



Ethics Through the Eyes of an Administrative Lawyer

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I. SCOPE NOTE

Being an Administrative Lawyer representing agencies, licensing boards, commissions, and the like, or practicing before the same, presents ethical issues different from other areas of practice. We will explore some of these issues and the ways to avoid ethical traps.

What makes being an Administrative Lawyer ethically challenging? First, licensing boards and commissions oftentimes not only make the laws or rules, but also interpret them and enforce them as judge and jury. Secondly, more than any other area, the “deciders,” those who enforce the rules, preside over hearings and rule on evidence are many times not lawyers. Third, many cases that come before administrative agencies, boards and commissions involve individuals who are not represented by counsel. Circumstances such as these should heighten the Administrative Lawyer’s sensitivity to ethical issues and awareness of the Rules of Professional Conduct. Let us explore together the interesting interplay between ethics and the Rules of Professional Conduct and practicing as an Administrative Lawyer.

II. CONFLICTS OF INTEREST

Administrative Lawyers must be particularly attuned to claim of conflict of interest. Loyalty and independent judgment are essential elements of the lawyer’s relationship to a client. Conflicts of interest can arise from the lawyer’s responsibilities to another client, a former client, a third person or from the lawyer’s own interests. In the case of an Administrative Lawyer, conflicts of interest can arise from uncertainty as to who the client is. At Lawyers Mutual, malpractice claims involving an alleged conflict of interest are the most difficult claims to defend. Jurors understand loyalty, and they will not be sympathetic to a lawyer who they suspect did not consider the client’s interests as paramount.

Every lawyer must adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine whether a conflict of interest exists. Ignorance caused by a failure to institute such procedures will not excuse a lawyer’s violation of the Rules of Professional Conduct. Rule 1.7, Comment [3]. It is not enough, however, to avoid a conflict of interest at the beginning of the representation. One must be vigilant throughout the representation to monitor for conflicts of interest and be prepared to take appropriate action. Unforeseeable developments,

such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts of interest in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. When an unforeseen conflict of interest arises, the lawyer will normally have the option of withdrawing from one of the representations in order to avoid the conflict. He must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

A. Who is the Client?

Representing an organization as a client can generate conflict of interest issues. A lawyer who represents an organization or other entity does not necessarily represent affiliates or subsidiaries of that entity. Thus, a lawyer who is representing an entity is not barred from accepting representation adverse to an affiliate, unless the circumstances are such that the affiliate should also be considered a client. Rule 1.7, Comment [34].

Revised Rule of Professional Conduct 1.13: ORGANIZATION AS CLIENT

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may reveal such information outside the organization to the extent permitted by Rule 1.6 and may resign in accordance with Rule 1.16.
- (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend

the organization or an officer, employee, or other constituent associated with the organization against a claim arising out of an alleged violation of law.

- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under these Rules, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
- (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment [9] makes clear that the Rule applies in the administrative law context.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of a client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. . . . Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.

Administrative Lawyers represent agencies, commissions, governmental organizations and the like, so one should know the “rules of engagement” with respect to representing an organizational client as opposed to constituents of the organization. The touchstone for staying out of trouble is found in Rule 1.3(a): A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. An organizational

client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. “Other constituents” is defined by the Rule to mean the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

When one of the constituents of an organizational client communicates with the organization’s lawyer in that person’s organizational capacity, Rule 1.6 (CONFIDENTIALITY OF INFORMATION) protects the communication. For example, if an organizational client requests that its lawyer investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client’s employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation, or as otherwise permitted by Rule 1.6. The key point is the constituent, even if he is the agency head, is not the client; the agency is.

B. What do you do when it becomes clear to you that the organization’s interest may be or become adverse to one or more of its constituents?

Rule 1.13(f) says “In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows, or reasonably should know, that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.” The lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest. He should further advise the constituent that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. The lawyer must take care to assure that the constituent understands that in the face of such adversity of interest, the lawyer for the organization cannot represent the constituent individual, and that such discussions between the lawyer for the organization and the individual may not be privileged.

Remember that communications between the lawyer for the organizational client and the constituent, when the constituent is acting in his organizational capacity are protected. Therefore, “adversity of interest” = “acting not in an organizational capacity.”

The practical effect of not being sensitive to this issue is that you may be conflicted out from representing the organizational client in a dispute between the constituent and the organization, if you have received information from the constituent that may be harmful to his position and have not first disclosed the conflict or potential conflict of interest. The comment to the Rule states “whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.”

C. What does the lawyer do if he or she knows that an officer, employee or other constituent is engaged in action or intends to act in a manner contrary to the best interests of the organizational client?

The comment to Rule 1.13 is a good place to start. Section [3] says that when constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province.

The exception is when the lawyer knows that the organization may be **substantially injured** by action of a constituent that is in **violation of law**. Rule 1.3(b) speaks to this and says that the lawyer "shall proceed as is reasonably necessary in the best interest of the organization." Such measures may include (1) asking the constituent to reconsider the matter; (2) advising that a separate legal opinion on the matter be sought for presentation to the proper authority in the organization; or (3) referring the matter to a higher authority in the organization, or to the highest authority in the organization which would normally be the board of directors or similar governing body.

