

When and How Criminal-Defense Attorneys Can Obtain Access to Confidential Child-Welfare and Juvenile Abuse, Neglect, and Dependency Records

Introduction

Consider these common scenarios. A criminal attorney learns that a county department of social services (DSS) or equivalent agency has been involved with that attorney's client and family. Or maybe the attorney believes that the DSS has investigated a report of suspected abuse, neglect, or dependency that involves a witness or alleged victim in the criminal case. How can the criminal attorney access existing child-welfare and juvenile abuse, neglect, and dependency records that may be relevant to the criminal case?

Alternatively, a respondent parent, guardian, custodian, or caretaker in a juvenile abuse, neglect, and dependency (A/N/D) action has been charged criminally. The criminal attorney asks the attorney representing the same individual in the A/N/D matter to share records and information relating to the A/N/D proceeding. What can the A/N/D attorney share with the criminal attorney?

There are numerous laws regulating access, confidentiality, disclosure, and redisclosure of information from records of child-welfare and A/N/D proceedings. Some laws apply solely to A/N/D records, while other laws apply to social-services records more generally. Protective services in an abuse, neglect, or dependency matter are social services and are governed by both the general and specific laws regulating disclosure. Applying the various laws can be confusing, and the answers to the questions that are raised can be unclear. The purpose of this bulletin is to answer frequently raised questions regarding criminal attorneys' access to child-welfare and juvenile A/N/D records, including whether two attorneys who represent the same individual are permitted to share otherwise-protected information with each other.

In most instances, a court order allowing a criminal attorney access to child-welfare or juvenile A/N/D records will be the most straightforward method, if not the only one. This bulletin addresses who can obtain a court order allowing a criminal attorney access to protected records, and how and where to obtain such an order. It also identifies situations where a court order is not needed.

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The Records

The Different Types of Records

It is important—both in this bulletin and in your practice—to be careful to differentiate between the types of records at issue. Generally, there are three categories of child-welfare and juvenile A/N/D records that may be of interest to a criminal attorney.

DSS records

Sometimes referred to as *agency records*, DSS records are the files maintained by the social worker or social workers assigned to a particular case or family. DSS records may include the files assembled by a social worker investigating a report of suspected juvenile abuse, neglect, or dependency; an in-home social worker who is addressing a need with the family, sometimes without court action having been initiated; or the foster-care or adoption social worker assigned to the juvenile who is the subject of that proceeding and who may be ordered in the custody of a DSS. The DSS creates and maintains these records.

The Courthouse File

A criminal attorney may be interested in the contents of the courthouse file maintained by the A/N/D clerk within the civil division of a clerk's office. The courthouse file is not an agency record. Instead, it is the record of the district court in the A/N/D action that contains information and records from the DSS and others.

The A/N/D Attorney's File

When a criminal attorney and an A/N/D attorney represent the same individual, the A/N/D attorney's file, created and maintained by the attorney for a respondent in an A/N/D proceeding, may be of interest to the criminal attorney. The file is the attorney's file, but the information contained within it includes information and records from the DSS and the district court where the A/N/D proceeding is being heard.¹

Why Child-Welfare and Juvenile A/N/D Records May Be Relevant to a Criminal Attorney

Each of these three types of records can be a wellspring of information for a criminal attorney. The records may contain child-welfare allegations and reports, notes from social workers or law officers, photographs and illustrations, medical and mental-health records, and information obtained from assessments or evaluations. Most importantly, some records may contain exculpatory evidence that is critical to the individual charged with a crime. Other records may reflect achievements made by the criminal attorney's client, such as a certificate from a parenting class or proof of drug treatment. The records, particularly the A/N/D attorney's file, may contain pleadings, discovery materials, exhibits, and notes or other trial-preparation materials. The documents and information contained within all three types of records may assist a criminal attorney in understanding the factual investigation of the case, learning about the state's evidence, preparing a defense, impeaching a witness, or putting the client in a better position for plea negotiations or, if applicable, sentencing.

1. Whenever decisions are being made about access to an attorney's file, concerns regarding attorney-client privilege and work-product disclosures must be considered. Those issues are beyond the scope of this bulletin.

