PROPOSED OPINIONS

RULES, PROCEDURE, COMMENTS

All opinions of the Ethics Committee are predicated upon the North Carolina Rules of Professional Conduct. Any interested person or group may submit a written comment – including comments in support of or against the proposed opinion – or request to be heard concerning a proposed opinion. The Ethics Committee welcomes and encourages the submission of comments, and all comments are considered by the committee at the next quarterly meeting. Any comment or request should be directed to the Ethics Committee at ethicscomments@ncbar.gov (mailto:ethicscomments@ncbar.gov) no later than October 15, 2024.

Council Actions

At its meeting on July 19, 2024, the State Bar Council adopted the ethics opinion summarized below:

2023 Formal Ethics Opinion 3
Installation of Third Party's Self-Service Kiosk in Lawyer's Office and Inclusion of Lawyer in Third Party's Advertising Efforts

Opinion provides that a lawyer may allow a third-party business to install a self-service kiosk in the lawyer's office for the provision of ignition lock services but may not receive rent or referral fees, and further concludes that a lawyer may be included in the business's advertising efforts upon compliance with Rule 7.4.

Ethics Committee Actions

At its meeting on July 18, 2024, the Ethics Committee considered a total of eight inquiries, including the adopted opinion referenced above. Four inquiries were sent or returned to subcommittee for further study, including an inquiry examining the ethical requirements relating to a lawyer's departure from a law firm and an inquiry addressing a lawyer's ability to obligate a client's estate to pay the lawyer for any time spent defending the lawyer's work in drafting and executing the client's will. The committee also approved an advisory opinion concerning short-term limited legal service programs, and the committee approved the publication of two proposed formal ethics opinions for comment—including a revised opinion on a lawyer's use of artificial intelligence in a law practice—which appear below.

Proposed 2024 Formal Ethics Opinion 1
Use of Artificial Intelligence in a Law Practice
July 18, 2024

Proposed opinion discusses a lawyer's professional responsibility when using artificial intelligence in a law practice.

Editor's Note: There is an increasingly vast number of helpful resources on understanding Artificial Intelligence and the technology's interaction with the legal profession. The resources referenced in this opinion are not exhaustive but are intended to serve as a starting point for a lawyer's understanding of the topic. Over time, this editor's note may be updated as additional resources are published that staff concludes would be beneficial to lawyers.

Background:

"Artificial intelligence" (hereinafter, "AI") is a broad and evolving term encompassing myriad programs and processes with myriad capabilities. While a single definition of AI is not yet settled (and likely impossible), for the purposes of this opinion, the term "AI" refers to "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments." Nat'l Artificial Intelligence Initiative Act of 2020, Div. E, sec. 5002(3) (2021). Said in another, over-simplified way, AI is the use of computer science and extensive data sets to enable problem solving or decision-making; often through the implementation of sophisticated algorithms. AI encompasses, but is not limited to, both extractive and generative AI,1 natural language processing, large language models, and any number of machine learning processes.2 Examples of law-related AI programs range from online electronic legal research and case management software to e-discovery tools and programs that draft legal documents (e.g., a trial brief, will, etc.) based upon the lawyer's input of information that may or may not be client-specific.

Most lawyers have likely used some form of AI when practicing law, even if they didn't realize it (e.g., widely used online legal research subscription services utilize a type of extractive AI, or a program that "extracts" information relevant to the user's inquiry from a large set of existing data upon which the program has been trained). Within the year preceding the date of this opinion, generative AI programs that *create* products in response to a user's request based upon a large set of existing data upon which the program has been trained (e.g., Chat-GPT) have grown in capability and popularity, generating both positive and negative reactions

regarding the integration of these technological breakthroughs in the legal profession.3 It is unquestioned that AI can be used in the practice of law to increase efficiency and consistency in the provision of legal services. However, AI and its work product can be inaccurate or unreliable despite its appearance of reliability when used during the provision of legal services.4

Inquiry #1:

Considering the advantages and disadvantages of using AI in the provision of legal services, is a lawyer permitted to use AI in a law practice?