The comment makes a useful suggestion to lawyers. The comment, section [3], says, "The stated policy of the organization may define circumstances and prescribe channels for such a review (i.e. review by a higher authority), and a lawyer should encourage the formulation of such a policy. Good preventive lawyering.

If the Administrative Lawyer learns that a member of the agency is acting in a manner inconsistent with the interests of the agency, the lawyer should consider taking the following steps:

- Ask the member to reconsider the action;
- If the member declines to reconsider the action, the lawyer may approach a higher authority within the organization;
- If warranted by the seriousness of the matter, the lawyer should refer the matter to the highest authority within the organization;
- If, but only if, the highest authority refuses to act, or if the lawyer reasonably believes the best interests of the organization necessitate otherwise, the lawyer may report the information outside the organization. Any communications outside the organization are limited by Rule 1.6 – CONFIDENTIALITY OF INFORMATION.
- If the lawyer must disclose information outside the organization, the lawyer will likely have to withdraw from the representation. Rule 1.16 – DECLINING OR TERMINATING REPRESENTATION.

D. Does this mean that you can never represent a constituent individual?

NO. Rule 1.13(e) states that “a lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 (CONFLICT OF INTEREST: CURRENT CLIENTS). Under Rule 1.7, you cannot represent the constituent if the representation involves a CONCURRENT CONFLICT OF INTEREST. A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client, or if the representation of one or more clients may be MATERIALLY LIMITED by the lawyer’s responsibility to another client, former client, or third person, or by a personal interest of the lawyer. Notwithstanding the concurrent conflict of interest, you can still represent the constituent if the four elements of Rule 1.7(b) are met. Rule 1.13(e) also says that if the organization’s consent to the dual representation is required by Rule 1.7, such consent must be given by the appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

III. DUAL REPRESENTATION – ADVOCATE AND COUNSELOR

Like corporate counsel, Administrative Lawyers often serve as counselors to agencies on general matters and as counsel to the agency in contested matters. This practice may raise an issue of procedural due process. Although the practice is generally permitted in North Carolina, it is still the subject of debate in some jurisdictions.

In Dorsey v. UNC-Wilmington, 122 N.C. App. 58, 468 S.E.2d 557, cert. denied, 344 N.C. 629, 477 S.E.2d 37 (1966), the plaintiff alleged that because UNC-W was represented before the State Personnel Commission by a senior deputy attorney general, and an assistant attorney general served as legal advisor to the Commission, she was deprived of her due process right to an impartial decision-maker. The Court of Appeals disagreed, stating “we have held that no per se violation of due process arises from such a combination of advisory function and advocacy function in the absence of a showing of actual bias or unfair prejudice.” Id. At 562.

In Hope v. Charlotte–Mecklenburg Bd. of Educ., 110 N.C. App. 599, 430 S.E.2d 472 (1993), the petitioner, a teacher who was dismissed on grounds of inadequate performance, insubordination, and neglect of duty, claimed a due process violation because the attorneys for the school board and for the school superintendent were members of the same firm. The Court of Appeals noted that “although the [b]oard was required to provide petitioner with all the essential elements of due process, it was permitted to operate under a more relaxed set of rules than in a court of law.” Id. at 602, 430 S.E.2d at 474. The Court of Appeals observed that the board was responsible for making the ultimate decision, not its attorney, who acted only in an advisory capacity, and held that “[t]he possibility that the [b]oard obtained information from [its] attorney about the case does not establish a due process violation.” Id. at 603, 430 S.E.2d at 474.

In Farris v. Burke County Bd. of Educ., 355 N.C. 225, 559 S.E.2d 774 (2002), the Supreme Court reviewed the decision of the board of education to terminate a teacher's employment. Unlike in Hope v. Charlotte-Mecklenburg Bd. of Educ., in Farris, a single attorney rather than different members of one firm arguably represented both the board of education and the superintendent at different points in the proceeding. The Supreme Court held that the teacher was not denied her due process rights, observing that the board of education is the decision-making body, and there was nothing in the record to indicate the attorney had improper *ex parte* contact with the board of education in his capacity as attorney for the superintendent before the board reached its decision. Id. at 784.

The careful Administrative Lawyer should be attuned to this issue and err on the side of avoiding even the appearance of impropriety. A good rule of thumb: the same attorney should not prosecute and then sit in on a closed session with a Board while it deliberates the same case.

RPC 130 – EMPLOYMENT OF BOARD MEMBER'S LAW FIRM (*Opinion rules that a law firm may accept employment on behalf of a governing board upon which its partner sits if such is otherwise lawful.*) Note that full disclosure of the relationship with the attorney board member is required, and the attorney board member cannot take any part in the selection of the partner, associate, or law firm of that attorney for the representation of the governing board, body or entity.