The Laws

The Framework for Statutory Interpretation

Both the attorney who is seeking the records and the attorney who is being asked to share them will need to parse the various legal authorities on confidentiality. When doing so, it is worthwhile to begin with some basic principles of statutory interpretation.

The North Carolina Supreme Court has addressed statutory construction and has done so when examining North Carolina's Juvenile Code, which is codified in Chapter 7B of the North Carolina General Statutes (hereinafter G.S.). According to the supreme court, "[t]he goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment."² This involves first examining the plain language of the statute and, when the language is clear and unambiguous, giving the plain meaning and effect to the actual words used.³ Words should not be added or deleted.⁴

When the statutory language is ambiguous, the reader should look to legislative intent by considering the language of the statute, the spirit of the act, and what the act seeks to accomplish.⁵ In determining legislative intent, the reader should interpret "the words and phrases of a statute . . . contextually, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute."⁶ The reader should not apply a "rigid interpretation of isolated provisions in the Juvenile Code," as such a reading can have unintended consequences, such as creating "requirements beyond those which the legislature intended to impose." Sections of a single statute should be "read holistically with other provisions in the Juvenile Code."⁷ When different statutes address the same subject matter, they "must be construed *in pari materia* and reconciled, if possible, so that effect may be given to each."⁸

Different provisions of the Juvenile Code, statutes in other chapters of the General Statutes, and provisions of the North Carolina Administrative Code apply to various confidentiality statutes governing child-welfare and juvenile A/N/D records. When analyzing who has access to these records, it is important to read the statutory and regulatory provisions within the broader statutory context.⁹ For example, when determining legislative intent, it may be relevant that some provisions explicitly distinguish groups of people, whereas other provisions do not.¹⁰

2. *In re J.E.B.*, 376 N.C. 629, 2021-NCSC-2, ¶ 11 (quoting *State v. Rankin*, 371 N.C. 885, 889 (2018)).

3. *In re J.E.B.*, 376 N.C. at 633–34, 2021-NCSC-2, ¶ 11.

4. *In re B.O.A.*, 372 N.C. 372 (2019).

5. See *In re J.E.B.*, 376 N.C. 629, 2021-NCSC-2, ¶ 11; *In re B.L.H.*, 376 N.C. 118 (2020).

6. *In re J.E.B.*, 376 N.C. 629, 2021-NCSC-2, ¶ 11.

7. *In re A.P.*, 371 N.C. 14, 18 (2018) (reversing court of appeals for not applying whole-text interpretation of statute).

8. *In re B.L.H.*, 376 N.C. at 123.

9. See *Id.*

10. See, e.g., *In re B.E.*, 375 N.C. 730, 748 n.9 (2020) (noting that some provisions in the Juvenile Code refer only to "the juvenile," while other provisions distinguish between the juvenile and the juvenile's guardian ad litem).

The Statutory Labyrinth

There are a multitude of authorities about access to child-welfare and juvenile A/N/D records. In terms of the questions raised in this bulletin, the most significant authorities¹¹ include Sections 302, 2901, and 700 of G.S. 7B and Chapters 69 and 70 of Title 10A of the North Carolina Administrative Code (hereinafter N.C.A.C.).

G.S. 108A-80(a)

This provision is arguably the central authority on confidentiality for social-services records. G.S. 108A-80 is important when determining who can access and use DSS child-welfare records in general, including a DSS client or an attorney for that client. G.S. 108A-80(a) makes it

unlawful for any person to obtain, disclose or use, or to authorize, permit, or acquiesce in the use of any list of names or other information concerning persons applying for or receiving public assistance or social services that may be directly or indirectly derived from the records, files or communications of [DSS].

The statute's ban on receiving or using information found in DSS records does not apply if it is for "purposes directly connected with the administration of the programs of public assistance and social services." A violation of the statute is a Class 1 misdemeanor.¹²

G.S. 7B-302

This statute is specific to information obtained by a DSS in a case involving a juvenile's alleged abuse, neglect, or dependency. G.S. 7B-302 makes the contents of the DSS record confidential, with some enumerated exceptions. The broadest exception applies to the juvenile. Written or electronic copies of the record that are not prohibited from disclosure under federal law must be provided to the juvenile and by the juvenile's guardian ad litem when requested. This exception also applies to adults who received social services as juveniles.¹³ Another exception can apply to any North Carolina civil matter in which a DSS is not a party. The judge in such a proceeding has the discretion to order the release of confidential DSS information after giving the DSS "reasonable notice and an opportunity to be heard and then determining that the information is relevant and necessary to the . . . matter before the court and unavailable from any other source."¹⁴

