UNC SCHOOL OF GOVERNMENT

2017 Civil Commitment

January 20, 2017 / Chapel Hill, NC

ELECTRONIC PROGRAM MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.

UNC SCHOOL OF GOVERNMENT

2017 Civil Commitment Conference

January 20, 2017/ Chapel Hill, NC

Co-sponsored by the UNC School of Government
& the NC Office of Indigent Defense Services

AGENDA

8:00 to 8:45 am	Check-in
8:45 to 9:00	Welcome *Austine Long, Program Attorney* *UNC School of Government, Chapel Hill, NC*
9:00 to 10:00	**Civil Commitment Nuts and Bolts [60 min.]** *Kristen Todd, Special Counsel* *Office of Special Counsel, Raleigh, NC*
10:00 to 11:00	**Making Sense of Addiction and Its Treatment [60 min]** *James W. Finch, MD, Co-director* *Changes By Choice, Durham, NC*
11:00 to 11:15	*Break*
11:15 to 12:15	**Effective Communication Strategies [60 min.]** *Peggy Best, LCSW, Associate Director, Alzheimer's Association Eastern North Carolina Chapter, Raleigh, NC*
12:15 to 1:00	Lunch *(provided in building)* *
1:00 to 2:00	**Working with Clients in IVC Cases (Ethics) [60 min.]** *Kristine Sullivan, Senior Attorney* *Disability Rights North Carolina, Raleigh, NC*
2:00 to 3:00	**Mental Health Disorders [60 min.]** *Edward Poa, M.D., Associate Professor, Baylor College of Medicine* *Chief, Inpatient Services, The Menninger Clinic, Houston, TX*
3:00 to 3:15	*Break* (light snacks provided)
3:15 to 4:15	**Appeals and Case Law Update [60 min.]** *David Andrews, Assistant Appellate Defender,* *Office of the Appellate Defender, Durham, NC*

CLE HOURS: 6.00 (Includes 1 hour of ethics/professional responsibility)

* IDS employees may not claim reimbursement for lunch.

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INDIGENT DEFENSE EDUCATION INFORMATION & UPDATES

If your e-mail address is *not* included on an IDS listserv and you would like to receive information and updates about Indigent Defense Education trainings, manuals, and other resources, please visit the School of Government's Indigent Defense Education site at:

www.sog.unc.edu/programs/indigentdefense

(Click *Sign Up for Program Information and Updates*)

Your e-mail address will not be provided to entities outside of the School of Government.

Find us on Facebook

(NC Indigent Defense Education)

&

follow us on twitter

(twitter.com/NCIDE)

UNC SCHOOL OF GOVERNMENT

ONLINE RESOURCES FOR INDIGENT DEFENDERS

ORGANIZATIONS

NC Office of Indigent Defense Services
http://www.ncids.org/

UNC School of Government
http://www.sog.unc.edu/

Indigent Defense Education at the UNC School of Government
https://www.sog.unc.edu/resources/microsites/indigent-defense-education

TRAINING

Calendar of Live Training Events
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/calendar-live-events

Online Training
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/online-training-cles

MANUALS

Orientation Manual for Assistant Public Defenders
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/orientation-manual-assistant-public-defenders-introduction

Indigent Defense Manual Series (collection of reference manuals addressing law and practice in areas in which indigent defendants and respondents are entitled to representation of counsel at state expense)
http://defendermanuals.sog.unc.edu/

UPDATES

On the Civil Side Blog
http://civil.sog.unc.edu/

NC Criminal Law Blog
https://www.sog.unc.edu/resources/microsites/criminal-law-north-carolina/criminal-law-blog

Criminal Law in North Carolina Listserv (to receive summaries of criminal cases as well as alerts regarding new NC criminal legislation)
http://www.sog.unc.edu/crimlawlistserv

TOOLS and RESOURCES

Collateral Consequences Assessment Tool (centralizes collateral consequences imposed under NC law and helps defenders advise clients about the impact of a criminal conviction)
http://ccat.sog.unc.edu/

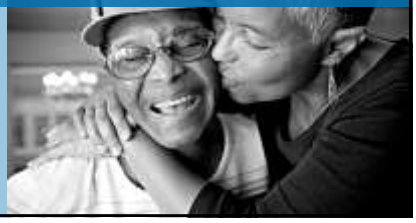
Motions, Forms, and Briefs Bank
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/motions-forms-and-briefs

Training and Reference Materials Index (includes manuscripts and materials from past trainings co-sponsored by IDS and SOG)
http://www.ncids.org/Defender%20Training/Training%20Index.htm

EFFECTIVE COMMUNICATION STRATEGIES

alzheimer's association

effective communication strategies



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Program goals

communication effective strategies

By the end of today's program, you will be able to:

- Explain the communication changes that take place throughout the course of the disease.
- Decode the verbal and behavioral messages delivered by someone with dementia and respond in ways that are helpful to the person.
- Identify strategies to connect and communicate at each stage of the disease.

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What is communication?

communication effective strategies

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Communication changes throughout the disease

Early stage (Mild)

- Convey thoughts and feelings through language.
- Able to make decisions about future care.
- May misinterpret what others say.

Middle stage (Moderate)

- Use basic words and sentences.
- Rely more on tone of voice, facial expression and body language.
- Continue to need emotional connection and meaningful activity

Late stage (Severe)

- May still respond to familiar words, phrases or songs.
- Use body language and the five senses to connect.

Communication in the early stage

Changes you may notice include:

- Difficulty finding the right words.
- Taking longer to speak or respond.
- Withdrawing from conversations.
- Struggling with decision-making or problem-solving.

Martha Tierney, LCSW, is Associate Director of Research Volunteer Programs for the National Office of the Alzheimer's Association.

Communication in the early stage

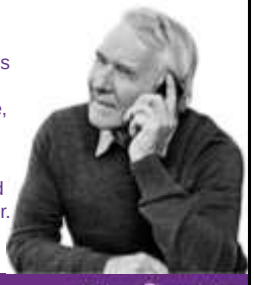
To connect:

- Ask directly how to help with communication.
- Keep sentences clear and straightforward.
- Leave plenty of time for conversations.
- Include the person in conversations that affect him or her, including planning for the future.

Communication in the early stage

Keep in mind:

- Avoid making assumptions.
- Speak directly to the person.
- Communicate in the way that is most comfortable for the person. Options include phone, email, and in person.
- Laugh together.
- Be honest, laugh together, and stay connected with each other.



Communication in the middle stage

Changes you may notice include:

- Increased difficulty finding the right words.
- Using familiar words repeatedly.
- Inventing new words to describe familiar things.
- Easily losing train of thought.
- Speaking less frequently.
- Communicating through behavior rather than words more often.

Consult a doctor when you notice major or sudden changes.

Beverly is a caregiver support group facilitator whose husband has Alzheimer's disease.

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Communication in the middle stage

communication effective strategies

To connect, approach the person gently

- Approach from the front, say who you are and call the person by name.
- Maintain eye contact and get at eye level if seated or reclining.
- Avoid criticizing, correcting and arguing.
- Pay attention to your tone.
- Take your time.

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Rebecca's mother had Alzheimer's disease.

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Communication in the middle stage

To connect, join the person's reality

Keep respect and empathy in your mind, then:

- Assess the person's needs.
- Let the person know you hear his or her concerns, whether they are expressed through words, behavior or both.
- Provide a brief answer.
- Respond to the emotions behind the statement.

Communication in the middle stage

To connect, keep it slow and basic

- Use short sentences and basic words.
- Speak slowly and clearly, one person and one question at a time.
- Limit distractions.
- Be patient.
- Offer a guess or fill in words if acceptable.

Communication in the middle stage

To connect, give multiple cues

- Provide visual cues and gestures.
- Avoid sudden movement.
- Write things down for the person.
- Put answers into your questions.
- Repeat as needed.
- Turn negatives into positives.
- Avoid quizzing.

Communication in the middle stage

To connect, respond empathically and reassure

- Join the person's reality.
- Provide reassurance that you hear and understand.
- Focus on the feelings, not the facts.
- Validate and redirect the person if necessary.

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Communication in the late stage

Changes you may notice include:

- Communication is reduced to a few words or sounds.
- Possible responses to familiar words or phrases.

To connect:

- Listen for expressions of pain and respond promptly.
- Help the person feel safe and happy.
- Continue to bring respect to each conversation.
- Keep talking.
- Use all five senses to communicate.

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Sandra's mother is in the late stage of Alzheimer's disease.

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Communication in the late stage

Connect through touch

- Feel different fabrics.
- Identify shapes by touch.
- Give lotion hand massages.
- Identify everyday items in a bag by touch.
- Visit with animals.
- Sculpt using non-toxic materials.
- Hold the person's hand or stroke his or her arm or back.

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Communication in the late stage

Connect through sight

- Laminate brightly colored pictures to look at together.
- Watch videos of animals, nature or travel.
- Look at photo albums together.
- View photos of famous paintings, favorite settings or prominent people from the past.
- Go bird-watching or visit an aquarium.
- Paint with watercolors.
- Go outdoors or sit by an open window together.

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Communication in the late stage

Connect through sound

- Listen to familiar music.
- Listen to recordings of the sounds of nature, farms, cities or animals.
- Identify musical instruments by sound.
- Listen to songs or speech in the person's native language.
- Read books, poetry, scripture, or newspaper articles to the person.
- Let the person hear the gentle tone of your voice.

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Communication in the late stage

Connect through smell

- Make small plastic bags containing items for the person to smell, such as:
  - Herbs or spices.
  - Cotton balls dipped in essential oils.
  - Grass clippings or fragrant flowers.
  - Teas or coffee beans.
- Use fragrant lotions for hand massages
- Cook or feed the person foods that smell good, such as apple pie or chicken soup.

Communication in the late stage

Connect through taste

- Favorite foods.
- Home-baked goodies.
- Popsicles.
- Flavored drinks.
- Ice creams and puddings.

Communication in all stages of the disease

- Join the person's reality to connect.
- Understand and accept what you can and cannot change.
- Remember that the person retains a sense of self despite the losses of the disease.
- Demonstrate respect and connect through feelings.
- Always treat the person as the adult he or she is.
- Try to decode the person's communications.
- Recognize the effects of your mood and actions.
- Try to understand the source of reactions.
- Help meet the needs while soothing and calming the person.

Sam Fazio, Ph.D., is the Director of Special Projects for the National Office of the Alzheimer's Association.

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Contact us – we can help

alz.org

- Alzheimer's Navigator
- Community Resource Finder
- ALZConnected
- Alzheimer's and Dementia Caregiver Center
- Safety Center

800.272.3900

- 24/7 Helpline – Available all day every day

alz.org/findus

- Support groups, education programs and more available in communities nationwide

training.alz.org

- Free online education programs available at training.alz.org

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Get involved

WALK TO END ALZHEIMER'S

THE LONGEST DAY

alzheimer's association trialmatch

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communication effective strategies

Questions?

Alzheimer's Association

We're here. All day, every day.

24/7 Helpline: 800.272.3900

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effective communication strategies

tips for program participants

introduction

Thank you for participating in the Alzheimer's Association's *Effective Communication Strategies* program. This brochure is designed to accompany the program and to provide you with a reference to take with you and use in the future.

The program and this Tips brochure are organized by stage. In each section, you will find a list of changes you may notice, followed by ideas for how to connect with the person in that stage. There is also space for notes.

We hope that you find this brochure helpful as you accompany the person with dementia through the stages, allowing you communicate and connect with each other more effectively and meaningfully.

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Early Stage

Changes you may notice include:

- Difficulty finding the right words.
- Taking longer to speak or respond.
- Withdrawing from conversations.
- Struggling with decision-making or problem-solving.

To connect:

- Ask directly how to help with communication.

  Instead of thinking:
  "He really struggles with words now. I'll keep guessing what he means — that should help."
  You could say:
  "If you're having trouble coming up with a word, would you like me to suggest a word or would you rather have more time to come up with it on your own?"
- Keep sentences clear and straightforward.
- Leave plenty of time for conversations.
- Include the person in conversations that affect him or her, including planning for the future.
- Don't make assumptions about the person's ability to communicate.

  Instead of thinking:
  "There's no way she can understand this, so why bring it up?"
  Try thinking:
  "I really want her to understand why I want to do this. I'll explain it a couple of different ways and if it doesn't work, I'll write it down for her and see if that helps."
- Speak directly to the person.
- Remember to laugh together.
- Be honest and frank about your feelings, and don't pull away.