RPC 73 – CONFLICTS OF INTEREST INVOLVING ATTORNEYS FOR AND ON GOVERNING BODIES (*Opinion rules where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants where a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.*)

A reason for this is an attorney who has some potential influence on the salary or employment prospects of a law enforcement officer ought not to be put in the position of cross-examining that officer. The officer might not feel free to testify truthfully and freely in this situation.

(Where an attorney advises a governing body, such as a county board of commissioners, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.)

If the attorney undertakes to represent the criminal defendants arrested by town police, he is, in effect, simultaneously representing clients with conflicting interests. It is presumed the conflict is so fundamental that it is not waivable. Per Rule 5.11, this disqualification is imputed to other members of the firm.

RULE 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees – A lawyer who has formerly served as a public officer or employee of the government: (1) is subject to Rule 1.9(c) (Duties to Former Clients – use of confidential information); and (2) cannot represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, UNLESS the appropriate government agency gives informed consent, confirmed in writing, to the representation.

If a lawyer is disqualified from representing the client, the entire firm is disqualified UNLESS the disqualified attorney is screened and written notice is given to the government agency promptly so that it can ascertain compliance with the Rule.

It works in reverse too. A lawyer who is currently serving as a public officer or employee of a the government is personally subject to the Rules of Professional Conduct, specifically in this context Rule 1.7 CONFLICT OF INTEREST and Rule 1.9 DUTIES TO FORMER CLIENT. The lawyer cannot participate in a matter in which he participated personally and substantially while in private practice or nongovernmental employment, UNLESS the appropriate government agency gives its INFORMED CONSENT, CONFIRMED IN WRITING.

Attorneys who are or were public servants will also be impacted by the State Government Ethics Act – Chapter 138A of the North Carolina General Statutes.

IV. RIGHT TO COUNSEL IN ADMINISTRATIVE HEARINGS

Administrative Lawyers often deal with pro se litigants. Dealing with pro se litigants presents special problems, one of which is the litigant's possible claim of a constitutional right to counsel. In Lassiter v. Dept. of Social Services, 452 U.S. 18 (1981), the U.S. Supreme Court held there was no constitutional right to counsel in civil proceedings. Lassiter came out of North Carolina and was a termination of parental rights case. The court held that in the circumstances of that case, the trial judge did not deny petitioner due process of law when he did not appoint counsel for her.

However, four Justices dissented, and they pointed out that what process is due varies in relation to the interests at stake and the nature of the government proceeding. So whereas in Lassiter due process did not require appointment of counsel, the dissenting Justices' analysis points out that depending on the facts, a contrary conclusion may be warranted. Administrative Lawyers, especially those representing government agencies, should be alert to this issue. One probably would not want one's case to be the next case that works its way back to the United States Supreme Court on this issue.

V. SELF-INCRIMINATION AND AGENCY HEARINGS

Given a contested matter like an license revocation case or administrative employment case and a pro se litigant who may assert what he believes to be his right against self-incrimination, what ethical obligation, if any, does the Administrative Lawyer have to advise the pro se litigant of the severe consequences of refusal to answer questions either in discovery or at the hearing?

“Taking the Fifth” as it were can have severe consequences if there is no basis for doing so. The consequences can include the dismissal of the case. A civil plaintiff who invokes the Fifth Amendment to thwart discovery subjects his case to dismissal. Dismissal is not automatic; the trial court must balance a party’s privilege against self-incrimination against the other party’s rights to due process and a fair trial. Sugg v. Field, 139 N.C. App. 160, 532 S.E.2d 843 (2000). Our courts have held that a party has a right to seek affirmative relief in the courts, but if in the course of her action she is faced with the prospect of answering questions which might tend to incriminate hers she must either answer those questions or abandon her claim. Cantwell v. Cantwell, 109 N.C. App. 395, 427 S.E.2d 129, disc. review improvidently allowed per curiam, 335 N.C. 235, 436 S.E.2d 588 (1993).

The writer could not find any cases regarding self-incrimination in a licensure proceeding. In the employment context, the law is clearer. In Debnam v. N.C. Department of Correction, 334 N.C. 380, 432 S.E.2d 324 (1993), the Supreme Court formulated a rule of automatic immunity. Debnam, a state employee, was threatened with dismissal for refusal to answer potentially incriminating questions put to him as a part of an internal investigation. When he refused to answer the questions, he was fired.

He sought judicial review of State Personnel Commission decision upholding his dismissal. He argued that he could not be dismissed for refusing to answer potentially incriminating questions because the officials who had questioned him had not informed him that his answers could not be used against him in any later criminal proceeding. The State Personnel Commission upheld the dismissal and the Superior Court affirmed the dismissal.

The Court of Appeals reversed and remanded. The Court of Appeals agreed with Debnam holding that “a person’s right to be free from self-incrimination under the Fifth Amendment to the United States Constitution is so basic, so fundamental, that the government is required to fully inform the person of that right in both grand jury and disciplinary proceedings.” 107 N.C. App. At 525, 421 S.E.2d at 394.