The most relevant exception for purposes of this bulletin is G.S. 7B-302(a1)(4). In a North Carolina criminal or juvenile-delinquency matter, a judge may order a DSS to disclose information from the DSS record, but the court must first conduct an in camera review of the DSS records before releasing those records to a criminal defendant or juvenile respondent. There is no requirement that the DSS first receive notice or have an opportunity to be heard. This statutory exception does not apply, however, when the criminal defendant or juvenile respondent

11. For more information about these laws, see AIMEE WALL, *DISCLOSING PROTECTIVE SERVICES INFORMATION: A GUIDE FOR NORTH CAROLINA SOCIAL SERVICES AGENCIES* (UNC School of Government, 2015).

12. See G.S. 108A-80(b).

13. G.S. 7B-302(a1)(2). Effective October 1, 2021, Session Law 2021-100, Sections 2 and 11, amend G.S. 7B-302(a1)(2) to allow for written and electronic copies to be provided, rather than allowing the juvenile and the guardian ad litem to simply "examine" the record. G.S. 7B-302(a1)(2) has also been amended to incorporate confidentiality protections under federal law.

14. G.S. 7B-302(a1)(3).

is the subject of the DSS records. The subject of the DSS records can obtain copies of any portions of them that are not prohibited by federal law from disclosure, without a court order or an in camera review.¹⁵

G.S. 7B-2901

This statute has two primary functions. First, it requires that the courthouse files maintained by the clerk in an A/N/D proceeding be withheld from public inspection. Without a court order, the courthouse files can only be reviewed and copied by the DSS; the juvenile named in the petition; the juvenile's guardian ad litem or attorney; or the juvenile's parent, guardian, or custodian (or attorney acting on behalf of any of those parties).¹⁶ Anyone who does not fit into one of those categories—including a caretaker respondent—will need to obtain a court order to access the courthouse files. G.S. 7B-2901 also requires the DSS to maintain records of the cases of children in its custody or under placement by the court. Access to these DSS records in North Carolina civil and criminal matters where a DSS is not a party is the same as those discussed above with respect to G.S. 7B-302.¹⁷

G.S. 7B-700

This section of the Juvenile Code addresses information sharing and discovery within an A/N/D proceeding when a court action is pending. The DSS has the discretion to share most information with any other party in a pending A/N/D matter.¹⁸ Note that the juvenile's guardian ad litem has access to information that the guardian ad litem determines is relevant.¹⁹ If the DSS denies a respondent's request to receive information, the respondent may seek the information through a discovery motion in the pending A/N/D case.²⁰ Attorneys should be familiar with the local rules in their judicial district on information sharing and discovery, which are expressly permitted in A/N/D cases.²¹ For example, local rules may specify the process for requesting information and may mandate a time for a party to respond. Rediscovery of any of the information accessed through information sharing and discovery is not allowed if prohibited elsewhere by state or federal law.²²

10A N.C.A.C. 69

This chapter addresses confidentiality and access to client²³ records maintained by a DSS, generally. Information that a DSS receives from entities or people is treated as client information.²⁴ The Administrative Code specifically recognizes the right of DSS clients and their attorneys to access the client's records.²⁵ The DSS, however, may refuse to disclose records to the

15. G.S. 7B-302(a1)(2).

16. G.S. 7B-2901(a).

17. G.S. 7B-2901(b)(2), (3).

18. G.S. 7B-700(a).

19. G.S. 7B-601(c). *See* G.S. 7B-700(f).

20. G.S. 7B-700(c). *See also In re M.M.*, 272 N.C. App. 55 (2020).

21. G.S. 7B-700(b).

22. G.S. 7B-700(e).

23. For purposes of social services, *client* is defined at 10A N.C.A.C. 60.0101(1).

24. 10A N.C.A.C. 69.0102. For purposes of social services, *client information* is defined at 10A N.C.A.C. 69.0101(3).

