ADVANCED CRIMINAL EVIDENCE: PRIVILEGES[1]

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Rule 501, North Carolina Rules of Evidence

"Except as otherwise required by the Constitution of the United States, the privileges of a witness, person, government, state or political subdivision thereof shall be determined in accordance with the law of this State."

OVERVIEW

Certain communications are protected from compulsory disclosure because both their content and context involve a natural expectation of privacy. The privileges protecting these communications are rooted in the federal and state constitutions, common law, and statutes. This manuscript discusses, in the context of criminal evidence in North Carolina, the privilege against self-incrimination, the attorney-client privilege, the husband-wife privilege, and the physician-patient privilege, as well as noting additional statutory privileges.

When confronted with a claim of privilege, the court should apply a basic rubric addressing who, when, scope, limits, and waiver. If the privilege applies, yet some information has been exposed, the court must consider how to cure the disclosure. The court must also be mindful of the interplay between privileges and our Rules of Professional Conduct.

PRIVILEGE AGAINST SELF-INCRIMINATION

Brandis & Broun § 126.

General Rule. The right against self-incrimination means that a witness is privileged, or not compellable, to answer any question that may incriminate him. This privilege is recognized by both the federal and state constitutions. U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."); N.C. Const. art. I § 23 ("In all criminal prosecutions, every person charged with crime has the right to . . . not be compelled to give self-incriminating evidence . . . ."); *see also Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) (making the Fifth Amendment of the U.S. Constitution applicable to the states by the Fourteenth Amendment).

Who may claim privilege. The privilege protects individuals—whether or not a witness or a criminal defendant. *United States v. Kordel*, 397 U.S. 1, 90 S. Ct. 763,

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25 L. Ed. 2d 1 (1970). It is personal to a witness and may be claimed only by him, not a person for whom he is testifying. *Boyer v. Teague*, 106 N.C. 576, 11 S.E. 665 (1890).

When it may be invoked. The privilege may be invoked in any proceeding: civil, criminal, administrative, judicial, investigatory, or adjudicatory. *Maness v. Meyers*, 419 U.S. 449, 95 S. Ct. 584, 42 L. Ed. 2d 574 (1975)

Scope. The privilege covers direct admissions of guilt and any answer that might tend to prove or provide a clue ultimately incriminating. It does not include silence without a direct invocation of one's rights. *Salinas v. Texas*, ___ U.S. ___, 133 S. Ct. 2174, 186 L. Ed .2d 376 (2013) (allowing comment on defendant's silence in response to noncustodial police questioning and requiring defendant to expressly invoke the privilege against self-incrimination in order to subsequently benefit from it).

Limits. Acts that are neither "testimonial" nor "communicative" such as being fingerprinted, photographed, measured, giving a voice or handwriting sample, appearance in court, standing, walking, or making a particular gesture are not covered by the privilege. *See Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). Relatedly, a defendant's refusal to submit to such procedures does not violate the privilege. *State v. Paschal*, 253 N.C. 795, 117 S.E.2d 749 (1961).

> **DNA evidence.** Although taking physical specimens, such as blood, urine, or saliva, does not implicate the privilege against self-incrimination, such nontestimonial means of identification may not be obtained in violation of the Fourth Amendment—*i.e.*, by means of an "unreasonable search or seizure." *See State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986). *See also Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013) (blood alcohol tests are not per se admissible under an exigent circumstances exception and must be subject to a totality of the circumstances analysis for nonconsensual, warrantless blood draws). Section 15A-273 provides for the issuance of a nontestimonial identification order (NIO) upon a showing of the existence of "a minimal amount of objective justification, something more than an 'unparticularized suspicion or hunch.' " *State v. Pearson*, 356 N.C. 22, 28-29, 566 S.E.2d 50, 54 (2002) (citation and quotation marks omitted). *See also State v. McMillan*, 214 N.C. App. 320, 718 S.E.2d 640 (2011) (holding trial court properly concluded that defendant freely and voluntarily consented to swabbing of mouth, photographs of his injuries, and collection of his belt and shoes).
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> **Photo identifications.** While these are not covered by the privilege, defendant does have a right to have counsel present if done after the initiation of judicial proceedings. *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972).
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> **Papers and documents.** The privilege does not protect against compulsory production of certain documents merely because they tend to incriminate. *Couch v. United States*, 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973). The protection afforded by the privilege is confined to personal records prepared by the person claiming privilege and retained in his possession. *Fisher v. United* States, 425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed.

2d 39 (1976). Lawful seizure does not violate the privilege. *United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976). Voluntary production waives the privilege. *See State v. Hollingsworth*, 191 N.C. 595, 132 S.E. 667 (1926); *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335, 1346 (11th Cir. 2012) ("[T]he act of Doe's decryption and production of the contents of the hard drives would sufficiently implicate the Fifth Amendment privilege.").

Waiver. The privilege can be waived by voluntarily giving testimony, whether in court or out of court.

Testifying defendant. The privilege is not waived by testifying before a jury when the privilege is a defense on the merits to the crime charged. *See, e.g.*, *Leary v. United States*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969) (failing to pay taxes under marijuana statute); *Marchetti v. United States*, 390 U.S. 39, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968) (failing to pay gambling tax).

Testifying witness. When a witness testifies, the privilege is not waived until that witness gives a specific answer to a question that might incriminate him. *Ward v. Martin*, 175 N.C. 287, 95 S.E. 621 (1918).

***Miranda* rights.** Prior to a custodial interrogation, a defendant must be advised that, among other things, "he has the right to remain silent [and] that anything he says can be used against him in a court of law." *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694, 726 (1966). No precise language is required as long as the language used conveys the right. *Florida v. Powell*, 559 U.S. 50, 130 S. Ct. 1195, 175 L. Ed .2d 1009 (2010). But, the witness must explicitly invoke the right. *Salinas v. Texas*, ___ U.S. ___, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013) ("[A] defendant normally does not invoke the privilege by remaining silent.").

Custodial Interrogation. The rights protected by *Miranda* and N.C.G.S. § 7B-2101 apply only to custodial interrogations. *State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997). To determine whether a defendant is in custody for *Miranda* purposes, the test is whether a reasonable person in the suspect's position would feel free to leave or would feel compelled to stay. *See State v. Hicks*, 333 N.C. 467, 478, 428 S.E.2d 167, 173 (1993). Questioning a prisoner does not necessarily convert a noncustodial situation to one in which *Miranda* applies. *Howes v. Fields*, ___ U.S. ___, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012). *See also State v. Braswell*, 222 N.C. App. 176, 181, 729 S.E.2d 697 (2012) ("[T]raffic stops are not 'custodial interrogations' and thus not subject to the mandates of *Miranda*.").