Opinion #1:

Yes, provided the lawyer uses any AI program, tool, or resource competently, securely to protect client confidentiality, and with proper supervision when relying upon or implementing the AI's work product in the provision of legal services.

On the spectrum of law practice resources, AI falls somewhere between programs, tools, and processes readily used in law practice today (e.g. case management systems, trust account management programs, electronic legal research, etc.) and nonlawyer support staff (e.g. paralegals, summer associates, IT professionals, etc.). Nothing in the Rules of Professional Conduct specifically addresses, let alone prohibits, a lawyer's use of AI in her law practice. However, should a lawyer choose to employ AI in her practice, the lawyer must do so competently, the lawyer must do so securely, and the lawyer must exercise her independent judgment in supervising the use of such processes in her practice.

Rule 1.1 prohibits lawyers from "handl[ing] a legal matter that the lawyer knows or should know he or she is not competent to handle[,]" and goes on to note that "[c]ompetent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Comment 8 to Rule 1.1 recognizes the reality of advancements in technology impacting a lawyer's practice, and states that part of a lawyer's duty of competency is to "keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice[.]" Rule 1.6(c) requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Rule 5.3 requires a lawyer to "make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer[,]" and further requires that "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer[.]" Rules 5.3(a) and (b). The requirements articulated in Rule 5.3 apply to nonlawyer assistants within a law firm as well as those outside of a law firm that are engaged to provide assistance in the lawyer's provision of legal services to clients, such as third-party software companies. *See* 2011 FEO 6 ("Although a lawyer may use nonlawyers outside of the firm to assist in rendering legal services to clients, Rule 5.3(a) requires the lawyer to make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer.").

A lawyer may use AI in a variety of manners in connection with her law practice, and it is a lawyer's responsibility to exercise her independent professional judgment in determining how (or if) to use the product of an AI tool in furtherance of her representation of a client. From discovery and document review to legal research, drafting contracts, and aggregating/analyzing data trends, the possibilities for employing AI in a law practice are increasingly present and constantly evolving. A lawyer's decision to use and rely upon AI to assist in the lawyer's representation of a client is generally hers alone and one to be determined depending upon a number of factors, including the impact of such services, the cost of such services, and the reliability of the processes. This opinion does not attempt to dictate when and how AI is appropriate for a law practice.5

Should a lawyer decide to employ AI in the representation of a client, however, the lawyer is fully responsible for the use and impact of AI in the client's case. The lawyer must use the AI tool in a way that meets the competency standard set out in Rule 1.1. Like other software, the lawyer employing an AI tool must educate herself on the benefits and risks associated with the tool, as well as the impact of using the tool on the client's case. Educational efforts include, but are not limited to, reviewing current and relevant resources on AI broadly and on the specific program intended for use during the provision of legal services. A lawyer that inputs confidential client information into an AI tool must take steps to ensure the information remains secure and protected from unauthorized access or inadvertent disclosure per Rule 1.6(c). Additionally, a lawyer utilizing an outside third-party company's AI program or service must make reasonable efforts to ensure that the program or service used is compatible with the lawyer's responsibilities under the Rules of Professional Conduct pursuant to Rule 5.3. Whether the lawyer is reviewing the results of a legal research program, a keyword search of emails for production during discovery, proposed reconciliations of the lawyer's trust account prepared by a long-time assistant, or a risk analysis of potential borrowers for a lender-client produced by an AI process, the lawyer is individually responsible for reviewing, evaluating, and ultimately relying upon the work produced by someone—or something—other than the lawyer.

Inquiry #2:

May a lawyer provide or input a client's documents, data, or other information to a third-party company's AI program for assistance in the provision of legal services?

Opinion #2:

Yes, provided the lawyer has satisfied herself that the third-party company's AI program is sufficiently secure and complies with the lawyer's obligations to ensure any client information will not be inadvertently disclosed or accessed by unauthorized individuals pursuant to Rule 1.6(c).

At the outset, the Ethics Committee does not opine on whether the information shared with an AI tool violates the attorney-client privilege, as the issue is a legal question and outside the scope of the Rules of Professional Conduct. A lawyer should research and resolve any question on privilege prior to engaging with a third-party company's AI program for use in the provision of legal services to a client, particularly if client-specific information will be provided to the AI program.