25. 10A N.C.A.C. 69.0304(c).

client if other laws prohibit disclosure, so long as the DSS notifies the client of the withholding and the basis for it.²⁶ Whenever there is a discrepancy between federal and state laws pertaining to the confidentiality of child-welfare records, the agency must abide by the authority it determines to be the most protective of the client.²⁷

10A N.C.A.C. 70

This chapter regulates children's services (specifically records related to juvenile abuse, neglect, and dependency) and includes provisions for record keeping and confidentiality. A DSS is required to maintain a record for any child placed in its custody or for whom protective services have commenced.²⁸ Protective services consist of screening reports, conducting assessments, casework, and other services provided to the families.²⁹ These records are to be kept confidential and can only be disclosed when authorized by other laws, including the Juvenile Code.³⁰ Under these provisions, the child and the child's attorney have a right to examine the child's record without a court order.³¹

Absent a specific court order, the identity of the individual or agency that made the report of abuse, neglect, or dependency remains confidential.³²

Additional federal confidentiality regulations apply to those portions of child-welfare and juvenile A/N/D records that include physical- or mental-health information and substance-abuse records.³³

Questions and Answers Regarding Criminal-Attorney Access to Protected Records How and When May a Criminal Attorney Seek a Court Order Compelling Access to DSS Records?

If an individual who is charged with a crime or that individual's attorney are unable to obtain agency records directly from a DSS, what can the criminal attorney do? While some attorneys' instincts may be to subpoena the records, that is not the best approach. The various confidentiality laws do not authorize a DSS to release records in response to a subpoena. Without a court order, the subpoena is likely to result in a motion to quash. Instead, a criminal attorney should follow the applicable provisions of the Juvenile Code and file a motion in criminal court seeking the production of the agency's records. If the motion is granted, the court must conduct an *in camera* review before determining what records to disclose.³⁴

26. 10A N.C.A.C. 69.0301, .0303.

27. 10A N.C.A.C. 69.0201.

28. 10A N.C.A.C. 70A.0112.

29. G.S. 7B-300.

30. 10A N.C.A.C. 70A.0112, .0113.

31. 10A N.C.A.C. 70A.0113(a)(2).

32. G.S. 7B-302(a1), -700(a).

33. *See, e.g.*, 45 C.F.R. § 160; 42 C.F.R. pt. 2. For a deeper discussion of these regulations and their applicability to protected records, see SARA DEPASQUALE & JAN S. SIMMONS, *ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA* § 14.2–.4 (UNC School of Government, 2019 ed. 2019).

34. G.S. 7B-302(a1)(4), -2901(b)(3).

This approach is consistent with a criminal defendant's due-process rights, Sixth Amendment compulsory-process rights, and the right to access exculpatory third-party records that are otherwise confidential.³⁵ Our appellate courts have reaffirmed that this right of a defendant applies to DSS records.³⁶

Generally, criminal attorneys will want to file this motion in criminal court, where the territory is familiar. Additionally, the statute authorizes the court hearing the criminal matter to enter the order and conduct the in camera inspection of the DSS records. Although a criminal attorney may want a client to seek an order in the A/N/D matter, there may not be a civil attorney involved, depending on the status of the A/N/D proceeding, whether the client is indigent, and whether the client has waived or forfeited the right to court-appointed counsel.³⁷ The court may also have terminated its jurisdiction in the A/N/D action such that there is not a pending action to file a motion in.³⁸ In some instances, criminal court may be the only venue for the motion.

When May a Criminal Attorney Access DSS Records Without a Court Order?

If the attorney's client is or was the juvenile in an A/N/D matter, that client has a right to receive a copy of the DSS records by requesting access from the DSS directly.³⁹ Legislation effective October 1, 2021, clarifies that the DSS shall provide a qualifying person under this provision with electronic or written copies of the requested information within a reasonable period of time, unless the disclosure is prohibited by federal law.⁴⁰

A criminal defendant's access to DSS records without a court order is far less certain when the individual is a parent or other adult involved in a matter with DSS. It is true that the Administrative Code states that these types of DSS clients and their attorneys can review and copy DSS records that pertain to the clients, including those in the social worker's files.⁴¹ However, the narrowly tailored Juvenile Code controls rather than the general regulations governing access to social-services records. As noted above, information sharing and discovery when a juvenile A/N/D matter is pending is governed by G.S. 7B-700. The DSS can share most information contained in its records with another party in the A/N/D proceeding.⁴² If the DSS denies a party's request to receive information, the party may seek the information through a discovery motion in the pending A/N/D matter.⁴³

35. See *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (holding that conducting an in camera review before releasing confidential records that are favorable and material protects a defendant's due-process rights without impairing the state's interest in protecting child-abuse information).