The Supreme Court reversed the decision of the Court of Appeals. The Supreme Court held that Debnam’s Fifth Amendment right to be free from compelled self-incrimination was not violated by his dismissal. Once he was informed by the investigating officials that he could be dismissed for failing to answer their questions, any responses Debnam gave and any information discovered as a result of such responses automatically became excludable from any criminal

proceeding which might be brought against him. Citing Garity v. New Jersey, 485 U.S. 493 (1967). Because the Department of Corrections made no attempt to elicit a waiver of Debnam's immunity, no Fifth Amendment violation occurred. Assurances by the investigating officials that any answers he gave could not be used against him in a criminal prosecution would not have afforded him any greater protection from self-incrimination than that to which he was automatically entitled to under the Fifth Amendment.

Given the rule of automatic immunity under Debnam, what duty does the prosecuting attorney for the state or the presiding officer in an Article 3 or Article 3A hearing have to advise the witness of his automatic immunity if he does testify?

VI. ADMINISTRATIVE LAWYERS AND EX PARTE COMMUNICATION

Under what circumstances may a lawyer who represents a client in a dispute with a government agency or body communicate with members of the agency or body?

Rule 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL provides a starting point. Rule 4.2(a) states the general rule that during 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 to do so by law or court order.

Subsection (b) states an exception to the general rule. In representing a client who has a dispute with a government agency or body, a lawyer **may** communicate about the subject of the representation with the elected officials who have authority over such government agency or body **even if** the lawyer knows the government agency or body is represented by another lawyer in the matter, **if** one of the following conditions is met:

- (1) The communication is in writing and a copy of the writing is promptly delivered to opposing counsel;
- (2) The communication is oral and adequate notice is given to opposing counsel; or
- (3) The communication is in the course of official proceedings.

On July 21, 2006, the State Bar issued 2005 Formal Ethics Opinion 5. This ethics opinion explores the extent to which a lawyer may communicate with employees or officials of a represented government entity. The question posed to the State Bar was as follows: Attorney A represents a former employee of County in an employment dispute with County. County Attorney is a full-time employee of the County. Attorney A has had no communications with County Attorney on this matter, but Attorney A knows that County Attorney has represented County in other employment litigation brought by Attorney A. In prior employment litigation cases, County Attorney has asked Attorney A that communications with senior county staff, such

as the county manager and department heads, concerning litigation or threatened litigation against County, be directed to County Attorney. Attorney A wants to write a letter to County's human resources director and the county manager on behalf of his current client, threatening litigation if the employment matter is not settled. Can he?

No. Because the communication concerns a specific claim and threatens litigation, Rule 4.2(a) applies to the communication. The next question is does the prohibition in Rule 4.2(a) apply to the human resources director and the county manager?

Yes. The protections of Rule 4.2(a) extend to the county manager and department heads if, with respect to his employment matter, 1) they supervise, direct or consult with County Attorney, 2) they can bind or obligate County as its position in litigation or settlement, 3) their acts or omissions are at issue in the litigation, or 4) they have participated substantially in the legal representation of the county. It is likely the county manager and the human resources director fall into one or more of these categories. Attorney A must obtain County Attorney's consent before communicating directly with the county manager or the human resources director.

The State Bar does not say a lawyer may never directly communicate with a government officer or employee without consent of government counsel. Routine communications on general policy issues or administrative matters would not require prior approval from government counsel. In addition, the State Bar realizes that there is a public interest in facilitating direct communication between representatives of citizens and government officials. But where the government stands in a position analogous to a private litigant, the prohibition in Rule 4.2(a) applies.

VII. BIAS AND *EX PARTE* COMMUNICATIONS IN CONTESTED CASE PROCEEDINGS

Lawyers representing agencies, boards and the like, as well as lawyers representing individuals before such entities should be attuned to possible bias and *ex parte* communications that could deprive a litigant of the right to a fair and impartial hearing. By doing so, the lawyer protects the integrity of the proceeding for both sides.

In Crump v. Board of Education, 326 N.C. 603, 392 S.E.2d 579 (1990), the Supreme Court dealt with an administrative board performing a quasi-judicial function. A high school teacher who was dismissed by the school board for alleged immorality and insubordination filed a joint petition and complaint seeking judicial review of the board's actions. The teacher's complaint asserted a § 1983 claim alleging that defendants acted with bias against him, in violation of due process. The claims were severed and the civil rights claim went to trial. The jury returned a verdict in favor of the teacher for \$78,000. Defendants appealed and the Court of Appeals affirmed. Defendants appealed to the Supreme Court.

The Supreme Court distinguished between permissible pre-hearing knowledge and impermissible bias. “In the present case, a Board member with pre-hearing knowledge regarding the allegations against Crump would neither necessarily nor presumptively be biased against him. ‘The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing.’ Withrow v. Larkin, 421 U.S. 35, 55, 95 S.Ct. 1456, 1468, 43 L.Ed.2d 712, 728 (1975), quoted in 3 Davis, Administrative Law Treatise 2d § 19:4 at 384 (1980). Indeed, because of their multi-faceted roles as administrators, investigators and adjudicators, school boards are vested with a presumption that their actions are correct, and the burden is on a contestant to prove otherwise. (Citations omitted.) Crump v. Bd. of Educ. of Hickory Admin. Sch. Unit, 326 N.C. 603, 617, 392 S.E.2d 579, 586 (1990).

