

Ethical Dilemmas in Client Representation for DSS Attorneys in North Carolina

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CONTENTS

Background on DSS Attorneys in North Carolina	2
Organization and Governance of Social Services Agencies in North Carolina	3
Scope of the DSS Attorney’s Representation	4
Identity of the Client for DSS Attorneys	5
Difficult “Organization as Client” Issues	6
Unique “Local Government as Client” Issues	10
Providing <i>Upjohn</i> Warnings to DSS Employees	11
Internal Conflicts and Conflicts of Interest	13
Handling Conflict between the Agency and Attorney	13
<i>Director as Attorney Supervisor</i>	13
<i>Working with Social Workers</i>	14
<i>Legal Strategy and Ethics</i>	15
Agency versus Individual Representation	15
Conclusion	17

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Attorneys who perform legal services on behalf of a county department of social services (DSS) in North Carolina face a unique set of issues with respect to client representation. Does a DSS attorney¹ represent DSS, the DSS director, DSS employees, the DSS board, or the county itself? What happens when those parties have conflicting interests? What are the implications of a DSS attorney's client also being the attorney's supervisor? For DSS attorneys, determining the identity of the client and the scope of representation has implications for decision-making in litigation and advising, reporting malfeasance, protecting the attorney-client privilege, and evaluating conflicts. This bulletin discusses how the Rules of Professional Conduct of the North Carolina State Bar (the "Rules," and each, a "Rule")² can guide DSS attorneys in making these determinations.

Background on DSS Attorneys in North Carolina

North Carolina counties use different models to provide legal services to county DSS agencies. DSS attorneys in North Carolina may be staff attorneys employed directly by the county DSS, county or assistant county attorneys, special county attorneys for social services,³ or attorneys in private practice under contract to represent the county DSS.⁴ The direction and supervision a DSS attorney receives may vary depending on which type of arrangement a county uses to provide legal services. Unlike some other states, North Carolina does not have a rule or statute determining the identity of a DSS attorney's client.⁵ The lack of a rule or statute makes it particularly important for a county to clearly identify in the attorney's job description or contract whether the attorney's client is the county DSS, the DSS director, the county social services governing board, the county, or some combination of those parties.

1. This bulletin uses the term "DSS attorney" to describe any attorney who provides legal services to a county DSS agency or a consolidated human services agency, regardless of whether that individual is a staff attorney with DSS.

2. Rules of Professional Conduct of the North Carolina State Bar, 27 N.C. ADMIN. CODE ch. 2; N.C. State Bar, *Rules of Professional Conduct*, NORTH CAROLINA STATE BAR, <https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/>.

3. See the North Carolina General Statutes (hereinafter G.S.), Chapter 108A, Section 16.

4. The various models for legal services used by county departments of social services are discussed in more detail in JOHN L. SAXON, *SOCIAL SERVICES IN NORTH CAROLINA* (UNC School of Government, 2008).

5. See, e.g., IOWA CODE ANN. § 232.90(1)–(2) (directing that in proceedings arising from a petition, the county attorney "shall represent the state," defined as "the general interest held by the people in the health, safety, welfare, and protection of all children living in this state"); MINN. STAT. § 260C.163(4) (specifying that county attorneys represent both the agency and "the public interest in the welfare of the child"); NEB. SUP. CT. RS. § 6-1706(B)(4)(c) ("The agency's or tribe's attorney role is to represent the agency or tribe and advocate for the agency's or tribe's position."); see also *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 564, 490 S.E.2d 642, 651 (1997) ("The relationship between DHHR and county prosecutors under the statute is a pure attorney-client relationship. . . . Therefore, all of the legal and ethical principles that govern the attorney-client relationship in general, are applicable to the relationship that exists between DHHR and county prosecutors in civil abuse and neglect proceedings."). For a more comprehensive discussion of the variety of models used to represent children and agencies in child protective proceedings, see Josh Gupta-Kagan, *Rethinking Family-Court Prosecutors: Elected and Agency Prosecutors and Prosecutorial Discretion in Juvenile Delinquency and Child Protection Cases*, 85 U. Chi. L. Rev. 743, 791–95 (2018).

Table 1. Options for Organization and Governance of Human Services Agencies in North Carolina

Option	Organization	Governance
A. Separate agencies with appointed governing boards	Agencies (such as a county health department and department of social services) are separate. ^a	Local appointed governing boards (i.e. local board of health and county board of social services) oversee the agencies.
B. Separate agencies with partial or full BOCC governance	Agencies (such as a county health department and department of social services) are separate.	The BOCC directly assumes the powers and duties of the local board of health and/or county board of social services. ^b
C. CHSA with appointed CHS board	The BOCC combines two or more agencies or functions to create a new CHSA. ^c	The BOCC appoints a CHS board to govern the CHSA.
D. CHSA with BOCC governance	The BOCC combines two or more agencies or functions into a new CHSA.	The BOCC directly assumes the powers and duties of the CHS board.

Note: BOCC = board of county commissioners; CHS = consolidated human services; CHSA = consolidated human services agency.

^a Before S.L. 2021-126, almost all counties had separate agencies with appointed governing boards.

^b In some counties, the BOCC governs all human services agencies. In others, it has only assumed governance of one agency while leaving another agency under the control of an appointed governing board.

^c Currently, all CHSAs in North Carolina include social services.

Organization and Governance of Social Services Agencies in North Carolina

A county DSS provides a variety of client services, such as financial assistance, food and nutrition services, adult protective services, child welfare services, and child support enforcement, among others.⁶ In addition to having a variety of models for providing legal services to their human services agencies, North Carolina counties also have multiple options for the organization and governance of their human services agencies. In 2012, the North Carolina General Assembly passed S.L. 2012-126, which provided counties with new options regarding the organization and governance of their human services functions. Specifically, S.L. 2012-126, which amended G.S. 153A-76 and G.S. 153A-77,

1. allowed any board of county commissioners (BOCC) in a county with a county manager appointed pursuant to G.S. 153A-81 to combine two or more human services functions into a single consolidated human services agency (CHSA)⁷ and

6. See, e.g., G.S. 108A-27 (Work First); G.S. 108A-40 (State-County Special Assistance); G.S. 108A-51 (food and nutrition services); G.S. 108A-103 (adult protective services); G.S. 7B-301, -302 (child protective services); G.S. 108A-48 (foster care assistance); G.S. 108A-50, -50.1 (adoption assistance); G.S. 110-141 (child support enforcement).