  Instead of thinking:
  "I'm sure he knows I still care, no matter what."
  You could say:
  "This is a change for me, too, but I love you and I'm not going anywhere. We'll deal with it together."

Middle Stage

Changes you may notice include:

- Increased difficulty finding the right words.
- Using familiar words repeatedly.
- Inventing new words to describe familiar things.
- Easily losing train of thought.
- Speaking less frequently.

Note: Be sure to consult a doctor when you notice major or sudden changes.

To connect, approach the person gently.

- Approach from the front, say who you are and call the person by name.
  Instead of:
  "Hi, Dad! I'm here!"
  You could say:
  "Hi, Dad, it's your son, Sam!"
- Maintain eye contact and get at eye level if seated or reclining.
- Avoid criticizing, correcting and arguing.
  Instead of:
  "No, Grandma, it's not Tuesday, it's Friday. What makes you think it's Tuesday? I always come over on Fridays."
  You could say:
  "Here's the calendar. I'll mark which day it is when I come over."
- Pay attention to your tone.
- Take your time.

To connect, join the person's reality.

Keep respect and empathy in your mind, then:

- Assess the person's needs.
- Let the person know you hear him or her.
- Provide a brief answer.

- Respond to the emotions behind the statement.

  Instead of:

  "Calm down, Aunt Mary. I'm sure your keys are not really lost."

  You could say:

  "I can hear how upset you are about the keys not being where they usually are. It's so frustrating when that happens! Can I take a look around?"

To connect, keep it slow and basic.

- Use short sentences and uncomplicated words.
- Speak slowly and clearly, one person and one question at a time.
- Limit distractions.
- Be patient.
- Offer a guess or fill in words if acceptable.
- Sometimes, it's helpful to offer the choice you think best at the end of the sentence.

  Instead of:

  "What would you like for breakfast?"

  You could say:

  "It's time for breakfast. Would you like eggs or oatmeal?"

To connect, give multiple cues.

- Provide visual cues and gestures.
- Avoid sudden movement.
- Write things down for the person.
- Put answers into your questions.

  Instead of:

  "Mom, I'm going to the drug store. What do you need?"

  You could say:

  "Mom, I'm going to the drug store now. Can I pick up more toothpaste and shampoo for you?"
- Repeat as needed.

- Turn negatives into positives.
  Instead of:
  "We go to that same park every day. Can't we do something else?"
  You could say:
  "Let's try something new today. Let's go watch the kids play in that new playground for a little while."
- Avoid quizzing.

To connect, respond empathically and reassure.

- Join the person's reality.
- Provide reassurance that you hear and understand.
- Focus on the feelings, not the facts.
  Instead of:
  "You're not alone at all — we come to visit you every day!"
  You could say:
  "I'm so sorry you feel alone — that's really hard. We visit as much as we can, but maybe you'd like more company. Let's see if there are some groups at the day center that you might be interested in joining."
- Validate and redirect the person if necessary.

Late Stage

Changes you may notice include:

- Communication is reduced to a few basic words or sounds.
- Possible responses to familiar words or phrases.

To connect:

- Listen for expressions of pain and respond promptly.
- Help the person feel safe and happy.

  Instead of thinking:

  "She hasn't had a bath yet today, and I have to leave soon. She hates the bath and she's so crabby today that I really dread this. But she needs to get into that tub now!"

  Try thinking:

  "She's not in a good mood today and she hates the bath. She just bathed yesterday and she's still pretty clean, so I think it will be ok and may actually go better if we wait until tomorrow."
- Continue to bring respect to each conversation.
- Keep talking.
- Use all five senses to communicate.

Connect through touch.

- Feel different fabrics.

  Try:
  - Burlap
  - Fake fur
  - Suede
  - Felt or polar fleece
  - Cotton
  - Wool knit
- Identify shapes by touch.
- Give lotion hand massages.

- Identify everyday items in a bag by touch.
  Try:
  - *Spoon*
  - *Spool of thread*
  - *Pencil*
  - *Comb*
  - *Child's blunt-tip scissors*
- Visit with animals.
- Sculpt using non-toxic materials.
  Note:
  There are commercial non-toxic sculpting products on the market, or you can make one at home. Recipes can be found online or through your local library.
- Hold the person's hand or stroke his or her arm or back.

Connect through sight.

- Laminate brightly colored pictures to look at together.
- Watch videos of baby animals, nature or travel.
- Look at photo albums together.
- View photos of famous paintings, favorite settings or prominent people from the past.
- Go bird-watching or visit an aquarium.
- Paint with watercolors.
- Go outdoors or sit by an open window together.

Connect through sound.

- Listen to familiar music.
- Listen to recordings of the sounds of nature, farms, cities, animals or babies.
- Identify musical instruments by sound.
  Note:
  Again, there are great free resources available online or through the local library.
- Listen to songs or speech in the person's native language.
- Let the person hear the gentle tone of your voice.

Connect through smell.

- Make small plastic bags containing items for the person to smell, such as:
  - Herbs, spices, teas or coffee beans.
  - Cotton balls dipped in essential oils.
  - Grass clippings, fragrant flowers.
- Use fragrant lotions for hand massages.

Note:
Be sure to only offer these under supervision, as any of these may be dangerous of swallowed.

Connect through taste.

- Favorite foods.
- Home-baked goodies.
- Popsicles.
- Flavored drinks.
- Ice creams and puddings.

Communication in all stages of the disease

In every stage, keep the following communication tips in mind.

- **Respect and empathy are key.**
  Remember that the essence of the person continues. Respect the person as the adult he or she is, and adjust your communication based on what is meaningful to the person today, no matter what the stage.
- **Join the person's reality to uncover the source of reactions and to connect.**
  Keep in mind that behavior is a form of communication, and by seeing the world through his or her eyes, you can get clues about what the person is responding to. This connection also provides soothing and reassurance for the person with dementia.
- **Understand and accept what you can and cannot change.**
  You cannot expect the person with the disease to behave as he or she might have in the past, with a reasonable response. If a communication of yours isn't getting the desired response, focus on what you can change in what you are doing to alter the situation.
- **Focus on feelings, not facts.**
  Responding to those feelings first can help avoid resistance.
- **Try to decode the person's communications.**

  The emotion behind the words or behavior being expressed are your most powerful tools when attempting to decode communication and connect with the person with dementia.
- **Recognize the effects of your mood and actions.**
  We all convey our moods through our actions and tone of voice. People with dementia are sensitive to these feelings and will often pick up and react to those feelings, sometimes causing feelings to escalate.
- **Help meet the needs while soothing and calming the person.**
  Provide what you can to meet the person's needs, remembering to help the person feel safe and content .

Resources can help

Throughout all the stages of the disease, the Alzheimer's Association has services and resources to help you and your family.

Get reliable information and resources at alz.org/care

- **Caregiver Center**

  Visit and get information, links and resources.

- **Alzheimer's Navigator**

  Create customized portfolio of resources.

- **ALZConnected**

  Connect with others via online message boards.

- **Community Resource Finder**

  Find local dementia-related resources.

- **E-learning courses**

  Learn any time with online education programs.

You can also call our 24/7 Helpline at 800.272.3900

Every day of the year, day or night, a call to the Helpline puts you in touch with dementia-trained professionals ready to provide information, resources and support.

The Alzheimer's Association is the world's leading voluntary health organization in Alzheimer's care, support and research. Our mission is to eliminate Alzheimer's disease through the advancement of research; to provide and enhance care and support for all affected; and to reduce the risk of dementia through the promotion of brain health.

Our vision is a world without Alzheimer's disease. ®

Alzheimer's Association

National Office

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Chicago, IL 60601-7633

800.272.3900

alz.org®

WORKING WITH CLIENTS IN IVC CASES

Client-Lawyer Relationship

Rule 1.2 Scope Of Representation and Allocation of Authority between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

> (1) A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> (2) A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of a client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
>
> (3) In the representation of a client, a lawyer may exercise his or her professional judgment to waive or fail to assert a right or position of the client.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation. Lawyers are encouraged to treat opposing counsel with courtesy and to cooperate with opposing counsel when it will not prevent or unduly hinder the pursuit of the objective of the representation. To this end, a lawyer may waive a right or fail to assert a position of a client without first obtaining the client's consent. For example, a lawyer may consent to an extension of time for the opposing party to file pleadings or discovery without obtaining the client's consent.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. *See* Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. *See* Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] Although paragraph (c) does not require that the client's informed consent to a limited representation be in writing, a specification of the scope of representation will normally be a necessary part of any written communication of the rate or basis of the lawyer's fee. See Rule 1.0(f) for the definition of "informed consent."

[9] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. *See, e.g.* , Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[10] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. There is also a distinction between giving a client legitimate advice about asset protection and assisting in the illegal or fraudulent conveyance of assets.

[11] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. *See* Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. *See* Rule 4.1.

[12] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[13] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[14] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. *See* Rule 1.4(a)(5).

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997

Amended March 1, 2003

ETHICS OPINION NOTES

CPR 110. An attorney may not advise client to seek a Dominican divorce knowing that the client will return immediately to North Carolina and continue residence.

RPC 44. A closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

RPC 103. A lawyer for the insured and the insurer may not enter voluntary dismissal of the insured's counterclaim without the insured's consent.

RPC 118. An attorney should not waive the statute of limitations without the client's consent.

RPC 114. Attorneys may give legal advice and drafting assistance to persons wishing to proceed pro se without appearing as counsel of record.

RPC 129. Prosecutors and defense attorneys may negotiate plea agreements in which appellate and post-conviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct.

RPC 145. A lawyer may not include language in an employment agreement that divests the client of her exclusive authority to settle a civil case.

RPC 172. A lawyer retained by an insurer to defend its insured is not required to represent the insured on a compulsory counterclaim provided the lawyer apprises the insured of the counterclaim in sufficient time to retain separate counsel.

RPC 208. A lawyer should avoid offensive trial tactics and treat others with courtesy by attempting to ascertain the reason for the opposing party's failure to respond to a notice of hearing where there has been no prior lack of diligence or responsiveness on the part of opposing counsel.

RPC 212. A lawyer may contact an opposing lawyer who failed to file an answer on time to remind the other lawyer of the error and to give the other lawyer a last opportunity to file the pleading.

RPC 220. A lawyer should seek the court's permission to listen to a tape recording of a telephone conversation of his or her client made by a third party if listening to the tape recording would otherwise be a violation of the law.

RPC 223. When a lawyer's reasonable attempts to locate a client are unsuccessful, the client's disappearance constitutes a constructive discharge of the lawyer requiring the lawyer's withdrawal from the representation.

RPC 240. A lawyer may decline to represent a client on a property damage claim while agreeing to represent the client on a personal injury claim arising out of a motor vehicle accident provided the limited representation will not adversely affect the client's representation on the personal injury claim and the client consents after full disclosure.

RPC 252. A lawyer in receipt of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain from examining the materials and return them to the sender.

98 FEO 2. Opinion rules that a lawyer may explain the effect of service of process to a client but may not advise a client to evade service of process.

99 FEO 12. Opinion rules that when a lawyer appears with a debtor at a meeting of creditors in a bankruptcy proceeding as a favor to the debtor's lawyer, the lawyer is representing the debtor and all of the ethical obligations attendant to legal representation apply.

2002 FEO 1. Opinion rules that, in a petition to a court for an award of an attorney's fee, a lawyer must disclose that the client paid a discounted hourly rate for legal services as a result of the client's membership in a prepaid or group legal services plan.

2003 FEO 16. Opinion rules that a lawyer who is appointed to represent a parent in a proceeding to determine whether the parent’s child is abused, neglected or dependent, must seek to withdraw if the client disappears without communicating her objectives for the representation, and, if the motion is denied, must refrain from advocating for a particular outcome.

2005 FEO 10. Opinion addresses ethical concerns raised by an internet-based or virtual law practice and the provision of unbundled legal services.

2008 FEO 3. A lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.
2008 FEO 7. A closing lawyer shall not record and disburse when a seller has delivered the deed to the lawyer but the buyer instructs the lawyer to take no further action to close the transaction.

2010 FEO 1. A lawyer may not appear in court for a party who has not authorized the representation and with whom the lawyer has not established a client-lawyer relationship unless allowed by statute, court order, or subsequent case law.

2011 FEO 3. A criminal defense lawyer may advise an undocumented alien that deportation may result in avoidance of a criminal conviction and may file a notice of appeal to superior court although there is a possibility that client will be deported
1.5
2011 FEO 10. A lawyer may advertise on a website that offers daily discounts to consumers where the website company's compensation is a percentage of the amount paid to the lawyer if certain disclosures are made and certain conditions are satisfied.