The evidence in the case tended to show discrepancies between the pre-hearing knowledge of and involvement in Crump’s case by several board members and their denial of such knowledge when questioned at trial by Crump’s lawyer. The evidence also suggested that one or more board members were predisposed against Crump prior to the hearing.

The Supreme Court approved of the trial court’s jury instruction on bias:

To find impermissible bias, you . . . must find by the greater weight of the evidence that the mind of a board member was predetermined and was fixed and not susceptible to change prior to the deliberating process of the hearing board, and that the decision was not based solely upon evidence during the hearing.

In affirming the Court of Appeals decision awarding Crump damages, the Supreme Court said “there was substantial evidence that, at the Board’s hearing, one or more Board members consciously concealed both prior knowledge of the allegations against Crump and a fixed disposition against him. Such evidence having been presented, the trial court properly submitted this case to the jury for its determination as to whether the Board member had in fact been biased against Crump.” Id. at 587.

Legal counsel acting as prosecutor or board advisor (or both) should be attuned to the issue of potential bias and should carefully avoid any appearance of bias in serving in multiple roles. In Evers v. Pender County Bd. of Education, 104 N.C. App. 1, 407 S.E.2d 879 (1991), aff’d, 331 N.C. 380, 416 S.E.2d 3 (1992), a teacher was dismissed for having sex with a student. During the hearing, the teacher alleged two sources of bias: (1) the school board attorney had participated in the investigation and had taken notes during the investigation and the notes had been used by the board and (2) the superintendent had participated in *ex parte* communications with school board members in which he repeated rumors and communicated his belief in Evers’ guilt to board members. At the hearing, the board chair testified that the board had worked hard to disregard rumors and provided assurances that the notes taken by the lawyer were not used and that no evidence of rumors would be considered. This testimony satisfied the Court of Appeals, but it highlights the issue.

Administrative Lawyers should avoid “co-mingling” of roles to the extent possible so as to avoid any appearance of impropriety or allegation of bias, unfairness or lack of due process.

VIII. UNAUTHORIZED PRACTICE OF LAW ISSUES

The issue here is whether a board can take action against a corporate licensee that declines to hire counsel in an administrative proceeding. Put another way, can the corporate licensee be represented at the administrative proceeding by and through its non-lawyer agent, its CEO for example. What does the board’s lawyer do about this?

In Lexis-Nexis v. Travisham Corp., 155 N.C. App. 205, 573 S.E.2d 547 (2002), the CEO of a corporate defendant represented the defendant in a breach of contract case pending in district court. Plaintiff appealed the order allowing the CEO to represent the corporate defendant on grounds that N.C. Gen. Stat. § 84-5 specifically prohibited corporations from practicing law.

The Court of Appeals noted that the issue was one of first impression for our courts, and therefore looked to the law of other jurisdictions and to the Restatement of Law Governing Lawyers. The Court of Appeals stated the general rule that a corporation cannot appear and represent itself either in person or by its officers, but can do so only through licensed attorney. However, the Court of Appeals recognized a exceptions to the general rule, one of which is that a corporation need not be represented by a lawyer in Small Claims Division, which is where this case was tried.

Unfortunately, the court in Lexis-Nexis v. Travisham did not include an exception for corporations in administrative proceedings.

In 2007, the Court of Appeals decided Allied Environmental Services, PLLC & Deans Oil Co., v. DEHNR, 187 N.C. App. 227, 653 S.E.2d 11 (2007). In this case, a corporate owner hired an agent to clean up contaminated land. DEHNR issued a notice that it was retracting the owner’s eligibility for reimbursement of cleanup costs, and the agent petitioned for a hearing to appeal the retraction. DEHNR moved to dismiss the petition on grounds that the agent was not a proper party to represent the corporate owner because corporations can only be represented by a lawyer. The ALJ agreed and dismissed the petition. The agent appealed and the trial court affirmed.

On appeal, the Court of Appeals reversed. The majority distinguished Lexis-Nexis v. Travisham Corp. and held there was no general rule in the administrative code requiring corporations to be represented by counsel at administrative hearings.

Judge Stroud concurred in the result, but pointed out that the court had apparently and perhaps inadvertently created another exception to N.C. Gen. Stat. § 84-5, which may run counter to N.C. Gen. Stat. § 84-2.1 (representation before an administrative tribunal is the practice of law) which is expressly prohibited to corporations by Gen. Stat. § 84-5. Judge Stroud suggested that the majority had thus permitted a rule in the administrative code to overrule a statute enacted by the legislature.