7. See G.S. 153A-77(b)(1). Counties can choose which functions to include in a CHSA. Currently, twenty-eight counties in North Carolina have created a CHSA that operates two or more of the county's human services functions. The majority of CHSAs in North Carolina include both social services and

2. allowed any BOCC to directly assume the powers and duties of one or more of the governing boards responsible for overseeing a local human services agency (i.e., the local board of health, the county board of social services, or both).⁸

It is important for a DSS attorney to understand the organization and governance structure of the agency to which the attorney provides services. Among other things, the organization and governance of the agency may affect a DSS attorney's duties regarding reporting malfeasance and decisions regarding disclosure of confidential information.

Scope of the DSS Attorney's Representation

The nature and scope of work for DSS attorneys varies from county to county. In some counties, DSS attorneys are responsible for representing the county DSS in proceedings involving juvenile abuse, neglect, or dependency; termination of parental rights; guardianship; and/or child support, but they do not provide advice to DSS or represent DSS in other matters. In other counties, DSS attorneys may advise or represent DSS in a wide variety of legal matters involving the department.⁹ For example, in counties where a county attorney represents DSS, that county attorney may defend DSS in lawsuits against the agency.

A DSS attorney's job description or contract should clearly specify the nature and scope of the attorney's relationship with DSS and the scope of the attorney's work and responsibility.¹⁰ A job description or contract might specify particular types of matters an attorney will handle on behalf of DSS or could clarify whether the attorney would be expected to act as an advisor to the DSS board. Determining the scope of an attorney's work can help to identify the attorney's client with respect to a particular matter. For example, if a job description or contract specifies that an attorney will solely be handling child support enforcement cases on behalf of DSS, it would be reasonable for an attorney to generally consider DSS itself to be the attorney's primary client when evaluating conflicts and making decisions about confidential information. On the other hand, if a job description or contract specifies that the attorney will be advising and representing the county on matters involving DSS, it may be that the attorney's obligations primarily flow toward the BOCC.

A county or DSS has substantial latitude to limit an individual DSS attorney's scope of representation.¹¹ For example, a county or DSS could agree that the attorney will only work on particular types of cases or spend a particular amount of time pursuing certain legal

public health. Some counties also include other functions in their CHSAs, such as veterans' services, senior services, or domestic-violence services. For more information on CHSAs, see UNC School of Government, *Consolidated Human Services Agencies (CHSAs)*, NORTH CAROLINA PUBLIC HEALTH LAW, <https://www.sog.unc.edu/resources/microsites/north-carolina-public-health-law/consolidated-human-services-agencies-chsas>.

8. See G.S. 153A-77(a); see also G.S. 108A-1 (governing boards for county social services). Amendments to G.S. 153A-76 prohibit county commissioners from abolishing and assuming the powers and duties of any of the following: (1) an area mental health, developmental disabilities, and substance abuse services board (though a grandfather clause provides an exception for Mecklenburg County, at G.S. 153A-76(6)); (2) a public health authority assigned the power, duties, and responsibilities to provide public health services as outlined in G.S. 130A-1.1.3; (3) a public health authority authorized to provide public health services under S.L. 1997-502.4; or (4) a public hospital as defined in G.S. 159-39(a).

9. SAXON, *supra* note 4, at 139.

10. SAXON, *supra* note 4, at 138.

11. See Rule 1.2.

objectives. However, as noted in a comment to Rule 1.2, agreeing to a limited representation does not exempt a lawyer from the duty to provide competent representation.¹² For example, if an attorney's contract specifies that she only works on behalf of DSS twenty hours per week, the time limitation does not excuse the attorney from dedicating the necessary preparation and attention to competently handle the matters assigned to her. If limitations on the scope of representation hinder a DSS attorney's ability to competently represent her client, the attorney should discuss these limitations with the client.

A county or DSS should also consider carefully whether a particular attorney's scope of representation should include carrying matters through the appeals process. Unless the attorney-client relationship is terminated as provided in Rule 1.16, a lawyer is obligated to "carry through to conclusion all matters undertaken for a client."¹³ Whether this duty includes an obligation to prosecute or defend an appeal for a client depends on the scope of the representation the lawyer has agreed to provide.¹⁴ Comment 4 to Rule 1.13 notes that if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client, and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, then the lawyer *must* consult with the client about the possibility of appeal before relinquishing responsibility for the matter.¹⁵ A DSS attorney's responsibility for a case does not necessarily end when the case moves to the appeal process, unless (1) the DSS has a separate process for handling appeals (such as a contract attorney or staff attorney who is assigned to handle appeals) or (2) the DSS attorney has explicitly agreed to a scope of representation with the client that does not include appeals.¹⁶

Identity of the Client for DSS Attorneys

In their daily work, DSS attorneys deal with a wide number of parties who may *feel* that they are represented by the DSS attorney, including social workers, DSS clients (for example, noncustodial parents in child support proceedings or children in abuse, neglect, and dependency proceedings), individual members of the DSS governing board, or individual county commissioners. However, none of these individuals are the DSS attorney's client. So who *is* the DSS attorney's client? The answer will largely depend on the model adopted by the county for providing legal services to DSS (staff attorney versus county attorney versus contract attorney) and the nature of the attorney's contract and/or job description.¹⁷ Many DSS attorneys likely think of the DSS agency itself as their client. However, there may be instances (particularly under the county attorney

12. See Rule 1.1.

13. Rule 1.3 cmt. 4.

14. *Id.*

15. See also Rule 1.4(a)(2).

16. In addition to the duty to "carry through to conclusion all matters undertaken for a client," DSS attorneys should also consider how their participation in the appellate process (or lack thereof) may affect other counties. Adverse judgments against a DSS on appeal can create legal precedents with implications for all 100 North Carolina counties, not just the county that the DSS attorney represents. Moreover, an adverse judgment on appeal can substantially impact the lives of the individuals (e.g., parents and children) involved in the underlying proceeding.

