

SOCIAL SERVICES in North Carolina

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Chapter 9

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The legal services provided by attorneys are an integral part of the work of county social services departments. Attorneys represent county social services departments in juvenile court proceedings involving abused, neglected, and dependent children. Lawyers also provide legal advice or representation to social services departments in paternity and child support proceedings, in guardianship proceedings, and other legal matters involving social services programs, clients, or employees.

Under North Carolina's "state-supervised and county-administered" social services system, each county is responsible for providing the county social services department with the legal services that are necessary to enable the department to properly administer state-mandated social services programs. State law, however, does not mandate the means by which the county must provide legal services for the county social services department. And in the absence of a statute expressly authorizing the county social services director to employ or retain an attorney, it is clear that the board of county commissioners has the ultimate legal authority and responsibility for determining how the county will provide legal services to the county social services department.¹

1. In determining how to provide legal services for the county social services department, the board of county commissioners should consult with the county social services director regarding the department's legal needs. Similarly, a

Every county social services department, therefore, has some type of relationship with an attorney who represents the department in legal proceedings. But the nature and scope of that relationship varies from county to county.

Some counties use a "county attorney" model under which the social services department is represented by the attorney, firm, or office that has been designated by the board of county commissioners as the county attorney. Other counties use a "staff attorney" model under which the social services attorney is hired by the county social services director, is an employee of the social services department, and works under the director's supervision. And other counties use a "contract attorney" model under which an attorney is retained to represent the county social services department on a contractual or fee-for-service basis.

Each of these models has potential advantages and potential drawbacks. The "best" model of legal representation for the county social services department, therefore, must be determined on a county-by-county basis, based on the department's legal needs, available resources, and other relevant factors.

County Attorneys

State law requires each board of county commissioners to appoint, retain, or employ an attorney to serve as the county attorney.²

Some counties employ an attorney to serve as the county attorney. Most county attorneys, however, are self-employed lawyers or members of law firms who are retained by the county on a contractual basis and whose legal practice is not limited to providing legal services to the county. In either case, the county attorney's salary or compensation is determined by the board of county commissioners and the county attorney serves at the board's pleasure.³

county social services director who has concerns about the quality, cost, or adequacy of the legal services that are provided for the department should raise those concerns with the county manager, the county attorney, or the board of county commissioners.

2. Section 153A-114 of the North Carolina General Statutes [hereinafter G.S.].

3. G.S. 153A-114.

State law provides that the county attorney is the legal adviser to the board of county commissioners.⁴ The precise nature and scope of the county attorney's responsibilities and work, however, is determined by the board of county commissioners. In a few counties, the county attorney represents the county and all of its constituent departments, including the county social services department, in all or almost all of the legal proceedings and matters involving the county or county agencies.

State law, however, does not require that the county social services director or department be represented by the county attorney. And, in many counties, the county attorney does not advise or represent the county social services director and department.

Special County Attorneys for Social Services

State law allows the board of county commissioners, with the approval of the county social services board, to appoint an attorney to serve as the "special county attorney for social services" or to designate the county attorney as the special county attorney for social services.⁵

If an attorney is appointed as the special county attorney for social services pursuant to Section 108A-16 of the North Carolina General Statutes [hereinafter G.S.], the attorney's duties include providing legal advice to the county social services director, the county social services board, and the board of county commissioners with respect to social services matters and performing any other duties that may be assigned by the county social services director, the county social services board, the board of county commissioners, or state law.⁶

A special county attorney for social services may be retained by the county on a contractual or fee-for-service basis or hired as a full- or part-time county employee (though not as an employee of the county social services department). The salary or compensation of a special county for social services is determined by the board of county commissioners.⁷

4. *Id.*

5. G.S. 108A-16.

6. G.S. 108A-18.

7. G.S. 108A-17.

In practice, few, if any, attorneys who provide legal services for county social services departments do so as special county attorneys for social services.

Assistant County Attorneys

Some counties employ one or more assistant county attorneys to provide legal services to the county social services department. These attorneys generally are hired and supervised by the county attorney and are not employees of the county social services department.

Social Services Staff Attorneys

An increasing number of counties provide legal representation for the county social services department through staff attorneys who are employees of the county social services department.

Like other county social services employees, social services staff attorneys are appointed and supervised by the county social services director. Like other county social services employees, social services staff attorneys who are in "career" status may be fired by the director only for "just cause."⁸ And, as in the case of other county social services employees, the qualifications, classification, and compensation of social services staff attorneys are governed by the State Personnel Act, the rules adopted by the State Personnel Commission, and other state laws governing county social services employees.