CASE NOTES

Law Firm as Interested Party. - Law firm which had no contact with defendant/phony psychiatric resident accused of sexual misconduct with client and which had not been authorized by him to undertake his representation lacked the authority under subsection (a) of this rule to represent him on a limited basis, but could intervene under § 1A-1, Rule 24 (a)(2) as an interested party to protect its interests. *Dunkley v. Shoemate* , 350 N.C. 573, 515 S.E.2d 442 (1999).

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Client-Lawyer Relationship

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. *See* Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should address with the client how the lawyer and the client will communicate, and should respond to or acknowledge client communications in a reasonable and timely manner.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(f).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client

is a child or suffers from diminished capacity. *See* Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. *See* Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

History Note: Statutory Authority G. 84-23

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ETHICS OPINION NOTES

RPC 48. Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

RPC 91. An attorney employed by the insurer to represent the insured and its own interests may not send the insurer a letter on behalf of the insured demanding settlement within the policy limits but must inform insurer of insured's wishes.

RPC 92. An attorney representing both the insurer and the insured need not surrender to the insured copies of all correspondence concerning the case between herself and the insurer.

RPC 99. A lawyer may tack onto an existing title insurance policy if such is disclosed to the client prior to undertaking the representation.

RPC 111. An attorney retained by a liability insurer to defend its insured may not advise insured or insurer regarding the plaintiff's offer to limit the insured's liability in exchange for consent to an amendment of the complaint to add a punitive damages claim but must communicate the proposal to both clients.

RPC 112. An attorney retained by an insurer to defend its insured may not advise insurer or insured regarding the plaintiff's offer to limit the insured's liability in exchange for an admission of liability but must communicate the proposal to both clients.

RPC 129. Prosecution and defense attorneys may negotiate plea agreements in which appellate and post-conviction rights are waived, except in regard to allegations of ineffective assistance of counsel or prosecutorial misconduct. Defense attorney must explain the consequences to the client.

RPC 156. An attorney who has been retained by an insurance company to represent an insured must inform and advise the insured to the degree necessary for the insured to make informed decisions about future representation when the insurance company pays its entire coverage and is released from further liability or obligation to participate in the defense under the provisions of N.C.G.S. 20-279.21(b)(4).

RPC 172. A lawyer retained by an insurer to defend its insured is not required to represent the insured on a compulsory counterclaim provided the lawyer apprises the insured of the counterclaim in sufficient time to retain separate counsel.

99 FEO 12. Opinion rules that when a lawyer appears with a debtor at a meeting of creditors in a bankruptcy proceeding as a favor to the debtor's lawyer, the lawyer is representing the debtor and all of the ethical obligations attendant to legal representation apply.

2006 FEO 1. A lawyer who represents the employer and its workers' compensation carrier must share the case evaluation, litigation plan, and other information with both clients unless the clients give informed consent to withhold such information.

2007 FEO 12. A lawyer may outsource limited legal support services to a foreign lawyer or a nonlawyer (collectively "foreign assistants") provided the lawyer properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client's advanced informed consent.

CASE NOTES

Failure to Notify Client of Dates. - The attorney violated the Code of Professional Responsibility by failing to notify the client of court dates. *North Carolina State Bar v. Frazier* , 62 N.C. App. 172, 302 S.E.2d 648, *appeal dismissed* , 308 N.C.

677, 303 S.E.2d 546 (1983).

A lawyer is ethically bound to advise his client of a plea bargain offer. *State v. Simmons* , 65 N.C. App. 294, 309 S.E.2d 493 (1983).

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Client-Lawyer Relationship

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

(1) to comply with the Rules of Professional Conduct, the law or court order;

(2) to prevent the commission of a crime by the client;

(3) to prevent reasonably certain death or bodily harm;

(4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;

(5) to secure legal advice about the lawyer's compliance with these Rules;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(7) to comply with the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court; or

(8) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(d) The duty of confidentiality described in this Rule encompasses information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered. For the purposes of this Rule, "client" refers to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client acquired during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information acquired during a lawyer's prior representation of a former client, and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information acquired during the representation. See Rule 1.0(f) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information acquired during the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the

Rules of Professional Conduct or other law. *See also* Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information acquired during the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information acquired during the representation of their clients, the confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime. Paragraph (b)(2) recognizes that a lawyer should be allowed to make a disclosure to avoid sacrificing the interests of the potential victim in favor of preserving the client's confidences when the client's purpose is wrongful. Similarly, paragraph (b)(3) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] A lawyer may have been innocently involved in past conduct by a client that was criminal or fraudulent. Even if the involvement was innocent, however, the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right, although not a professional duty, to rectify the situation. Exercising that right may require revealing information acquired during the representation. Paragraph (b)(4) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification.

[8] Although paragraph (b)(2) does not require the lawyer to reveal the client's anticipated misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. *See* Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[9] Paragraph (b)(4) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information acquired during the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(4) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[10] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[11] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(6) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[12] A lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[13] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information acquired during the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(1) permits the lawyer to make such disclosures as are necessary to comply with the law.

[14] Paragraph (b)(1) also permits compliance with a court order requiring a lawyer to disclose information relating to a client's representation. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client's representation, however, the lawyer must, absent informed consent of the client to do otherwise, assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal. *See* Rule 1.4. Unless review is sought, however, paragraph (b)(1) permits the lawyer to comply with the court's order.

[15] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[16] Paragraph (b) permits but does not require the disclosure of information acquired during a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. When practical, the lawyer should first seek to persuade the client to take suitable action, making it unnecessary for the lawyer to make any disclosure. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). *See* Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. *See* Rule 3.3 (c).

Detection of Conflicts of Interest

[17] Paragraph (b)(8) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [8]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[18] Any information disclosed pursuant to paragraph (b)(8) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(8) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(8). Paragraph (b)(8) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation. See Comment [5].

Acting Competently to Preserve Confidentiality

[19] Paragraph (c) requires a lawyer to act competently to safeguard information acquired during the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *See* Rules 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information acquired during the professional relationship with a client does not constitute a violation of paragraph (c) if the lawyer

has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information to comply with other law—such as state and federal laws that govern data privacy, or that impose notification requirements upon the loss of, or unauthorized access to, electronic information—is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[20] When transmitting a communication that includes information acquired during the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the client's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[21] The duty of confidentiality continues after the client-lawyer relationship has terminated. *See* Rule 1.9(c)(2). *See* Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Lawyer's Assistance Program

[22] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers' or judges' assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek help through such programs. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance, which may then result in harm to their professional careers and injury to their clients and the public. The rule, therefore, requires that any information received by a lawyer on behalf of an approved lawyers' or judges' assistance program be regarded as confidential and protected from disclosure to the same extent as information received by a lawyer in any conventional client-lawyer relationship.

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997

Amended March 1, 2003; October 2, 2014

ETHICS OPINION NOTES

CPR 284. An attorney who, in the course of representing one spouse, obtains confidential information bearing upon the criminal conduct of the other spouse must not disclose such information.

CPR 300. An attorney, after being discharged, cannot discuss the client's case with the client's new attorney without the client's consent.

CPR 313. An attorney may not voluntarily disclose confidential information concerning a client's criminal record.

CPR 362. An attorney may not disclose the perjury of his partner's client.

CPR 374. Information concerning apparent tax fraud obtained by an attorney employed by a fire insurer to depose insureds concerning claims is confidential and may not be disclosed without the insurer's consent.

RPC 12. An attorney may reveal confidential information to correct a mistake if disclosure is impliedly authorized by the client.

RPC 21. An attorney may send a demand letter to an adverse party without identifying the client by name.

RPC 23. An attorney does not need the consent of the client to file Form 1099 including confidential information with the IRS incident to a real estate transaction since such is required by law.

RPC 33. An attorney may not disclose confidential information concerning the client's identity and criminal record without the client's consent nor may an attorney misrepresent such information to the court. In response to a direct question from the court concerning such matters, an attorney may not misrepresent the defendant's criminal record but is under

no ethical obligation to respond. If the client misrepresents his identity or record under oath, the attorney must ask the client to correct the misstatements. If the client refuses, the attorney must seek to withdraw. (*But see* Rule 3.3)

RPC 62. An attorney may disclose client confidences necessary to protect her reputation where a claim alleging malpractice is brought by a former client against the insurance company which employed the attorney to represent the former client.

RPC 77. A lawyer may disclose confidential information to his or her liability insurer to defend against a claim but not for the sole purpose of assuring coverage.

RPC 113. A lawyer may disclose information concerning advice given to a client at a closing in regard to the significance of the client's lien affidavit.

RPC 117. An attorney may not reveal confidential information concerning a client's contagious disease without the client's consent.

RPC 120. An attorney may, but need not necessarily, disclose confidential information concerning child abuse pursuant to a statutory requirement.

RPC 133. A law firm may make its waste paper available for recycling.

RPC 157. A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent but in so doing the lawyer may disclose only her belief that there exists a good faith basis for the relief requested and may not disclose confidential information which led her to conclude the client is incompetent.

RPC 175. A lawyer may ethically exercise his or her discretion to decide whether to reveal confidential information concerning child abuse or neglect pursuant to a statutory requirement.

RPC 179. A lawyer must comply with the client's request that the information regarding a settlement be kept confidential if the client enters into a settlement agreement conditioned upon maintaining the confidentiality of the terms of the settlement.

RPC 195. The attorney who represented an estate and the personal representative in her official capacity may divulge confidential information relating to the representation of the estate and the personal representative to the substitute personal representative of the estate.

RPC 206. A lawyer may disclose the confidential information of a deceased client to the personal representative of the client's estate but not to the heirs of the estate.

RPC 209. Opinion provides guidelines for the disposal of closed client files.

RPC 215. When using a cellular or cordless telephone or any other unsecure method of communication, a lawyer must take steps to minimize the risk that confidential information may be disclosed.

RPC 230. A lawyer representing a client on a good faith claim for social security disability benefits may withhold evidence of an adverse medical report in a hearing before an administrative law judge if not required by law or court order to produce such evidence. (*But see* Rule 3.3.)

RPC 244. Although a lawyer asks a prospective client to sign a form stating that no client-lawyer relationship will be created by reason of a free consultation with the lawyer, the lawyer may not subsequently disclaim the creation of a client-lawyer relationship and represent the opposing party.

RPC 246. Under certain circumstances, a lawyer may not represent a party whose interests are opposed to the interests of a prospective client if confidential information of the prospective client must be used in the representation.

RPC 252. A lawyer in receipt of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain from examining the materials and return them to the sender.

98 FEO 5. Opinion rules that a defense lawyer may remain silent while the prosecutor presents an inaccurate driving record to the court provided the lawyer and client did not criminally or fraudulently misrepresent the driving record to the prosecutor or the court, and further provided, that on application for a limited driving privilege, there is no misrepresentation to the court about the client's prior driving record.

98 FEO 10. Opinion rules that an insurance defense lawyer may not disclose confidential information about an insured's representation in bills submitted to an independent audit company at the insurance carrier's request unless the insured consents.

98 FEO 16. Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is

not frivolous.

98 FEO 18. Opinion rules that a lawyer representing a minor owes the duty of confidentiality to the minor and may only disclose confidential information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation.

98 FEO 20. Opinion rules that, subject to a statute prohibiting the withholding of the information, a lawyer's duty to disclose confidential client information to a bankruptcy court ends when the case is closed although the debtor's duty to report new property continues for 180 days after the date of filing the petition.

99 FEO 11. Opinion rules that an insurance defense lawyer may not submit billing information to an independent audit company at the insurance carrier's request unless the insured's consent to the disclosure, obtained by the insurance carrier, was informed.

99 FEO 15. Opinion rules that a lawyer with knowledge that a former client is defrauding a bankruptcy court may reveal the confidences of the former client if required by law or if necessary to rectify the fraud.

2000 FEO 11. Opinion rules that a lawyer who was formerly in-house legal counsel for a corporation must obtain the permission of a court prior to disclosing confidential information of the corporation to support a personal claim for wrongful termination.

2002 FEO 7. Opinion clarifies RPC 206 by ruling that a lawyer may reveal the relevant confidential information of a deceased client in a will contest proceeding if the attorney/client privilege does not apply to the lawyer's testimony.
2004 FEO 6 - Opinion rules that a lawyer may disclose confidential client information to collect a fee, including information necessary to support a claim that the corporate veil should be pierced, provided the claim is advanced in good faith.