17. See SAXON, *supra* note 4, at 139.

model) in which a DSS attorney should think of the county, rather than DSS, as the attorney's ultimate client.¹⁸

In North Carolina, a DSS is a subdivision of a county government, not a separate or independent legal entity.¹⁹ If litigation is brought against a county DSS, it is the county, not the agency itself, that is the proper defendant.²⁰ Similarly, neither the social services governing board nor the BOCC is a legal entity apart from the county, since both are created by and are an extension of the county.²¹ Accordingly, one could argue that a DSS attorney's ultimate client is always the county, even if the attorney was not hired by the BOCC and does not directly advise or interact with the BOCC.²²

Like any organization or entity, a county or a DSS can only act through its officers, employees, and agents.²³ Therefore, the county DSS director (and to the extent that authority is delegated, the director's staff)²⁴ has authority to generally determine the agency's objectives for legal representation and to direct the attorney to achieve those objectives.²⁵ A DSS staff attorney must generally accept the DSS director's decisions regarding the objectives of the attorney's legal representation of the department, even if the attorney disagrees with the prudence of those decisions.²⁶ Similarly, a county attorney or special county attorney for social services who reports directly to the BOCC must generally accept the BOCC's decisions regarding departmental policy, operations, and litigation objectives, even if the attorney dislikes or disagrees with those decisions.

Difficult "Organization as Client" Issues

Like any attorney that represents an organization as a client, DSS attorneys face a serious dilemma if they receive directions from a client representative that may conflict with the best interests of the organization itself, or if they see a client representative engaging in

18. SAXON, *supra* note 4, at 137–38.

19. *See, e.g., Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997); *Malloy v. Durham Cnty. Dep't of Soc. Servs.*, 58 N.C. App. 61, 293 S.E.2d 285 (1982) (county DSS has no capacity to sue or be sued).

20. *See Meyer*, 347 N.C. at 104, 489 S.E.2d at 884 (an action against a county DSS which directly affects the rights of the county is an action against the county); *Johnson v. Marrow*, 228 N.C. 58, 44 S.E.2d 468, 470 (1947) (a county must be sued for the acts of its agencies); *see also Wade v. Alamance Cnty. Dep't of Soc. Servs.*, No. 1:19-CV-619, 2020 WL 3846336, at *5 (M.D.N.C. July 8, 2020) (compiling cases in which federal-district courts in North Carolina have dismissed claims against departments of social services); *West v. Buncombe Cnty., N.C.*, 1:14-CV-00088-MOC-DSC, 2014 WL 4384021, at *3 (W.D.N.C. Sept. 3, 2014) (dismissing claims asserted against a county department of health and human services and child protective services on grounds that the entities lacked legal capacity for suit).

21. *Avery v. Cnty. of Burke*, 660 F.2d 111, 114 (4th Cir. 1981); *Piland v. Hertford Cnty. Bd. of Comm'rs*, 141 N.C. App. 293, 296, 539 S.E.2d 669, 671 (2000) (holding county to be the real party in interest as opposed to BOCC).

22. This raises the question whether a BOCC may be entitled to full disclosure from a DSS attorney of information that is protected by the attorney's duty of confidentiality under Rule 1.6. If the county is the ultimate "client" of a DSS attorney, then the attorney's duty of confidentiality may arguably run to the BOCC (as a whole, not individual BOCC members), even if the attorney was not directly hired or retained by the BOCC. This issue has not been explored in North Carolina case law and is beyond the scope of this bulletin.

23. *See* Rule 1.13 cmt. 1.

24. G.S. 108A-14.

25. Rule 1.2 cmts. 1–2.

26. Rule 1.13 cmt. 3; Rule 1.2.

unlawful behavior that might harm the agency as a whole.²⁷ Rule 1.13 addresses how attorneys representing an organization as a client should proceed in such situations. Per Rule 1.13, a DSS attorney must proceed “as is reasonably necessary in the best interest of the organization” if the attorney knows that

1. the DSS director (or other client representative) is acting, intends to act, or refuses to act in violation of his or her legal obligation to DSS or in violation of law that might reasonably be imputed to DSS; and
2. The director’s action (or other client representative’s action) is likely to result in substantial injury to DSS.

How should a DSS attorney proceed when the DSS director is acting (or directing the attorney to act) in a way that would be likely to injure DSS? Rule 1.13 directs an attorney in such a situation:

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*.²⁸

For purposes of referring the matter to a higher authority, who is above the DSS director “in the organization?” Because of the variety of social services governance structures permitted in North Carolina, this answer will be county-specific. In counties with a CHSA, this may be the CHS director (if that individual is not also the DSS director) or the county manager.²⁹ In other counties, it will be an appointed DSS board.³⁰ In counties where the BOCC has abolished the DSS board and assumed its duties (but has not created a CHSA), going to the BOCC may be the appropriate next step for an attorney referring a matter to a “higher authority.”³¹

Rule 1.13 establishes that an attorney facing such an ethical dilemma should begin by reporting up, not out. In other words, a DSS attorney should begin by reporting malfeasance or potential harm up the organizational “chain of command” for DSS rather than to external entities (such as watchdog organizations).³² This chain of command should always begin with the attorney’s direct supervisor, who, in many cases, will be the DSS director. The organizational hierarchy *above* the DSS director will differ depending on the organization and governance

27. For a more in-depth discussion on the complex duties an attorney owes to an organizational client, see William H. Simon, *Duties to Organizational Clients*, 29 GEO. J. LEGAL ETHICS 489 (2016).

