

Recovering Our Bill of Rights

The Honorable Paul M. Newby
Associate Justice, North Carolina Supreme Court





Justice Paul M. Newby

Paul Martin Newby was born in Asheboro, N.C. on May 5, 1955 to Samuel O. and Ruth Parks Newby. He was raised in Jamestown where he graduated from Ragsdale High School. He received his B.A. degree in Public Policy Studies (magna cum laude) from Duke University and law degree from UNC-Chapel Hill School of Law.

Justice Newby served as a judicial intern in the United States Supreme Court and interned in the 18th Judicial District Public Defenders Office (Greensboro/High Point). He began his law practice in Asheville with Van Winkle, Buck, Wall, Starnes and Davis, P.A. He was Vice President and General Counsel of Cannon Mills Realty and Development Corporation in Kannapolis. In 1985, Justice Newby was appointed as an Assistant United

States Attorney in Raleigh where he served for over 19 years. He taught many courses for the United States Department of Justice and received the Crime Victims Fund Award.

Since beginning his service on the Supreme Court in 2004, Justice Newby has participated as a member of the North Carolina Courts Commission. He has been an instructor for the North Carolina Judicial College and various continuing legal education courses. Justice Newby is an Adjunct Professor of Law at Campbell University, where he teaches courses on state constitutional law and appellate practice. He is also the co-author, with Professor John V. Orth of the UNC School of Law, of *The North Carolina State Constitution with History and Commentary* (2d ed. forthcoming 2012). In recognition of his professional service, Justice Newby received the James Iredell Award and an Honorary Doctor of Laws from Southern Wesleyan University.

Justice Newby actively participates in the North Carolina Bar Association. In the past, Justice Newby has served on the Technology Advisory Committee (2005-2011), the Litigation Council (2005-2011), and as Vice President (2008-2009). He currently serves on the Law-Related Education Committee (2007-), the Strategic Planning & Emerging Trends Committee (2011-), and the International Law Section Council (2010-). Justice Newby hosted a group of international judges for the Open World Program, sponsored by the Library of Congress. The North Carolina Bar Association honored Justice Newby in 2011 with its Citizen Lawyer Award, and in 2012 he received its John McNeill Smith, Jr. Award, recognizing his work in the area of constitutional rights and responsibilities. Justice Newby has also served on the Alternative Dispute Resolution Committee of the State Judicial Council (2005-2009).

Justice Newby is an Eagle Scout and serves as Scoutmaster Emeritus of Troop 11 and as a board member of Occoneechee Council. He is the recipient of the Heroism Award for rescuing nine people from a riptide, of the God and Service Award, and of the Silver Beaver Award. In 2010, Justice Newby was named Scouter of the Year for his coordination of Scouting's state-wide Report to the State, recognizing the 100th anniversary of the Boy Scouts of America. In 2012, Justice Newby was designated a Distinguished Eagle Scout, a national honor that recognizes both his service to the Boy Scouts and his dedication to public service.

Justice Newby has been married to Macon Tucker Newby since 1983, and they have four children. He and his family attend Christ Baptist Church in Raleigh where he is an Elder, Sunday School teacher and youth leader.

LOST AND FOUND: THE BILL OF RIGHTS

Justice Paul M. Newby
Supreme Court of North Carolina
Raleigh, North Carolina

Gentleman walks into your office with what is purported to be North Carolina's original copy of the Bill of Rights. He would like you to render an opinion that his possession and sale of the document is lawful, and he would like you to represent him in arranging a sale of the document. Ethical implications?

Rule 1.2 Scope Of Representation and Allocation of Authority between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(1) A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(2) A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of a client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(3) In the representation of a client, a lawyer may exercise his or her professional judgment to waive or fail to assert a right or position of the client.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Should you decline to represent this gentleman in this matter? Ethical implications?

Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of law or the Rules of Professional Conduct;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client; or
- (2) the client knowingly and freely assents to the termination of the representation; or
- (3) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; or
- (4) the client insists upon taking action that the lawyer considers repugnant, imprudent, or contrary to the advice and judgment of the lawyer, or with which the lawyer has a fundamental disagreement; or
- (5) the client has used the lawyer's services to perpetrate a crime or fraud; or
- (6) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is

fulfilled; or

(7) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(8) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; or

(9) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Rule 1.18 Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(1) the disqualified lawyer is timely screened from any participation in the matter; and

(2) written notice is promptly given to the prospective client.

He agrees to pay your hourly fee plus forty percent of the sale price of the document. You decide to undertake the representation. Ethical implications?

Rule 1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses.

The factors to be considered in determining whether a fee is clearly excessive include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest directly adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

....

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses, provided the requirements of Rule 1.8(a) are satisfied; and

(2) contract with a client for a reasonable contingent fee in a civil case, except as prohibited by Rule 1.5.

While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i), that applies to any one of them shall apply to all of them.

Rendering an opinion regarding the document's status as stolen property. Ethical implications?

Rule 2.3 Evaluation for Use by Third Persons

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client so requests or the client consents after consultation

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Advising the gentleman. Ethical implications?

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent, professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but also to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

If you conclude the document is stolen. Ethical implications?

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

- (1) to comply with the Rules of Professional Conduct, the law or court order;
- (2) to prevent the commission of a crime by the client;
- (3) to prevent reasonably certain death or bodily harm;
- (4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;
- (5) to secure legal advice about the lawyer's compliance with these Rules;
- (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (7) to comply with the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court.

