the absence of declaratory relief, which may not be available, the subsequent lawyer has no way to push resolution of the issue. All a prior firm has to do, to really put the squeeze on the subsequent or departing lawyer, is to sit on the case for almost three years, then file a lawsuit, dawdle in pursing it, then take a voluntary dismissal, then repeat the process, with the added possibility of appeal. The only way to get prompt resolution would be for the subsequent lawyer to agree to an extortionate deal. The Proposed Opinion could actually foster delay in resolving fee issues.

The risk of bankruptcy by the subsequent attorney is not a justification for tying up the fees in trust for several reasons, not the least of which is that placing the money in trust does not protect it from creditors. The case law holds that there is no lien in this circumstance, so the fees will be accessible to a bankruptcy trustee, just like any other asset, for payment to creditors, including firms that have claims for fees.

Again, if Opinion #5 were modified to allow withdrawal by the resolving attorney of the amount that she believes, in good faith, to be in excess of the amount to which the prior firm will ultimately be due, then the approach represented by the Proposed Opinion would create less difficulty. While it would still be technically incorrect, some of the practical problems would be lessened. Of course, I suspect that firms that would favor the Proposed Opinion are not interested in reducing the problems it would create.

Difficulty could also be reduced by provision by the State Bar of arbitration services to resolve fee issues between attorneys. A quicker resolution reduces the pressures all around. In my only really unpleasant experience with these issues, I made the mistake of promising to keep a fee in trust until the amount to be paid to prior, unrelated counsel was resolved. After more than six months of getting no real response, I badgered the guy (with whom I have a good relationship) into agreeing to arbitration before a retired Deputy Commissioner of the Industrial Commission. As the arbitration approached, my colleague finally got serious about talking, and we reached agreement, including agreement as to how to handle future cases. I had essentially no leverage in getting him to agree to the arbitration. I just got lucky. A formalized process, which does not now exist, with short time frames, would help enormously. It would not, however, cure the error in the Proposed Opinion.

D. **Conclusion.**

There is no ethical rule or imperative that dictates a system that allows prior firms to prevent income to subsequent lawyers by freezing contingency fees. On the contrary, the approach represented by the Proposed Opinion is likely to run counter to ethically important issues of client choice and competent representation. Further, there is case law that indicates the opposite approach.

As long as this letter is, I have tried to keep it short and have, consequently, left out illustrative cases, among other things. I will be happy to discuss this with the Committee or provide additional information.

Please understand that I recognize that these issues are not simple and that the Ethics Committee is acting in good faith to find solutions. My disagreement with the Proposed Opinion does not imply any disrespect for the Committee, and I appreciate what you do.

Thank you for your attention to this matter.

Very truly yours,
Jay A. Gervasi, Jr.
State Bar No. 13504

Enclosure

CC: Ms. Jeri Whitfield
Mr. Mark Sumwalt

SECOND, EARLIER LETTER

June 27, 2003

Re: Bar Inquiry Concerning Fees for Prior Counsel

Dear Jeri:

This letter follows our telephone conversation last week. It is my understanding that the Bar Association Workers' Compensation Section has received a request for comment from the State Bar, concerning an inquiry about the relative rights of prior and current counsel in contingency fee situations, particularly in workers' compensation cases when an employee attorney has left a firm and a client has left with her. As you know, I have been involved in those situations on both sides and have been consulted by a number of attorneys about them. I have opinions as to the current law, as well as on policy issues surrounding it, which I am never reluctant to share. In the interests of disclosure, in addition to being a member of the Workers' Compensation Section of the Bar Association, I am the recently anointed Chair of the Workers' Compensation Section of the North Carolina Academy of Trial Lawyers, but I do not write this in that capacity. I am also, as you are, a certified specialist in workers' compensation law.

An overriding policy principle is that our clients have a right to choose their lawyers. That is axiomatic. The best way to deal with client choice, when an attorney leaves a firm, is to write a joint letter, advising of the departure and inviting that lawyer's clients to stay with the firm, leave with the departing attorney, or choose another option altogether. In my experience, the vast majority of clients usually go with the departing attorney. The question is what to do about fees, when work was performed on a case at the prior firm, but a fee is realized after the case has left the firm with a departing lawyer.

A few background matters help to clarify. First, we are talking about attorneys who are employees of the firm from which they depart. I do not know if the same analysis applies, when an equal partner leaves a partnership that has no contractual provisions governing fees. However, when a "partner", who is actually an owner of an incorporated firm, leaves, that "partner" is probably an employee of the corporation. Obviously, the analysis gets sloppy if the "partner" is the largest shareholder in the corporation, which can make it difficult to figure out who is leaving whom. Second, there is no analytical difference between situations in which the client leaves the firm with a departing attorney and those in which the client leaves the firm to go to an unrelated attorney in another practice. In both cases, the client is leaving the firm that had been representing her and going to another. Whether the new firm contains the individual lawyer who previously represented the client or not makes no difference, for present technical purposes. Third, it makes no difference whether the new firm is a subsequent employer of the individual, departing attorney, is a partnership including the departing attorney or is the departing attorney as a solo practitioner. There is a transition from one representing entity to another in all cases. And fourth, none of this applies in situations in which the client leaves a firm and resolves her case without representation. Generally, it appears that lawyers who have represented clients have a right to have their contracts honored, at least in workers' compensation cases, in which there is a statutory requirement that a fee contract be honored, unless it is unreasonable. Adjustment is necessary only when attorneys are competing for the fee.

There is no problem in hourly billing environments, because hours billed while the departing attorney is an employee of the firm belong to the firm, and hours billed after departure belong to the new employer, whether that new employer is a new employing firm or the departing attorney as a solo practitioner. The problem comes up in contingency fee cases. There are two main cases that define the landscape. In Eller v. J. & S. Truck Services, Inc., 100 N.C.App. 545, 397 S.E.2d 242 (1990), disc. rev. denied, 328 N.C. 271, 400 S.E.2d 451 (1991), the Court of Appeals held that the Industrial Commission does not have jurisdiction to decide a controversy between attorneys as to the division of a fee. Presumably, such jurisdiction resides in the General Courts of Justice. It is not clear whether the decision would have been different, if the case had been couched as the Commission's granting two fees to the two different lawyers, instead of refusing to split one.