2005 FEO 9. Opinion rules that a lawyer for a publicly traded company does not violate the Rules of Professional Conduct if the lawyer “reports out” confidential information as permitted by SEC regulations.

2007 FEO 2. Opinion rules that a lawyer may not take possession of a client’s contraband if possession is itself a crime and, unless there is an exception allowing disclosure of confidential information, the lawyer may not disclose confidential information relative to the contraband.

2007 FEO 12. A lawyer may outsource limited legal support services to a foreign lawyer or a nonlawyer (collectively "foreign assistants") provided the lawyer properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client's advanced informed consent.

2008 FEO 1. A lawyer representing an undocumented worker in a workers' compensation action has a duty to correct court documents containing false statements of material fact and is prohibited from introducing evidence in support of the proposition that an alias is the client's legal name.

2008 FEO 3. A lawyer may assist a pro se litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2008 FEO 5. Client files may be stored on a website accessible by clients via the internet provided the confidentiality of all client information on the website is protected.

2008 FEO 13. Unless affected clients expressly consent to the disclosure of their confidential information, a lawyer may allow a title insurer to audit the lawyer's real estate trust account and reconciliation reports only if certain written assurances to protect client confidences are obtained from the title insurer, the audited account is only used for real estate closings and the audit is limited to certain records and to real estate transactions insured by the title insurer.

2009 FEO 1. A lawyer must use reasonable care to prevent the disclosure of confidential client information hidden in metadata when transmitting an electronic communication and a lawyer who receives an electronic communication from another party or another party's lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document.

2009 FEO 3. A lawyer has a professional obligation not to encourage or allow a nonlawyer employee to disclose confidences of a previous employer's clients for purposes of solicitation.

2010 FEO 12. A hiring law firm may ask an incoming law school graduate to provide sufficient information as to his prior legal experience so that the hiring law firm can identify potential conflicts of interest.

2011 FEO 6. A law firm may contract with a vendor of software as a service provided the lawyer uses reasonable care to safeguard confidential client information.

2011 FEO 16. A criminal defense lawyer accused of ineffective assistance of counsel by a former client may share confidential client information with prosecutors to help establish a defense to the claim so long as the lawyer reasonably believes a response is necessary and the response is narrowly tailored to respond to the allegations.

CASE NOTES

Statement to Insurance Adjuster. - The attorney-client privilege does not cover a statement made to an insurance adjuster, not in the presence or at the request of counsel, and even before an attorney-client relationship exists. *Phillips v. Dallas Carrier Corp* ., 133 F.R.D. 475 (M.D.N.C. 1990).

Law firm was disqualified from representing plaintiff computer company in copyright case against another company which hired three of plaintiff's engineers where the law firm had previously represented one of the engineers. *Robert Woodhead, Inc. v. Datawatch Corp.* , 934 F. Supp. 181 (E.D.N.C. 1995).

Applied in *SuperGuide Corp. v. DirecTV Enters., Inc.* , 141 F. Supp. 2d 616 (W.D.N.C. 2001).

Quoted in *Travco Hotels, Inc. v. Piedmont Natural Gas Co* ., 332 N.C. 288, 420 S.E.2d 426 (1992).

Stated in *Furbush v. Otsego Mach. Shop, Inc.,* 914 F. Supp. 1275 (E.D.N.C. 1996).

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Client-Lawyer Relationship

Rule 1.14 Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. *See* Rule 1.2 (d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad

litem or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997

Amended March 1, 2003

ETHICS OPINION NOTES

CPR 314. An attorney who believes his or her client is not competent to make a will may not prepare or preside over the execution of a will for that client.

RPC 157. A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection if reasonably necessary to protect the client's interest.

RPC 163. A lawyer may seek the appointment of an independent guardian ad litem for a child whose guardian has an obvious conflict of interest in fulfilling his fiduciary duties to the child.

98 FEO 16. Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

98 FEO 18. Opinion rules that a lawyer representing a minor owes the duty of confidentiality to the minor and may only disclose confidential information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation.

2003 FEO 7. A lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

2006 FEO 11. Outside of the commercial or business context, a lawyer may not, at the request of a third party, prepare

documents, such as a will or trust instrument, that purport to speak solely for principal without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

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98 Formal Ethics Opinion 16

January 15, 1999

Representation of Client Resisting an Incompetency Petition

Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

Inquiry #1:

Wife, who is elderly, was removed from the marital home. Husband, who is also elderly, contacted Attorney A because Husband did not understand why his wife was removed from the home. He asked Attorney A to investigate. Attorney A discovered that Wife was the subject of an involuntary incompetency proceeding. When Attorney A gained access to Wife, she indicated that she wanted Attorney A to represent her in resisting the involuntary incompetency petition. She repeatedly said that she wanted to go home to live with her husband.

Attorney A also learned that Husband was investigated by police relative to allegations of abuse and neglect of Wife. Attorney A met with Husband and told him that he could not represent Wife in resisting the incompetency petition and represent Husband in defending against an action in connection with Wife's care or treatment. Husband agreed that Attorney A's representation would be limited to representing Wife in resisting the incompetency petition and that Husband would be responsible for paying the legal fees for that representation. A written fee agreement memorializing this arrangement was executed. Although Wife was held in a hospital at this time, she continued to express unequivocally that she desired Attorney A to represent her.

When Attorney A visited Wife, he noticed abnormalities in her behavior but he also witnessed extended periods of apparent lucidity. She repeatedly told Attorney A she wanted to go home, that she did not want an appointed guardian, and that she did not want to be declared incompetent. Attorney A filed several motions in the incompetency proceeding, including a motion to remove the guardian and for a jury trial. At the incompetency hearing before the clerk, the attorney for the Department of Social Services (DSS) and the guardian ad litem who had been appointed for Wife by the clerk, contended that Attorney A had no "standing or authority" to pursue motions on behalf of Wife. They argued that Attorney A had a conflict of interest due to his initial representation of Husband and Husband's continued payment for the representation. The clerk found that Attorney A was without "standing or authority" to represent Wife and summarily denied all motions filed on Wife's behalf by Attorney A. Attorney A's motion to stay the incompetency proceeding was also denied.

During the incompetency hearing, Attorney A was not allowed to participate as counsel for Wife. Attorney A was called as a witness, however. Wife, when she testified, could not identify Attorney A as her lawyer. However, she expressed a desire to return home with her husband to avoid becoming a ward of the state. At the close of the evidence, the clerk declared Wife incompetent and appointed the director of DSS to be her legal guardian.

Thereafter Attorney A filed a notice of appeal seeking a trial *de novo* in superior court on the issues of right to counsel, incompetency, and right to a jury trial. The attorney for DSS now contends that Attorney A has no authority to represent Wife because she has been adjudicated incompetent and only her legal guardian may make decisions about her legal representation. The DSS lawyer now demands that Attorney A provide the guardian with a copy of every document in Wife's legal file.

Does Attorney A have a conflict of interest because he initially represented Husband?

Opinion #1:

No. The representation of Wife in the incompetency proceeding is not a representation that is adverse to the interest of Husband. Furthermore, Attorney A obtained the consent of Husband to represent only Wife in the incompetency proceeding. The exercise of Attorney A's independent professional judgment on behalf of Wife is not impaired by the prior representation of Husband. See Rule 1.7 and Rule 1.9.

Inquiry #2:

Does it matter that Husband pays for the representation of Wife?

Opinion #2:

No. Rule 1.8(f) of the Revised Rules of Professional Conduct permits a lawyer to accept compensation for representing a client from someone other than the client if the client consents after consultation; there is no interference with the lawyer's independent professional judgment or the attorney-client relationship; and the confidentiality of client information is protected.

Inquiry #3:

Wife has been declared incompetent by the state and a guardian appointed to represent her interests. Does Attorney A have to treat Wife as incompetent and defer to the decision of the guardian relative to the representation of Wife?

Opinion #3:

No. Wife is entitled to counsel of her own choosing particularly with regard to a proceeding that so clearly and directly affects her freedom to continue to make decisions for herself. Rule 1.14(a) provides as follows: "[w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." If Attorney A is able to maintain a relatively normal client-lawyer relationship with Wife and Attorney A reasonably believes that Wife is able to make adequately considered decisions in connection with her representation, Attorney A may continue to represent her alone without including the guardian in the representation. However, if Attorney A has reason to believe that Wife is incapable of making decisions about her representation and is indeed incompetent, the appeal of the finding of incompetency may be frivolous. If so, Attorney A may not represent her on the appeal. *See* Rule 3.1 (prohibiting frivolous claims and defenses).

Inquiry #4:

Once the guardian was appointed for Wife, did the guardian become Attorney A's client, or otherwise step into the shoes of Wife, such that Attorney A may only take directions from the guardian and not from Wife?

Opinion #4:

No. Rule 1.14(a) quoted above indicates that a lawyer may represent a client under a mental disability. The lawyer owes the duty of loyalty to the client and not to the guardian or legal representative of the client, particularly if the lawyer concludes that the legal guardian is not acting in the best interest of the client.

Inquiry #5:

Does Attorney A have to turn over Wife's legal file to Wife's appointed guardian?

Opinion #5:

No. When a guardian is appointed for a client, a lawyer may turn over materials in the client's file and disclose other confidential information to the guardian if the release of such confidential

information is consistent with the purpose of the original representation of the client or consistent with the express instructions of the client. *See, e.g.,* RPC 206 (attorney for deceased client may release confidential information to the personal representative of the estate). However, where, as here, the release of confidential information to a guardian is contrary to the purpose of the representation, the lawyer must protect the confidentiality of the client's information and may not release the legal file to the guardian absent a court order. *See* Rule 1.6(d)(3).

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Effective Communication and the ADA

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation [which includes the office of a lawyer] by any person who owns, leases (or leases to), or operates a place of public accommodation. 42 U.S.C. §§ 12182(a), 12181(7)(F); 28 C.F.R. § 36.104.

Discrimination includes failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations. 42 U.S.C. § 12182(b)(2)(A)(ii).

A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities. 28 C.F.R. § 36.303(c).

If provision of a particular auxiliary aid or service by a public accommodation would result in a fundamental alteration or in an undue burden, the public accommodation shall provide an alternative auxiliary aid or service, if one exists, that would ensure that, to the maximum extent possible, individuals with disabilities receive the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation. 28 C.F.R. § 36.303(f).

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-230

Filed: 19 April 2016

Mecklenburg County, No. 13 CVD 11484

MICHAEL M. BERENS, Plaintiff,

v.

MELISSA C. BERENS, Defendant.

Appeal by Defendant from order entered 18 November 2014 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 23 September 2015.

Horack Talley Pharr & Lowndes, P.A., by Christopher T. Hood and Gena G. Morris, for Plaintiff-Appellee.

Wyrick Robbins Yates & Ponton LLP, by Michelle D. Connell, and Tom Bush Law Group, by Tom J. Bush, for Defendant-Appellant.

Thurman, Wilson, Boutwell & Galvin, P.A., by John D. Boutwell, for Brook Adams

INMAN, Judge.

This appeal presents the question of whether a party to litigation who engages her friend as an agent to participate in meetings with her attorney waives the protections of attorney-client communications and attorney work product for information arising from the meeting with her attorney and any work product created with the assistance of or shared with the agent as a result of those meetings. Based on our caselaw and the record here, the answer in this case is no.

Defendant-Appellant Melissa Berens ("Defendant") appeals the interlocutory order denying her request for a protective order and her motion to quash Plaintiff-Appellee Michael Berens's ("Plaintiff's") subpoena *duces tecum* to Brooke Adams Healy ("Ms. Adams") compelling production of all documents relating to Ms. Adams's communications with Defendant; her communications with the Tom Bush Law Group ("the law firm"), the firm representing Defendant in her divorce; and her communications with any third party regarding "one or more members of the Berens family" and the legal proceedings that are the subject of the underlying divorce case. On appeal, Defendant argues that Plaintiff's subpoena to Ms. Adams seeks information protected by the attorney-client privilege and by the work product doctrine because Ms. Adams was Defendant's agent. Consequently, according to Defendant, Ms. Adams's presence during Defendant's meetings with her attorney did not waive the privileges nor did her involvement in the preparation of materials for litigation defeat the privileges. Defendant also contends that the subpoena exceeds the scope of Rule 45 of the North Carolina Rules of Civil Procedure.

After careful review, we reverse the trial court's order and remand for proceedings consistent with this opinion.