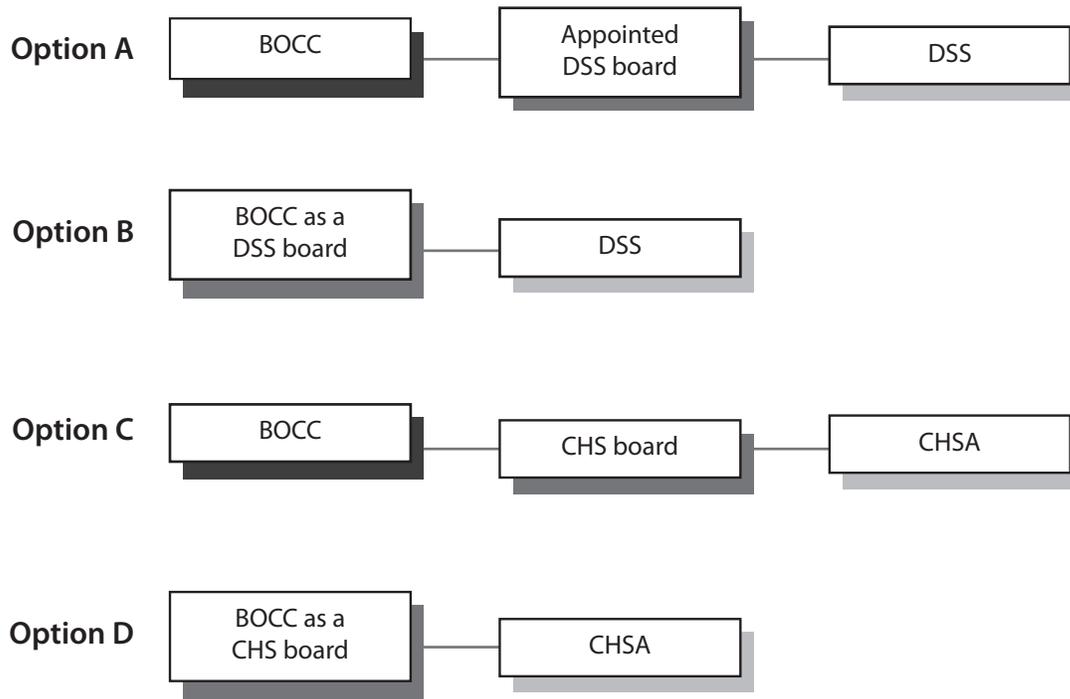
28. Rule 1.13(b) (emphasis added).

29. In a county with a CHSA, the county manager is the individual responsible for appointing and supervising the consolidated human services director. G.S. 153A-77(e). In counties where the CHSA director is also the DSS director, an attorney may need to go directly to the county manager for purposes of “reporting up” under Rule 1.13. In counties where the DSS director is supervised by the CHSA director, the CHSA director would be the appropriate next step for reporting up above the DSS director.

30. In a county with an appointed DSS board, the DSS board is the entity responsible for appointing and supervising the DSS director. G.S. 108A-12.

31. In a county where the BOCC has abolished the appointed DSS board (but has not created a CHSA) and assumed its duties and responsibilities, the BOCC has the authority to appoint and supervise the DSS director. G.S. 153A-77(a).

32. “Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization.” Rule 1.13 cmt. 4.

Figure 1. County Organization and Governance Structures

model a county employs for its social services agency. If, at any point in the chain, an individual or governing board “persists in conduct contrary to the lawyer’s advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization.”³³ In determining whether the matter should be reported to a higher authority, Comment 4 to Rule 1.13 directs an attorney to “give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations.”

In addition to having multiple county-specific governance structures for a county DSS, North Carolina is one of only a few states in the United States where social services programs are administered by counties under the state’s supervision.³⁴ In most states, the state directly

33. *Id.*

34. For example, most states have state-administered child welfare services. Nine states can be described as county-administered: California, Colorado, Minnesota, New York, North Carolina, North Dakota, Ohio, Pennsylvania, and Virginia. Child welfare services in two “hybrid” states, Nevada and Wisconsin, are partially administered by the state and partially administered by counties. CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., STATE VS. COUNTY ADMINISTRATION OF CHILD WELFARE SERVICES (2018), <https://www.childwelfare.gov/pubs/factsheets/services/>.

administers social services programs through a centralized administrative system.³⁵ The supervising agency for county-administered social services programs is the North Carolina Department of Health and Human Services (NCDHHS).³⁶ Because of the unique supervisory role that NCDHHS plays in North Carolina's county-administered social services system, there may also be instances in which it is appropriate for a DSS attorney to report a matter up to NCDHHS.³⁷

So where does NCDHHS fit into this reporting chain when a DSS attorney is analyzing his obligations under Rule 1.13? NCDHHS is a state agency and a separate legal entity from a county government.³⁸ However, NCDHHS does have the authority to take corrective action in the event of noncompliance with the law, including withholding funding or temporarily assuming administration of social services programs.³⁹ Moreover, a DSS director acts as an agent of NCDHHS in relation to work required by NCDHHS in the county and is responsible for carrying out NCDHHS policies.⁴⁰ Therefore, it stands to reason that NCDHHS would be the "highest authority that can act on behalf of the organization as determined by applicable law" as described in Rule 1.13. Comment 5 to Rule 1.13 recognizes that in some situations, the "highest authority" with capacity to act on behalf of an organization may lie outside of the organization itself: "The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation."