Juveniles. A juvenile in custody must be advised before questioning that: (1) he has the right to remain silent; (2) any statement he makes can be and may be used against him; (3) he has a right to have a parent, guardian, or custodian present during questioning; (4) he has a right to consult with an attorney and that one will be appointed for him if he is not represented and wants representation. N.C.G.S. § 7B-2101(a). A juvenile does not have a right to speak to a relative who is not a guardian

or custodian. *State v. Oglesby*, 361 N.C. 550, 648 S.E.2d 819 (2007). The Supreme Court of North Carolina recently allowed discretionary review of *State v. Benitez*, __ N.C. App. __, 768 S.E.2d 201 (2014), to determine whether the presence of a foreign juvenile defendant's uncle, with whom the defendant was living, was sufficient to satisfy the requirements of N.C.G.S. § 7B-2101(b). That provision states that "no in-custody admission or confession . . . may be admitted into evidence unless . . . made in the presence of the juvenile's parent, guardian, custodian, or attorney."

A juvenile's age should be considered when it is known to the officer or readily apparent and can influence a determination of whether a reasonable person would believe they were free to leave. *J.D.B. v. North Carolina,* ___ U.S. ___, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). Before a trial court may admit into evidence a statement resulting from the custodial interrogation of the juvenile, "the court shall find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights." N.C.G.S. § 7B-2101(d).

Admissibility of Miranda Waivers. When faced with the issue of the admissibility of a defendant's confession, the trial court should conduct a *voir dire* hearing to determine whether a defendant waived his *Miranda* rights, and its findings of fact are binding upon appellate review. *State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984). Our Supreme Court has stated:

> The validity of a waiver as knowingly and intelligently executed depends on the specific facts and circumstances of the particular case, including the background, conduct, and experience of the accused. A defendant's waiver is valid if it is determined that his decision not to rely on his rights was not the product of coercion, that he was aware at all times that he could remain silent and request counsel, and that he was cognizant of the intention of the prosecution to use his statements against him.

State v. Barnes, 345 N.C. 184, 243, 481 S.E.2d 44, 77 (1997) (citing *Patterson v. Illinois*, 487 U.S. 285, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988)). The State "bears the burden of demonstrating that the waiver was knowingly and intelligently made." *State v. Simpson*, 314 N.C. 359, 334 S.E.2d 53 (1985). Even after having properly invoked the privilege, the defendant may subsequently waive it. *Maryland v. Shatzer*, 559 U.S. 98, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010) (break in custody of 14 days sufficient to allow subsequent waiver and questioning).

Comment prohibited. Once invoked, the Fifth Amendment prohibits comment on the defendant's silence. *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 1233, 14 L. Ed. 2d 106 (1965); *State v. Moore*, 366 N.C. 100, 726 S.E.2d 168 (2012) (finding error in testimony referring to the defendant's exercise of his right to silence and its admission by the trial judge); *State v. Richardson*, ___ N.C. App. ___, 741 S.E.2d 445 (2013) (concluding the prosecutor's final argument to the jury impermissibly emphasized the fact that the defendant chose to remain silent after being placed under arrest and advised of his Miranda rights). *But see State v.*

Rogers, 355 N.C. 420, 452, 562 S.E.2d 859, 879 (2002) ("A prosecutor's argument pointing out a defendant's failure to answer the State's evidence " 'is not a comment on the defendant's failure to testify.' ").

Statutory immunity. Some testimony is required by statute if the witness is granted immunity. *See, e.g.*, N.C.G.S. § 1-357 (proceedings supplemental to execution of civil judgment); *id.* § 16-2 (gambling); *id.* § 49-6 (mother of child born out of wedlock).

ATTORNEY-CLIENT PRIVILEGE

Brandis & Broun § 129.

General Rule. A privilege exists if (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated, and (5) the client has not waived the privilege. It is, however, a qualified privilege subject to the general supervisory powers of the trial court. *State v. McIntosh*, 336 N.C. 517, 444 S.E.2d 438 (1994).

Who may claim privilege. The privilege belongs to the client. When the attorney is a witness and the client is neither present nor a party, the client's disapproval is presumed, and thus the attorney may claim the privilege on the client's behalf. N.C. Rev. R. Prof. Conduct, 1.6(d)(14) (2014).

When it may be invoked. The privilege exists when communications are made after an attorney-client relationship has begun. *State v. Smith*, 138 N.C. 700, 50 S.E. 859 (1905). Even if the attorney has not been specially retained for the particular matter, the privilege exists if an attorney-client relationship exists and the client made the communication seeking legal advice. *Guy v. Avery Cty. Bank*, 206 N.C. 322, 173 S.E. 600 (1934). The privilege may be claimed whenever disclosure of privileged communications is sought, whether in litigation or not. When the client sues the attorney, or otherwise charges the attorney with professional incompetence, the client may not claim the privilege. N.C. Rev. R. Prof. Conduct, 1.6(b)(6); *see also State v. Taylor*, 327 N.C. 147, 393 S.E.2d 801 (1990) (defendant waived the benefits of both the attorney-client privilege and the work product privilege, but only with respect to matters relevant to his allegations of ineffective assistance of counsel); *State v. Buckner*, 351 N.C. 401, 527 S.E.2d 307 (2000).

Scope. The privilege applies only to communications made in confidence. *State v. Van Landingham*, 283 N.C. 589, 197 S.E.2d 539 (1973) (rendering communication not confidential when the wife's presence was not essential to the communication). The privilege exists if it was made between the attorney and the client or in the presence of those acting as the attorney's or client's agents.

Limits. The trial court determines the propriety of a claim of privilege. N.C. R. Evid. 104(a). This can be done by an initial inquiry, including an in camera inspection. *See State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977). The privilege is strictly construed to those matters covering its policy. The identity of a client is not privileged. *State v. Tate*, 294 N.C. 189, 239 S.E.2d 821 (1978).

Mere assertion of the privilege is insufficient. The party asserting the privilege "can only meet its burden by providing some *objective* indicia that the exception is applicable under the circumstances." *Multimedia Publ'g of N.C., Inc. v. Henderson Cty.*, 136 N.C. App. 567, 525 S.E.2d 786, *rev. denied*, 351 N.C. 474, 543 S.E.2d 492 (2000).

