

**North Carolina Department of Labor
Division of Occupational Safety and Health**

Raleigh, North Carolina

Field Information System

Operational Procedure Notice 101C

Subject: Third Party Litigation

A. Purpose and Scope.

This OPN communicates guidelines to be followed by all OSH Division personnel who are asked or subpoenaed to participate in a lawsuit to which the Department of Labor is not a party. These suits are collectively known as “third party litigation,” and may involve workers' compensation claims or civil actions for damages.

B. Discussion.

In accordance with federal law, federal OSHA personnel are not required to participate in third party lawsuits. North Carolina law does not afford OSH Division personnel the same protection. Since our program is required to be "as effective as" the federal program, it is important for the Department to carefully manage participation in these suits to minimize the amount of time spent from primary duties, to avoid the appearance of "taking sides," and to protect our ability to prosecute our enforcement actions.

In addition, there is case file information that cannot be revealed pursuant to statutory authority. N.C. Gen. Stat. § 95-136(e1) prohibits the release of witness and complainant names and identifying statements unless they are used for enforcement purposes by the Department or by permission of the Commissioner of Labor for other public purposes, such as criminal investigations. In addition, 13 N.C.A.C. 07A.0303 sets forth the circumstances when an OSH investigation file may or may not be disclosed. Next, medical records, and any information therein, which have been released to the Department and are contained in case files may not be released without permission of the patient, his/her executor or next of kin pursuant to N.C. Gen. Stat. § 8-53. And finally, trade secrets and confidential information are protected under N.C. Gen. Stat. § 132-1.2.

It is the responsibility of OSH Division personnel who participate in third party litigation to be completely unbiased. In order to minimize the amount of time OSH Division personnel spend on third party litigation and to provide appropriate neutrality, all substantive conversations with attorneys must occur following the filing of a lawsuit and when both parties are represented. Telephone conference calls can be arranged to minimize the amount of time involved, however all interested parties must be involved and OSH Division personnel should be represented by counsel – usually provided by the N.C. Attorney General's Office – Labor Section.

C. Action. When initially contacted by an attorney involved in a third party suit:

1. Indicate that you are represented by counsel and may not discuss the case except pursuant to this written policy.
2. Fill out the [Third Party Litigation Contact](#) form. (WORD typeover)

3. Send the form to the NCDOL Legal Affairs Division, so that a letter explaining the Division's policies regarding participation in third party suits can be sent to the Counsel. You and your supervisor will receive a copy of the letter when it is sent.
4. Keep a log of all time spent on any third party litigation in which you are asked to participate, testify, etc. Assessment of the time spent working on third party litigation should include preparation, conversations, travel time, waiting time, in addition to any actual court or deposition appearances, and any actual expenses incurred including mileage, per diem, copying, etc. Account for all such time on the OSHA Form 31 under "Optional Information" by designating it S-13, Third Party Litigation.
5. If the attorneys want to talk with you pursuant to this policy, advise them that they should schedule any conference/deposition through the NCDOL Legal Affairs Division. This is so Legal Affairs can ensure that all interested parties are represented at this conference/deposition, and that you are represented by counsel from the N.C. Attorney General's Office – Labor Section.
6. If the party requests copies of the OSH inspection file (a written request is required, such as a letter, subpoena, fax, or E-mail), be sure to indicate such on the Third Party Litigation Contact form. Once the NCDOL Legal Affairs Division receives this Third Party Litigation Contact form and the related written request from the third party for OSH file documents, the NCDOL Legal Affairs Division will forward the records request to the Planning Statistics and Information Management ("PSIM") Bureau. The PSIM Bureau is the only entity that shall disclose OSH files to outside parties.

If the written request is in the form of a subpoena, PSIM Bureau staff will communicate with the NCDOL Legal Affairs Division or with the N.C. Attorney General's Office – Labor Section for instructions on forwarding the necessary documents to the appropriate party in response to the subpoena. Please note that only the written requests associated with a Third Party Litigation Contact form will be forwarded to the NCDOL Legal Affairs Division. General disclosure requests will continue to be forwarded directly to the PSIM Bureau.

7. Deliver or fax a copy of any subpoena received for a third party suit IMMEDIATELY to the NCDOL Legal Affairs Division. If the subpoena is overly-broad or you have been improperly subpoenaed, we may ask the N.C. Attorney General's Office – Labor Section to narrow the subpoena or quash it. The N.C. Attorney General's Office – Labor Section may need to represent you in any depositions or court appearances; therefore, it is critical that you keep the NCDOL Legal Affairs Division informed.

If attorneys object or wish to discuss this policy further, please refer them to the NCDOL Legal Affairs Division at 919-733-0368.

Due to your workload, it is not mandatory for you to spend extensive time reviewing the case file to refresh your memory. It is permissible to testify in court or attest in a

deposition or affidavit that you either cannot recall something from a file or do not know the answer to a question.

If at any time you feel that any attorney or a representative involved in a third party matter is pressuring or badgering you, please refer that person to the NCDOL Legal Affairs Division at 919-733-0368.

D. **Expiration.**

This OPN amends and cancels OPN 101B. It is effective on the date of signature and will remain in effect until amended or canceled by the Director.

Signature on original
Kevin O'Barr
Safety Standards Officer

Signature on original
Allen McNeely
Director

3/9/04
Date of Signature