A DSS attorney should keep in mind, however, that NCDHHS is not the attorney's client. Accordingly, any information the attorney shares with NCDHHS will not be protected by the attorney-client privilege in the event of litigation. Because of this, one could argue that reporting confidential information to NCDHHS is more like a report "out" (disclosing information outside the organization) than a report "up" within the organization. Rule 1.13 does allow a lawyer to reveal information outside the organization in particular circumstances. If the highest authority that can act on behalf of a county DSS "insists upon action, or a refusal to act, that is clearly a

35. *Id.* See also PROGRAM EVALUATION DIV., N.C. GEN. ASSEMB., STATUTORY CHANGES WILL PROMOTE COUNTY FLEXIBILITY IN SOCIAL SERVICES ADMINISTRATION, Rep. No. 2011-03 (May 2011), 2-3, https://www.ncleg.net/PED/Reports/documents/DSS/DSS_Report.pdf ("North Carolina is one of 11 states that provide social services programs through a state-supervised and county-administered system. . . . Most other states operate a state-administered social services system, and counties have little or no role in administering or financing state and federal social services programs.").

36. G.S. 108A-1. See G.S. 108A-74 (authorizing NCDHHS to take various remedial measures when a county DSS fails to comply with its mandated performance requirements or applicable law, ranging from a corrective action plan to an NCDHHS takeover of a county DSS in which the DSS director is divested of service delivery powers).

37. G.S. 108A-74 (regarding the authority of NCDHHS to take corrective action related to a county DSS).

38. See G.S. 143B-6.

39. G.S. 108A-74.

40. G.S. 108A-14(a)(5). See also *Gammons v. N.C. Dep't of Hum. Res.*, 344 N.C. 51, 63, 472 S.E.2d 722, 729 (1996) ("Based on the plain language of our statutory law governing social services and the provision of child protective services, the Department of Human Resources has substantial and official control over the provision of child protective services and designates the county director as the person responsible for carrying out the policies formulated by the Department, through the Social Services Commission and the Division of Social Services."). The Department of Human Resources was the predecessor agency to NCDHHS.

violation of law and is likely to result in substantial injury” to the DSS, the lawyer may reveal such information “outside the organization” to the extent permitted by Rule 1.6.⁴¹ Rule 1.6 sets forth a very limited set of circumstances in which an attorney may reveal information acquired during the professional relationship with a client. Among other permitted disclosures, Rule 1.6 would allow a DSS attorney to reveal confidential information (1) to prevent the commission of a crime by the client, (2) to prevent reasonably certain death or bodily harm, or (3) 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.⁴² Even if the circumstances do not warrant a disclosure under Rule 1.6, a DSS attorney may still explore ways to seek support or technical assistance from NCDHHS in a manner that does not reveal confidential information.

Finally, there are limitations on an attorney’s ability to disclose information under Rule 1.13. The authority to disclose under Rule 1.13(d) does not extend to the disclosure of information relating to the lawyer’s representation of the organization (1) to investigate an alleged violation of law or (2) to defend the organization or one of its officers, employees, or other constituents against a claim arising out of an alleged violation of law. For example, a county attorney representing DSS in a lawsuit from a former employee alleging unlawful discrimination could not disclose information outside of the county DSS “organization” if that information related to the discrimination claim at issue in the lawsuit. The county attorney, could, however, disclose an issue *unrelated* to the attorney’s representation in that discrimination lawsuit if such a disclosure was warranted under Rule 1.13 and permitted under Rule 1.6.

Unique “Local Government as Client” Issues

Rule 1.13 acknowledges that ethical dilemmas for attorneys representing governmental organizations may involve different considerations than for attorneys representing private entities.⁴³ Comment 9 to Rule 1.13 notes that defining the identity of the client and the obligations of an attorney may be more difficult in the government context. For example, Comment 9 highlights that if an action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government in which that department is situated may be the “client” for purposes of a Rule 1.13 analysis.⁴⁴ DSS attorneys are representing an agency that is part of a larger local government: the county. As such, the DSS attorney should consider the potential injury not only to DSS itself but to the county as well. As noted earlier, in the event of a lawsuit targeting the practices of the county DSS, it will often be the county itself that is potentially on the hook for monetary damages.⁴⁵

41. Rule 1.13(c).

42. Rule 1.6(b).

43. For more information on the question of identifying “the client” for local government attorneys, see Chris McLaughlin, *Ethics and the Role of the Local Government Attorney*, COATES’ CANONS: NC LOC. GOV’T L., UNC SCH. OF GOV’T BLOG (Oct. 9, 2014), <https://canons.sog.unc.edu/ethics-and-the-role-of-the-local-government-attorney/>.

44. Rule 1.13 cmt. 9.

45. See *supra* notes 18 and 19. In some tort claims involving a county DSS, NCDHHS may be a proper defendant. Pursuant to the Tort Claims Act, NCDHHS may be sued directly in tort if (1) the “claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority,” and (2) the claim arose “under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.” *Gammons v. N.C. Dep’t of Hum. Res.*, 344

Beyond this threshold issue of identifying the client, the fact that governmental organizations like DSS serve the public complicates the “substantial injury” analysis that an attorney must make under Rule 1.13. What if the client’s actions might not substantially harm the agency or the county but could harm the members of the public served by the agency? What if the client’s actions could substantially injure the agency through damaging the public’s trust? What if the client’s actions could lead to a loss of federal or state DSS funding, which would in turn harm the county’s residents and potentially harm recipients of DSS services around the state?⁴⁶ Rule 1.13 does not explain how or whether these factors should be considered but does acknowledge that “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.”⁴⁷ This language indicates that for DSS attorneys, evaluating “substantial injury” to the organization may also involve considering the impact on the public that the organization serves. However, Rule 1.13 does not explicitly indicate that this consideration of public interest is a guiding principle or a *required* consideration. Considering the impact of potential liability or other substantial injury to the organization itself (here, DSS and the county) should still be the primary determining factor in deciding whether an internal (“up the chain”) report under Rule 1.13 or an external disclosure under Rule 1.6 is necessary.⁴⁸

Providing Upjohn Warnings to DSS Employees

DSS attorneys often work closely with social workers and other DSS staff members. In some instances, this close working relationship may create confusion for DSS employees. Imagine you are a DSS staff attorney and you are asked to talk with a social worker at your agency to ask some questions about some suspected misconduct by another DSS employee. The social worker says, “You’re our attorney, so anything I say to you is privileged, right?” The answer should be a clear