Common interest; joint client. In North Carolina, our courts recognize the common interest or joint client doctrine, noting that "as a general rule, where two or more persons employ the same attorney to act for them in some business transaction, their communications to him are not ordinarily privileged inter sese." *Dobias v. White*, 240 N.C. 680, 685, 83 S.E.2d 785, 788 (1954). The rationale for the doctrine rests upon the non-confidential nature of communications between the parties during the tripartite relationship. *But see Raymond v. N.C. Police Benevolent Ass'n, Inc.*, 365 N.C. 94, 721 S.E.2d 923 (2011) (holding that a tri-partite attorney-client relationship existed between former officer, association, and officer's attorney selected by association and in camera review was the appropriate remedy to determine which communications between officer, association, and counsel were protected by attorney-client privilege).

In *Nationwide Mutual Fire Insurance Co. v. Bourlon*, 172 N.C. App. 595, 617 S.E.2d 40 (2005), *aff'd per curiam*, 360 N.C. 356, 625 S.E.2d 779 (2006), the Court of Appeals held that the common interest or joint client doctrine applies to the context of insurance litigation in North Carolina. Therefore, where an insurance company retains counsel for the benefit of its insured, those communications related to the representation and directed to the retained attorney by the insured are not privileged as between the insurer and the insured. The attorney-client privilege still attaches, however, to those communications unrelated to the defense of the underlying action, as well as those communications regarding issues adverse between the insurer and the insured, such as coverage issues.

Will contest. When all parties claim under the client in a contest over a deceased client's will, no party has the privilege regarding communications between the client and the attorney. *In re Kemp's Will*, 236 N.C. 680, 73 S.E.2d 906 (1953).

Communications related to a third party when client is deceased. When a client is deceased and a party makes a non-frivolous assertion that the attorney client privilege does not apply, a trial court may conduct an in camera review of the substance of the communications. To the extent any portion of the communications between the attorney and the deceased client relate *solely* to a third party, such communications are not privileged. If the trial court finds that some or all of the communications are outside the scope of the privilege, the trial court may compel the attorney to provide the substance of the communications to the State for its use in a criminal investigation, consistent with certain procedural formalities. To the extent the communications relate to a third party *but also affect the client's own rights or interests* and thus remain privileged, such communications may be revealed only upon a clear and convincing showing that their disclosure does not expose the client's estate to civil liability and that such disclosure would not likely result in additional harm to loved ones or reputation. *In re Miller*, 358 NC 364, 595 S.E.2d 120 (2004).

Billing records. Billing records do not automatically fall under the attorney-client privilege. *In re Grand Jury Proceedings*, 33 F.3d 342 (4th Cir. 1994). The attorney-client privilege, however, *may* protect information in a billing record showing the "motive of the client in seeking representation, litigation strategy, or the specific nature of the service provided, such as researching particular areas of law." *Chaudhry v. Gallerizzo*, 174 F.3d 394 (4th Cir.), *cert. denied*, 528 U.S. 891, 145 L. Ed. 2d 181, 120 S. Ct. 215 (1999) (citations omitted).

Open Meetings Law Exception. Section 143-318.11(3) authorizes closed sessions:

> To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant. The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure. If the public body has approved or considered a settlement, other than a malpractice settlement by or on behalf of a hospital, in closed session, the terms of that settlement shall be reported to the public body and entered into its minutes as soon as possible within a reasonable time after the settlement is concluded.

With the open meetings law exception, the burden is on the governmental unit to demonstrate that the attorney-client exception applies. Discussions regarding the drafting, phrasing, scope, and meaning of proposed enactments would be permissible during a closed session, but as soon as discussions move beyond legal technicalities and into the propriety and merits of proposed enactments, the legal justification for closing the session ends. *Multimedia Publ'g of N.C., Inc.*, 136 N.C. App. 567, 525 S.E.2d 786.

Waiver. The privilege belongs to the client and may be waived by him. *State v. Bronson*, 333 N.C. 67, 423 S.E.2d 772 (1992). Such waiver may be express or implied. In *State v. Campbell*, 177 N.C. App. 520, 629 S.E.2d 345 , *disc. review denied*, 360 N.C. 578, 635 S.E.2d. 902 (2006), the defendant argued on appeal that defense counsel breached the attorney-client privilege by telling the jury that the defendant had lied to his attorneys. The defendant, citing *In re Miller*, contended that the lies he told his counsel were confidential communications, and those communications were "privileged and may not be disclosed." The appellate court held, however, that since defendant admitted he lied to his attorneys in both his direct examination and cross-examination at trial, he had waived this privilege.

Privilege distinguished from attorney work-product. Rule 26(b)(3) of the North Carolina Rules of Civil Procedure provides:

> Trial Preparation; Materials. -- Subject to the provisions of subsection (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that

> other party's consultant, surety, indemnitor, insurer, or agent only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought or work product of the attorney or attorneys of record in the particular action.
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> A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (i) a written statement signed or otherwise adopted or approved by the person making it, or (ii) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

In civil matters, this "work product," or trial preparation exception of Rule 26(b)(3), although not a *privilege*, is a "qualified immunity" and extends to all materials prepared "in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent." The protection covers materials prepared after the other party has secured an attorney and those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation. Materials prepared in the ordinary course of business are not protected, nor does the protection extend to *facts* known by any party. *Willis v. Duke Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976). As related to the agent-attorney, our courts narrowly construe the work product doctrine, consistent with its purpose, which is to safeguard the lawyer's work in developing his client's case. *Isom v. Bank of Am., N.A.*, 177 N.C. App. 406, 628 S.E.2d 458 (2006). *See also Dickson v. Rucho*, 366 N.C. 332, 737 S.E.2d 362 (2013) (holding that a statute relating to redistricting communications did not waive the right of legislators to assert attorney-client privilege or work-product doctrine in litigation concerning redistricting).

Under Rule 26(b)(3), the work product exception may apply to materials prepared in anticipation of *any* litigation, even if the earlier litigation was between different parties.

As is generally the rule applicable to a trial court's discovery order, the appellate courts will apply an "abuse of discretion" standard in determining whether the work product, or trial preparation exception applies. *Isom*, 177 N.C. App. 406, 628 S.E.2d 458. To demonstrate such abuse, the trial court's ruling must be shown to be "manifestly unsupported by reason" or not the product of a "reasoned decision." *Nationwide Mut. Fire Ins. Co.*, 172 N.C. App. 595, 617 S.E.2d 40.