This inquiry is akin to any lawyer providing confidential information to a third-party software program (practice management, cloud storage, etc.), on which the Ethics Committee has previously opined. As noted above, a lawyer has an obligation to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating the representation of the client." Rule 1.6(c). What constitutes "reasonable efforts" will vary depending on the circumstances related to the practice and representation, as well as a variety of factors including the sensitivity of the information and the cost or benefit of employing additional security measures to protect the information. Rule 1.6, cmt. [19]. Ultimately, "[a] lawyer must take steps to minimize the risk that confidential client information will be disclosed to other clients or to third parties" when using technology to handle, communicate, analyze, or otherwise interact with confidential client information. 2008 FEO 5; *see also* 2005 FEO 10; 2011 FEO 6.

The Ethics Committee in 2011 FEO 6 recognized that employing a third party company's services/technology with regards to confidential client information requires a lawyer to exercise reasonable care when selecting a vendor. The opinion states:

> [W]hile the duty of confidentiality applies to lawyers who choose to use technology to communicate, this obligation does not require that a lawyer use only infallibly secure methods of communication. Rather, the lawyer must use reasonable care to select a mode of communication that, in light of the circumstances, will best protect confidential client information and the lawyer must advise effected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality....A lawyer must fulfill the duties to protect confidential client information and to safeguard client files by applying the same diligence and competency to manage the risks of [technology] that the lawyer is required to apply when representing clients.

2011 FEO 6 (internal citations omitted). In exercising reasonable care, the opinion discusses a sample of considerations for evaluating whether a particular third party company's services are compatible with the lawyer's professional responsibility, including:

• The experience, reputation, and stability of the company;

• Whether the terms of service include an agreement on how the company will handle confidential client information, including security measures employed by the company to safeguard information provided by the lawyer; and

• Whether the terms of service clarify how information provided to the company will be retrieved by the lawyer or otherwise safely destroyed if not retrieved should the company go out of business, change ownership, or if services are terminated.

2011 FEO 6; *see* Rule 5.3. A proposed ethics opinion from the Florida Bar on a lawyer's use of AI adds that lawyers should "[d]etermine whether the provider retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information" when determining whether a third party company's technological services are compatible with the lawyer's duty of confidentiality. *See* Florida Bar Proposed Advisory Opinion 24-1 (published Nov. 13, 2023). Furthermore, this duty of reasonable care continues beyond initial selection of a service, program, or tool and extends throughout the lawyer's use of the service. A lawyer should continuously educate herself on the selected technology and developments thereto—both individually and by "consult[ing] periodically with professionals competent in the area of online security"—and make necessary adjustments (including abandonment, if necessary) when discoveries are made that call into question services previously thought to be secure. 2011 FEO 6.

The aforementioned considerations—including the consideration regarding ownership of information articulated by the Florida Bar opinion—are equally applicable to a lawyer's selection and use of a third party company's AI service/program. Just as with any third-party service, a lawyer has a duty under Rule 5.3 to make reasonable efforts to ensure the third-party AI program or service is compatible with the lawyer's professional responsibility, particularly with regards to the lawyer's duty of confidentiality pursuant to Rule 1.6. Importantly, some current AI programs are publicly available to all consumers/users, and the nature of the AI program is to retain and train itself based on the information provided by any user of its program. Lawyers should educate themselves on the nature of any publicly available AI program intended to be used in the provision of legal services, with particular focus on whether the AI program will retain and subsequently use the information provided by the user. Generally, and as of the date of this opinion,

lawyers should avoid inputting client-specific information into publicly available AI resources.

Inquiry #3:

If a firm were to have an AI software tool initially developed by a third-party but then used the AI tool in-house using law firm owned servers and related infrastructure, does that change the data security requirement analysis in Opinion #2?