N.C. 51, 54, 472 S.E.2d 722, 724 (1996) (quoting G.S. 143-291). The county director of social services acts as an agent of NCDHHS, such that the doctrine of respondeat superior is implicated with respect to the director’s actions. *Gammons*, 344 N.C. at 64, 472 S.E.2d at 729 (citing G.S. 108A-14(a)(5)). Accordingly, the Industrial Commission has jurisdiction under the Tort Claims Act to determine NCDHHS’s liability for the alleged negligence of a county director of social services. *Gammons*, 344 N.C. at 64, 472 S.E.2d at 729. *See also* Patrick v. N.C. Dep’t of Health & Hum. Servs., 192 N.C. App. 713, 716–17, 666 S.E.2d 171, 173 (2008). However, the fact that the Tort Claims Act provides for subject-matter jurisdiction in the Industrial Commission does not preclude a claim against defendants (including the county or a DSS employee) in superior court. Though a plaintiff cannot receive a double recovery, a plaintiff may maintain both a suit against a state agency in the Industrial Commission under the Tort Claims Act and a suit against the negligent “agent” or employee in the General Court of Justice for common-law negligence. *Meyer v. Walls*, 347 N.C. 97, 108, 489 S.E.2d 880, 886 (1997).

46. A DSS attorney should keep in mind that a loss of federal funding based on certain compliance errors could have an impact on the entire state, not merely the county or agency that the attorney represents.

47. Rule 1.13 cmt. 9.

48. Discussing the many unique ethical conflicts raised for governmental attorneys is beyond the scope of this bulletin. For more information on this topic, see generally Steven K. Berenson, *The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers’ General Duty to Serve the Public Interest*, 42 BRANDEIS L.J. 13, 31–45 (2003); Catherine J. Lancot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 1004 (1991) (“Unlike private practitioners, the government lawyer has at least four possible clients: (1) the agency official, (2) the agency itself, (3) the government, and (4) ‘the people,’ sometimes termed ‘the public interest.’”).

and decisive no. Why? Because the attorney-client privilege belongs to the organizational client, not to individual employees of the client.⁴⁹ In the event of litigation against DSS, for example, the county could choose to waive the privilege and disclose information shared by the DSS employee, even if the employee wished to keep the information confidential. Additionally, if the employee discloses information that would harm the agency, the DSS attorney may be obligated to report that information up the organizational chain under Rule 1.13.

In order to ensure that DSS employees are informed of the potential waiver of privilege before deciding to speak with a DSS attorney, the attorney should consider whether to deliver an *Upjohn* warning in advance of the conversation. The term *Upjohn* warning arose in the wake of *Upjohn Co. v. United States*,⁵⁰ a U.S. Supreme Court case involving the application of attorney-client privilege to conversations between company attorneys and employees. An *Upjohn* warning is a verbal warning provided by an attorney, explaining that (1) the attorney represents the organization (here, DSS), not the individual employee; (2) the employee is being interviewed to assist the attorney in providing legal advice to the organization; and (3) the conversation between the attorney and the employee is privileged, but the attorney-client privilege belongs to the organization, not to the employee, so the organization can waive the privilege without consent from the employee.⁵¹ Although the warning can be given verbally, it should be documented by a signed acknowledgment, attorney notes, or a memorandum of the interview.⁵²

North Carolina courts have not yet examined whether *Upjohn* warnings are sufficient to preserve an organization's control of attorney-client privilege with respect to communications made by employees of a local governmental entity.⁵³ However, the fundamental concept of the *Upjohn* warning is already present in Comment 10 to Rule 1.13. This comment states that when an organization's attorney becomes aware that an individual constituent's interests are adverse to the organization, the attorney should (1) advise the individual of the conflict of interest, (2) explain that the attorney does not represent the individual as a client, and (3) advise that the individual may wish to retain independent counsel. Accordingly, a DSS attorney should consider

49. Discussing North Carolina case law on attorney-client privilege with respect to employees of an organization is beyond the scope of this bulletin. Not all communications between an attorney and an employee of the attorney's organizational client will necessarily be protected by attorney-client privilege. North Carolina law recognizes that privileged information can be shared with the agent of an attorney's client without destroying the privilege. *Berens v. Berens*, 247 N.C. App. 12, 19–21, 785 S.E.2d 733, 739–40 (2016). However, "the mere fact that an employee is the company's 'agent' in some respects does not necessarily require that a communication involving that employee be found privileged." *Brown v. Am. Partners Fed. Credit Union*, 183 N.C. App. 529, 536, 645 S.E.2d 117, 122 (2007). North Carolina's Supreme Court has not yet clearly determined which agents of an organization can have privileged conversations with the organization's attorney. *See generally* *Glob. Textile All., Inc. v. TDI Worldwide, LLC*, 375 N.C. 72, 77, 847 S.E.2d 30, 35 (2020). *See also* *Technetics Grp. Daytona, Inc. v. N2 Biomedical, LLC*, 2018 NCBC LEXIS 116, *7, 2018 WL 5892737, *3 (Super. Ct. N.C. Nov. 8, 2018) (finding that North Carolina law is "particularly unsettled" with respect to "whether and to what extent the privilege covers communications between counsel and lower-level employees").

50. 449 U.S. 383 (1981).

51. For more information on recommended contents of the *Upjohn* warning, see WHITE COLLAR CRIME COMMITTEE WORKING GROUP, AM. BAR ASSOC., *UPJOHN WARNINGS: RECOMMENDED BEST PRACTICES WHEN CORPORATE COUNSEL INTERACTS WITH CORPORATE EMPLOYEES* (July 17, 2009), <https://www.crowell.com/PDF/ABAUpjohnTaskForceReport.pdf>.

52. *Id.* at 3.

53. *See supra* notes 18, 19, and 45.

giving an *Upjohn* warning whenever the attorney is involved in situations where the attorney knows or reasonably should know that the interests of DSS are (or may become) adverse to those of any individual employees with whom the attorney is dealing. For example, any situation involving alleged employee misconduct or an employee's allegations against the agency could involve potential adversity and should trigger alarm bells that an *Upjohn* warning may be required before speaking with an employee to gather facts or provide counsel.