The other important case is Pryor v. Merten, 127 N.C.App. 483, 490 S.E.2d 590 (1997). In Pryor, there was a dispute as to contingency fees in a personal injury case. The client, a minor, had hired one law firm initially, which firm had associated another firm. The client then fired that set of lawyers and hired another firm, which also associated counsel. After a settlement offer of $250,000 that the client almost accepted, he went back to the law firm that had been associated by the first lawyer. After settlement and approval of the minor settlement, the second associated law firm found out about the settlement and filed a "motion in the cause," claiming a quantum meruit fee. The Trial Court awarded a fee, and the Court of Appeals affirmed. There were a number of procedural matters that do not concern us here, involving claims of res judicata, laches, etc. On the issue at hand, the Court of Appeals noted prior authority that dictated a claim against a client for quantum meruit recovery, but noted that the issue of multiple claims for contingency fees had not been directly addressed. The Court stated that allowing recovery from the client would place an unacceptable burden on the client's recovery and held that when there are multiple claims for contingency fees from a single recovery, the claim for quantum meruit recovery by prior counsel is against the attorney who is representing the client at the time the fee is generated. There is no lien attached to the proceeds, just a claim available for quantum meruit payment. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992) (cited in Pryor).

Taking the case law and Industrial Commission procedures together, it appears that the proper way for fees to be distributed is for the Commission to order a fee to the attorney who is under contract at the time a fee is generated. Thereafter, prior counsel will have a claim in quantum meruit against the attorney who receives the fee, which claim can be pursued in the General Courts of Justice. There is no need for the Industrial Commission to hold up payment of the fee while waiting for resolution of a dispute between the attorneys, since the Commission does not have jurisdiction over the matter. Further, it is bad policy to allow prior counsel to hold fees hostage, for a couple of reasons.

First, but not foremost, the prior firm rarely has as much at stake in the fee as the departing attorney. For example, when an attorney leaves to open a solo practice, that attorney has an immediate need for money. At the same time, the firm from which she departed actually has less need for money than it had while she was working there, because the firm is no longer having to pay the salary or benefits of the departing attorney. To allow the firm from which the attorney departed to sit and watch fees reside in some sort of escrow, while the departing attorney is forced to go through years of litigation to get any fee in each case creates, in my opinion (and experience), an inappropriate imbalance in the effects of the dispute on the parties to it. The "emotional equities" surrounding the situation may be irritating when it is perceived

that the departing attorney has left a firm for no reason and opportunistically stolen clients. But for every case that can be perceived that way, there will be others in which it is perceived that the departing attorney was fired unreasonably or placed in an intolerable position that forced him to leave.

Second, and foremost, allowing fees to be held hostage chills the clients' ability to exercise their right to the attorney of their choice. The client has the right to choose the lawyer and, by extension, to pay the lawyer of her choice. If the prior firm can assert too much pressure on departing counsel as to fees, then the departing attorney may not be able to accept representation of the clients that wish to depart. While we unanimously recognize the right of a client to choose her lawyer, that right is not much use, when the chosen lawyer can be pressured by the prior firm into declining the representation. In the context of fees in cases in which prior counsel was not a prior employer, I have had several cases in which clients left prior lawyers and came to me. In some of those cases, prior counsel had not done a very good job, often due to lack of experience in workers' compensation. If prior counsel were able to prevent me from getting fees in those cases, I would be forced to decline some of them, leaving clients stuck with inadequate lawyers. The same thing can happen when, for example, the only qualified workers' compensation lawyer in a firm leaves. Further, when negotiating the fee arrangement for a departing attorney, the ability to deprive the departing lawyer of fees allows the prior firm to pressure her into agreeing to recommend to certain clients that they remain in the firm, in exchange for a survivable deal concerning the fees in other cases. In each of these instances, an imbalance in the impact of the dispute can hurt clients.

Third, allowing the prior firm to prevent the departing attorney from gaining access to fees gives the firm too much power over the attorney. We, as a bar, should try to avoid trapping lawyers in their jobs. It makes them miserable and is detrimental to the service rendered to their clients. Unfortunately, there are sometimes unavoidable circumstances that make a lawyer unable to leave a bad situation. However, when given an opportunity to do otherwise, we should not create obstacles to leaving that exacerbate such problems.

I am not unsympathetic to the concerns of firms from which attorneys depart with clients. It is frustrating to believe that the firm has spent resources teaching the attorney and that firm reputation or marketing has provided cases to the lawyer, then to see the lawyer leave with the financial product of firm investment. However, the above procedure allows the prior firm to recover payment of fees. The only difference between that procedure and allowing the prior firm to hold fees hostage is timing. It is significant that prior firms seldom contend that the fee should be paid to them, with the departing attorneys making claims for their share. The suggestion is usually that the entire fee should be held somewhere until there is resolution of the issue as to which representing entity gets what. Such a procedure, while causing the problems mentioned above, would not get money to the prior firm any faster than would paying the fee to resolving counsel and allowing the prior firm to pursue its part. It would just allow the prior firm the tactical advantage of being able to squeeze the departing lawyer, perhaps extorting an agreement. In my opinion, providing tactical squeezing leverage to one side of a dispute is not an appropriate goal for the Courts or the State Bar.

It is fair to point out that the above procedure is not neutral as to its affect on the tactical balance in a fee dispute. However, observation of the real world reveals that in the vast majority of cases, the firm from which the lawyer departs suffers less without the fees than does the departing attorney, particularly when the departing attorney opens a solo practice. To the extent that a decision needs to be made, as a matter of policy, between two procedures, I believe that

the one chosen should be the one that has the least tactical effect in most fee disputes. It is a matter of balance, and I think the practical realities indicate that the above procedure is the right one.