The work product immunity is ordinarily a *qualified immunity*. If a party seeking information protected by the work product doctrine demonstrates a substantial need and inability to obtain the information elsewhere, disclosure may be required. In *Isom*, the plaintiff's cause of action and theory of the case was based on proving that the plaintiff was fired for refusing to sign a particular document. Since the bank was the only party in possession of this particular document, the appellate court upheld the trial judge's determinations of substantial need and inability to otherwise obtain the document. Nonetheless, *absolute immunity* still protects disclosure "of mental impressions, conclusions, opinions, or legal theories of any attorney or other representative of a party concerning the litigation." Rule 26(b)(3).

Work product in criminal proceedings. Separate statutes address prosecution and defense work product in criminal matters.

> **§ 15A-904. Disclosure by the State -- Certain information not subject to disclosure**
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> (a) The State is not required to disclose written materials drafted by the prosecuting attorney or the prosecuting attorney's legal staff for their own use at trial, including witness examinations, voir dire questions, opening statements, and closing arguments. Disclosure is also not required of legal research or of records, correspondence, reports, memoranda, or trial preparation interview notes prepared by the prosecuting attorney or by members of the prosecuting attorney's legal staff to the extent they contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or the prosecuting attorney's legal staff.
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> (a1) The State is not required to disclose the identity of a confidential informant unless the disclosure is otherwise required by law.
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> (a2) The State is not required to provide any personal identifying information of a witness beyond that witness's name, address, date of birth, and published phone number, unless the court determines upon motion of the defendant that such additional information is necessary to accurately identify and locate the witness.
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> (a3) The State is not required to disclose the identity of any individual providing information about a crime or criminal conduct to a Crime Stoppers organization under promise or assurance of anonymity unless ordered by the court. For purposes of this Article, a Crime Stoppers organization or similarly named entity means a private, nonprofit North Carolina corporation governed by a civilian volunteer board of directors that is operated on a local or statewide level that (i) offers anonymity to persons providing information to the organization, (ii) accepts and expends donations for cash rewards to persons who report to the organization information about alleged criminal activity and that the organization forwards to the appropriate law enforcement agency, and (iii) is established as a cooperative alliance between the news media, the community, and law enforcement officials.

(a4) The State is not required to disclose the Victim Impact Statement or its contents unless otherwise required by law. For purposes of this Chapter, a Victim Impact Statement is a document submitted by the victim or the victim's family to the State pursuant to the Victims' Rights Amendment.

(b) Nothing in this section prohibits the State from making voluntary disclosures in the interest of justice nor prohibits a court from finding that the protections of this section have been waived.

(c) This section shall have no effect on the State's duty to comply with federal or State constitutional disclosure requirements.

§ 15A-906. Disclosure of evidence by the defendant--Certain evidence not subject to disclosure

Except as provided in G.S. 15A-905(b) this Article does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by prosecution or defense witnesses, or by prospective prosecution witnesses or defense witnesses, to the defendant, his agents, or attorneys.

HUSBAND-WIFE PRIVILEGE

Brandis & Broun §§ 127-28.

N.C.G.S. § 8-56. Husband and wife as witnesses in civil action

In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage.

N.C.G.S. § 8-57. Husband and wife as witnesses in criminal actions

(a) The spouse of the defendant shall be a competent witness for the defendant in all criminal actions, but the failure of the defendant to call such spouse as a witness shall not be used against him. Such spouse is subject to cross-examination as are other witnesses.

(b) The spouse of the defendant shall be competent but not compellable to testify for the State against the defendant in any criminal action or grand jury proceedings, except that the spouse of the defendant shall be both competent and compellable to so testify:

(1) In a prosecution for bigamy or criminal cohabitation, to prove the fact of marriage and facts tending to show the absence of divorce or annulment;

(2) In a prosecution for assaulting or communicating a threat to the other spouse;

(3) In a prosecution for trespass in or upon the separate lands or residence of the other spouse when living separate and apart from each other by mutual consent or court order;

(4) In a prosecution for abandonment of or failure to provide support for the other spouse or their child;

(5) In a prosecution of one spouse for any other criminal offense against the minor child of either spouse, including any child of either spouse who is born out of wedlock or adopted or a foster child.

(c) No husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage.

Overview. At common law, husband and wife could not testify in an action to which either was a party. The English Act of 1853 abolished this disqualification, but enacted that "no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

General rule in civil actions. Section 8-56, relating only to *civil proceedings*, while making spouses competent and compellable under all circumstances to testify, includes provisions according privilege to confidential communications between them during the marriage.

General rule in criminal actions. Although the spouse of the defendant is always a *competent* witness, (1) the defendant's failure to call the witness cannot be used against him or her, and (2) the spouse of the defendant is *not compellable* to testify for the State unless one of the five exceptions in (b) of the statute applies. Section 8-57 includes, however, the statutory privilege relating to confidential communications between husband and wife.

Summary. Thus, in both civil and criminal proceedings, adverse spousal testimony is allowed (and even compellable by the state in those circumstances set forth in any of the five situations set out in section 8-57(b)). Both statutes, however, preserve the protection from disclosure of confidential marital communications.

Who may claim the privilege. Neither spouse may be compelled to disclose a confidential communication between husband and wife. The communicating spouse is protected from disclosure of the communications by the other spouse. *Whitford v. North State Life Ins. Co.*, 163 N.C. 223, 79 S.E. 501 (1913).

When may it be invoked. The privilege may be invoked in any civil, criminal, or judicial proceeding.

Scope. The privilege covers confidential communications made during marriage.

Divorce. Marital communications are privileged, even after the couple divorces. *State v. Jolly*, 20 N.C. 108 (1938).

Form of the communication. Tape recordings of confidential marital communications, as well as letters are also within the privilege. *See Hicks v. Hicks*, 271 N.C. 204, 155 S.E.2d 799 (1967). Acts of sexual intercourse are also "confidential communications" within the meaning of the statutory privilege. *Wright v. Wright*, 281 N.C. 159, 188 S.E.2d 317 (1972). Acts accompanying statements intended as confidential marital communications are also within the privilege. *State v. Holmes*, 101 N.C. App. 229, 398 S.E.2d 873 (1990), *aff'd*, 330 N.C. 826, 412 S.E.2d 660 (1992) (holding that a wife's testimony regarding the defendant's removal of the gun was inadmissible over defendant's objection when induced by the confidence of the marital relationship).

Limits. The scope of the privilege is limited by the nature of the communication and when it is made.