As a general matter, it is important for an attorney to remind all of the DSS agency's constituents—including clients, staff members, and board members—that the attorney represents the organization itself, not the many individuals associated with it.⁵⁴ Under Rule 4.3, when a DSS attorney deals with any person who is not represented by counsel, the attorney must not

- (a) give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client; [or]
- (b) state or imply that the lawyer is disinterested.⁵⁵

The DSS attorney's obligation to clarify this relationship also applies with respect to other individuals who may mistakenly believe they are *personally* represented by the attorney, such as custodial parents in child support enforcement proceedings, caretakers in a termination of parental rights proceeding, or vulnerable adults in need of protective services.

Internal Conflicts and Conflicts of Interest

Handling Conflict between the Agency and Attorney

Director as Attorney Supervisor

For many staff attorneys who are employed by a county DSS, the DSS director is the attorney's direct supervisor. In the majority of North Carolina counties, the DSS director is not an attorney. The Rules allow for a nonlawyer (the DSS director) to supervise an attorney, so long as (1) the director does not direct or regulate the attorney's professional judgment in violation of Rule 5.4(d) and (2) the attorney does not assist the director in the unauthorized practice of law in violation of Rule 5.5(f).⁵⁶

54. For more information on how a poorly worded *Upjohn* warning can potentially create unintentional joint representation, see Chris McLaughlin, *More Legal Ethics Lessons from Penn State*, COATES' CANONS: NC LOCAL GOV'T L., UNC SCH. OF GOV'T BLOG (Feb. 26, 2019), <https://canons.sog.unc.edu/more-legal-ethics-lessons-from-penn-state/>.

55. Rule 4.3(b) goes on to state: "When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

56. For more information on what constitutes the "practice of law," see G.S. 84-2.1. Please note that a DSS attorney is also prohibited under Rule 5.5(f) from assisting a social worker in engaging in the unauthorized practice of law. If a DSS attorney receives assistance from a social worker who is not a lawyer, the attorney must supervise all delegated work and retain ultimate responsibility for the work product. See Rule 5.3.

Depending on the attorney's job description or contract, the DSS director may be in the dual role of supervisor and primary client representative. It is possible that in some cases, the DSS director could direct the DSS attorney to take action that is not in the best interest of the agency. In that case, the attorney should proceed using the analysis set forth in Rule 1.13. However, as a general matter, the attorney should follow the director's directions as the primary client representative for DSS, even if the attorney disagrees with the prudence of the director's decisions.⁵⁷ For example, imagine that a DSS director wants a DSS attorney to file a petition alleging that a juvenile is neglected, but the attorney thinks the case would be poorly timed or too difficult to win. The attorney may explain to the DSS director why the case may be difficult to win, but if the director persists in wanting the attorney to file the petition, the DSS attorney should generally proceed with filing the petition. Under Rule 1.2, an attorney's client retains "ultimate authority to determine the purposes to be served by legal representation." The reporting of potential malfeasance allowed by Rule 1.13 is intended to address serious instances of potential harm to the client, not day-to-day disagreements on the client's methods or legal objectives.

Working with Social Workers

Depending on the nature of the work the DSS attorney is engaged in, the attorney may work closely with DSS social workers—for example, in juvenile abuse, neglect, and dependency proceedings or in adult incompetency proceedings. It is important for both DSS attorneys and social workers to recognize that an individual social worker is not the DSS attorney's client. In conversations with social workers, DSS attorneys should clarify that they represent DSS as an organization, not individual employees of DSS. The DSS attorney may occasionally face disagreements with a DSS social worker regarding the direction or objectives to be achieved in a particular case. The American Bar Association's *Standards of Practice for Lawyers Representing Child Welfare Agencies* provides helpful guidance for such conflicts:

The agency attorney and agency should jointly develop a conflict resolution system to cover attorney-caseworker conflict

Key principles of the system should include: 1) the attorney and caseworker (or two caseworkers) should start with a face-to-face meeting to try to resolve the conflict; 2) if there is no resolution, the system should delineate how each should go up their respective chains of command; and 3) the system should set out examples of issues that are legal and those that are social work decisions, understanding that most issues will need to be resolved jointly. The system should incorporate timeframes for resolution so as not to delay a case. The agency attorney should prepare a caseworker before court so that conflicts do not surface in front of the judge.⁵⁸

Ultimately, a DSS attorney should escalate a conflict with a social worker to the DSS director, if needed. Generally, the DSS attorney should then defer to the direction of the director as the

57. See Rule 1.2 regarding the allocation of authority between client and lawyer.

58. AM. BAR ASSOC., STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILD WELFARE AGENCIES § D-1, at 16 (August 2004), https://www.americanbar.org/content/dam/aba/administrative/child_law/agency-standards.pdf.

client representative, except in the case of a substantial ethical conflict as described in the Rule 1.13 analysis.

Legal Strategy and Ethics

When faced with a significant disagreement on legal strategy, the DSS attorney should proceed by advising the client on the law and strategy that the attorney intends to employ. Comment 2 to Rule 1.2 recognizes that “clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.” However, a client may still ultimately wish to proceed in a way that differs from what the DSS attorney recommends. Comment 2 to Rule 1.2 further explains that if a resolution cannot be reached and a lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation.⁵⁹ For many DSS attorneys, withdrawal from representation would mean resignation from the attorney’s job. Accordingly, DSS attorneys should strive to reach a mutually agreeable resolution with the client before taking this step.