36. See, e.g., *State v. Martinez*, 212 N.C. App. 661 (2011); see also JOHN RUBIN, PHIL DIXON, & ALYSON A. GRINE, [1 PRETRIAL] NORTH CAROLINA DEFENDER MANUAL § 4.6(A) (UNC School of Government, 2d ed. 2013).

37. See G.S. 7B-602(a), (a1).

38. See G.S. 7B-201, -911.

39. G.S. 7B-302(a1)(2), -2901(b)(1). See also *In re J.L.*, 199 N.C. App. 605 (2009) (holding that the trial court abused its discretion by denying the juvenile the right to review DSS files about the juvenile).

40. G.S. 7B-302(a1)(2), -2901(b)(1); S.L. 2021-100, §§ 2, 18.

41. 10A N.C.A.C. 69.0304(c).

42. G.S. 7B-700(a). See also G.S. 7B-302(a1)(5), -2901(b)(4).

43. G.S. 7B-700(c). See also *In re M.M.*, 272 N.C. App. 55 (2020).

Who Has Access to Juvenile A/N/D Courthouse Records Without a Court Order?

The person named in an A/N/D petition as the juvenile—including an adult who was once the juvenile—and that person’s parent, guardian, or custodian can examine and obtain written copies of the record maintained by the clerk without a court order.⁴⁴ Attorneys for those individuals have the same right to examine and obtain written copies of the courthouse file.⁴⁵ See the question immediately below for possible complications, however.

Why Should a Criminal Attorney, Even One Who Arguably Has Access Under G.S. 7b-2901(a), Consider Seeking a Court Order to Gain Access to the Courthouse Records?

There are legal and practical reasons that make obtaining a court order, via either a motion in criminal court by the defense attorney or in A/N/D court by the parent attorney, the soundest option.

First, multiple people may be involved in an A/N/D proceeding, and the courthouse records may reflect that complexity. There may, for example, be multiple parties to the proceeding, including parents, the juvenile, custodians, guardians, or caretakers. In addition, A/N/D matters frequently involve evidence pertaining to individuals who are not named parties to the action, such as a respondent’s romantic partner, a relative, or a placement provider for the juvenile. Consequently, the courthouse records may contain sensitive information about any number of individuals who may not be at all relevant to the criminal case. A court order authorizing a criminal attorney’s access to records removes all doubt over what the attorney should have access to.

It is also important to recognize that the subject matter in the two proceedings may differ. A criminal attorney having access to protected records, including those in the courthouse file, may make less sense if the criminal and A/N/D proceedings are about unrelated allegations. If a DSS files a petition alleging that a boy is abused because his father hits him, and the boy’s father is criminally charged with child abuse based on the same allegations, there is a direct connection between the proceedings. In that situation, it seems likely that the criminal attorney would have a need to access the A/N/D records, subject to the confidentiality laws and regulations. What if instead of being charged with child abuse, the father is facing identity-theft charges? And what if the father has never met his son, but is named as a party in the A/N/D action solely because of paternity? It seems concerning that the father’s criminal attorney in this situation would, with no court oversight, have automatic access to the A/N/D courthouse records—records that may include private information such as the sexual-, physical-, and mental-health histories of the son’s mother, from whom the father has long been estranged. Again, obtaining a court order that authorizes disclosure of protected records to the criminal attorney helps ensure that the privacy rights of all individuals named in the records are being considered and sufficiently protected.

The more individuals there are involved in a proceeding or named in a record, the more privacy rights there are to consider. The more varied the subject matter of the proceedings, the more complicated the calculations become for determining who has access to what records and for what purpose. Obtaining a court order provides certainty and protection for an attorney who is in receipt of confidential child-welfare and juvenile A/N/D records. A court order giving the criminal attorney access to these records reduces the risk and burden to everyone involved in deciding what records the attorney should possess. That is particularly true if the court

44. G.S. 7B-2901(a).

45. G.S. 7B-2901(a)(4).

considering the motion for access to DSS records is the criminal court, which will review the records in camera before any disclosure.