Nature of communication; subsisting marriage. A communication made in the known presence of a third party is not protected. Similarly, a person who obtains writings of one of the spouses or overhears a communication between the spouses may testify, as long as that person did not do so through the connivance of one of the spouses. *Hicks*, 271 N.C. 204, 155 S.E.2d 799. Communications related to business matters which by their nature might be expected to be divulged are also not privileged. *Whitford v. N. State Life Ins. Co.*, 163 N.C. 223, 79 S.E. 501 (1913). Casual remarks not made in the confidence of the marriage are not privileged. In *State v. Gladden*, 168 N.C. App. 548, 608 S.E.2d 93, *appeal dismissed, disc. rev. denied*, 359 N.C. 638, 614 S.E.2d 312 (2005), the Court of Appeals upheld the admission of the wife's testimony that while her husband (the defendant) was retrieving a gun he told her that he was using the gun "to help grandpa kill some chicken hawks."

Communications "during the marriage." In *State v. Carter*, 156 N.C. App. 446, 577 S.E.2d 640 (2003), *cert. denied*, 543 U.S. 1048, 125 S. Ct. 868, 160 L. Ed. 2d 784 (2005), the defendant's wife refused to testify for the State at trial. She had given the police a videotaped statement almost three years after the end of her marriage to the defendant. The Court of Appeals held that the privilege did not apply to certain communications referred to in the video that had occurred approximately one week *before the marriage*. Other communications, however, referred to in the same post-marriage video, relating to other criminal conduct, but which had taken place *after the marriage*, were held to be within the privilege. Still other post-marriage communications on the same video were properly admitted when the defendant had made the statements to his wife in the presence of a third party, the court determining in this latter instance that the privilege had been waived.

No reasonable expectation of privacy. In *State v. Rollins*, 363 N.C. 232, 675 S.E.2d 334 (2009), the incarcerated defendant admitted to murder during several recorded conversations with his wife in the public visiting areas of three prisons. The defendant claimed the conversations were confidential communications protected by the marital privilege. The Supreme Court held the marital privilege did not apply because the defendant did not have a reasonable expectation of privacy in the public visiting areas. *See also State*

v. Terry, 207 N.C. App. 311, 699 S.E.2d 671 (2010) (finding marital privilege inapplicable to conversations between the defendant and his wife in county sheriff's department).

Waiver.

Holder of the privilege. The non-witness spouse holds the privilege and may prevent the witness spouse from testifying about confidential communications. The non-witness spouse is deemed to waive the privilege, however, when the witness spouse testifies without objection regarding the communication. *Scott v. Kiker*, 59 N.C. App. 458, 297 S.E.2d 142 (1982).

Statutory waiver in child abuse matters. Section 8-57.1 statutorily waives the privilege, in both civil and criminal matters, when the evidence sought relates either (1) to the abuse or neglect of a child under the age of 16 or (2) an illness of or injuries to such child or a cause in any proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B of the General Statutes.

CLERGYMEN-COMMUNICANT PRIVILEGE

N.C.G.S. § 8-53.2. Communications between clergymen and communicants

No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, provided, however, that this section shall not apply where communicant in open court waives the privilege conferred.

Absolute privilege. This privilege is absolute. A trial court has no discretion to compel disclosure when the privilege exists.

Two statutory requirements. (1) The communicant must be seeking the counsel and advice of his minister and (2) the information must be entrusted to the minister as a confidential communication. When a minister was a personal friend of defendant and initiated contact with defendant instead of defendant seeking the advice of the minister, the privilege does not apply. *State v. Andrews*, 131 N.C. App. 370, 507 S.E.2d 305 (1998), *disc. rev. denied*, 350 N.C. 100, 533 S.E.2d 471 (1999).

PHYSICIAN-PATIENT PRIVILEGE

Brandis & Broun § 130.

N.C.G.S. § 8-53. Communications between physician and patient

No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to

> enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon, and no such information shall be considered public records under G.S. 132-1. Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin. Any resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to G.S. 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.

General Rule. At common law, communications from patients to physicians were not privileged. *State v. Martin*, 182 N.C. 846, 109 S.E. 74 (1921). Section 8-53 amends the common law rule and provides for a qualified privilege, granting power to the trial judge to compel disclosure of communications from patient to physician "if necessary to a proper administration of justice." Compelling disclosure is intended to apply to "exceptional" factual situations. *Lockwood v. McCaskill*, 261 N.C. 754, 136 S.E.2d 67 (1964). The judge's decision to compel disclosure is reversible only for abuse of discretion. *See State v. Drdak*, 330 N.C. 587, 591-92, 411 S.E.2d 604, 607 (1992) (allowing disclosure if necessary to the proper administration of justice and requiring the defendant to show an abuse of discretion in order to successfully challenge that ruling).

Who may claim the privilege. The privilege belongs to the patient alone. It is the patient's privilege to waive, and that waiver cannot be used to the advantage of another. *See, e.g.*, *Martin*, 182 N.C. 846, 109 S.E. 74 (holding a criminal defendant could not object to disclosure by victim's physician).

When may it be invoked. The privilege may be invoked anytime disclosure of privileged information is sought.

Scope. The privilege covers communications between patient and physician as well as knowledge gained by the physician through observing or examining the patient in the physician's professional capacity. *Smith v. John L. Roper Lumber Co.*, 147 N.C. 62, 60 S.E. 717 (1908). The privilege also extends to entries in hospital records made by physicians, or at their direction, when those entries pertain to communications and information obtained by the physician in attending to the patient. *Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 125 S.E.2d 326 (1962). As long as they are assisting or acting under the direction of a treating physician, the privilege covers nurses, technicians, and others. *State v. Cooper*, 286 N.C. 549, 213 S.E.2d 305 (1975).

Limits. The statute creates a qualified, as opposed to absolute, privilege. A trial judge has discretion to compel disclosure even when the information otherwise qualifies as privileged "if in his opinion the same is necessary to a proper administration of justice."

> **Victim's medical records.** A trial court may examine the sealed medical records of a victim. In *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987), the United States Supreme Court recognized the defendant's Sixth Amendment right to confront witnesses at trial, but held that the defendant was entitled only to the victim's medical records that the

trial court determined to be material in that they were either (1) exculpatory of defendant's guilt or (2) material to defense or punishment. In a criminal proceeding, when the State does not possess the victim's records, the defendant may use a subpoena *duces tecum* directed to the victim's medical provider(s). If the provider asserts the privilege under section 8-53, the trial judge should make an *in camera* review pursuant to *Ritchie*.

Manner of disclosure. The scope and method of disclosure can be problematic for a trial judge faced with volumes of medical records spanning many years. A developing practice, although not specifically addressed in our appellate decisions, is for the trial judge to delegate to the attorneys, as "officers of the court" the in camera review of such records. Justification for this practice is that the attorneys are in the best position to determine whether the records are material—*i.e.*, whether the records are either exculpatory or material to defense or punishment in the case.