Factual and Procedural Background

Plaintiff and Defendant were married on 23 September 1989 and separated on 20 July 2012. Six children were born of the marriage. On 4 June 2014, the trial court

entered a temporary parenting arrangement order in an effort to best address each child's needs. In it, the court noted that there were several allegations that Plaintiff had engaged in physical confrontations with his children, including one incident in which Plaintiff grabbed one child and pushed him up against the wall. The court found that all the children have complained about "Plaintiff/Father acting weird or creepy," citing several instances of Plaintiff's inappropriate attempts at jokes or inappropriate behavior when he does not "get his way." The court also stated that when "[Plaintiff] does not get his way, he acts inappropriately, gets up and has 'mini explosions.'"

The trial court held that it was in the children's best interest that Plaintiff have temporary supervised parenting only with the two youngest children and no contact with the four oldest children. The court calendared the permanent child custody trial to begin on 1 December 2014.

Prior to the trial, on 9 September 2014, Plaintiff's counsel issued a subpoena *duces tecum* to Ms. Adams. Ms. Adams, an attorney who is now on inactive status with the North Carolina State Bar, is a friend of Defendant's and asserted in an affidavit that she had been "acting as a consultant/agent on behalf of [Defendant] and the Tom Bush Law Group, and acting in a supporting role for [Plaintiff]." Ms. Adams stated that her friendship with Defendant began prior to the current proceedings. As

part of her role as a consultant and agent of Defendant, Ms. Adams stated that she had

> attended meetings with [Defendant] and her attorneys and [has] had access to various documents and tangible things, including. . . emails and documents from and to [Defendant], her attorneys and/or other consultants/experts; correspondence and documents form and to [Defendant], her attorneys and/or other consultants/experts; notes of meetings between [Defendant] and her attorneys; drafts of Court pleadings; potential Court exhibits and documents; case law; statutes; settlements offers during mediation; and, [sic] strategy planning documents.

Attached to her affidavit was a copy of the "Confidentiality Agreements and Acknowledgement of Receipt of Privileged Information" (the "confidentiality agreement") that Ms. Adams entered into with Defendant, identifying Ms. Adams as Defendant's agent, emphasizing that the privileged information she received would be used "solely for the purpose[] of settling or litigating" the divorce proceedings, and affirming the expectation that Ms. Adams's presence and involvement were "necessary for the protection of [Defendant's] interest" and the expectation that all communications would be "protected by the attorney-client privilege." The confidentiality agreement further provided:

> Client's Agent will limit her communications concerning the Client's litigation and dispute with her husband to Client and Client's attorneys and they [sic] will have no communication with anyone, including, but not limited to Wife's experts, accountants, consultants or attorneys, or other advisors and consultants unless Client's attorneys are present.

Based on her assertion that she was Defendant's agent, Ms. Adams's counsel argued before the trial court that all documents and tangible things sought by Plaintiff's subpoena were protected by the attorney-client privilege and by work product immunity because Ms. Adams's presence in a "support role, to be a consultant, a representative" did not destroy the privilege or immunity. Plaintiff's counsel disagreed, arguing that Ms. Adams was engaged in the "unauthorized practice of law" and that the law firm had "assisted" her in that role.

The trial court denied Defendant's and Ms. Adams's motions on 16 November 2014, finding, in pertinent part, that:

> 19. Defendant/Mother's Motions and Ms. Adams'[s] Motions collectively assert that Ms. Adams has been functioning as a consultant and agent of Defendant/Mother and of the Tom Bush Law Group in this litigation. Ms. Adams states that she has attended meetings with Defendant/Mother and her attorneys, reviewed pleadings, emails, documents, case law, statutes etc.
>
> . . .
>
> 21. Ms. Adams is not an employee of the Tom Bush Law Group, nor has she been retained by the Tom Bush Law Group in this litigation.
>
> 22. In truth, Ms. Adams is a good friend of Defendant/Mother and Ms. Adams is helping Defendant/Mother out in this litigation.
>
> 23. The Agreement executed by Ms. Adams and Defendant/Mother holds no weight in this litigation.
>
> 24. This Court cannot find that any attorney-client

> privilege or work product immunity exists with respect to the relationship between Ms. Adams and Defendant/Mother and the Tom Bush Law Group.
>
> 25. There is no "good friend" exception to the attorney-client privilege or work product immunity warranting entry of an order quashing the Subpoena or protective order relieving Ms. Adams of her obligation to the comply with the Subpoena.
>
> 26. One could, argue that Ms. Adams is practicing law if she wishes to utilize either the attorney-client privilege or work product immunity. The Court will not focus on this argument or consider it since Ms. Adams is simply viewed as a good friend of Defendant/Mother.

The trial court concluded in pertinent part that:

> 2. The Agreement executed by Ms. Adams and Defendant/Mother holds no weight in this litigation.
>
> . . .
>
> 4. No exception to the attorney-client privilege or work product immunity exists warranting entry of an order quashing the Subpoena or a protective order relieving Ms. Adams of her obligation to the comply with the Subpoena.[1]
>
> 5. Defendant/Mother's Motions and Ms. Adams' Motions should be denied and Ms. Adams should fully comply with Plaintiff/Father's Subpoena.

Defendant and Ms. Adams timely appealed.

Ms. Adams's Appeal

[1] The trial court's conclusion that "[n]o exception to the attorney-client privilege or work product immunity exists" in this case appears to be a non-sequitur because the court ultimately held that neither the privilege nor the immunity applied.

Ms. Adams argues that she constitutes an "aggrieved party" and has a statutory right to appeal the trial court's order pursuant to N.C. Gen. Stat. § 1-271 (2013) and Rule 3 of the North Carolina Rules of Appellate Procedure. In an abundance of caution, however, Ms. Adams filed a petition for *writ of certiorari* seeking appellate review of the order.

Rule 3 provides that "[a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal. . . ." N.C. R. App. P. 3(a)(2014). Our Supreme Court has interpreted Rule 3 to mean that it "afford[s] no avenue of appeal to either entities or persons who are nonparties to a civil action." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). Although Ms. Adams filed various pleadings in response to Plaintiff's subpoenas in the trial court and was represented by counsel during the hearing, it does not appear from the record that she took any action to intervene or otherwise become a party in the underlying action. *See id.* While Ms. Adams is correct that she will be affected by the trial court's order compelling documents and other tangible things, she is not an "aggrieved party" entitled to appeal the order.

The *Bailey* court addressed a similar request by a nonparty and concluded that because the party had no right to appeal as a nonparty, "no such right could be lost by a failure to take timely action." *Id.* at 157, 540 S.E.2d at 322. While Rule 21 provides that a *writ of certiorari* may be issued to permit review of a trial court's order

if, among other reasons, there is no right of appeal from an interlocutory order, N.C.R. App. P. 21(a)(1) (2014), *Bailey* compels a conclusion that this avenue of appeal is not available for those who did not fall within the parameters of Rule 3 allowing the party to appeal in the first place. Accordingly, we deny Ms. Adams's petition.

Defendant-Appellant's Appeal

Orders compelling discovery generally are not immediately appealable. *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). However, orders compelling discovery "where a party asserts a privilege or immunity that directly relates to the matter to be disclosed pursuant to the interlocutory discovery order and the assertion of the privilege or immunity is not frivolous or insubstantial, the challenged order affects a substantial right and is thus immediately appealable." *Hammond v. Saini*, 229 N.C. App. 359, 362, 748 S.E.2d 585, 588 (2013) *aff'd*, 367 N.C. 607, 766 S.E.2d 590 (2014)(citation omitted).

Standard of Review

A trial court's order compelling the production of documents that a party claims are protected by the attorney-client privilege or the work product doctrine is generally subject to review for an abuse of discretion. *Isom v. Bank of Am., N.A.*, 177 N.C. App. 406, 410, 628 S.E.2d 458, 461 (2006). "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.'" *Id.* at 410, 628 S.E.2d at 461 (citation omitted)

(internal quotation marks omitted). However, a trial court's "discretionary ruling made under a misapprehension of the law . . . may constitute an abuse of discretion." *Hines v. Wal-Mart Stores E., L.P.*, 191 N.C. App 390, 393, 663 S.E.2d 337, 339 (2008) (order for new trial reversed because "the order reveals that the trial court misapprehended the law and improperly shifted plaintiff's burden of proof to defendant"). *See also State v. Tuck*, 191 N.C. App. 768, 773, 664 S.E.2d 27, 30 (2008) (trial court abused its discretion in evidentiary ruling because it misapprehended the applicable discovery statute and failed to consider criteria necessary to its analysis).

Analysis

Plaintiff argues that Ms. Adams was not functioning in the capacity of an agent but was "merely Defendant-Appellant's friend" and that the presence of a friend during attorney-client communications and giving her access to work product defeats the claim of privilege under our state's established caselaw.

Defendant argues that Ms. Adams's presence during and access to attorney-client communications and work product as a "friend, agent, and trusted confidant" did not destroy the attorney-client privilege or work product doctrine because Ms. Adams was acting as Defendant's agent.[2] In support of this argument, Defendant

[2] Defendant also urges this Court to adopt an approach used in other jurisdictions which considers, on a case-by-case basis, the intention and understanding of the client as to whether the communications would remain confidential. Defendant specifically cites the analysis adopted by the Rhode Island Supreme Court in *Rosati v. Kuzman*, 660 A.2d 263, 266 (R.I. 1995) (holding that "the mere presence of a third party per se does not constitute a waiver thereof. Given the nature of the

cites the written confidentiality agreement providing that Ms. Adams was acting as her "agent and personal advisor to specifically assist her in this litigation" and that Ms. Adams's presence and involvement in attorney-client communications "is necessary for the protection of [Defendant's] interest."

Defendant does not contend, and did not contend before the trial court, that she and Ms. Adams had an attorney-client relationship. Rather, she contends that because Ms. Adams was her agent for purposes of this litigation, the privileges and protections arising from her attorney-client relationship with the law firm within the context of the confidentiality agreement remained intact despite the sharing of attorney communications and work product with Ms. Adams.

In concluding that "[t]he [confidentiality agreement] executed by Ms. Adams and Defendant/Mother holds no weight in this litigation,"[3] the trial court

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attorney-client privilege, the relevant inquiry focuses on whether the client reasonably understood the conference to be confidential notwithstanding the presence of third parties." (emphasis removed) (citation removed) (internal quotation marks removed)), and by courts in Maryland. *See Newman v. State*, 384 Md. 285, 307, 863 A.2d 321, 334–35 (2004) (concluding that the attorney-client privilege was not defeated by the presence of a third party confidant because: (1) the record indicated the client's "clear understanding that the communications made in the presence of [the third party] would remain confidential"; (2) the attorney "exerted his control over [the third party's] presence"; and (3) in all times during the "extremely contentious" divorce and custody proceedings, the third party "acted as a source of support for [the client]" by attending court proceedings with the client, participating in investigations, and communicating directly with the attorney).

[3] The trial court included this statement in both its findings of fact and conclusions of law. Because it involves the application of legal principles, it is a conclusion of law. *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675–76 (1997) (although trial court made identical findings of fact and conclusions of law that juvenile was neglected, that a government agency had made reasonable efforts to prevent her removal from her parent's home, and that it was in the juvenile's best interest to remain in county custody, "[t]hese determinations…are more properly designated conclusions of law and we treat them as such for purposes of this appeal"). Plaintiff did not dispute the authenticity of the

misapprehended the law of agency. In failing to address the confidentiality agreement and other evidence of the agency relationship between Defendant and Ms. Adams, the trial court misapprehended the law regarding the extension of the attorney-client privilege and the attorney work product doctrine to communications with a client's agent within the context of the litigation and confidentiality agreement.

I. Attorney-Client Privilege

"It is a well-established rule in this jurisdiction that when the relationship of attorney and client exists, all confidential communications made by the latter to his attorney on the faith of such relationship are privileged and may not be disclosed." *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981). Our Supreme Court has outlined a five-factor test, *i.e.*, the *Murvin* test, to determine whether the attorney-client privilege attaches to a particular communication:

> 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. . . . Communications between attorney and client generally are not privileged when made in the presence of a third person who is not an agent of either party.

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confidentiality agreement or present any evidence to dispute Defendant's or Ms. Adams's stated understanding and intention in executing the confidentiality agreement.

Id. at 531, 284 S.E.2d at 294 (citation omitted).

> The burden is always on the party asserting the privilege to demonstrate each of its essential elements. This burden may not be met by mere conclusory or ipse dixit assertions, or by a blanket refusal to testify. Rather, sufficient evidence must be adduced, usually by means of an affidavit or affidavits, to establish the privilege with respect to each disputed item.