Another reason for obtaining a court order is that not everyone involved in a matter may interpret the rules of confidentiality and access in the same way. For example, while G.S. 7B-2901(b) provides that attorneys for the juvenile or for the juvenile's parent, guardian, or custodian can examine A/N/D courthouse records, it does not explicitly state whether that is limited to attorneys who have entered an appearance in the juvenile A/N/D matter. What if a criminal attorney representing one of those individuals wants access to the courthouse file? Perhaps one of those individuals is involved in civil litigation over a dog bite or a car accident. Does the individual's attorney in the unrelated civil matter have access to A/N/D courthouse records by virtue of G.S. 7B-2901(a)? The statute is not specific. Clerks are trained, however, to be protective of these records and may interpret the reference in the statute to attorneys as limited to attorneys who have entered appearances in the A/N/D proceeding. A court order granting a criminal attorney access to the records removes all doubt.

Can the A/N/D Attorney, with the Respondent's Permission, Provide Copies of DSS Child-Welfare and Juvenile A/N/D Records to the Respondent's Criminal Attorney? Can the Respondent Provide the Criminal Attorney with Those Records?

There is disagreement in the field over whether a respondent or the respondent's attorney in an A/N/D proceeding can share records with the same respondent's criminal attorney. No authority exists that expressly allows or prohibits an A/N/D attorney or respondent from sharing child-welfare and juvenile A/N/D records with the client's criminal attorney. The crux of the debate comes down to how one interprets (1) the prohibitions against redisclosure in G.S. 108A-80 and (2) G.S. 7B-700(e), which prohibits redisclosure when prohibited by state or federal law.

A Hypothetical

A DSS files a neglected-juvenile petition in juvenile A/N/D court that includes allegations that Mary, the mother, abuses alcohol and drives under the influence while Jimmy, the juvenile, is in the car. Separately, Jimmy's father, Franklin, is charged with larceny. At first glance, the DSS records documenting Mary's alcohol dependency may appear immaterial to Franklin's larceny charges. Mary's alcohol dependency, however, could be relevant to a theory of defense that Mary is the one who left the store with unpurchased goods. Or Mary's substance abuse could be relevant for the purpose of impeaching Mary if she testifies to her recollections of the events in question. Franklin's criminal attorney wants him or his A/N/D attorney to share the DSS records. Can Franklin or his A/N/D attorney share those records? There are arguments both for and against providing otherwise-protected records to Franklin's criminal attorney.

Arguments that Sharing Is Allowed

Fundamental fairness. Some will argue that fundamental fairness requires that a person charged with a crime be able to share lawfully obtained records and information with the defense attorney. It would be impractical and illogical to expect Franklin to have records from one case and shield those records from his attorney in another case.

Waiver. G.S. 108A-80(a) seems intended to protect recipients of social services. In the absence of explicit prohibitions to the contrary, Franklin—who is a recipient of social services—should be able to waive that protection, at least regarding records and information pertaining to himself.

Under this interpretation, Franklin should be able to provide records related to him to his criminal attorney directly, or Franklin's A/N/D attorney could do so after receiving his express written consent.

No express prohibition. While the Juvenile Code specifically limits the ability of certain parties to share records (e.g., DSS⁴⁶ and the juvenile's guardian ad litem⁴⁷), it does not impose limits on a respondent's ability to share records or information with others unless redisclosure is prohibited by state or federal law.⁴⁸

Authority to share with attorney. The implementing regulation that applies generally to social-services records⁴⁹ authorizes a recipient of social services, or the recipient's attorney, to review or copy information pertaining to the recipient, including information in the social worker's file. This provision does not restrict access to a specific type of attorney, e.g., the attorney in the A/N/D action. Given the absence of restrictions and considering that the Juvenile Code does not explicitly prohibit an A/N/D attorney from sharing information with the individual's criminal attorney, arguably Franklin's criminal attorney is allowed access to information received by the A/N/D attorney with Franklin's permission.