Waiver. The doctor is duty-bound to protect the communications, a duty he cannot waive. The privilege is for the benefit of the *patient* and can be waived only by the patient. Such waiver, however, may be express or implied. A waiver, as well as a court inquiry on the necessity of compelling disclosure, may be either before trial or during trial.

Implied waiver. The privilege is impliedly waived when (1) the patient fails to object to testimony on the privileged matter, (2) the patient calls the physician as a witness and examines him or her as to the patient's physical condition, (3) the patient testifies to the communication between himself or herself and the physician, or (4) a patient by bringing an action, counterclaim, or defense directly places his or her medical condition at issue. *Mims v. Wright*, 157 N.C. App. 339, 578 S.E.2d 606 (2003). The patient does not, by voluntarily testifying as to his or her own physical condition or to his or her injuries or ailments, without going into detail and without referring to communications made to the physician, waive the privilege. But when the patient voluntarily goes into detail regarding the nature of his or her injuries and either testifies to what the physician did or said while in attendance, or relates what he or she communicated to the physician, the privilege is waived, and the adverse party may examine the physician. *Capps v. Lynch*, 253 N.C. 18, 116 S.E.2d 137 (1960). *See also Midkiff v. Compton*, 204 N.C. App. 21, 693 S.E.2d 172, *cert. denied*, 364 N.C. 326, 700 S.E.2d 922 (2010) (plaintiff impliedly waived physician-patient privilege as to medical records casually or historically related to "great pain of body and mind" claimed in her complaint; no abuse of discretion to fail to conduct *in camera* review). The question of implied waiver is largely determined by the facts and circumstances of the particular case and depends upon the statute and the extent and ultimate materiality of the testimony given with respect to the nature, treatment, and effect of the injury or ailment. *Neese v. Neese*, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

Statutory waiver in child abuse matters. Section 8-53.1 statutorily waives both the physician-patient and the nurse privilege (§ 8-53.13) where the evidence sought relates either (1) to the abuse or neglect of a child under the age of 16 or (2) an illness of or injuries to such child or a cause in any proceeding related to a report pursuant to the North Carolina Juvenile Code.

Privilege distinguished from prohibition on unauthorized *ex parte* contacts with physician in civil practice. Defense counsel may not interview plaintiff's nonparty treating physicians privately without plaintiff's express consent; defendant must instead utilize the statutorily recognized methods of discovery enumerated in Rule 26 of the NCRCP. Considerations of patient privacy, the adequacy of formal discovery devices, and the untenable position in which *ex parte* contact places the nonparty physician supersede defendant's interest in a less expensive and more convenient method of discovery. *Crist v. Moffatt*, 326 N.C. 326, 335, 389 S.E.2d 41, 46 (1990). Additionally, federal courts have interpreted the Health Insurance Portability and Accessibility Act of 1996 (HIPAA), 42 USCS sec. 1320d et seq., as prohibiting *ex parte* interviews of plaintiff's treating physician by defense counsel in absence of strict compliance with HIPAA. *See In re Vioxx Products Liability Litigation* 230 F.R.D. 470, *order modified on reconsideration*, 230 F.R.D. 473 (E.D. La. 2005).

HIPAA. HIPAA is intended to insure the integrity and confidentiality of patient information and to protect against unauthorized uses or disclosures of the information. The regulations implementing HIPAA, which became effective on April 14, 2003, establish procedures for the disclosure of "protected health information." Although beyond the scope of this presentation, that portion of the regulation relating to disclosures for judicial and administrative proceedings is found at 45 C.F.R. § 164.512(e), while that portion relating to law enforcement purposes is found at 45 C.F.R. § 164.512(f).

PSYCHOLOGIST-PATIENT PRIVILEGE

N.C.G.S. § 8-53.3. Communications between psychologist and client or patient

> No person, duly authorized as a licensed psychologist or licensed psychological associate, nor any of his or her employees or associates, shall be required to disclose any information which he or she may have acquired in the practice of psychology and which information was necessary to enable him or her to practice psychology. Any resident or presiding judge in the district in which the action is pending may, subject to G.S. 8-53.6, compel disclosure, either at the trial or prior thereto, if in his or her opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.
>
> Notwithstanding the provisions of this section, the psychologist-client or patient privilege shall not be grounds for failure to report suspected child abuse or neglect to the appropriate county department of social services, or for failure to report a disabled adult suspected to be in need of protective services to the appropriate county department of social services. Notwithstanding the provisions of this section, the psychologist-client or patient privilege shall not be grounds for excluding evidence regarding the abuse or neglect of a child, or an illness of or injuries to a child, or the cause thereof, or for excluding evidence regarding the abuse, neglect, or exploitation of a disabled adult, or an illness of or injuries to a disabled adult, or the cause thereof, in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B of the General Statutes, or to the Protection of the Abused, Neglected, or Exploited Disabled Adult Act, Article 6 of Chapter 108A of the General Statutes.

Not applicable to criminal defendant's competency examination. No psychologist-client privilege is created when a defendant is examined at his request for purposes of evaluating his mental status. Even if it were, the court could order disclosure if the records were "necessary to the proper administration of justice." *State v. Williams*, 350 N.C. 1, 21, 510 S.E.2d 626, 639, *cert. denied*, 528 U.S. 880, 120 S. Ct. 193, 145 L. Ed. 2d 162 (1999) (citation omitted).

OTHER STATUTORY PRIVILEGES

N.C.G.S. § 8-53.4. School counselor privilege

No person certified by the State Department of Public Instruction as a school counselor and duly appointed or designated as such by the governing body of a public school system within this State or by the head of any private school within this State shall be competent to testify in any action, suit, or proceeding concerning any information acquired in rendering counseling services to any student enrolled in such public school system or private school, and which information was necessary to enable him to render counseling services; provided, however, that this section shall not apply where the student in open court waives the privilege conferred. Any resident or presiding judge in the district in which the action is pending may compel disclosure, either at the trial or prior thereto, if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be the district court judge, and if the case is in superior court the judge shall be a superior court judge.

N.C.G.S. § 8-53.5. Communications between licensed marital and family therapist and client(s)

No person, duly licensed as a licensed marriage and family therapist, nor any of the person's employees or associates, shall be required to disclose any information which the person may have acquired in rendering professional marriage and family therapy services, and which information was necessary to enable the person to render professional marriage and family therapy services. Any resident or presiding judge in the district in which the action is pending may, subject to G.S. 8-53.6, compel disclosure, either at the trial or prior thereto, if in the court's opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.