The Court of Appeals subsequently declined to extend the holding in the Allied Environmental Services case to In re Twin County Motorsports, Inc., ___ N.C. App. ____, 749 S.E.2d 474 (2013), disc. rev. allowed, _____ N.C. _____, 755 S.E.2d 627 (2014). The court was faced with an administrative hearing before Division of Motor Vehicles, not a proceeding before the Administrative Office of the Courts. The Court of Appeals held Twin County Motorsports, Inc. had to be represented by counsel and could not proceed pro se.

It may be fair to say that the issue of corporate appearances at administrative hearings may not be fully resolved. Administrative Lawyers should be alert to this issue and aware of the possibly contradictory authorities.

ATTORNEY-CLIENT PRIVILEGE AND THE OPEN MEETINGS LAW

N.C. Gen. Stat. § 143-318.10(d) requires that any time a majority of the board are simultaneously in communication for the purpose of conducting hearings, participating in deliberations, voting upon or transacting public business of the board, that meeting must be a public meeting. There is an exception for boards authorized to investigate the qualifications of applicants for professional or occupational licenses or for purposes of taking disciplinary action against a license holder. (For example, the State Bar ethics committee meetings are open meetings, while the grievance committee meetings are not.)

There is also an attorney-client exception to the Open Meetings Law. The attorney-client exception allows a board to hold a closed session when the closed session is required to consult with an attorney in order to preserve the attorney-client privilege between the attorney and the board. If the intent is to come within the attorney-client exception, the presence of third parties (anyone other than board members, staff and legal counsel) may vitiate the exception and destroy the attorney-client privilege. Additionally, when a board meets in closed session, it must keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what took place.

In Multimedia Publishing of North Carolina, Inc. v. Henderson County, 145 N.C. App. 365, 550 S.E.2d 846 (2001), the Court of Appeals held that:

1. An agency can meet in closed session under the attorney-client exception to discuss a legal issue with the board attorney even though the matter does not involve a pending or threatened claim.
2. An agency cannot meet in closed sessions under the attorney-client exception if the attorney is not present or if the matter discussed does not involve attorney-client privilege.
3. The attorney-client exception is narrowly construed, and if challenged, the burden of proof is on the agency to prove by objective evidence that the exception applies under the circumstances. Thus, the requirement for keeping a separate general account for each closed session in such detail as to provide the necessary objective evidence to carry the burden of proof, if challenged.

IX. RULE 3.4(a) AND THE PUBLIC RECORDS LAW

N.C. Gen. Stat. § 132-1 basically provides that all records (paper or electronic) made or received in connection with the transaction of public business by any agency are public records and must be accessible to the public, unless the record is specifically excepted from the statute. The statute is construed liberally. Gannett Pacific Corp. v. N.C. State Bureau of Investigation, 164 N.C. App. 154, 595 S.E.2d 162 (2004). In Gannett Pacific Corp., the plaintiff requested ALL public records related to the investigation of the May 3, 2002 fire at the Mitchell County, North Carolina jail. The trial court dismissed the plaintiff's complaint on 12(b) (6) motion. The Court of Appeals affirmed in part and reversed in part, remanding to the trial court. The Court of Appeals affirmed insofar as the request involved the SBI's records of its criminal investigation or criminal intelligence information related to the fire; such records were not "public records" under the Public Records Act. The Court of Appeals held that some records held by the SBI were public records and because the plaintiff requested ALL public records, the complaint stated a claim upon which relief could be granted. The Court of Appeals discussed the types of records the SBI possessed that could qualify as public records subject to disclosure and remanded the case to the trial court.

An agency may refuse disclosure of the requested records if one or more of the following statutory exemptions applies:

- Communications between attorneys and government clients made within the scope of the attorney-client relationship N.C. Gen. Stat. § 132-1.1
- State and local tax information N.C. Gen. Stat. § 132-1.1
- Public Enterprise Billing Information N.C. Gen. Stat. § 132-1.1
- Personally Identifiable Admissions Information for North Carolina public colleges and universities N.C. Gen. Stat. § 132-1.1
- Trade secrets N.C. Gen. Stat. § 132-1.2
- Certain government lawsuit settlements N.C. Gen. Stat. § 132-1.3
- Criminal investigation records N.C. Gen. Stat. § 132-1.4
- Criminal intelligence information records N.C. Gen. Stat. § 132-1.4
- Information contained in a 911 database N.C. Gen. Stat. § 132-1.5

- Emergency Response Plans N.C. Gen. Stat. § 132-1.6
- Photographs and recordings of autopsies (although the text of an official autopsy report is a public record which you may request) N.C. Gen. Stat. § 132-1.8

This list is not a complete list of the occasions when an agency may refuse disclosure. There are numerous narrow exceptions to North Carolina's public records law as well.

Of particular interest to Administrative Lawyers is the first exception above. Public records shall not include written communications to any public board, council, commission or other governmental body of the State or any county, municipality or other political subdivision or unit of government made within the scope of the attorney-client relationship by any attorney serving any such governmental body concerning any claim against or on behalf of the governmental body or governmental entity for which such body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action or any administrative or other type of proceeding to which the governmental body is a party or by which it is or may be directly affected. These non-public records become public records three years from the date such communication was received by the board, agency, commission, etc..