The most legitimate concern that a prior firm can raise with respect to a non-escrow approach is the risk of bankruptcy of the departing attorney. In my opinion, there are sufficient disincentives to bankruptcy that most lawyers will not choose to use it as a litigation tool. However, in general discussion, Chris Justice, a young lawyer in my building, suggested the possibility of a presumptive escrow of something like 25% of earned fees, which would provide at least some protection to prior firms against insolvency of departing lawyers. The amount to which the prior firm would be entitled would not be affected by the amount in escrow—that is, the quantum meruit recovery could be more or less. But there would be some level of protection. Such a procedure might also make prior firms more comfortable, by applying some tactical pressure to the departing lawyer, without giving the prior firm an overwhelming advantage. While that may be beyond the scope of this discussion, I think it is an idea that is worth exploring.

Now, as to the specific questions asked of the Bar:

1. The case law is not clear as to whether the departing attorney is required to notify the firm of the settlement. In Pryor, the Court mentioned lack of notice, in relation to some of the procedural issues that were raised, implying that failure to give notice would make it more difficult for resolving/departing counsel to claim laches. I would favor a requirement that the departing attorney advise the prior firm that a fee has been earned, simply because there is no legitimate value in allowing subsequent counsel to hide the fact, and notifying is more honest. However, I think the part of the question about notifying that "a decision needs to be made as to the division of the fee" is misplaced, in that it implies that someone will make a decision before Attorney X gets paid. A departing lawyer would be reluctant to notify a prior firm that a fee has been earned only if that information would confer tactical advantage on the prior firm, by allowing it to tie up the fee. Because the prior firm does not have that ability, there is no reason for the departing lawyer not to notify the prior firm. That a question as to notification would come up, and the tactical maneuvering that the question implies, serve to illustrate the negative aspects of allowing fees to be held hostage by a prior firm.

2. I think question two is based on a misapprehension of the law. Attorney X, who is defined as departing counsel, who is under contract at the time the fee is generated, will not "unilaterally determine" anything. However, she will receive the entire fee, so there is no decision to be made prior to disbursing a portion to herself. Of course, there will be a claim against her in favor of her prior employer, which she will need to deal with.

3. Again, the question presupposes duties that do not exist. Attorney X is not required to deposit anything in trust, pending resolution of the fee dispute. It would be a good idea, though, as she spends the fee, to bear in mind that there is a claim lurking that could result in a judgment that she may have to pay. And as mentioned above, if the Bar is interested in splitting babies, it might want to consider a policy (for which there is currently no support in the law) requiring deposit into trust of something like 25% of earned fees that are subject to dispute, as a measure of protection for prior firms.

4. Attorney X has no obligation to advise the client as to any obligation to pay fees, because the client has no such obligation. In a contingency fee environment, the money paid to prior counsel comes from subsequent counsel. The Pryor Court's objective, in announcing the procedure it did, was to avoid the problem of overcharging the client. The Court stated clearly that the client would pay one fee, which would satisfy the claims of all lawyers. Reimbursement of costs is completely separate. The client has a duty to reimburse costs that is independent of the fee, so there is no obstacle to the prior firm's seeking reimbursement. It is better, more civil practice for departing counsel to encourage clients to meet their obligations to prior counsel as to costs, but I do not think she has any legal power to force payment.

5. Once more, I do not think that the fee should ever end up in trust. (For those who do not practice workers' compensation law, fees are generally ordered to be paid directly to plaintiff's counsel, by separate check. There is usually no need to process settlement proceeds through a trust account, as there is in other personal injury cases.) In the workers' compensation system, the client has the right to challenge the fee at the time it is requested by the lawyer. Once the fee is ordered to be paid to plaintiff's counsel, the client has no further control over it. Frankly, I am not sure how this, or the Pryor v. Merten decision for that matter, meshes with ethical rules regarding fee sharing arrangements and client consent. I am inclined to view it separately, since the only "agreement" comes up as settlement of a potential claim by one lawyer (or firm) against another.

In my opinion, the above is an accurate outline of the procedure for resolving fee disputes. It should be noted, however, that the practicalities are a mess. Proving the amount of the quantum meruit payment is likely to be very difficult. Most plaintiffs' firms do not keep detailed time records. Assessing the value of each time increment is hard. And each case must be handled individually. Litigation over each of the fees in 80 cases that leave with a departing lawyer is not desirable. It is far more practical to reach some agreement as to how fees are to be divided. As a practical matter, agreements are made, for some calculable portion of the fees in cases that leave with the departing lawyer, in most instances. In my opinion, the relative positions that the parties are placed in by the above procedure helps to promote fair resolution of those situations. To allow the prior firm the additional leverage that would come with being able to hold up disbursement of fees would shift the balance too far toward the firm and would allow the firm to extort unfair arrangements.

As you and I have discussed, my prior firm has no objection to my discussing the terms of my departure with others. I have been asked to counsel several firms and departing lawyers in ways that I hope have helped. As always, I am happy to help where I can. There are others in similar situations, including those who advised me. Perhaps the State Bar can set up a system for encouraging firms and departing lawyers to seek consultation with some of us who have left and been left.

I apologize for the length of this letter. If I spent more time on it, I may be able to condense some. But this is a complicated issue. I hope I have been of some help. Feel free to contact me, if I can be of any assistance.

Very truly yours,
Jay A. Gervasi, Jr.
State Bar No. 13504

II. Communication issues.

Again, it is not completely obvious why communication issues are so tense in workers' compensation, and some of the seminal cases are not from that field. However, the tough situations keep coming up in comp.

Also again, the Bar's opinions in these matters seem unusually likely to involve litigation advantage or disadvantage.

A Private investigator communication with represented parties.