Social services staff attorneys generally are employed on a full-time basis and work exclusively on social services matters. The precise nature and scope of their work is determined by the county social services director and is usually set forth in the written job descriptions for their positions.

Contract Attorneys

Some counties contract with an attorney or law firm to provide legal services for the county social services department. Attorneys who provide legal services to the county social services department under a

8. The discipline and discharge of county social services employees is discussed in detail in Chapter 8.

contract with the county are independent contractors, not employees of the county or the county social services department. The nature and scope of their work and the amount and manner of their compensation are determined by the terms of their contracts.

Legal services contracts involving the county social services department must be approved by the board of county commissioners unless the board has expressly or implicitly delegated that authority to the county manager, the county attorney, the county social services director, or another county official, board, or office.⁹

Legal services contracts involving the county social services department must be preaudited by the county finance officer in accordance with the Local Government Budget and Fiscal Control Act (LGBFCA).¹⁰ The state's competitive bidding requirements, however, do not apply to contracts between the county and an attorney to provide legal services to the county social services department.¹¹

The Attorney–Agency Relationship

Most attorneys who are employed or retained to provide legal services to the county social services department probably assume that the county social services department, rather than the county, the board of county commissioners, the county social services director, or the county social services board, is their client, and that their professional responsibilities as lawyers therefore are owed to the county social services department, acting through the social services director, rather than the county, the county commissioners, or the social services board. The North Carolina State Bar's Revised Rules of Professional Conduct, however, recognize that "defining precisely the identity of the client and prescribing the resulting obligations of . . . lawyers may be . . . difficult in the government context and is a matter [that cannot be determined

9. G.S. 153A-12. The fact that someone executes or signs a contract does not necessarily mean that he or she has the legal authority to approve or enter into the contract. See Frayda S. Bluestein, *A Legal Guide to Purchasing and Contracting for North Carolina Local Governments*, 2d ed. (Chapel Hill: School of Government, The University of North Carolina at Chapel Hill, 2004), 6–7, 15–16.

10. G.S. 159-28(d).

11. See G.S. 143-129. See also Bluestein, *A Legal Guide to Purchasing and Contracting for North Carolina Governments*, 23.

solely within] the scope of these Rules.”¹² So there may be instances in which the county, rather than the county social services department or director, is the client of the attorney who provides legal services to the social services department or director—especially when legal services are provided under the county attorney model, the assistant county attorney model, or special county attorney for social services model.

Unlike some states, North Carolina does not have a statute or rule that determines who is a social services attorney’s client. Therefore, regardless of which model a county uses to provide legal services to the county social services department, it is important that the social services attorney’s job description, contract, or agreement clearly identify whether the attorney’s client is the county social services department, the county social services director, the county social services board, the county, or some combination of these.

If an attorney is employed or retained to represent the county social services department, the department—as an organization, rather than the county social services director or individual employees of the department—is the attorney’s client.¹³ A government agency, corporation, or other organization, however, can act only through its officers, employees, and agents. And the county social services director and his or her designated representatives are the “duly authorized constituents” or agents of the social services department. So, a social services attorney must consult with the director and the director’s staff regarding the means by which the department’s objectives are pursued through legal representation, and generally must accept the director’s or staff’s decision regarding the objectives of the attorney’s legal representation

12. 27 N.C. ADMIN. CODE 02 Rule 1.13, Comment 6.

13. 27 N.C. ADMIN. CODE 02 Rule 1.13(a). A social services attorney must advise the county social services director or a social services employee that the attorney represents the department and does not represent the director or employee if the attorney knows or reasonably should know that the department’s interests are adverse to those of the director or employee. 27 N.C. ADMIN. CODE 02 Rule 1.13(d). The social services attorney may represent the county social services director or a social services employee if the department’s written consent is given by an appropriate departmental official other than the individual who will be represented, the attorney reasonably believes that he or she will be able to provide competent and diligent legal representation to the department and to the director or employee, and the dual representation will not involve the assertion of a legal claim between the department and the director or employee. 27 N.C. ADMIN. CODE 02 Rule 1.13(e); 27 N.C. ADMIN. CODE 02 Rule 1.7.

of the department, the settlement of legal proceedings involving the department, and decisions regarding departmental policy and operations, even if the social services attorney doubts the prudence or utility of those decisions.¹⁴

The Role and Responsibilities of Social Services Attorneys

The precise nature and scope of the work and responsibilities of social services attorneys varies from county to county and among social services attorneys within particular counties.

In some counties, a social services attorney is responsible for representing the county social services department in juvenile court proceedings and does not advise or represent the social services board, director, department, or staff in other legal matters. In other counties, a social services attorney may represent the agency in child support or guardianship proceedings but not in juvenile proceedings. And in some counties, a social services attorney may advise or represent the department in all, or almost all, legal matters involving the department.