Arguments that Sharing Is Not Allowed

Limited to social-services context. G.S. 108A-80(a) prohibits individuals from disclosing, using, allowing, or "acquiesce[ing] in the use of" information regarding individuals applying for or receiving public assistance or social services—which includes child welfare—that may directly or indirectly be derived from DSS records. A conservative reading of the language of G.S. 108A-80(a) is that it bars Franklin and his A/N/D attorney from sharing protected records with Franklin's criminal attorney because the criminal attorney is not "directly connected" with the administration of social services. This interpretation is consistent with the importance placed on the confidentiality of child-welfare and A/N/D records throughout the law.

Redisclosure prohibited by state and federal law. G.S. 7B-700(e) prohibits redisclosure of any information that has been obtained through discovery or shared with parties to an A/N/D proceeding if the redisclosure is prohibited by state or federal law. G.S. 108A-80(a) may be an example of such a state prohibition. If G.S. 108A-80(a) bars redisclosure or use of protected information by a criminal attorney because that redisclosure or use is not directly connected with the administration of social services, then that redisclosure is also barred by G.S. 7B-700(e).

Sharing information about others. The confidentiality protections afforded by G.S. 108A-80 apply not just to Franklin but to all recipients of social services. The privacy rights of everyone involved should be considered and may be one reason in camera reviews are required when DSS records are ordered to be shared in a criminal case. The in camera review does not occur if Franklin's criminal attorney simply receives the information from Franklin or his A/N/D attorney.

46. G.S. 7B-302, -2901.

47. G.S. 7B-601(c), -700(f), -3100(c).

48. See G.S. 7B-700(f).

49. 10A N.C.A.C. 69.0304(c).

Prohibition on redisclosure. It is not entirely clear whether Franklin's criminal attorney would be allowed to use or further disclose information received from Franklin or his A/N/D attorney. The expansive protections and prohibition on redisclosure in G.S. 108A-80 could be interpreted to prevent use of the otherwise-confidential social-services information in a criminal proceeding.

The Takeaway

Obtaining a court order granting Franklin's criminal attorney access to DSS child-welfare and juvenile A/N/D records is likely the best option. There are too many uncertainties surrounding Franklin and his A/N/D attorney's ability to disclose records and information to the criminal attorney without violating the rules of confidentiality.

Acting without a court order would also leave Franklin's A/N/D attorney in the very difficult position of needing to determine which records can be shared and which need to be withheld or redacted. Assuming for the moment that the statutes and regulations allow Franklin's A/N/D attorney to share confidential records about Franklin, Franklin is not the only recipient of social services whose information is protected under G.S. 108A-80. Mary's information is also protected, for example. Franklin's A/N/D attorney would need to parse the records closely and make difficult determinations, including what is relevant to the criminal matter, which may fall outside of the A/N/D attorney's expertise. Additional issues, such as attorney-client privilege and attorney work product, would also need to be considered by Franklin's A/N/D attorney.

The problem ultimately is that Franklin and his A/N/D attorney providing Franklin's criminal attorney with protected information involves a great deal of statutory interpretation and, truthfully, some amount of guesswork. The vast protections and regulations surrounding DSS child-welfare and A/N/D records are a challenge to navigate, even for experienced practitioners. Fortunately, attorneys do not need to take on that challenge, as the law provides for a clear path forward: obtain a court order giving the criminal attorney access to DSS records and juvenile A/N/D records. Those DSS and juvenile A/N/D records will provide the criminal attorney access to most, perhaps even all, of the same records that make up the A/N/D attorney's file.

To obtain an order, the criminal attorney may seek an order in the criminal case, requiring DSS to release its records for an in camera review.⁵⁰ If an A/N/D action is pending, the A/N/D attorney can also request a court order through the A/N/D proceeding, authorizing the release of records to the client's criminal attorney. Either way, the result should be the criminal attorney getting access to records that it would be appropriate for the attorney to have access to. Remove the risk and remove the burden from the attorney's shoulders by seeking the protection of a court order.

If an attorney files a motion requesting access to protected records, the judge may grant the request, possibly with limits placed on the attorney's access (including redaction of select information). If the judge places limits on the attorney's access or denies the request altogether, the criminal attorney should consider requesting that the undisclosed or redacted records be placed under seal for appellate review.

