

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

**Raleigh, North Carolina**

Field Information System

Operational Procedure Notice 101D

**Subject:** Third Party Litigation

A. **Purpose and Scope.**

This OPN communicates guidelines to be followed by NCDOL Occupational Safety and Health (OSH) Division personnel who are contacted by an attorney and/or representative from an attorney's office directly or are subpoenaed to participate in a lawsuit to which the North Carolina Department of Labor (NCDOL) 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, 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 away from primary duties, to avoid the appearance of "taking sides," and to protect our ability to prosecute our enforcement actions.

OSH Division case files contain information that cannot be revealed pursuant to N.C. Gen. Stat. § 95-136(e1). This statute prohibits the release of witness and complainant names and identifying information unless the information is used: (1) for enforcement purposes by the department, (2) by permission of the commissioner of labor for other public purposes, such as criminal investigations; or, (3) by signed release from the witness or complainant. In addition, 13 N.C.A.C. 07A.0303 sets forth what information in an OSH investigation file may or may not be disclosed and when it may be disclosed. Medical records, and any information contained 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. Trade secrets and confidential information are protected under N.C. Gen. Stat. § 95-152 and §132-1.2 and may not be released.

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: (1) following the filing of a lawsuit and (2) through use of the deposition process when both parties to the suit are appropriately noticed and allowed to be present.

C. **Action.**

When contacted by an attorney or representative from an attorney's office, OSH Division personnel should obtain contact information and case identification information necessary to fill out the Third Party Litigation Contact Form. They should advise the

attorney/representative that they are represented by counsel and may not discuss the case. They should also inform the attorney/representative that someone from the Legal Affairs Division will contact them at a later date. If you receive a subpoena, you must immediately notify the Legal Affairs Division.

The following is a list of what to do when you are subpoenaed or contacted by an attorney/representative involved in a third party suit:

1. Indicate that you are represented by counsel and may not discuss the case.
2. Notify the attorney/representative that someone from the Legal Affairs Division will contact them at a later date.
3. Fill out the [Third Party Litigation Contact](#) Form.
4. Immediately send the form to the Legal Affairs Division via electronic mail, facsimile or hand delivery so that a letter explaining the division's policies regarding participation in third party suits can be sent to the attorney/representative. You and your supervisor will receive a copy of the letter when it is sent.
5. Keep a log of all time spent on any third party litigation in which you 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.
6. If the attorney/representative wants to talk with you pursuant to this policy, advise them that they should schedule a deposition through the Legal Affairs Division. This is so the Legal Affairs Division can ensure that all interested parties are represented at this deposition, so that the time you are away from your primary duties is minimized, and if needed, that you are represented by counsel from the N.C. Attorney General's Office – Labor Section.
7. If the attorney/representative 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. If the written request is in the form of a letter, fax or e-mail, you should immediately forward the request to the Planning Statistics and Information Management ("PSIM") Bureau and make note of this action on the Third Party Litigation Contact Form. If the written request is in the form of a subpoena, it should accompany the Third Party Litigation Contact Form when sent to Legal Affairs Division. Once the Legal Affairs Division receives this Third Party Litigation Contact Form and the related subpoena from the third party for OSH file documents, the Legal Affairs Division will review the subpoena to ensure it is for releasable documents. If so, it will forward the records request to the Planning Statistics and Information Management ("PSIM") Bureau. If the subpoena is for documents the Legal Affairs Division believes to be unreleasable, contact will be made with the Attorney General's Office – Labor Section in order for appropriate action to be taken. The PSIM Bureau is the only entity that will disclose OSH Division files to outside parties.

If a written request in the form of a subpoena is received by PSIM Bureau, they will communicate with the Legal Affairs Division, who will in turn contact 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 in the form of a subpoena associated with a Third Party Litigation Contact Form will be forwarded to the Legal Affairs Division. General disclosure requests will continue to be handled by and forwarded directly to the PSIM Bureau.

8. Deliver, e-mail, or fax a copy of any subpoena received for a third party suit IMMEDIATELY to the 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. It is important to note that there are very stringent civil and superior court deadlines for narrowing or quashing a subpoena. Failure of OSH Division personnel to immediately forward subpoena's to the Legal Affairs Division has the potential to cause adverse results that could force NCDOL to disclose an inspection file that would otherwise be unreleasable.

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 Legal Affairs Division informed. If an attorney/representative objects, becomes argumentative, is difficult to obtain the required information from, or wishes to discuss this policy further, please refer them to the 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. OSH Division personnel will never take a copy of an inspection file with them to a deposition or court appearance.

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 Legal Affairs Division at 919-733-0368.

D. **Expiration.**

OPN 101C is canceled. This OPN is effective on the date of signature and will remain in effect until revised or canceled by the director.

Signed on Original  
Susan Haritos  
Health Standards Officer

Signed on Original  
Allen McNeely  
Director

6/27/2011  
Date of Signature