In re Miller, 357 N.C. 316, 336, 584 S.E.2d 772, 787 (2003) (citations omitted) (internal quotation marks omitted).

The parties do not dispute that an attorney-client relationship existed between the law firm and Defendant. Rather, they dispute whether Ms. Adams's presence during meetings of the law firm and Defendant destroyed the privileged nature of those meetings and related documents.

Defendant contends that all the communications Ms. Adams witnessed between the law firm and Defendant met all five factors of the *Murvin* test because Ms. Adams was an agent of Defendant. As explained below, we agree.

Defendant points to Ms. Adams's affidavit attesting her role as an agent and the confidentiality agreement she and Defendant signed memorializing their mutual understanding and expectation that Ms. Adams was acting as Defendant's agent and that Ms. Adams's access to Defendant's privileged information was protected by the attorney-client privilege.

Generally, communications between an attorney and client are not privileged if made in the presence of a third party because those communications are not confidential and because that person's presence constitutes a waiver. *Brown v. Am. Partners Fed. Credit Union*, 183 N.C. App. 529, 536, 645 S.E.2d 117, 122 (2007); *Harris v. Harris*, 50 N.C. App. 305, 316, 274 S.E.2d 489, 495 (1981). However, the privilege still applies if the third party is an agent "of either party." *Murvin*, 304 N.C. at 531, 284 S.E.2d at 294. As explained by our Supreme Court,

> [i]n limiting the application of the privilege by holding that attorney-client communications which relate solely to a third party are not privileged, we note that this rationale would not apply in a situation where the person communicating with the attorney was acting as an agent of some third-party principal when the communication was made. In that instance, the information would remain privileged because the third-party principal would actually be the client who is communicating with the attorney through the agent. Because the communication would relate to the third-party principal's interests, it would therefore be within the scope of matter about which the attorney was professionally consulted and thus would be privileged.

Miller, 357 N.C. at 340–41, 584 S.E.2d at 789–90 (internal citation omitted).

If Ms. Adams was Defendant's agent when she witnessed the communications between Defendant and the law firm, the communications would remain privileged should they satisfy the other *Murvin* factors.

Agency is defined as "the relationship that arises from the manifestation of consent by one person to another that the other shall act on his behalf and subject to

his control, and consent by the other so to act." *Green v. Freeman*, 233 N.C. App. 109, 112, 756 S.E.2d 368, 372 (2014). "There are two essential ingredients in the principal-agent relationship: (1) Authority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent." *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 435, 617 S.E.2d 664, 669 (2005) (citation omitted) (internal quotation marks omitted).

The trial court dismissed without explanation Defendant's and Ms. Adams's claims that Ms. Adams was, at all times, acting as an agent of and consultant for Defendant. The trial court simply characterized Ms. Adams as "a good friend of Defendant/Mother" and concluded that the Agreement executed by Ms. Adams held "no weight in this litigation." In addition, based upon Finding of Fact 21, that "Ms. Adams is not an employee of the Tom Bush Law Group, nor has she been retained by the Tom Bush Law Group in this litigation," the trial court apparently considered that only a paid consultant or employee of the law firm could assist in the litigation without destroying the privilege. This misapprehension may have been why the trial court summarily disregarded Ms. Adams's affidavit and other evidence supporting Defendant's and Ms. Adams's contentions that, in addition to being Defendant's "good friend," Ms. Adams was also Defendant's agent and consultant in the contentious divorce and child custody proceedings, especially in light of the serious allegations noted in the temporary parenting order. Ms. Adams and Defendant memorialized

their relationship in the confidentiality agreement, referring to Ms. Adams as "Client's Agent," *i.e.*, Defendant's agent, and noting that Ms. Adams's role was to "serve as [Defendant's] agent and personal advisor[] to assist [Defendant] in her dispute and/or litigation." In addition, the information protected by this agreement is limited to direct communications between Defendant and the law firm and the law firm's work product, which may be developed with Ms. Adams's assistance under the confidentiality agreement. The trial court did not address whether or why this evidence did not manifest consent by Defendant and Ms. Adams regarding Ms. Adams's role.

We hold that an agency relationship existed between Ms. Adams and Defendant for the purposes agreed upon between them. This holding is based not merely on Defendant's allegations and assertions, *see generally In re Miller*, 357 N.C. at 336, 584 S.E.2d at 787, but on additional evidence derived from a source other than Defendant. The additional evidence includes the affidavit by Ms. Adams establishing that her role during the communications was as Defendant's agent and consultant—the type of evidence specifically noted by the *In re Miller* court as probative of an agency relationship—as well as the written agreement memorializing the agency relationship between Ms. Adams and Defendant. The agreement provided express authority by Defendant for Ms. Adams to act as her agent and evidences Defendant's control over Ms. Adams, both necessary showings to establish an agency relationship.

See Phelps-Dickson Builders, 172 N.C. App. at 435, 617 S.E.2d at 669. The trial court failed to conduct the essential analysis as to whether the affidavit, confidentiality agreement, and other evidence established an agency relationship. We are aware of no caselaw, nor has Plaintiff cited any authority, that being a client's "good friend" and being a client's agent are mutually exclusive. Nor does our caselaw prohibit a non-practicing attorney from acting as an agent for purposes of assisting another person in communications with legal counsel. Our holding would be the same if Ms. Adams had been a friend trained as an accountant, a psychologist, or an appraiser who agreed to assist with the litigation without charge. Consequently, we must reverse the trial court's order concluding that the attorney-client privilege does not apply in this case.[4]

II. Work Product Doctrine

> In order to successfully assert protection based on the work product doctrine, the party asserting the protection . . . bears the burden of showing (1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant or *agent*.

[4] Although Defendant's appellate counsel urges this Court to adopt a new rule requiring the trial court to consider the client's expectations regarding confidentiality, it is not necessary given the evidence establishing an agency relationship.

Isom, 177 N.C. App. at 412–13, 628 S.E.2d at 463 (emphasis added) (citation omitted) (internal quotation marks and editing marks omitted). The doctrine is not without limits:

> The work-product doctrine shields from discovery 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. This includes documents prepared after a party secures an attorney and documents 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 by the work-product doctrine. The test is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.

In re Ernst & Young, LLP, 191 N.C. App. 668, 678, 663 S.E.2d 921, 928 (2008) (citations omitted) (internal quotation marks omitted).

We are persuaded that, given the record evidence, many of the documents requested by Plaintiff may constitute privileged work product not subject to discovery. Accordingly, the trial court's order concluding that the work product protection necessarily does not apply to the documents is reversed.

III. Remand

Although we reverse the trial court's conclusion that neither the attorney-client privilege nor the work product doctrine has any application in this case, the ultimate determination of which documents are shielded from discovery requires further

inquiry regarding the nature of each document requested. This determination must be made by the trial court from evidence including an *in camera* review of the documents.

Plaintiff's subpoenas requested all documents relating to all of Ms. Adams's communications with Defendant, all documents relating to her communications with the law firm, and all documents relating to her communications with any third party regarding the ongoing legal proceedings during a specified time period. While we have held that the record evidence established an agency relationship between Ms. Adams and Defendant, it is unclear whether all the requested materials fall within the scope of the attorney-client privilege by satisfying the five-factor *Murvin* test. For example, communications between Ms. Adams and third parties outside the law firm may not fall within the protection of the attorney-client privilege. Therefore, we must remand for the trial court to determine whether the attorney-client privilege applies to the requested communications, using the five-factor *Murvin* test and considering Ms. Adams as Defendant's agent. Unless the trial court can make this determination from other evidence such as a privilege log, it must conduct an *in camera* review of the documents. *See Raymond v. N.C. Police Benevolent Ass'n., Inc.*, 365 N.C. 94, 101, 721 S.E.2d 923, 928 (2011) (ordering the trial court to conduct an *in camera* review on remand to determine whether the communications were protected by the attorney-client privilege under *Murvin*).

We also are unable to determine based on the limited record whether the documents requested, or any of them, are subject to the work product doctrine. This determination is necessary only for documents which Defendant asserts are work product and which the trial court concludes are not protected by the attorney-client privilege. *See Isom*, 177 N.C. App. at 412–13, 628 S.E.2d at 463. We remand for the trial court to review the documents *in camera* and determine whether the work product protection applies, taking into account that Ms. Adams was acting as Defendant's agent. *See Ernst & Young, LLP*, 191 N.C. App. at 677–78, 663 S.E.2d at 928 (2008) (remanding for an *in camera* review to determine whether the documents requested were created in anticipation of litigation and satisfy the work product doctrine). A document created by Ms. Adams within the context of the confidentiality agreement for the law firm and for the purposes of the litigation would be protected, as would any documents created by the law firm which would normally be protected even if they were shared with Ms. Adams.

Given our reversal of the trial court's order, it is not necessary to address Defendant's alternative argument that Plaintiff's subpoena to Ms. Adams exceeded the scope of Rule 45 of the North Carolina Rules of Civil Procedure.

Conclusion

Based on the foregoing reasons, we reverse the trial court's order denying Defendant's motion to quash and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and STROUD concur.

§ 122C-3. Definitions.

The following definitions apply in this Chapter:

. . .

(12a) "Developmental disability" means a severe, chronic disability of a person which:

a. Is attributable to a mental or physical impairment or combination of mental and physical impairments;

b. Is manifested before the person attains age 22, unless the disability is caused by a traumatic head injury and is manifested after age 22;

c. Is likely to continue indefinitely;

d. Results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, capacity for independent living, learning, mobility, self-direction and economic self-sufficiency; and

e. Reflects the person's need for a combination and sequence of special interdisciplinary, or generic care, treatment, or other services which are of a lifelong or extended duration and are individually planned and coordinated; or

f. When applied to children from birth through four years of age, may be evidenced as a developmental delay.

. . .

Intellectual Disability

In the upcoming fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), the diagnosis of intellectual disability (intellectual developmental disorder) is revised from the DSM-IV diagnosis of mental retardation. The significant changes address what the disorder is called, its impact on a person's functioning, and criteria improvements to encourage more comprehensive patient assessment.

The revised disorder also reflects the manual's move away from a multiaxial approach to evaluating conditions. Using DSM-IV, mental retardation was on Axis II to ensure that clinicians identified associated impairments alongside other mental disorders. With DSM-5, all mental disorders will be considered on a single axis and given equal weight.

Disorder Characteristics

Intellectual disability involves impairments of general mental abilities that impact adaptive functioning in three domains, or areas. These domains determine how well an individual copes with everyday tasks:

- The conceptual domain includes skills in language, reading, writing, math, reasoning, knowledge, and memory.
- The social domain refers to empathy, social judgment, interpersonal communication skills, the ability to make and retain friendships, and similar capacities.
- The practical domain centers on self-management in areas such as personal care, job responsibilities, money management, recreation, and organizing school and work tasks.

While intellectual disability does not have a specific age requirement, an individual's symptoms must begin during the developmental period and are diagnosed based on the severity of deficits in adaptive functioning. The disorder is considered chronic and often co-occurs with other mental conditions like depression, attention-deficit/hyperactivity disorder, and autism spectrum disorder.

Name Change

Intellectual disability (intellectual developmental disorder) as a DSM-5 diagnostic term replaces "mental retardation" used in previous editions of the manuals. In addition, the parenthetical name "(intellectual developmental disorder)" is included in the text to reflect deficits in cognitive capacity beginning in the developmental period. Together, these revisions bring DSM into alignment with terminology used by the World Health Organization's International Classification of Diseases, other professional disciplines and organizations, such as the American Association on Intellectual and Developmental Disabilities, and the U.S. Department of Education.

Comprehensive Assessment

DSM-5 emphasizes the need to use both clinical assessment and standardized testing of intelligence when diagnosing intellectual disability, with the severity of impairment based on adaptive functioning rather than IQ test scores alone. By removing IQ test scores from the diagnostic criteria, but still including them in the text description of intellectual disability, DSM-5 ensures that they are not overem-

phasized as the defining factor of a person's overall ability, without adequately considering functioning levels. This is especially important in forensic cases.

It is important to note that IQ or similar standardized test scores should still be included in an individual's assessment. In DSM-5, intellectual disability is considered to be approximately two standard deviations or more below the population, which equals an IQ score of about 70 or below.

The assessment of intelligence across three domains (conceptual, social, and practical) will ensure that clinicians base their diagnosis on the impact of the deficit in general mental abilities on functioning needed for everyday life. This is especially important in the development of a treatment plan.