In the event of any disagreement, either with a governing board, the DSS director, or a DSS employee, a DSS attorney is still bound at all times by the North Carolina Rules of Professional Conduct. This means that a DSS attorney should not follow a client’s direction if it would cause the attorney to violate the attorney’s ethical obligations.⁶⁰ For example, Rule 1.2(d) prohibits an attorney from knowingly counseling or assisting a client to commit a crime or fraud. Similarly, under Rule 3.13, an attorney is prohibited from offering false evidence or making false statements of material fact or law to a tribunal, even if the client directs the attorney to present such evidence or make such statements. In some cases where a DSS attorney receives a directive that would cause the attorney to violate the Rules, the attorney may conclude that resigning or otherwise terminating representation is the proper course of action.⁶¹

Agency versus Individual Representation

What happens if an attorney is asked to represent the DSS director or DSS employees in the context of litigation in which those individuals have been named as defendants?⁶² Representing a DSS director in litigation when the director has been sued in the director’s *individual* capacity raises a potential conflict for an attorney when that attorney is representing the county or the director in the director’s *official* capacity in that same lawsuit. A lawsuit against a DSS director in his or her official capacity is, in essence, a lawsuit against a county DSS itself.⁶³ The same

59. Per Rule 1.16(b)(4), a lawyer may withdraw from representation when “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.”

60. “If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law . . . , the lawyer must consult with the client regarding the limitations on the lawyer’s conduct.” Rule 1.2 cmt. 14.

61. See Rule 1.16.

62. Representing DSS in the context of litigation against the agency may not be likely for a DSS staff attorney but is a more common scenario for county attorneys. Depending on the nature of the litigation, some counties may choose to retain outside counsel to represent DSS in litigation. Other counties may rely on their county attorneys to handle litigation against DSS.

63. “A lawsuit that names a county social services official or employee in his or her official capacity is in all respects other than name an action against the local government or local government agency for which

potential conflict would exist for representing a DSS employee, such as a social worker, who is sued in the employee's individual capacity.

This situation is contemplated by Rule 1.13(g), which 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.” When read in tandem with Rule 1.7, this would permit a DSS attorney to represent the DSS director or other DSS employees in litigation, so long as such dual representation did not create a concurrent conflict of interest under Rule 1.7.⁶⁴ Even if a concurrent conflict of interest exists, a DSS attorney could choose to proceed with the dual representation if

- (1) the [DSS attorney] reasonably believes that the [attorney] 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.⁶⁵

When Rule 1.7 requires an organization's consent to dual representation, “the consent shall be given by an appropriate official of the organization other than the individual who is to be represented.”⁶⁶ For example, if an attorney represents both the county and the DSS director (in his or her individual capacity) in a lawsuit related to DSS practices, and the attorney concludes that Rule 1.7 requires consent, an official other than the DSS director should approve such dual representation on behalf of DSS. The best practice in all cases involving dual representation would be to get informed, written consent from the director (or implicated employee, if applicable) and the BOCC. Why should the BOCC be the entity to grant consent to dual representation on behalf of DSS? As described earlier, a county DSS is a subdivision of a county government, and if litigation is brought against a county DSS, it is the county itself that is the proper defendant.⁶⁷

In some cases, dual representation will simply be impossible due to adverse interests of the parties involved. Even in a situation where dual representation initially appears possible under Rule 1.7, it may become clear that the individual interests of the DSS director (or other DSS employee named as a defendant) diverge from the interests of the county as the lawsuit or dispute develops. Comment 4 to Rule 1.7 notes that if a conflict of interest arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation. Whether the lawyer may continue to represent any of the clients in the same

he or she works, and any liability that is imposed against a county official or employee in his or her official capacity is imposed against the county rather than the official or employee personally.” SAXON, *supra* note 4, at 254 (internal quotation marks and citation omitted).

64. A concurrent conflict of interests exists when

- (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. Rule 1.7(a).

65. Rule 1.7(b).

66. Rule 1.13(g).

67. See *supra* notes 16 and 17.

multiparty litigation is determined both by the lawyer's ability to comply with duties owed to the former client (the representation that the lawyer ended due to the conflict) and by the lawyer's ability to adequately represent the remaining client or clients in light of those duties.⁶⁸

Even if dual representation in litigation is permitted by Rules 1.13(g) and 1.7, a DSS attorney may find that there are other Rules that make representation as an advocate in litigation unethical or ill-advised. For example, suppose a DSS attorney is asked to represent DSS and the director in a discrimination lawsuit from a former employee. If the attorney has never handled an employment lawsuit, fulfilling the attorney's duty of competence under Rule 1.1 may not be possible. The attorney should consider associating with a lawyer who has the appropriate experience to handle the matter.⁶⁹ As another example, consider a DSS attorney who is asked to represent DSS and the director in a lawsuit regarding an allegedly improper practice with respect to how DSS handles termination of parental rights proceedings. The attorney might be a necessary fact witness in such a case and should likely decline to take on such representation. Subject to some limited exceptions, Rule 3.7 prohibits an attorney from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness.⁷⁰

Conclusion

DSS attorneys engage in tremendously difficult work and are routinely faced with challenging ethical dilemmas. The state-supervised, county-administered social services system in North Carolina—combined with the many options available for organizing and governing county social services agencies—make it highly challenging for DSS attorneys to analyze how the Rules apply to their circumstances. Moreover, the Rules do not directly address many of the “client identity” problems that specifically pertain to attorneys who work on behalf of local governments. DSS attorneys facing challenging decisions related to conflicts, reporting malfeasance, privilege, confidentiality, or other ethics issues should consider reaching out to the North Carolina State Bar for advice on how to navigate these sticky situations.⁷¹

68. Rule 1.7 cmt. 4.

69. Before retaining outside counsel to provide or assist in the provision of legal services to DSS, a DSS attorney should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. Rule 1.1 cmt. 6.

70. A lawyer who is a necessary witness may be permitted to act as an advocate if disqualifying the lawyer would work substantial hardship on the client or if the lawyer's testimony concerns either an uncontested issue or the nature of legal services rendered in the case. Rule 3.7(a).

71. Any lawyer may request informal advice from the ethics department of the North Carolina State Bar by calling (919) 828-4620 or by emailing ethicsadvice@ncbar.gov.