N.C.G.S. § 8-53.6. No disclosure in alimony and divorce actions

In an action pursuant to G.S. 50-5.1, 50-6, 50-7, 50-16.2A, and 50-16.3A if either or both of the parties have sought and obtained marital counseling by a licensed physician, licensed psychologist, licensed psychological associate, licensed clinical social worker, or licensed marriage and family therapist, the person or persons rendering such counseling shall not be competent to testify in the action concerning information acquired while rendering such counseling.

N.C.G.S. § 8-53.7. Social worker privilege

No person engaged in delivery of private social work services, duly licensed or certified pursuant to Chapter 90B of the General Statutes shall be required to disclose any information that he or she may have acquired in rendering professional social services, and which information was necessary

to enable him or her to render professional social services: provided, that the presiding judge of a superior or district court may compel such disclosure, if in the court's opinion the same is necessary to a proper administration of justice and such disclosure is not prohibited by G.S. 8-53.6 or any other statute or regulation.

Asserting the statutory social worker privilege requires some action or objection by the holder of the privilege to protect communications with a social worker in child custody and support action. *Mosteller v. Stiltner*, 221 N.C. App. 486, 727 S.E.2d 601 (2012).

N.C.G.S. § 8-53.8. Counselor privilege

No person, duly licensed pursuant to Chapter 90, Article 24, of the General Statutes, shall be required to disclose any information which he or she may have acquired in rendering professional counseling services, and which information was necessary to enable him or her to render professional counseling services: Provided, that the presiding judge of a superior or district court may compel such disclosure, if in the court's opinion the same is necessary to a proper administration of justice and such disclosure is not prohibited by other statute or regulation.

N.C.G.S. § 8-53.9. Optometrist/patient privilege

No person licensed pursuant to Article 6 of Chapter 90 of the General Statutes shall be required to disclose any information that may have been acquired in rendering professional optometric services and which information was necessary to enable that person to render professional optometric services, except that the presiding judge of a superior or district court may compel this disclosure, if, in the court's opinion, disclosure is necessary to a proper administration of justice and disclosure is not prohibited by other statute or rule.

N.C.G.S. § 8-53.10. Peer support group counselors

(a) Definitions. -- The following definitions apply in this section:

(1) Client law enforcement employee. -- Any law enforcement employee or a member of his or her immediate family who is in need of and receives peer counseling services offered by the officer's employing law enforcement agency.

(2) Immediate family. -- A spouse, child, stepchild, parent, or stepparent.

(3) Peer counselor. -- Any law enforcement officer or civilian employee of a law enforcement agency who:

a. Has received training to provide emotional and moral support and counseling to client law enforcement employees and their immediate families; and

b. Was designated by the sheriff, police chief, or other head of a law enforcement agency to counsel a client law enforcement employee.

(4) Privileged communication. -- Any communication made by a client law enforcement employee or a member of the client law enforcement employee's immediate family to a peer counselor while receiving counseling.

(b) A peer counselor shall not disclose any privileged communication that was necessary to enable the counselor to render counseling services unless one of the following apply:

(1) The disclosure is authorized by the client or, if the client is deceased, the disclosure is authorized by the client's executor, administrator, or in the case of unadministrated estates, the client's next of kin.

(2) The disclosure is necessary to the proper administration of justice and, subject to G.S. 8-53.6, is compelled by a resident or presiding judge. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.

(c) The privilege established by this section shall not apply:

(1) If the peer counselor was an initial responding officer, a witness, or a party to the incident that prompted the delivery of peer counseling services.

(2) To communications made while the peer counselor was not acting in his or her official capacity as a peer counselor.

(3) To communications related to a violation of criminal law. This subdivision does not require the disclosure of otherwise privileged communications related to an officer's use of force.

(d) Notwithstanding the provisions of this section, the peer counselor privilege shall not be grounds for failure to report suspected child abuse or neglect to the appropriate county department of social services, or for failure to report a disabled adult suspected to be in need of protective services to the appropriate county department of social services. Notwithstanding the provisions of this section, the peer counselor privilege shall not be grounds for excluding evidence regarding the abuse or neglect of a child, or an illness of or injuries to a child, or the cause thereof, or for excluding evidence regarding the abuse, neglect, or exploitation of a disabled adult, or an illness of or injuries to a disabled adult, or the cause thereof, in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B, or to the Protection of the Abused, Neglected, or Exploited Disabled Adult Act, Article 6 of Chapter 108A of the General Statutes.

N.C.G.S. § 8-53.11. Persons, companies, or other entities engaged in gathering or dissemination of news

(a) Definitions. -- The following definitions apply in this section:

(1) Journalist. -- Any person, company, or entity, or the employees, independent contractors, or agents of that person,

company, or entity, engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium.

(2) Legal proceeding. -- Any grand jury proceeding or grand jury investigation; any criminal prosecution, civil suit, or related proceeding in any court; and any judicial or quasi-judicial proceeding before any administrative, legislative, or regulatory board, agency, or tribunal.

(3) News medium. -- Any entity regularly engaged in the business of publication or distribution of news via print, broadcast, or other electronic means accessible to the general public.

(b) A journalist has a qualified privilege against disclosure in any legal proceeding of any confidential or nonconfidential information, document, or item obtained or prepared while acting as a journalist.

(c) In order to overcome the qualified privilege provided by subsection (b) of this section, any person seeking to compel a journalist to testify or produce information must establish by the greater weight of the evidence that the testimony or production sought:

(1) Is relevant and material to the proper administration of the legal proceeding for which the testimony or production is sought;

(2) Cannot be obtained from alternate sources; and

(3) Is essential to the maintenance of a claim or defense of the person on whose behalf the testimony or production is sought.

Any order to compel any testimony or production as to which the qualified privilege has been asserted shall be issued only after notice to the journalist and a hearing and shall include clear and specific findings as to the showing made by the person seeking the testimony or production.

(d) Notwithstanding subsections (b) and (c) of this section, a journalist has no privilege against disclosure of any information, document, or item obtained as the result of the journalist's eyewitness observations of criminal or tortious conduct, including any physical evidence or visual or audio recording of the observed conduct.

N.C.G.S. § 8-53.12. Communications with agents of rape crisis centers and domestic violence programs privileged

(a) Definitions. -- The following definitions apply in this section:

(1) Agent. -- An employee or agent of a center who has completed a minimum of 20 hours of training as required by the center, or a volunteer, under the direct supervision of a center supervisor, who has completed a minimum of 20 hours of training as required by the center.