The updated criteria will help clinicians develop a fuller, more accurate picture of patients, a critical step in providing them with effective treatment and services.

DSM is the manual used by clinicians and researchers to diagnose and classify mental disorders. The American Psychiatric Association (APA) will publish DSM-5 in 2013, culminating a 14-year revision process.

APA is a national medical specialty society whose more than 36,000 physician members specialize in the diagnosis, treatment, prevention and research of mental illnesses, including substance use disorders. Visit the APA at www.psychiatry.org. For more information, please contact Eve Herold at 703-907-8640 or press@psych.org.

Substance-Related and Addictive Disorders

In the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), the revised chapter of "Substance-Related and Addictive Disorders" includes substantive changes to the disorders grouped there plus changes to the criteria of certain conditions.

Substance Use Disorder

Substance use disorder in DSM-5 combines the DSM-IV categories of substance abuse and substance dependence into a single disorder measured on a continuum from mild to severe. Each specific substance (other than caffeine, which cannot be diagnosed as a substance use disorder) is addressed as a separate use disorder (e.g., alcohol use disorder, stimulant use disorder, etc.), but nearly all substances are diagnosed based on the same overarching criteria. In this overarching disorder, the criteria have not only been combined, but strengthened. Whereas a diagnosis of substance abuse previously required only one symptom, mild substance use disorder in DSM-5 requires two to three symptoms from a list of 11. Drug craving will be added to the list, and problems with law enforcement will be eliminated because of cultural considerations that make the criteria difficult to apply internationally.

In DSM-IV, the distinction between abuse and dependence was based on the concept of abuse as a mild or early phase and dependence as the more severe manifestation. In practice, the abuse criteria were sometimes quite severe. The revised substance use disorder, a single diagnosis, will better match the symptoms that patients experience.

Additionally, the diagnosis of dependence caused much confusion. Most people link dependence with "addiction" when in fact dependence can be a normal body response to a substance.

Addictive Disorders

The chapter also includes gambling disorder as the sole condition in a new category on behavioral addictions. DSM-IV listed pathological gambling but in a different chapter. This new term and its location in the new manual reflect research findings that gambling disorder is similar to substance-related disorders in clinical expression, brain origin, comorbidity, physiology, and treatment.

Recognition of these commonalities will help people with gambling disorder get the treatment and services they need, and others may better understand the challenges that individuals face in overcoming this disorder.

While gambling disorder is the only addictive disorder included in DSM-5 as a diagnosable condition, Internet gaming disorder will be included in Section III of the manual. Disorders listed there require further research before their consideration as formal disorders. This condition is included to reflect the scientific literature on persistent and recurrent use of Internet games, and a preoccupation with them, can result in clinically significant impairment or distress. Much of this literature comes from studies in Asian countries. The condition criteria do not include general use of the Internet, gambling, or social media at this time.

Other Disorders of Interest

DSM-5 will not include caffeine use disorder, although research shows that as little as two to three cups of coffee can trigger a withdrawal effect marked by tiredness or sleepiness. There is sufficient evidence to support this as a condition, however it is not yet clear to what extent it is a clinically significant disorder. To encourage further research on the impact of this condition, caffeine use disorder is included in Section III of DSM-5.

DSM is the manual used by clinicians and researchers to diagnose and classify mental disorders. The American Psychiatric Association (APA) will publish DSM-5 in 2013, culminating a 14-year revision process. For more information, go to www.DSM5.org.

APA is a national medical specialty society whose more than 36,000 physician members specialize in the diagnosis, treatment, prevention and research of mental illnesses, including substance use disorders. Visit the APA at www.psychiatry.org and www.healthyminds.org. For more information, please contact Eve Herold at 703-907-8640 or press@psych.org.

Alcohol, Other Drugs, and Health: Current Evidence

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Research Summary

Diagnostic and Statistical Manual of Mental Disorders: *DSM-5* Replaces *DSM-IV*

The previous edition of the *Diagnostic and Statistical Manual of Mental Disorders* (*DSM-IV*) divided substance-related disorders into two categories: *substance abuse* and *substance dependence*. There were a number of problems with this system: the dividing line between *abuse* and *dependence* was not clear; *substance dependence* was often confused with *physical dependence*; and the term *abuse* has pejorative connotations. Published in May 2013, the *DSM-5* replaces these with a single term: *substance use disorder*. There are two major changes to the diagnostic criteria: 1) *Recurrent legal problems*, which was a criterion for substance abuse, has been removed. 2) A new criterion has been added: craving or strong desire/urge to use a substance.

The *DSM-5* defines a *substance use disorder* as the presence of at least 2 of 11 criteria, which are clustered in four groups:

1. *Impaired control:* (1) taking more or for longer than intended, (2) unsuccessful efforts to stop or cut down use, (3) spending a great deal of time obtaining, using, or recovering from use, (4) craving for substance.
2. *Social impairment:* (5) failure to fulfill major obligations due to use, (6) continued use despite problems caused or exacerbated by use, (7) important activities given up or reduced because of substance use.
3. *Risky use:* (8) recurrent use in hazardous situations, (9) continued use despite physical or psychological problems that are caused or exacerbated by substance use.
4. *Pharmacologic dependence:* (10) tolerance to effects of the substance, (11) withdrawal symptoms when not using or using less.*

* Persons who are prescribed medications such as opioids may exhibit these two criteria, but would not necessarily be considered to have a substance use disorder.

Comments:
The *DSM-5* suggests using the number of criteria met as a general measure of severity, from *mild* (2–3 criteria) to *moderate* (4–5 criteria) and *severe* (6 or more criteria). Defining substance use disorders on a single continuum makes sense, but will likely create confusion in the short term and the DSM provides no guidance on how to use these criteria to decide on who needs formal treatment.

Finally, new to *DSM-5* are cannabis and caffeine withdrawal, and the criteria for tobacco use disorder are now the same as for all other substance use disorders.

Darius A. Rastegar, MD

Reference:
American Psychiatric Association. *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*. Arlington, VA: American Psychiatric Association, 2013.

American Psychiatric Association. *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV*. Washington, DC: American Psychiatric Association, 1994.

MENTAL HEALTH DISORDERS

Mental Health Disorders

2017 Civil Commitment
UNC School of Government

Edward Poa, MD, FAPA
Chief of Inpatient Services, The Menninger Clinic
Associate Professor, Baylor College of Medicine

NC statutes

- "…an individual who is mentally ill and either (i) dangerous to self, as defined in G.S. 122C-3(11)a., or dangerous to others, as defined in G.S. 122C-3(11)b., or (ii) in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness..."

Presentation will focus on mental health disorders leading to

Dangerousness to self
Dangerousness to others
Disability or deterioration that would result in dangerousness

Mental illness means…

- *When applied to an adult,* an illness which so lessens the capacity of the individual to use self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control;
- *When applied to a minor*, a mental condition, other than mental retardation alone, that so impairs the youth's capacity to exercise age adequate self-control or judgment in the conduct of his activities and social relationships so that he is in need of treatment.

Substance abuse means…

- The pathological use or abuse of alcohol or other drugs in a way or to a degree that produces an impairment in personal, social, or occupational functioning. "Substance abuse" may include a pattern of tolerance and withdrawal.

Psychotic Disorders

- Disorders of thinking and perceptions
    - Delusions: false beliefs
    - Hallucinations: false perceptions
- Include:
    - Psychotic Disorders
    - Delusional Disorder
    - Schizophrenia

    - Schizoaffective Disorder
    - Schizophreniform Disorder
    - Brief Psychotic Disorder
    - Substance/Medication-Induced Psychotic Disorder
    - Psychotic Disorder Due to Another Medical Condition
    - Unspecified Schizophrenia Spectrum and Other Psychotic Disorder
- Psychosis and danger to self
    - Risk of harm to self in context of delusions of doom
    - Risk of disability or deterioration due to:
    - Symptoms interfere with ability to care for self
    - Catatonia
- Psychosis and danger to others
    - Paranoid delusions can result in aggression towards others
    - Delusions of doom can result in harm to others as a beneficent act
    - Disorganization can result in unplanned aggression toward those trying to care for them
    - Victims of aggression usually family and friends, not strangers

Bipolar Disorders

- Disorders marked by severe mood swings that include emotional highs (mania and hypomania) and emotional lows (depression)
- Include:
    - Bipolar Disorder
    - Cyclothymic Disorder
    - Substance/Medication-Induced Bipolar and Related Disorder
    - Bipolar and Related Disorder Due to Another Medical Condition
    - Unspecified Bipolar and Related Disorder
- Bipolar Disorder and danger to self
    - Mania can lead to risk-taking and unsafe situations
    - Depressive phase can lead to suicidality
    - Increased risk in mixed states – combination of depressive and manic symptoms
- Bipolar Disorder and danger to others
    - Mania can lead to aggression when others try to control their behaviors or rein them in
    - Risk can be increased in the presence of psychosis

Depressive Disorders

- Characterized by persistent feelings of sadness severe enough to impact functioning
- Include:
    - Depressive Disorders
    - Disruptive Mood Dysregulation Disorder
    - Major Depressive Disorder
    - Persistent Depressive Disorder

    - Premenstrual Dysphoric Disorder
    - Substance/Medication-Induced Depressive Disorder
    - Depressive Disorder Due to Another Medical Condition
    - Unspecified Depressive Disorder
- Depressive Disorders and danger
    - Usually danger to self in the form of suicidality
    - Aggression can occur in the context of lashing out in frustration
    - Risk can be increased in the presence of psychosis
- Self-harm
    - Coping skill or danger to self?
    - Context is important

Neurocognitive Disorders (Dementia)

- Symptoms
    - Memory impairment
    - One or more cognitive disturbances
        - Aphasia (language)
        - Apraxia (motor)
        - Agnosia (recognition)
        - Deficits in executive functioning
    - Deficits cause significant impairment and are a decline from previous functioning
- Alzheimers type
    - Most common – about 2/3 of dementia cases
    - Memory loss is usually most noticeable symptom
    - Amyloid plaques and neurofibrillary tangles – “plaques and tangles”
    - Mixed (combination of Alzheimers and Vascular) often lumped into this category
- Lewy body type
    - Second most common at 10-15 % of cases
    - Often results in visual hallucinations
    - Can have a fluctuating level of cognitive impairment
    - Can respond poorly to antipsychotic medications
- Frontotemporal type
    - Frontal lobe responsible for executive functioning and inhibition
    - Characterized by personality changes, behavioral changes, and/or language impairment
    - Memory may be relatively preserved
- Vascular type
    - Caused by loss of blood flow to parts of the brain
        - Ischemic (blockage of blood vessel)
        - Hemorrhagic (bleeding)
    - Deficit is due to part of brain affected
    - Can be step-wise in nature
- Traumatic brain injury

    - Deficit caused by direct result of physical injury and/or bruising
    - Usually not progressive
    - Potential for improvement
- Parkinsons and Huntingtons disease
    - Neurodegenerative disease with motor symptoms that can include cognitive symptoms
- Neurocognitive disorder due to a medical condition
    - Hepatic encephalopathy
    - Renal failure
    - HIV/AIDS
- Neurocognitive Disorders and danger
    - Aggression occurs in context of confusion and paranoia
    - Loss of inhibition can lead to verbal and physical aggression
    - Aggression usually focused on caretakers due to frustration or lack of understanding
- Commitment can occur due to:
    - Lack of capacity to consent to treatment (admission)
    - Risk of disability or deterioration
    - Usually a gradual and progressive condition, so commitment is less frequent

Other possible mental illnesses leading to commitment

Substance Use Disorders

- Alcoholic
    - Wernicke's encephalopathy (acute) and Korsakoff's psychosis (chronic)
    - Damage to mammillary bodies from thiamine deficiency
    - Confabulation can be a hallmark symptom
- Psychosis due to substance use leading to danger
    - Hallucinogens
    - PCP
    - Stimulants
    - Withdrawal

Thoughts of killing others - criminal issue or psychiatric issue?