Opinion #3:

No. Lawyer remains responsible for keeping the information secure pursuant to Rule 1.6(c) regardless of the program's location. While an in-house program may seem more secure because the program is maintained and run using local servers, those servers may be as much if not more vulnerable to attack because a lawyer acting independently may not be able to match the security features typically employed by larger companies whose reputations are built, in part, on security and customer service. A lawyer who plans to independently store client information should consult an information technology/cybersecurity expert about steps needed to adequately protect the information stored on local servers.

Relatedly, AI programs developed for use in-house or by a particular law practice may also be derivatives of a single, publicly available AI program; as such, some of these customized programs may continue to send information inputted into the firm-specific program back to the central program for additional use or training. Again, prior to using such a program, a lawyer must educate herself on the nuances and operation of the program to ensure client information will remain protected in accordance with the lawyer's professional responsibility. The list of considerations found in Opinion #2 offers a starting point for questions to explore when identifying, evaluating, and selecting a vendor.

Inquiry #4:

If a lawyer signs a pleading based on information generated from AI, is there variation from traditional or existing ethical obligations and expectations placed on lawyers signing pleadings absent AI involvement?

Opinion #4:

No. A lawyer may not abrogate her responsibilities under the Rules of Professional Conduct by relying upon AI. Per Rule 3.1, a lawyer is prohibited from bringing or defending "a proceeding, or assert[ing] or controvert[ing] an issue therein, unless there is a basis in law and fact for doing so that is not frivolous[.]" A lawyer's signature on a pleading also certifies the lawyer's good faith belief as to the factual and legal assertions therein. *See* N.C. R. Civ. Pro. 11 ("The signature of an attorney…constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."). If the lawyer employs AI in her practice and adopts the tool's product as her own, the lawyer is professionally responsible for the use of the tool's product. *See* Opinion #1.

Inquiry #5:

If a lawyer uses AI to assist in the representation of a client, is the lawyer under any obligation to inform the client that the lawyer has used AI in furtherance of the representation or legal services provided?

Opinion #5:

The answer to this question depends on the type of technology used, the intended product from the technology, and the level of reliance placed upon the technology/technology's product. Ultimately, the attorney/firm will need to respond to each case and each client individually. Rule 1.4(b) requires an attorney to explain a matter to her client "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Generally, a lawyer need not inform her client that she is using an AI tool to complete ordinary tasks, such as conducting legal research or generic case/practice management. However, if a lawyer delegates substantive tasks in furtherance of the representation to an AI tool, the lawyer's use of the tool is akin to outsourcing legal work to a nonlawyer or other third-party resource or service, for which the client's advanced informed consent is required. *See* 2007 FEO 12. Additionally, if the decision to use or not use an AI tool in the case requires the client's input with regard to fees, the lawyer must inform and seek input from the client. As stated before, it is ultimately a lawyer's professional responsibility to exercise independent judgment when deciding to use or rely upon the work product of any outsourced, third-party service. *See* 2007 FEO 12; Opinions #1 & 4.

Inquiry #6:

Lawyer has an estate planning practice and bills at the rate of $300 per hour. Lawyer has integrated an AI program into the provision of legal services, resulting in increased efficiency and work output. For example, Lawyer previously spent approximately three hours drafting standard estate planning documents for a client; with the use of AI, Lawyer now spends only one hour preparing those same

documents for a client. May Lawyer bill the client for the three hours of work that the prepared estate documents represent?

Opinion #6:

No, Lawyer may not bill a client for three hours of work when only one hour of work was actually experienced. A lawyer's billing practices must be accurate, honest, and not clearly excessive. Rules 7.1, 8.4(c), and 1.5(a); *see also* 2022 FEO 4. If the use of AI in Lawyer's practice results in greater efficiencies in providing legal services, Lawyer may enjoy the benefit of those new efficiencies by completing more work for more clients; Lawyer may not inaccurately bill a client based upon the "time-value represented" by the end product should Lawyer not have used AI when providing legal services.

Rather than billing on an hourly basis, Lawyer may consider billing clients a flat fee for the drafting of documents—even when using AI to assist in drafting—provided the flat fee charged is not clearly excessive and the client consents to the billing structure. *See* 2022 FEO 4.