Rule 3.4(a) states that a lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. Further, a lawyer shall not counsel or assist another in doing such act. Administrative Lawyers who fail to heed the requirements of N.C. Gen. Stat. § 132-1 not only potentially commit a misdemeanor, but also violate the Rules of Professional Conduct.

X. ADMINISTRATIVE LAWYERS AND LOBBYING

The General Assembly in 2006 made significant changes to North Carolina's ethics and lobbying laws. The changes impact attorneys and lobbyists, and most became effective on January 1, 2007.

A. Overview

- The State lobbying laws now cover executive branch lobbying, restrict lobbyists' campaign contributions, gift giving, and service on regulatory boards, and change reporting of activity by lobbyists;
- Ethical standards, as well as permitted and prohibited practices for elected and appointed officials and certain State employees, are outlined;
- The Statement of Economic Interest that must be filed with the State Ethics Commission by elected and appointed officials and certain State employees requires

- details about certain assets, board memberships and business relationships, and the penalties for lack of disclosure are increased; and,
- A new Ethics Commission replaces the State Board of Ethics and will oversee the administration of State ethics laws applicable to elected and appointed officials and certain State employees.

B. Lobbying (GS 120C-100 to -800)

What is “Lobbying”?

The law defines “lobbying” to include both:

- Influencing or attempting to influence legislative or executive action (both terms are broadly defined) through “direct communication or activities” (sometimes called “traditional lobbying”), and
- Developing goodwill through communications or activities, including the building of relationships with the intention of influencing current or future legislative or executive action, or both, (sometimes called “goodwill lobbying”)

with a “designated individual” [a legislator, legislative employee or “public servant” (members of the Council of State and Cabinet, voting members of boards, and certain State employees)], or a member of their immediate family (includes spouse and unemancipated children, or extended family living in the household).

“Lobbying” does not include communications or activities that occur as part of a relationship (business, civic, religious, fraternal, personal or commercial) which is not connected to such action.

Who is a “Lobbyist”?

- A “lobbyist” is an individual who engages in “lobbying” and is employed or engaged to lobby, who receives compensation to lobby even if not paid by the person or entity he represents, who contracts for economic consideration to lobby, or who is employed by a person or entity and a “significant part” of the employee’s duties include lobbying.
- An “employee” is not a lobbyist if less than 5% of that employee’s actual duties in any 30-day period include engaging in the traditional lobbying referenced above.
- The law lists a number of activities that do not make a person a “lobbyist,” including expressing a personal opinion or stating facts or recommendations on legislative or executive action to a “designated individual” and appearing before a committee, commission, board, council or other collective body whose membership

includes “designated individuals” by invitation of the body or a member of the body.

What Registration is Required?

- Lobbyists must register with the Secretary of State’s office every year.
- Lobbyists must register within one day after they begin lobbying.
- The registration fee for lobbyists is \$250.

What Reporting is Required?

- The law requires reporting of all “reportable expenditures” (anything of value over \$10 or a contract, agreement, or promise) made for the purpose of lobbying.
- Reports must be filed by lobbyists, their principals and solicitors whether or not such expenditures are made.
- Reports for lobbyists, their principals and solicitors must be made under oath and filed quarterly.
- In addition, monthly reports are required to be filed by lobbyists and their principals when they make reportable expenditures related to lobbying legislators and legislative employees when the General Assembly is in session.

Some Dos and Don’ts in Lobbying

- Lobbyists cannot make campaign contributions to legislative or Council of State candidates nor collect such contributions from multiple contributors, take possession of those multiple contributions, or transfer and deliver them to such candidates (“bundling”).
- There is a minimum six-month “cooling off” period for any legislator, Council of State member, or Cabinet Secretary after leaving office before that person can become a lobbyist.
- No lobbyist can serve as a campaign treasurer or assistant campaign treasurer for a campaign committee for a candidate for the General Assembly or Council of State.
- It is unlawful to attempt to influence the action of a “designated individual” by the promise of financial support of his or her candidacy or the threat to provide financial support to his or her opposition.
- Lobbyists are restricted from serving on certain state boards or commissions. N.C. Gen. Stat. § 120C-304(e).

What are the Consequences for Violation of the Lobbying Laws?

- Penalties for violations include imposition of civil fines by the Secretary of State and Ethics Commission, voiding of a lobbyist's registration, a two-year ban on lobbying and referral of the matter to the Wake County District Attorney for prosecution if appropriate.
- Violations of a number of the law's requirements related to registration, campaign contributions and gifts are a Class 1 misdemeanor.