This is a place where ethics and litigation have butted heads very directly. Following is 2003 Formal Ethics Opinion 4. As stated under the title, argument over this issue was so intense that it produced a long delay in generating the Opinion. There does not appear to be any controversy with the basics—that a lawyer may not communicate with a represented party, and the lawyer cannot do, through an agent, what he cannot do himself. The controversy arose due to the way the inquiry was couched: whether, when direct contact is made by a private investigator with a represented plaintiff, directly contrary to an attorney's instructions, the attorney may introduce the information gained through the contact into evidence. While the Bar said that it "declines to comment on the admissibility of evidence," it did so anyway, opining that the lawyer could introduce the evidence, if she first advised the tribunal and opposing counsel as to the source of the evidence. In response to Inquiry #2, the Bar opined that visual observations obtained after the improper communication ("fruit of the poisonous tree" in criminal law parlance) could be introduced. Curiously absent is emphasis on ethical implications.

Also missing is any indication of what would happen under slightly different circumstances. For example, would the same admissibility rule apply if the private investigator had not been explicitly told not to have direct contact with the plaintiff, or even if the attorney had told the PI to have the contact? That is, can the evidence be introduced, as long as the source is revealed to opposing counsel and the tribunal, even if there has been an ethical breach? If not, why not? And what happens when defense lawyers advise their insurance clients of this ruling? If adjusters routinely send private investigators to talk to represented plaintiffs before referring files to defense counsel, is defense counsel free to use the evidence, needing only to tell the other side what has happened first? And how far can the defense go in using the "fruit of the poisonous tree?" Does the Bar really intend to imply that any amount of improper contact by a PI with a represented plaintiff can be laundered by simply confirming the information gained with observations and using the observations as evidence instead of the communications?

2003 Formal Ethics Opinion 4

July 25, 2003

Communicating with a Represented Person through an Agent

Editor's Note: This inquiry was originally submitted to the Ethics Committee in 2001. Since that time, four proposed responses to the inquiry were published for comment

under the designation *Proposed 2001 Formal Ethics Opinion 13* . Because of the delay in publication, the proposed opinion has been renumbered as a 2003 ethics opinion to reflect that citations in the opinion are to the Revised Rules of Professional Conduct (2003).

Opinion rules that a lawyer may not proffer evidence gained during a private investigator's verbal communication with an opposing party known to be represented by legal counsel unless the lawyer discloses the source of the evidence to the opposing lawyer and to the court prior to the proffer.

Inquiry #1:

Attorney represents the employer and the workers' compensation carrier in a workers' compensation case filed by Plaintiff, an injured employee. Attorney knows that Plaintiff is represented by legal counsel. Attorney hired a private investigator to watch Plaintiff to see if Plaintiff engaged in any physical activity indicating that he is not injured to the extent that he claims. Attorney instructed the private investigator not to engage Plaintiff in conversation. During the surveillance, the investigator ignored Attorney's instructions and engaged Plaintiff in a conversation about a motel property located next to Plaintiff's property. As a pretext for the communication, the investigator told Plaintiff he was interested in purchasing the motel property. During the conversation, Plaintiff stated that he was repairing the motel property from storm damage. The investigator's observations of Plaintiff during the remainder of the surveillance, without further verbal contact with Plaintiff, indicate that Plaintiff is physically able to work.

May Attorney proffer the private investigator's testimony about his conversation with Plaintiff as evidence in the workers' compensation trial?

Opinion #1:

Rule 4.2(a) of the Rules of Professional Conduct (2003) prohibits a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the other lawyer consents or the communication is authorized by law. A lawyer may not do through an agent that which the lawyer is prohibited by the Revised Rules of Professional Conduct (2003) from doing himself. *See* Rule 5.3.

The Ethics Committee declines to opine on the admissibility of evidence. However, to discourage unauthorized communications by an agent of a lawyer and to protect the client-lawyer relationship, the lawyer may not proffer the evidence of the communication with the represented person, even if the lawyer made a reasonable effort to prevent the contact, unless the lawyer makes full disclosure of the source of the information to opposing counsel and to the court prior to the proffer of the evidence. *See* Rule 3.3, Rule 4.1, and ABA Comm. On Ethics and Professional Responsibility, Formal Op. 95-396 (1995).

Inquiry #2:

If the information gained from the investigator's conversation with Plaintiff may not be used at trial, may Attorney still offer the evidence gained through the investigator's visual observations of Plaintiff?

Opinion #2:

Yes. Visual observation is not a direct contact or communication with a represented person and does not violate Rule 4.2(a).

B. *Communications with employees of represented corporate defendants.*

The general rule on communications with employees of opposing, represented corporations is that such communications are not permitted with managerial employees or those who are authorized to speak for the corporation, in the absence of permission from the representing attorney. In essence, anyone whose out of court statement could be admitted into evidence as an admission of a party opponent is off-limits. While RPC 67 (1989) below refers only to employees of corporations, there does not seem to be any reason that the same rule would not apply to unincorporated organizations. In workers' compensation cases, plaintiffs' lawyers are the ones who are most likely to run into the issue.

Some additional complexity is introduced in 97 FEO 2, below, which expands on the prohibition in RPC 67 by including in the definition of the class of employees who cannot be contacted those who might participate in the legal representation in a case. Concerns about the risk of revealing confidential information about the representation are so significant that 97 FEO 2 creates an exception to the usual lack of prohibition against communicating with former employees of a represented organization, when those former employees, such as insurance adjusters assigned to a case, participated in the representation. The opinions carry an implied warning to defense counsel that they should be careful about discussing trial strategy with "rank and file" employees of the employers they represent, as plaintiffs' counsel will be permitted to speak with those employees and discover confidential information.