In every instance, though, it is important for the agency and the attorney to have a clear understanding of the social services attorney's role and responsibilities. And to ensure that this is the case, the social services attorney's job description or contract should clearly specify the precise nature and scope of the attorney's relationship with the agency and the nature and scope of the attorney's work and responsibilities.

The professional responsibilities of social services attorneys, like those of other attorneys, are governed by the North Carolina State Bar's Revised Rules of Professional Conduct.¹⁵ Among other things, these

14. 27 N.C. ADMIN. CODE 02 Rule 1.13, Comment 3; 27 N.C. ADMIN. CODE 02 Rule 1.2. A social services attorney, however, must proceed as is reasonably necessary in the department's best interest if he or she knows that the social services director or an employee of the social services department is acting, intends to act, or is refusing to act in violation of his or her legal obligation to the department or in violation of law which reasonably might be imputed to the department and that the director's or employee's action is likely to result in substantial injury to the department. 27 N.C. ADMIN. CODE 02 Rule 1.13(b).

15. The rules of professional responsibility and legal ethics that apply to attorneys in child welfare cases are discussed in detail in Jennifer L. Renne, *Legal Ethics in Child Welfare Cases* (Washington, DC: American Bar Association Center on Children and the Law, 2004). See also Mimi Laver, *Foundations for Success:*

rules require lawyers to provide competent representation of clients;¹⁶ to act with reasonable diligence and promptness in representing clients;¹⁷ to consult with clients about the means by which their legal objectives are to be accomplished;¹⁸ to keep their clients reasonably informed about the status of legal matters;¹⁹ to protect the confidentiality of information obtained in connection with legal representation of their clients;²⁰ to avoid conflicts of interest in representing clients;²¹ to exercise independent, professional judgment and render candid advice to clients;²² to refrain from asserting frivolous legal claims;²³ to refrain from making false statements to the court or offering evidence that they know to be false;²⁴ to refrain from engaging in unauthorized *ex parte* communications with judges;²⁵ to refrain from making false statements of law or fact to others when representing a client,²⁶ and to comply with other rules of legal ethics and professional responsibility.

The North Carolina Department of Justice

The North Carolina Department of Justice is a state agency headed by the attorney general.²⁷ The attorney general and the deputy and assistant attorneys general employed by the Department of Justice provide

Strengthening Your Agency Attorney Office (Washington, DC: American Bar Association Center on Children and the Law, 1999).

16. 27 N.C. ADMIN. CODE 02 Rule 1.1.

17. 27 N.C. ADMIN. CODE 02 Rule 1.3.

18. 27 N.C. ADMIN. CODE 02 Rule 1.4(a)(2).

19. 27 N.C. ADMIN. CODE 02 Rule 1.4(a)(3).

20. 27 N.C. ADMIN. CODE 02 Rule 1.6. Although the social services attorney generally does not represent the county social services director or employees of the social services department, communications between the county social services director or employees and the social services attorney are protected by the attorney-client privilege and generally may not be disclosed unless the department consents, the disclosure is authorized by the Rules of Professional Conduct, or the disclosure is necessary in order to carry out the attorney's representation of the department.

21. 27 N.C. ADMIN. CODE 02 Rules 1.7 through 1.11.

22. 27 N.C. ADMIN. CODE 02 Rule 2.1.

23. 27 N.C. ADMIN. CODE 02 Rule 3.1.

24. 27 N.C. ADMIN. CODE 02 Rule 3.3.

25. 27 N.C. ADMIN. CODE 02 Rule 3.5(a)(3).

26. 27 N.C. ADMIN. CODE 02 Rule 4.1.

27. G.S. 114-1.

legal representation and advice to all state government departments, agencies and commissions.²⁸

Attorneys who work in the Health and Public Assistance Section and other sections of the department's Administrative Division provide legal assistance for state social services agencies, including the Division of Social Services, the Division of Medical Assistance, and the Division of Aging and Adult Services in the North Carolina Department of Health and Human Services. The attorney general's staff also includes four regionally based child welfare attorneys.

The North Carolina Association of Social Services Attorneys

The North Carolina Association of Social Services Attorneys is a voluntary, nongovernmental association of attorneys who represent state and county social services agencies.

In cooperation with the School of Government and the North Carolina Association of County Attorneys, the association sponsors two training conferences each year. Many of the association's members also participate on an e-mail listserv that provides a forum for asking questions and sharing knowledge regarding legal practice in the social services context.

28. G.S. 114-2(2).