Relatedly, Lawyer may also bill a client for expenses incurred related to Lawyer's use of AI in the furtherance of a client's legal services, provided the expenses charged are accurate, not clearly excessive, and the client consents to the charge, preferably in writing. *See* Rule 1.5(b). Such costs include:

• a lawyer's use of AI that is specifically identified and directly related to the legal services provided to the client during the representation; or

• a general administrative fee to cover the costs of generic expenses incurred during the representation for the benefit of the client, e.g., copies, printing, postage, or general technology-related expenses—including AI—that are implemented to improve services or client convenience.

Endnotes

1. For a better understanding of the differences between *extractive and generative AI, see Jake Nelson, Combining Extractive and Generative AI for New Possibilities*, LexisNexis (June 6, 2023), lexisnexis.com/community/insights/legal/b/thought-leadership/posts/combining-extractive-and-generative-ai-for-new-possibilities (last visited January 10, 2024).

2. For an overview of the state of AI as of the date of this opinion, *see What is Artificial Intelligence (AI)?*, IBM, ibm.com/topics/artificial-intelligence (last visited January 10, 2024). For information on how AI relates to the legal profession, *see AI Terms for Legal Professionals: Understanding What Powers Legal Tech*, LexisNexis (March 20, 2023), lexisnexis.com/community/insights/legal/b/thought-leadership/posts/ai-terms-for-legal-professionals-understanding-what-powers-legal-tech (last visited January 10, 2024).

3. John Villasenor, *How AI Will will Revolutionize the Practice of Law*, Brookings Institution (March 20, 2023), brookings.edu/articles/how-ai-will-revolutionize-the-practice-of-law/ (last visited January 10, 2024); Steve Lohr, *AI is Coming for Lawyers Again*, New York Times (April 10, 2023), nytimes.com/2023/04/10/ technology/ai-is-coming-for-lawyers-again.html (last visited January 10, 2024).

4. Larry Neumeister, *Lawyers Blame ChatGPT for Tricking Them Iinto Citing Bogus Case Law*, AP News (June 8, 2023), apnews.com/article/artificial-intelligence-chatgpt-courts-e15023d7e6fdf4f099aa 122437dbb59b (last visited January 10, 2024).

5. In certain circumstances a lawyer may need to consult a client about employing AI in the provision of legal services to that client, *see* Opinion #5, below.

The Ethics Committee welcomes feedback on the proposed opinion; feedback should be sent to ethicscomments@ncbar.gov (mailto:ethicscomments@ncbar.gov).

Proposed 2024 Formal Ethics Opinion 2
Withholding Criminal Discovery in District Court
July 18, 2024

Proposed opinion concludes that it is ethically permissible for a prosecutor to condition a plea offer on withholding discovery in district court provided the prosecutor complies with Rule 3.8 and any other constitutional requirements. The proposed opinion further concludes that a defense lawyer may participate in such a plea deal upon communication to and consent by the defendant.

Defense Counsel is appointed to represent Defendant for a class H felony, possession with intent to sell or deliver methamphetamine (PWISD). The PWISD is based solely on the amount of methamphetamine and no other indications of any intent to sell or deliver. The assistant district attorney (ADA) assigned to prosecute Defendant's charge sets the case in HI Plea Court (district court) and sends Defense Counsel a written plea offer. The offer is to plead guilty to a class I felony, possession of methamphetamine, and receive probation.

Defendant is not a convicted felon and wants to pursue a misdemeanor offer. Defense Counsel sends ADA a discovery request. ADA indicates that since there is no discovery requirement in district court, they will only provide the full discovery packet if Defendant

rejects the HI felony plea offer, in which case they intend to move forward to trial on the class H felony PWISD methamphetamine and seek the maximum punishment available. After telling Defendant the ADA's indicated intent, Defendant reluctantly agrees to take the plea.

Inquiry #1:

May ADA condition a plea offer on Defendant's election to not request discovery in district court while indicating that Defendant's pursuit of discovery will result in revocation of the offer and the ADA's pursuit of a more significant outcome for Defendant's case?

Opinion #1:

Yes, provided ADA complies with Rule 3.8.