Of course, communication with a represented party is allowed with the permission of the party's lawyer. This comes up more frequently in workers' compensation than in other fields, due to the on-going nature of benefits, which constantly creates things to discuss, like late checks and organizing medical appointments, that give rise to direct communications between plaintiffs' counsel and adjusters that are routinely allowed by defense counsel. Even though such communication is routinely allowed, plaintiffs' counsel should be careful to get the required permission from defense counsel, even when adjusters call and say that the communication is permitted. While we recognize that the attorney will almost always give the permission if instructed by an adjuster client to do so, we should still follow the formalities, especially when we recognize that the communications prohibitions must work in both directions, and very few plaintiffs' lawyers would be happy to hear a defense lawyer explain that she had discussed a case directly with a plaintiff, because the plaintiff had said it was all right.

RPC 67

July 14, 1989

Interviewing Employee of Adverse Corporate Party

Opinion rules that an attorney generally may interview a rank and file employee of an adverse corporate party without the knowledge or consent of the corporate party or its counsel.

Inquiry:

After a workers' compensation claim has been filed and the employer is represented by counsel, may the claimant's attorney contact a nonmanagerial co-employee of the claimant to discuss the circumstances of the alleged accident without obtaining consent of counsel for the employer?

Opinion:

Yes. Rule 7.4(a) of the Rules of Professional Conduct generally prohibits contact with only those employees of a represented corporate party which have managerial responsibility or who have been authorized to speak for the corporation. Rank and file employees whose personal acts or omissions are not at issue may ordinarily be interviewed without the knowledge or consent of the corporate party or its counsel. *See* CPR 2.

97 Formal Ethics Opinion 2

January 16, 1998

Editor's Note: Opinion was originally published as RPC 254. Before adoption, it was revised to reference the appropriate sections of the Revised Rules of Professional Conduct under which it was finally decided.

Communications with Unrepresented Former Employees of Represented Organizations

Opinion rules that a lawyer may interview an unrepresented former employee of an adverse represented organization about the subject of the representation unless the former employee participated substantially in the legal representation of the organization in the matter.

Inquiry #1:

Y Insurance Company carries the workers' compensation coverage for Employer. Adjuster, an employee of Y Insurance Company, was assigned to investigate and manage Employee's workers' compensation claim against Employer. During the three years that she handled Employee's claim, Adjuster played a major role in the decision making relative to the defense of the claim.

Last year, Attorney A was assigned to represent Y Insurance Company and Employer in Employee's workers' compensation action. Adjuster and Attorney A have worked closely together on the defense of the case. Adjuster's input, her knowledge of the claims file, and the records Adjuster has maintained in the claims file are integral to Attorney A's defense of the case.

May the lawyers for Employee communicate directly with Adjuster about Employee's claim without the consent of Attorney A?

Opinion #1:

No. Rule 4.2(a) of the Revised Rules of Professional Conduct provides: "[d] uring the representation of a client, a lawyer shall not communicate about the subject of the representation with a person 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 ABA Committee on Ethics and Professional Responsibility states, in Formal Opinion 95-396 (1995), that such "anticontact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests."

An organization that is represented by legal counsel in a matter also falls within the protection of Rule 4.2. Communications by adverse counsel with certain personnel of a represented organization are prohibited. Comment [5] to Rule 4.2 states that "this rule will prohibit communications by the lawyer concerning the matter with persons having managerial responsibility on behalf of the organization." *Compare* RPC 67 (permitting *ex parte* communications with a "rank and file" employee of an adverse corporate party). Although an adjuster for an insurance company may not be considered a "manager" or "management personnel" for the company, the adjuster does have managerial responsibility for the claims that she investigates. The adjuster is also privy to privileged communications with the legal counsel for the company and is generally involved in substantive conversations with the organization's lawyer regarding the representation of the organization. To safeguard the client-lawyer relationship from interference by adverse counsel and to reduce the likelihood that privileged information will be disclosed, Rule 4.2(a) protects from direct communications by opposing counsel not only employees who are clearly high-level management officials but also any employee who, like the adjuster in this inquiry, has participated substantially in the legal representation of the organization in a particular matter. Such participation includes substantive and/or privileged communications with the organization's lawyer as to the strategy and objectives of the representation, the management of the case, and other matters pertinent to the representation.

Inquiry #2:

About three months before an important Industrial Commission hearing in Employee's case, Adjuster left the employment of Y Insurance Company to become an adjuster for Z Insurance Company. Attorney B represents Employee in the workers' compensation action. Not long before the Industrial Commission hearing, Adjuster was in Attorney B's offices on an unrelated matter. Attorney A was not present. Attorney B approached Adjuster to discuss Employee's case. Should Attorney B have obtained the consent of Attorney A prior to speaking directly with Adjuster with regard to Employee's workers' compensation case?

Opinion #2:

Yes. The protection afforded by Rule 4.2(a) to "safeguard the client-lawyer relationship from interference by adverse counsel" can be assured to a represented organization only if there is an exception to the general rule that permits *ex parte* contact with former employees of an organization without the consent of the organization's lawyer. *See* RPC 81 (permitting a lawyer to interview an unrepresented

former employee of an adverse corporate party without the permission of the corporation's lawyer). The exception must be made for contacts with a former employee who, while with the organization, participated substantially in the legal representation of the organization, including participation in and knowledge of privileged communications with legal counsel. Permitting direct communications with such a person, although no longer employed by the organization, would interfere with the effective representation of the organization and the organization's relationship with its legal counsel. Such communications are permitted only with the consent of the organization's lawyer or in formal discovery proceedings. The general rule, set forth in RPC 81, permitting a lawyer to interview an unrepresented former employee of an adverse organizational party without the consent of the organization's lawyer, remains in effect with the limited exception explained above.

Inquiry #3:

[The facts of this inquiry are unrelated to the preceding inquiries.]