50. G.S. 7B-302(a1)(4), -2901(b)(3).

Practice Tips for Learning More About a Child-Welfare Case

Tip 1: Check for Defendants' Involvement with DSS Matters

Given that criminal attorneys may not necessarily be aware of A/N/D proceedings or a DSS investigation of a report of juvenile abuse, neglect, or dependency, they should make it a routine part of their intake to learn whether the DSS has been involved with their clients or their clients' families. Doing so early on allows a criminal attorney to take the necessary steps to acquire confidential records related to a child-welfare case with a DSS.

Tip 2: Attend Defendants' A/N/D Hearings

The A/N/D attorney and the client may want to keep the criminal attorney informed of important A/N/D court dates. The criminal attorney may attend and observe the hearings in an A/N/D proceeding. Hearings in an A/N/D matter are open to the public; however, the Juvenile Code gives the court discretion in determining whether any part of a hearing should be closed to the public. The court must consider several factors, including to what extent, if any, "the confidentiality afforded the juvenile's record pursuant to . . . G.S. 7B-2901 will be compromised by an open hearing."⁵¹ If the A/N/D court is asked to close the proceedings, the party who is represented by a criminal attorney in a criminal matter could ask that the criminal attorney (or staff) be allowed to attend. If a juvenile requests that a hearing remain open, it cannot be closed.⁵²

Conclusion

Navigating the many statutes and regulations surrounding the confidentiality of child-welfare and juvenile A/N/D records is difficult, even for people who are well versed in the laws. The clearest and least complicated option for a criminal attorney is obtaining a court order authorizing the attorney's access to DSS and A/N/D courthouse records.

51. G.S. 7B-801(a).

52. G.S. 7B-801(b).

Other Resources

There are resources available for navigating the issue of a criminal lawyer's access to child-welfare and juvenile A/N/D records and information.

The Social Services Confidentiality Research Tool, maintained by the School of Government, is a searchable database of legal resources and authorities relevant to the confidentiality of these records. *Social Services Confidentiality Research Tool*, UNC SCH. OF GOV'T. <https://www.sog.unc.edu/resources/tools/social-services-confidentiality-research-tool> (last visited Oct. 19, 2021).

The Office of Indigent Defense Services' Parent Defender website has sample motions and forms, including for discovery. *Parent Representation*. INDIGENT DEFENSE SERVICES. <https://www.ncids.org/parent-representation/> (last visited Oct. 18, 2021).

PRETRIAL, Volume 1 of the NORTH CAROLINA DEFENDER MANUAL, contains discussions on the right of a person charged with a crime to access a third party's confidential records, including those of a DSS, and the procedures for seeking and obtaining access. JOHN RUBIN, PHIL DIXON, & ALYSON A. GRINE, [\[1 PRETRIAL\] NORTH CAROLINA DEFENDER MANUAL § 4.6\(A\), 4.8\(F\)](#) (UNC School of Government, 2d ed. 2013).

Sara DePasquale and Jan Simmons address confidentiality and sharing of information from DSS and juvenile A/N/D records in Chapter 14 of [ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA](#) (UNC School of Government 2019) .

The NC CHILD WELFARE MANUAL is a collection of state policies for social workers on confidentiality in child welfare. N.C. DEP'T OF HEALTH AND HUM. SERVS., [NC CHILD WELFARE MANUAL](#) (July 2019).

Aimee N. Wall provides further analysis of state and federal confidentiality laws that pertain to the disclosure of protected information in [DISCLOSING PROTECTIVE SERVICES INFORMATION: A GUIDE FOR NORTH CAROLINA SOCIAL SERVICES AGENCIES](#) (UNC School of Government, 2015).

For a series of bulletins addressing different aspects of confidentiality and social services, see John L. Saxon, [Confidentiality and Social Services, \(Part I\): What Is Confidentiality?](#), SOC. SERVS. BULL. No. 30 (UNC Institute of Government, Feb. 2001); John L. Saxon, [Confidentiality and Social Services \(Part II\): Where Do Confidentiality Rules Come From?](#), SOC. SERVS. BULL. No. 31 (UNC Institute of Government, May 2001); and John L. Saxon, [Confidentiality and Social Services \(Part III\): A Process for Analyzing Issues Involving Confidentiality](#), SOC. SERVS. BULL. No. 35 (UNC Institute of Government, April 2002).