C. Ethical Standards for "Covered Persons" (GS 138A-31 to -41 and -45)

- The law contains an extensive listing of "dos" and "don'ts" for "covered persons," which includes legislators, "public servants" (Council of State, Cabinet, voting members of State boards and certain State employees), and "judicial officer(s)" (justices, judges, district attorneys, clerks of court).
- A fundamental principle is that covered persons and legislative employees cannot knowingly use their public position to benefit them, their family or a business with which they are associated.
- This includes, directly or indirectly, accepting or soliciting "anything of value" for them, or another person, in return for being influenced in the discharge of their official duties.
- Penalties for violation include removal from office or termination from employment.
- The law bans (with a few enumerated exceptions) a "gift" (defined as "anything of monetary value given or received without valuable consideration") from **lobbyists** and their principals (the person on whose behalf they are lobbying) to "public servants," legislators and legislative employees.
- It also bans a "gift" to "public servants" from persons doing business or seeking to do business with the State entity employing the recipient, persons engaging in activities regulated or controlled by that entity, or persons having a financial interest that may be substantially and materially affected by the recipient's official actions.
- "Public servants" are prohibited (with a few enumerated exceptions) from participating in "official action" (broadly defined in the law) requiring the exercise of discretion if they, a member of their "extended family" (includes spouse, children, siblings, parents and similar relatives of a spouse) or a business they are associated with, has an economic interest in, or a reasonably foreseeable benefit from, the matter under consideration that would impair their independent judgment or the inference could be drawn that the interest or benefit would influence their official action.

D. Statement of Economic Interest (GS 138A-21 to - 27)

- “Covered person(s)” [defined to include legislators, “public servants” (includes Council of State, Cabinet, voting members of State boards and certain State employees) and “judicial officer(s)” (justices, judges, district attorneys, clerks of court)] must file a Statement of Economic Interest detailing certain assets, income sources, board memberships, business relationships and other personal information.
- The law’s stated purpose for the disclosure is to assist covered persons and those that appoint, elect, hire, supervise or advise them to identify and avoid conflicts of interest and potential conflicts of interest between the person’s private interest and public duties.
- Generally, these statements must be filed before a person’s initial appointment, election or employment.
- Failure to file can result in the person not taking office or employment.
- Failure to file can also lead to fines or criminal penalties for knowingly concealing or failing to disclose required information.

E. State Ethics Commission (GS 138A-6 to - 15)

- Effective October 1, 2006, a new Ethics Commission replaced the State Board of Ethics. The Ethics Commission has eight members, four appointed each by the Governor and the General Assembly with membership split evenly between the two political parties.
- The Ethics Commission’s powers and duties include receiving and reviewing Statements of Economic Interest filed by elected and appointed officials and certain State employees, receiving and investigating complaints, rendering advisory opinions about ethics laws, and implementing a mandatory ethics education program for elected and appointed officials (including voting members of State boards) and certain State employees.

XI. INTERESTING ETHICS OPINIONS

RPC 230 (July 26, 1996) – *Opinion rules that a lawyer representing a client on a good faith claim for social security disability benefits may withhold evidence of an adverse medical report in a hearing before an administrative law judge if not required by law or court order to produce such evidence.*

The lawyer had represented the client in a previous workers’ compensation claim. An IME doctor had written a report saying there was little wrong with the claimant and he was a malingerer. The lawyer considered the report biased and unfair. The lawyer withheld the workers’ compensation IME report from the evidence in the social security disability hearing before the ALJ.

98 FEO 1 (January 15, 1999) – *Opinion rules that a lawyer representing a client in a social security disability hearing is not required to inform the administrative law judge of material adverse facts known to the lawyer.*

Attorney wrote the client's treating physician and asked for a letter stating the physician's opinion about the claimant's disability. The doctor wrote that she did not believe the claimant was disabled. The lawyer withheld the letter from the evidence in the social security disability hearing.

Distinguish Rule 3.3(d) that states: "In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."

The State Bar said even though social security hearings before an ALJ are considered non-adversarial because no one represents the SSA at the hearing, such hearings are not *ex parte*. In a disability hearing, there is a "balance of presentation" because the SSA has an opportunity to develop the written record that is before the ALJ at the time of the hearing. Moreover, the ALJ has the authority to make his or her own investigation of the facts.

2003 FEO 10 (January 16, 2004) – *Opinion rules that a Social Security lawyer may agree to compensate a nonlawyer/claimant's representative for the prior representation of the client.*

Rule 5.4(a) prohibits a lawyer from sharing legal fees with a nonlawyer except in limited circumstances that were not applicable here. The purpose of the rule is to protect the lawyer's professional independence from interference from a nonlawyer. The prohibition also prevents solicitation of cases by lawyers and discourages nonlawyers from engaging in the unauthorized practice of law.

Nonlawyers are permitted by law to represent claimants in matters before the SSA. However, only a lawyer may represent a client who is appealing an ALJ. Rule 5.4(a) should not be applied in a way that may make it difficult or impossible for a claimant to switch to a lawyer representative. Nor should the rule be applied in a way that ignores the prior work the nonlawyer representative did on the case or the fact the nonlawyer may be compensated by law on a contingent fee basis.

The amount of the compensation paid to the nonlawyer representative must be reasonable and must be related to the work actually performed by the nonlawyer representative on behalf of the client. There must also be full disclosure the presiding ALJ or federal judge.