Rule 3.8 imposes "special responsibilities" on prosecutors in North Carolina. Specifically, Rule 3.8(a) requires a prosecutor to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause[.]" Rule 3.8(d) requires a prosecutor—after reasonably diligent inquiry—to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense. This includes evidence or information required to be disclosed pursuant to statutory and case law. *See, e.g., Brady v. Maryland*, 373 U.S. 83 (1963). The reason for these special responsibilities is articulated in the comments to Rule 3.8. Comment [1] to Rule 3.8 provides that a "prosecutor's duty is to seek justice, not merely to convict[.]" The comment further states that the prosecutor's responsibility carries with it specific obligations to see that the defendant is accorded procedural justice. *Id.*

Generally, there is no legal right to discovery in district court criminal cases in North Carolina beyond the evidence and information required to be disclosed by statutory law or case law. *See State v. Cornett*, 177 N.C. App. 452, 455, 629 S.E.2d 857, 859 (2006). Presuming ADA is otherwise compliant with Rule 3.8—particularly that ADA is not prosecuting a charge that is not supported by probable cause in violation of Rule 3.8(a) and ADA has made "timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions including all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense"—ADA is acting within his lawful discretion in refusing to turn over discovery given the procedural posture of Defendant's case.

Whether such conditional plea offers are a "best practice" for a District Attorney's Office is beyond the scope of this committee, though the committee recognizes the reasonable, competing interests at stake. The district attorney is tasked with processing and resolving an enormous caseload as efficiently as possible in the public interest, and plea offers such as the one described in this opinion contribute to that efficiency. Simultaneously, conditioning a plea offer on Defendant not requesting discovery may ultimately undermine the integrity of ADA's plea offer and compliance with Rule 3.8 due to the impression left by the conditional plea offer and the potential for others to attribute an appearance of impropriety or avoidance of transparency to the offer. The committee encourages prosecutors to be mindful of the calling in the Preamble to the Rules of Professional Conduct to "uphold the legal process" and to "further the public's understanding of and confidence in the rule of law and the justice system[.]" Preamble [5], [6].

Nevertheless, if ADA is fully compliant with Rule 3.8, ADA may offer the plea deal conditioned upon Defendant's election to not pursue discovery.

Inquiry #2:

Is it permissible for Defense Counsel to advise Defendant on and participate in the plea deal without reviewing the discovery pursuant to ADA's conditional plea offer?

Opinion #2:

Yes, provided Defense Counsel advises Defendant about the conditions of the plea and the impact thereof, advises Defendant about the limitations of Defense Counsel's evaluation, and follows Defendant's directive.

Defense Counsel has a duty to "explain a matter to the extent reasonably necessary to permit [Defendant] to make informed decisions regarding the representation." Rule 1.4(b). Defense Counsel also has a duty to "abide by a client's decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are pursued." Rule 1.2(a). In advising Defendant on whether to accept or reject ADA's plea offer, Defense Counsel has a duty to explain to Defendant the effect and possible consequences of the proposed plea, including the risk that there might be exculpatory evidence in the remainder of the discovery that is unavailable to Defense Counsel. Rule 1.4(b); RPC 129. Defense Counsel should also explain to Defendant that ADA has a professional responsibility under Rule 3.8 to refrain from prosecuting a charge that is not supported by probable cause and to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense. Rule 3.8(a), (d). While not required, it is advisable for Defense Counsel to memorialize such a consultation in writing, preferably signed by Defendant.

Absent information indicating otherwise, Defense Counsel may presume that ADA is complying with his duties under the Rules of

Professional Conduct and may communicate that understanding to Defendant. Defense Counsel may also rely upon Defendant's evaluation of his own conduct as it relates to the charges and resulting plea offer in determining whether the plea offer is in Defendant's best interests. After consultation with Defendant, Defense Counsel shall abide by the client's decision as to whether the plea will be accepted or rejected. Rule 1.2(a)(1).

The Ethics Committee welcomes feedback on the proposed opinion; feedback should be sent to ethicscomments@ncbar.gov (mailto:ethicscomments@ncbar.gov).