(c) The duty of confidentiality described in this Rule encompasses information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered. For the purposes of this Rule, "client" refers to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

Brokering the sale. Ethical implications?

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Comment

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or

the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. Rule 1.6(b)(1) permits a lawyer to disclose information when required by law. Similarly, Rule 1.6(b)(4) permits a lawyer to disclose information when necessary to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

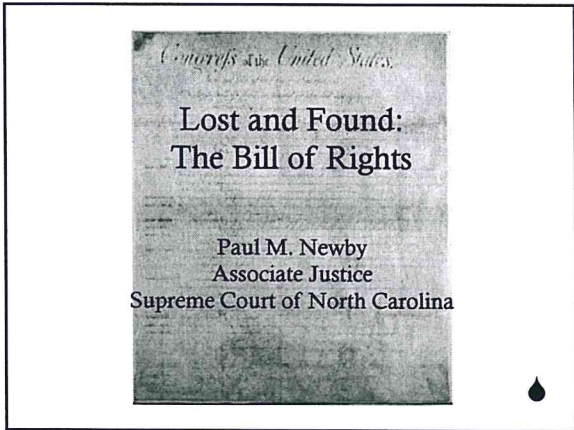
- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3.

Bottom line.


Ten Suggestions of Professional Responsibility

10. Personally and professionally, live by the law.
9. How long do you intend to work in the legal profession? Is one case or one client worth the damage to your reputation? Once damaged, is it possible to be repaired?
8. Does it pass the "smell" test?
7. How would you feel if it appeared in the newspaper?
6. If you have to search for a rule to justify it, don't.

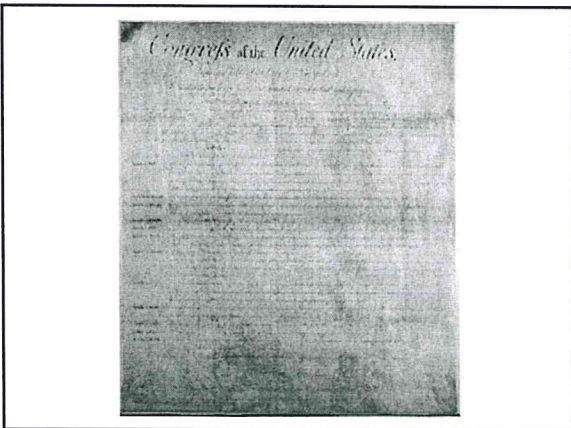
5. Don't rely on memory, always read the rules.
4. Beware of the RING (Lord of the Rings): Money, Power, and Sex.
3. When in doubt, don't.
2. Would your mother understand and agree with what you did?
1. The Golden Rule: Treat others as you would like them to treat you.



Initial Consultation



- A gentleman walks into your office with what is purported to be North Carolina's original copy of the Bill of Rights. He would like you to render an opinion that his possession and sale of the document is lawful. He would also like you to represent him in arranging a sale of the document.
- Ethical implications?




Rule 1.2(d)
Scope of Representation

- A lawyer shall not counsel a client to engage, or assist a client, in conduct that the *lawyer knows is criminal or fraudulent*, but a lawyer *may discuss the legal consequences* of any proposed course of conduct with a client and *may counsel or assist* a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Undertaking Representation

- Should you decline to represent the gentleman in this matter?
- Ethical implications?



Rule 1.16(b)(3)
Declining Representation

- [A] lawyer may withdraw from representing a client if . . . the client persists in a course of action involving the lawyer's services that the *lawyer reasonably believes is criminal or fraudulent*

Setting Terms of Representation



- The gentleman agrees to pay your hourly fee plus 40% of the sale price of the document.
- You decide to undertake the representation.
- Ethical implications?

Rule 1.5(a) Fees

- A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee
- Factors in setting a reasonable fee include
 - time and labor required
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 - nature and length of the professional relationship with the client
 - experience, reputation, and ability of the lawyer or lawyers performing the services
 - whether the fee is fixed or contingent



Rule 1.8(a) Conflict of Interest: Current Clients

- A lawyer shall not enter into a *business transaction with a client* . . . unless:
 - the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client . . . ;
 - the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
 - the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction

Carrying out the Representation

- Rendering an opinion regarding the document's status as stolen property.
 - Ethical implications?
- Advising the gentleman.
 - Ethical implications?



Rule 2.1 Advisor

- In representing a client, a lawyer shall exercise *independent*, professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but also to other considerations such as *moral, economic, social* and political factors that may be relevant to the client's situation.

Nature of Transaction

- You conclude the document is stolen.
 - Ethical implications?




Rule 1.6(b)(2)
Exception to Confidentiality of Information

- (a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary: . . . (2) to prevent the commission of a crime by the client.

Brokering the Sale

- Ethical implications of brokering the sale?



Rule 4.1
Truthfulness of Statements to Others

- In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Rule 8.4(c)
Misconduct

- It is professional misconduct for a lawyer to:
... engage in conduct involving dishonesty,
fraud, deceit or misrepresentation

Bottom Line:

Ten Suggestions of
Professional
Responsibility



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professionally, live by the law.**

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(Lord of the Rings):
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mother
understand
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