Employee X is no longer employed by Corporation. While an employee of Corporation, however, Employee X may have engaged in activities that would constitute the sexual harassment of other employees of Corporation. An action alleging sexual harassment based on Employee X's conduct was brought against Corporation. Although he is not a named defendant in the action, Employee X's acts, while an employee, may be imputed to the organization. When he was employed, Employee X did not discuss the corporation's representation in this matter with Corporation's lawyer. Employee X is unrepresented. May the lawyer for the plaintiffs in the sexual harassment action interview Employee X without the consent of the lawyer for Corporation?

Opinion #3:

Yes. Unlike the adjuster in the two prior inquiries, Employee X was not an active participant in the legal representation of his former employer in the sexual harassment action. It does not appear that he was involved in any decision making relative to the representation of Corporation nor was he privy to privileged client-lawyer communications relative to the representation. Rather, Employee X is a fact witness and a potential defendant in his own right. Permitting *ex parte* contact with Employee X by the plaintiff's counsel will not interfere with Corporation's relationship with its lawyer nor will it result in the disclosure of privileged client-lawyer communications regarding the representation. Comment [5] to Rule 4.2, which indicates that the rule prohibits communications with any employee "â€¦ whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization, " should be applicable only to current employees. The purpose of Rule 4.2 is not enhanced by extending the prohibition to former employees who, during the time of their employment, did not participate substantively in the representation of the organization.

Although the plaintiff's lawyer may communicate directly with the Employee X, the lawyer's communications are subject to the protections for unrepresented persons set fourth in Rule 4.3. Rule 4.3(a) prohibits a lawyer from giving advice to an unrepresented person, other than the advice to secure legal counsel, if the interests of the person are in conflict with the interests of the lawyer's client. Similarly, Rule 4.3(b) requires the lawyer to make known to the unrepresented person that the lawyer is not disinterested.

C. Communications with treating physicians.

Most workers' compensation practitioners are, by now, familiar with the prohibition against non-consensual, ex parte communication with treating physicians by defense counsel. That rule, announced by the Court of Appeals in Salaam v. N.C. Dept. of Transportation (see citation below), has been reiterated in the Bar ethics opinion, RPC 225 (1997). To the extent that there is anything ethically interesting about the Salaam decision, it is that it was based on public policy concerns about patient privacy, which does not really have an ethical dimension. The reason for the opinion is unclear, though it may have been in response to an inquiry that was submitted before the Salaam decision was published.

RPC 224

October 24, 1997

Editor's Note: This opinion was originally published as RPC 224 (Third Revision).

Communication with Treating Physician

Opinion prohibits the employer's lawyer from engaging in direct communications with the treating physician for an employee with a workers' compensation claim.

Inquiry #1:

Employee was injured in a work-related accident. Attorney A represents Employee in his workers' compensation claim. Attorney X represents the employer. Employee's treating physician is Dr. Care. May Attorney X contact Dr. Care privately, without the consent of Employee or Attorney A, to discuss Employee's medical treatment?

Opinion #1:

No. *See Salaam v. N.C. Department of Transportation*, 122 N.C. 83, 468 S.E.2d 536 (1996), disc. rev. improvidently allowed, 345 N.C. 494, ___S.E.2d___ (1997) (applying the holding in *Crist v. Moffat*, 326 N.C. 326, 389 S.E.2d 41 (1990), to adversarial proceedings before the Industrial Commission and recognizing the public policy interest in protecting patient privacy in light of the adequacy of formal discovery procedures).

D. Communication with the Industrial Commission.

As indicated in 98 FEO 13 below, commissioners and deputy commissioners of the Industrial Commission are treated the same as other judges, for purposes of rules governing the contacts between parties and those judicial officials. Oddly, despite a lot of stern-sounding language about prohibited communication, the bottom line of the Opinion is that the lawyer may submit in writing to the Commission anything that the Commission allows to be submitted. In other words, the ethical restrictions add nothing as to when the communications are permissible or not. The concern seems to be to prevent undue influence upon the tribunal, which would

presumably be done by copying the communication to opposing counsel, and to prevent “bad-mouthing” opposing counsel, which is really a separate issue from the form of communication.

Again, as in other issues, this one comes up more frequently in workers’ compensation, due to the on-going nature of the benefit, which tends to create on-going disputes.

98 Formal Ethics Opinion 13

July 23, 1999

Written Communications with a Judge or Judicial Official

Opinion restricts informal written communications with a judge or judicial official relative to a pending matter.

Inquiry:

Attorney A represents the employee in a workers' compensation case. Attorney X represents the employer and the insurance carrier. After the case was assigned to a deputy commissioner for hearing, Attorney A wrote to Attorney X regarding discovery disputes, medical treatment and examination of the employee, and alternative employment for the employee. The letter implied that Attorney X had engaged in improper conduct by communicating with an examining physician and failing to respond to discovery. The letter was copied to the deputy commissioner scheduled to hear the case.

Apart from the submission or filing of formal pleadings, motions, petitions, or notices, may a lawyer communicate in writing with a judge or other judicial official about a proceeding that is pending before the judge or judicial official?

Opinion:

A lawyer may communicate in writing with a judge or judicial official under the limited circumstances set forth below.

Rule 3.5(a)(3) of the Revised Rules of Professional Conduct regulates *ex parte* communications by a lawyer with a judge or other judicial official. The phrase "other judicial official," as used in the rule, includes, but is not limited to, the commissioners and deputy commissioners of the Industrial Commission.

On its face, Rule 3.5(a)(3) appears to permit unlimited written communications with a judge or other judicial official relative to a proceeding pending before the judge or judicial official provided a copy of the written communication is furnished simultaneously to the opposing party. The rule must be read, however, in conjunction with Rule 8.4(d) which prohibits conduct that is prejudicial to the administration of justice, and with comment [7] to Rule 3.5 which states:

> All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a

tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party.