(2) Center. -- A domestic violence program or rape crisis center.

(3) Domestic violence program. -- A nonprofit organization or program whose primary purpose is to provide services to domestic violence victims.

(4) Domestic violence victim. -- Any person alleging domestic violence as defined by G.S. 50B-1, who consults an agent of a domestic violence program for the purpose of obtaining, for himself or herself, advice, counseling, or other services concerning mental, emotional, or physical injuries suffered as a result of the domestic violence. The term shall also include those persons who have a significant relationship with a victim of domestic violence and who have sought, for themselves, advice, counseling, or other services concerning a mental, physical, or emotional condition caused or reasonably believed to be caused by the domestic violence against the victim.

(5) Rape crisis center. -- Any publicly or privately funded agency, institution, organization, or facility that offers counseling and other services to victims of sexual assault and their families.

(6) Services. -- Includes, but is not limited to, crisis hotlines; safe homes and shelters; assessment and intake; children of violence services; individual counseling; support in medical, administrative, and judicial systems; transportation, relocation, and crisis intervention. The term does not include investigation of physical or sexual assault of children under the age of 16.

(7) Sexual assault. -- Any alleged violation of G.S. 14-27.2, 14-27.3, 14-27.4, 14-27.5, 14-27.7, 14-27.7A, or 14-202.1, whether or not a civil or criminal action arises as a result of the alleged violation.

(8) Sexual assault victim. -- Any person alleging sexual assault, who consults an agent of a rape crisis center for the purpose of obtaining, for themselves, advice, counseling, or other services concerning mental, physical, or emotional injuries suffered as a result of sexual assault. The term shall also include those persons who have a significant relationship with a victim of sexual assault and who have sought, for themselves, advice, counseling, or other services concerning a mental, physical, or emotional condition caused or reasonably believed to be caused by sexual assault of a victim.

(9) Victim. -- A sexual assault victim or a domestic violence victim.

(b) Privileged Communications. -- No agent of a center shall be required to disclose any information which the agent acquired during the provision of services to a victim and which information was necessary to enable the agent to render the services; provided, however, that this subsection shall not apply where the victim waives the privilege conferred. Any resident or presiding judge in the district in which the action is pending shall compel disclosure, either at the trial or prior thereto, if the court finds, by a preponderance of the evidence, a good faith, specific and reasonable

basis for believing that (i) the records or testimony sought contain information that is relevant and material to factual issues to be determined in a civil proceeding, or is relevant, material, and exculpatory upon the issue of guilt, degree of guilt, or sentencing in a criminal proceeding for the offense charged or any lesser included offense, (ii) the evidence is not sought merely for character impeachment purposes, and (iii) the evidence sought is not merely cumulative of other evidence or information available or already obtained by the party seeking the disclosure or the party's counsel. If the case is in district court, the judge shall be a district court judge, and if the case is in superior court, the judge shall be a superior court judge.

Before requiring production of records, the court must find that the party seeking disclosure has made a sufficient showing that the records are likely to contain information subject to disclosure under this subsection. If the court finds a sufficient showing has been made, the court shall order that the records be produced for the court under seal, shall examine the records in camera, and may allow disclosure of those portions of the records which the court finds contain information subject to disclosure under this subsection. After all appeals in the action have been exhausted, any records received by the court under seal shall be returned to the center, unless otherwise ordered by the court. The privilege afforded under this subsection terminates upon the death of the victim.

(c) Duty in Case of Abuse or Neglect. -- Nothing in this section shall be construed to relieve any person of any duty pertaining to abuse or neglect of a child or disabled adult as required by law.

N.C.G.S. § 8-53.13. Nurse privilege

No person licensed pursuant to Article 9A of Chapter 90 of the General Statutes shall be required to disclose any information that may have been acquired in rendering professional nursing services, and which information was necessary to enable that person to render professional nursing services, except that the presiding judge of a superior or district court may compel disclosure if, in the court's opinion, disclosure is necessary to a proper administration of justice and disclosure is not prohibited by other statute or rule. Nothing in this section shall preclude the admission of otherwise admissible written or printed medical records in any judicial proceeding, in accordance with the procedure set forth in G.S. 8-44.1, after a determination by the court that disclosure should be compelled as set forth herein.

CURING THE PREJUDICIAL EFFECT OF INADMISSIBLE EVIDENCE

Brandis & Broun §§ 19-22.

The trial court, being careful to avoid appearances of partiality, may *ex mero motu* properly exclude inadmissible evidence. *State v. Overman*, 284 N.C. 335, 200 S.E.2d 604 (1973). However, under ordinary circumstances, the court is not required to exclude evidence when there is no objection; failure to make an objection waives it. N.C. R. Evid. 103(a)(1); N.C.G.S. § 15A-1446(b). Exceptional situations in which an evidentiary ruling may be reversed even in the absence of an objection include: (1) when there is plain error, *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012); (2) when use of the evidence violates statute in the furtherance of public policy, *State v. McCall*, 289 N.C. 570, 223 S.E.2d 334 (1976); (3) when on the face of the record, a criminal defendant's confession is inadmissible, *State v. Pearce*,

266 N.C. 234, 145 S.E.2d 918 (1966); and (4) when a question is asked by the judge or a juror, N.C.G.S. § 15A-1446(d)(11).

When the trial court allows a motion to strike certain questions or testimony, general curative instructions given at the outset of the trial that admonish the jury to disregard stricken matters will suffice to cure any prejudicial effect. The court does not have to reissue these instructions, but "the better procedure is to give the instruction to disregard the answer immediately after allowing the motion to strike." *State v. Franks*, 300 N.C. 1, 13, 265 S.E.2d 177, 184 (1980). Counsel can move for a mistrial if it is believed the curative instruction will not be sufficient. By statute, the court must declare a mistrial "if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061. A trial court's decision regarding whether to declare a mistrial will not be reversed "unless it is so clearly erroneous as to amount to a manifest abuse of discretion." *State v. Diehl*, 353 N.C. 433, 436, 545 S.E.2d 185, 187 (2001).

Again, ordinarily instructions to the jury to disregard the evidence will sufficiently cure even an erroneous ruling admitting evidence if the trial court later withdraws that ruling and strikes the evidence. If the admission of the evidence is manifestly prejudicial—*e.g.*, emphasized by repetition or allowed to remain with the jury for an undue length of time—the withdrawal may be too late to cure the prejudicial effect. *State v. Silva*, 304 N.C. 122, 282 S.E.2d 449 (1981) (testimony of fruits of a search later determined to be unlawful).