The submission to a tribunal of formal written communications, such as pleadings and motions, pursuant to the tribunal's rules of procedure, does not create the appearance of granting undue advantage to one party. However, informal *ex parte* written communications, whether addressed directly to the judge or copied to the judge as in this inquiry, may be used as an opportunity to introduce new evidence, to argue the merits of the case, or to cast the opposing party or counsel in a bad light. To avoid the appearance of improper influence upon a tribunal, informal written communications with a judge or other judicial official should be limited to the following:

1) Written communications, such as a proposed order or legal memorandum, prepared pursuant to the court's instructions;

2) Written communications relative to emergencies, changed circumstances, or scheduling matters that may affect the procedural status of a case such as a request for a continuance due to the health of a litigant or an attorney;

3) Written communications sent to the tribunal with the consent of the opposing lawyer or opposing party if unrepresented; and

4) Any other communication permitted by law or the rules or written procedures of the particular tribunal.

III. Conflicts.

Unlike the other areas addressed above, conflicts generally do not have much impact on the relative positions of parties to litigation. However, that they arise between lawyers and their clients or potential clients does not make them any easier to resolve.

A. Plaintiffs' side: death claims.

The primary (and maybe only) situation in which a workers' compensation plaintiffs' lawyer is likely to run into conflict problems is when there are multiple claimants for the benefits arising from the death of the same employee. Things are complicated by the fact that the beneficiaries of death claims are not subsumed within an estate, but are separate parties, defined in the Workers' Compensation Act, which gives exclusive priority to whole dependents, including persons, like widows and minor children, who are presumed dependent. The scenario set forth in 2001 FEO 6 is a conflict mess, with potential beneficiaries including not only the widow and the child born to the deceased employee and her, but also the employee's minor children from his previous marriage (who are clearly entitled) and step-children who lived with the employee and the widow (who would be entitled only if they could prove actual whole dependency).

If looked at clearly, it is obvious that the same lawyer cannot represent the stepchildren and anyone else. The larger, practical problem is, what do we do with them? Their mother, with whom they live and who is almost certainly their only available advisor, may want them to take benefits, but she is in a conflict with them, whether she acknowledges it or not. Therefore, she really should not be retaining counsel for them. Further, she would be acting against the interests of not only her late husband's children from a previous marriage, but even of her own child with

the late husband. As a practical matter, kids in the step-children's situation have no real mechanism for obtaining guardians ad litem to look into obtaining counsel, as the lawyers retained by some adult are the ones who usually handle that. This presents a practical problem for defendants, too, whose exposure is not affected by the number of beneficiaries in this case (except for the very attenuated advantage of minimizing the share received by the joint child, who will receive more than 400 weeks of that share) and who are primarily interested in getting a valid Industrial Commission order to protect them against beneficiaries that might pop up later. The Commission has addressed this problem recently by asking for plaintiffs' lawyers to take positions as "guardians ad litem," who are more like representing lawyers than real guardians, for the minor potential beneficiaries who are left out of the group that can be represented by the primary plaintiffs' counsel in the case.

2001 Formal Ethics Opinion 6

July 27, 2001

Multiple Representation of Claims for workers' compensation Death Benefits

Opinion examines when a lawyer has a conflict of interest in representing various family members on claims for a deceased employee's workers' compensation death benefits.

Inquiry #1:

Worker was fatally injured in a work related accident covered under the workers' compensation Act. At the time of Worker's death, he was married to Wife #2 who has two children from a previous marriage (the "stepchildren"). Worker had two children of his own from his first marriage ("Worker's children"). Wife #2 and Worker also had one child together (the "joint child"). All of the children are under 18 years of age. Only the joint child is under 10 years of age.

Liability is admitted and the only issue before the Industrial Commission is the determination of the beneficiaries of the workers' compensation benefits payable by reason of Worker's death. Under the workers' compensation Act, the death benefits are divided equally among all the beneficiaries and then paid out over at least 400 weeks. N.C.G.S. §97-38. Every additional beneficiary entitled to compensation reduces the compensation payable to any individual beneficiary. A minor child who is under 10 years of age will receive compensation until the child reaches 18 years of age even if that is longer than 400 weeks. Compensation payments are usually made payable to a surviving spouse for the use and benefit of minor children of the surviving spouse. Once a surviving minor child turns 18 years old, compensation is paid directly to the child. A stepchild of a deceased employee qualifies as a dependent only if the child was substantially dependent upon the deceased employee at the time of death. Whether a stepchild was substantially dependent upon the deceased employee may be disputed.

Wife #2 asked Attorney A to represent all of the following claimants to the death benefits: Wife #2; the guardians ad litem for Worker's children; the stepchildren; and the joint child. May Attorney A represent Worker's children and stepchildren simultaneously?

Opinion #1:

Worker's children will maximize their shares of the death benefits by excluding Worker's stepchildren from the distribution. Attorney A cannot represent the interests of Worker's children unless he advocates against the compensation of Worker's stepchildren. Such a direct conflict of interest is prohibited under Rule 1.7(a).

Attorney A may not ask the guardians ad litem for Worker's children to consent to the conflict of interest because, as stated in Comment [5] to Rule 1.7, "When a disinterested lawyer would conclude that the client should not agree to representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."

Inquiry #2:

Wife #2 asked Attorney A to represent her, Worker's stepchildren, and the joint child of the marriage of Wife #2 and Worker. The two stepchildren are over age 10 and will continue to receive benefits after turning 18 years old. While they are minors, they will live with their mother and any benefits they receive will likely be paid to Wife #2 to support the household. Similarly, any compensation payable to the joint child of the marriage will be paid to Wife #2 to support the child. May Attorney A represent Wife #2, the stepchildren, and the joint child?

Opinion #2:

Attorney A may represent Wife #2 and her own children from her first marriage or Attorney A may represent Wife #2 and the joint child of her marriage to Worker. It is assumed that Wife #2 will receive the benefits payable to all of these children during their minority if they reside with Wife #2 and, therefore, Wife #2 and these children have a common economic interest. Moreover, Wife #2 has a financial obligation for her children until they reach age 18. *See* RPC 123.

Nevertheless, Attorney A may not represent the stepchildren and the joint child of the marriage simultaneously. The interest of the stepchildren of Worker and the joint child of the marriage are opposed because the joint child has an interest in maximizing the benefits payable by eliminating the claims of the two stepchildren on the basis that the two stepchildren were not substantially dependent on Worker at the time of his death. Even though the compensation to the two stepchildren might initially be payable to Wife #2 to run the household, once the two stepchildren are emancipated, they will receive compensation directly. Therefore, their interests are adverse to that of the joint child of the marriage. *See* Rule 1.7(a).

B. Defense side: the problems of routinely representing two parties.

Unlike plaintiffs' lawyers, defense counsel represent more than one party very frequently. Any time an insured employer is the target of a claim, the defense lawyer represents both the insurance carrier and the employer. The situation is emphasized by the fact that, unlike in other types of personal injury cases, insurance carriers are actually parties in comp cases. The supposed loyalty to both clients is complicated, as in other insurance defense situations, by the imbalance in the business relationships—the lawyer may have numerous cases in which he

represents the carrier, so that keeping the carrier happy is much more financially important than satisfying the insured.

Some defense conflicts are fairly obvious, such as when there is a coverage issue that necessitates the hiring of separate counsel to represent the employer in the comp case and to represent the carrier in denying the coverage. More subtle problems can occur when the two defendants have different goals. While workers' compensation does not present the specific problem of demands by an insured to settle cases within policy limits, in order to avoid personal liability, when the carrier does not want to do that, conflicts can still occur, such as when an insured employer wants to fight a case that the carrier has decided to settle, in the employer's hopes of avoiding experience that will increase the employer's premiums. The more comical cases are those in which employers believe that their employees should be compensated, and defense of the claim at the instruction of the insurance carrier is directly contrary to the wishes of the insured. Any kind of tactical disagreement places the defense lawyer in a difficult position.

A particularly messy set of problems is addressed in 2006 FEO 1, below, in which the inquiry includes that the defense lawyer assigned to represent the employer has been told not to share any information with his own client. The initial seeming absurdity of that idea is rendered more reasonable by the circumstances that provoked the instruction, such as when the employer and the plaintiff are the same person, they are related or close friends, or when information given to the employer might be shared with another carrier with adverse interests to the client carrier. The Bar Opinion dutifully states that the lawyer cannot effectively represent both the insured employer and the carrier if the lawyer cannot keep both advised as to important aspects of the case. However, the resolution is a bit unsatisfying. While it makes sense for the carrier to hire separate counsel to defend the employer and to defend itself, it is not clear how that works. The carrier cannot effectively defend the claim without communicating with the employer, so there is almost no point in the carrier's having separate counsel, especially when the conflict is based on the employer's desire that the employee (perhaps the employer herself) be compensated. The carrier's lawyer would not be the one defending the case, anyway. And how can the lawyer hired to represent the employer accept payment from the carrier, which can only be done with the lawyer's good faith determination that the representation will not be adversely affected by any conflict between the payor and the client, when the client wants the carrier that is paying for the defense to lose and pay the claim? And if these situations are, as the inquiry states, "common," do we really expect defense counsel to advise carriers on a routine basis that the defense lawyer must withdraw and the carrier must hire two other lawyers? As a practical matter, experience tells us that the procedure stated in the Opinion is very rarely followed.

2006 Formal Ethics Opinion 1

April 21, 2006

Withholding Information from Employer at Direction of workers' compensation Carrier in Joint Representation

Opinion rules that a lawyer who represents the employer and its workers' compensation carrier must share the case evaluation, litigation plan, and other information with both clients unless the clients give informed consent to withhold such information.

Inquiry:

As a defense attorney for workers' compensation cases, Attorney A is retained by an insurance company or a third-party administrator to represent both the carrier and the employer. In most workers' compensation insurance policies, the carrier has the right to direct the litigation and to resolve the claim without approval of the employer. Attorney A frequently receives general instruction from the carrier/third-party administrator not to provide the employer with a copy of any correspondence that includes an evaluation of the claim or a discussion of the litigation strategy. In addition, the following are common situations in which a defense lawyer is faced with the dilemma of what information relative to the evaluation of the claim or the litigation strategy may or should be provided to the employer:

1. The employer's representative and the plaintiff are the same person (i.e., the plaintiff owns the business).

2. The employer's representative and the plaintiff are related or close friends. Anything Attorney A sends to the representative will be forwarded to the plaintiff.

3. Two or more insurance carriers provided coverage for the employer over different time periods and the interests of the carriers are adverse. If Attorney A sends an evaluation to the employer, it can be anticipated that it will be forwarded to the other carrier(s).

What duty does the defense lawyer have, in these situations, to provide the employer with copies of correspondence to the carrier/third-party administrator that contain evaluations of the claim or discussions of the litigation plan?

Opinion:

Attorney A represents both the employer and the carrier and therefore has a duty to keep each client informed about the status of the matter. As noted in comment [31] to Rule 1.7, "...common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation." The comment continues as follows:

> This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential.

Loyalty to a client is impaired when a lawyer cannot keep the client reasonably informed or promptly comply with reasonable requests for information. Rule 1.4(a); RPC 153; 03 FEO 12. The employer and the carrier are both entitled to Attorney A's full, candid evaluation of all aspects of the claim. *See* 03 FEO12. If the carrier will not consent to Attorney A providing the same information to employer or the employer will not agree that certain information will be withheld, then Attorney A has a conflict and must withdraw from the representation of the employer and the carrier. If the carrier hires another lawyer to represent only the employer, Attorney A may—with the employer's consent—continue to represent the carrier and withhold evaluation and litigation strategy information from the employer.

IV. Conclusion.

While some ethical issues in workers' compensation cases are fairly straight-forward, others are very difficult to manage in any practical way. Of course, if they were easy, they would not be so much fun.