- If any indication of a psychiatric disorder, it may be worthwhile to pursue involuntary commitment so that an evaluation can occur (to determine presence of mental illness and causation)
- Consequences from criminal proceedings usually more severe than civil proceedings

Things to rule out

- Delirium
- Medical conditions mimicking mental illness

References

- Allen, N.G, Khan, J.S., Alzahri, M.S., & Stolar, A.G. (2015). Ethical issues in emergency psychiatry. Emergency Medical Clinics of North America, 33, 863-874.
- Chodoff, P. (1976). The case for involuntary hospitalization of the mentally ill. American Journal of Psychiatry, 133(5), 496-501.
- Felthous, A.R. (2011). The “untreatability” of psychopathy and hospital commitment in the USA. International Journal of Law and Psychiatry, 34, 400-405.
- Ford, M.D. (1980). The psychiatrist’s double bind: the right to refuse medication. American Journal of Psychiatry, 137(3), 332-339.
- Miller, R.D. (1992). Need-for-treatment criteria for involuntary civil commitment: impact in practice. The American Journal of Psychiatry, 149(10), 1380-1384.

APPEALS AND CASE LAW UPDATE

CASE SUMMARIES FROM INVOLUNTARY COMMITMENT AND VOLUNTARY ADMISSION APPEALS

Civil Commitment Conference
January 20, 2017
Kristen Todd, Special Counsel
David Andrews, Assistant Appellate Defender

Published Opinions

***In re Shackleford*, 789 S.E.2d 15 (2016):** In *Shackleford*, the respondent argued that he was deprived of the right to appellate review because the court's recording equipment failed to record the arguments and testimony presented at the commitment hearing, which made it impossible for the court reporter to prepare a transcript. The Court of Appeals agreed and remanded the case for a new hearing. *Id*. at 21. As part of its opinion, the Court of Appeals held that the respondent's appellate counsel made sufficient, though ultimately unsuccessful, efforts to reconstruct the hearing. The limited reconstruction that resulted from appellate counsel's efforts was not an adequate alternative to a verbatim transcript and did not "fulfill the same functions as a transcript."

***In re Woodard*, 791 S.E.2d 109 (2016):** The respondent in *Woodard* also argued that he was deprived of the right to appellate review because the recording equipment failed to record his commitment hearing. Again, the respondent's appellate counsel made sufficient efforts to reconstruct the commitment hearing. However, the Court of Appeals held that the trial judge's response, which included "a detailed account of the testimony offered at the hearing in a five-page, single-spaced, typed memorandum," constituted an adequate alternative to a transcript. *Id*. at 115.

***In re W.R.D.*, 790 S.E.2d 344 (2016):** In *W.R.D.*, the respondent argued that the evidence did not establish that he was either dangerous to himself or dangerous to others. With respect to the question of danger to self, the facility's expert testified that the respondent refused to take heart medication and that such refusal "could be deadly." He also testified that the respondent could not "maintain his own nourishment and medical care." The Court of Appeals held that the expert's testimony did not satisfy the definition of danger to self. Whether the respondent's refusal to take heart medication could be deadly did not establish that any possible harm would occur in the "near future," as required by the definition of dangerous to self. *Id*. at 348. Additionally, the expert's testimony that the respondent could not maintain nourishment and medical care was not based on sufficient underlying facts demonstrating a reasonable probability of serious physical debilitation. *Id*. With respect to the question of danger to others, the expert testified that the respondent made a threat, was hostile and aggressive, and stuck his finger in the face of employees. However, the Court of Appeals held that this testimony did not satisfy the

definition of danger others because it did not indicate that the respondent ever inflicted, attempted to inflict, or threatened to inflict serious bodily harm on others. *Id*. at 349.

***In re M.B.*, 771 S.E.2d 615 (2015):** In *M.B.*, the Court of Appeals held that readmitting a minor to a psychiatric residential treatment facility despite a recommendation that the minor be discharged to less restrictive treatment was not erroneous because no sufficient lesser facility was available and N.C. Gen. Stat. § 122C-2 indicated that the admission of a minors to mental health facilities depended on the General available resources. *Id*. at 626. Nevertheless, the Court of Appeals "strongly admonish[ed]" the Department of Social Services and the minor's legal guardian for their "lackluster performance" in trying to find placement for the juvenile. *Id*. at 627.

***In re Moore*, 758 S.E.2d 33 (2014):** In *Moore*, the Court of Appeals addressed the issue of whether the respondent must object to the sufficiency of an affidavit and petition at his first involuntary commitment hearing or risk waiving the objection in future hearings. The respondent argued on appeal that the facts alleged in the petition were insufficient to meet the statutory requirements for involuntary commitment and the trial court did not, therefore, have subject matter jurisdiction. *Id*. at 36. The Court, however, framed the respondent's issue as a challenge to the magistrate's determination to issue a custody order. *Id*. In reframing the issue in this manner, the Court analogized the case to that of an insufficient warrant in a criminal case. The Court explained that "[w]hen there is a problem with a warrant, a defendant may waive his objection to the sufficiency of the warrant if he does not object before he enters a plea[.]" *Id*. at 36. The Court then held that because the respondent did not raise concerns about the sufficiency of the affidavit during his first involuntary commitment hearing, he waived the issue for any later hearings and for appeal. *Id*. at 37.

***In re Spencer*, 762 S.E.2d 637 (2014):** In *Spencer*, the respondent argued that his case should have been dismissed because the record did not demonstrate that he was examined by a physician within 24 hours of being admitted to a 24-hour facility. The Court of Appeals disagreed, holding that while there was no report of the examination in the court file, there was testimony from a doctor that the respondent was examined in a timely manner. The Court then held that the doctor's testimony was proof that the examination had, in fact, occurred. *Id*. at 640. The respondent also argued that because of the lack of a written report of the examination, he did not have sufficient notice for the commitment hearing. Again, the Court of Appeals disagreed because respondent was present with his attorney at the hearing, was able to testify on his own behalf, and did not argue or demonstrate any prejudice from the lack of a report. *Id.* at 641.

***In re C.W.F.*, 753 S.E.2d 736 (2014), *disc. rev. improvidently allowed*, 367 N.C. 740 (2015):** *C.W.F.* addressed the issue of the admission of and reliance on reports prepared by non-testifying witnesses. In *C.W.F.*, the facility presented the trial court with three evaluations prepared by staff members from the facility who did not appear at the hearing to testify. *Id*. at 737-38. The respondent objected to the admission of the reports on hearsay, authentication, and confrontation grounds, but the court overruled the objection. *Id*. at 738-39. The court later entered an order concurring in the admission. As part of its order, the court found as fact all of the matters set forth in one of the reports. The Court of Appeals vacated and remanded the order because the

staff member who prepared the report that formed the basis of the court's order did not testify at the hearing and was not subject to cross-examination.

***In re A.N.B.*, 754 S.E.2d 442 (2014):** In *A.N.B.*, the respondent argued that the trial court erred by denying his motion for funds for an expert. As part of the motion, the respondent argued that he needed expert testimony in order to establish that his continued admission was not appropriate and to help him understand the testimony of the facility's expert. However, the Court of Appeals held that the trial court properly denied the motion because the respondent failed to demonstrate that "there existed some particularized reason, outside reasons that would be found in a standard case, why th[e] case required funding [for] an expert . . . ." *Id*. at 413. The respondent also argued that the trial court improperly qualified two facility employees as experts in "counseling and diagnosis" because there was no evidence that they had backgrounds in psychiatry or psychology. The Court of Appeals reviewed the evidence of the employees' backgrounds, which indicated that both employees had post-graduate degrees in counseling and experience working as counselors, and held that the trial court properly qualified the employees as experts. *Id*. at 415. Finally, the respondent argued that the trial court failed to make sufficient findings of fact in its order. The Court of Appeals agreed and reversed the order concurring in the minor's admission because the trial court failed to make any finding that further treatment was needed. *Id*. at 418-19.

***In re Bullock*, 748 S.E.2d 27 (2013):** *Bullock* is an interesting case for two reasons, neither of which are specific to commitment law, but both of which are important. The first thing the Court of Appeals did in *Bullock* was to discuss the difference between actual findings regarding material facts and mere recitations of testimony. *Id*. at 30. The Court explained that the trial court must make independent findings by determining that specific testimony in the record is credible. *Id*. In *Bullock*, most of the trial court's findings were merely recitations of the testimony given by the witnesses, not independent findings of fact. *Id*. Its failure to make sufficient findings required the Court to reverse the commitment order. The second thing the Court of Appeals did in *Bullock*, which has become the norm in commitment cases, was to not only reverse the order, but to remand the order to the trial court to allow it to make sufficient findings of fact. *Id*. 24-25. What is interesting about *Bullock* is that the Court actually seemed to explain this decision, whereas it has not done so in other cases. In *Bullock*, the Court stated that it was remanding to the trial court for entry of a revised order because "there [was] sufficient evidence in the record to support such findings." *Id* at. 24. Unlike in other cases where the Court simply remanded without explanation, the Court in *Bullock* seemed to indicate that it believed the evidence to be sufficient and was remanding because sufficient findings could be made.

***In re Murdock*, 222 N.C. App. 45 (2012):** In *Murdock*, the Court of Appeals addressed the issue of whether a fact-based or an elements-based test should be used when determining whether a respondent has been charged with a "violent crime" under N.C. Gen. Stat. §15A-1003(a), which governs the referral of an incapable defendant for civil commitment proceedings. Based on the evidence presented at his commitment hearing, the respondent was found to be incapable of proceeding and was found to have committed a "violent crime." On appeal of this hearing, the respondent argued that the trial court erred in using a fact-based analysis to determine his crime was "violent," and instead argued that the legislature intended for courts to

look only at the elements of the offense when making such a determination. The Court held that the trial court acted appropriately when analyzing the underlying facts of the respondent's charged crime. It found that a "violent crime" could be either one "which has an element involving the use, attempted use, or threatened use, or substantial risk of use of physical force, or a crime which does not have violence as an element, but assault with a deadly weapon was involved in its commission." *Id*. at 50. The respondent's actions, which included stating that he would not go with the officers, running into a bedroom where he stood within arms-reach of a loaded revolver, and then resisting while being handcuffed and removed from the bedroom were an "unequivocal appearance of an attempt with force and violence, to do some immediate physical injury to the officers," supported the trial court's conclusion that he had been charged with a "violent crime." *Id*. at 51.

***In re Whatley*, 224 N.C. App. 267 (2012):** In *Whatley*, the Court of Appeals addressed parts of the definitions of danger to self and danger to others that involve the likelihood of future danger. Specifically, the trial court found that the respondent was psychotic, manic, and bipolar, and that the respondent needed "medication monitoring" because she did not plan to follow up with outpatient care. The Court of Appeals held that the trial court's findings did not satisfy the definition of danger to self. The findings about the respondent's diagnoses only involved the question of mental illness. *Id*. at 273. In addition, the findings that the respondent needed to be monitored did not establish that she would suffer serious physical debilitation without treatment, as required by the definition of danger to self. *Id*. at 273. The trial court also found that the respondent "exhibit[ed] psychotic behavior that endangered . . . her newborn child." However, the Court of Appeals held that this finding did not satisfy the definition of danger to others because it failed to demonstrate a reasonable probability that the respondent's conduct would be repeated or that there was any "nexus" between the conduct and future danger to others. *Id*. at 274.

***In re Watson*, 209 N.C. App. 507 (2011):** In *Watson*, the Court of Appeals addressed the issue of whether respondents in involuntary commitment cases have the right to represent themselves at the district court hearing and, if so, what procedures must be followed before allowing them to do so. There, the trial court allowed the respondent to represent himself without conducting any type of inquiry into the respondent's ability to knowingly, intelligently, and voluntarily waive his right to counsel. Following testimony from the respondent and the respondent's doctor, the court committed the respondent for thirty days of inpatient treatment and sixty days of outpatient treatment. The Court of Appeals held that while respondents do have the right to represent themselves in commitment hearings, trial courts must conduct a thorough inquiry of the respondent and the record must show that the respondent was "literate and competent, that he understood the consequences of his waiver, and that, in waiving, he was voluntarily exercising his own free will." *Id*. at 515. The Court then applied statutes applicable to waiver of counsel in criminal cases, and provided a helpful checklist of questions that, while not mandatory, offered guidance for trial courts in future cases. *Id*. 515-21. Finally, the Court stressed the importance of the trial court making specific factual findings to support its decision, whether that decision was to grant or deny the respondent's request to waive counsel. *Id*. at 521.

***In re Allison*, 216 N.C. App. 297 (2011):** In *Allison*, the trial court relied on a locally modified form involuntary commitment order which provided a box that indicated that by clear, cogent,

and convincing evidence it found that the respondent met the requirements for further inpatient treatment. *Id*. at 299. The trial court simply checked the box and did not make any further written findings of fact or incorporate by reference either physician's report. *Id* at. 300. The Court of Appeals reversed the commitment order because "the trial court's checking of a box on its locally modified form [was] insufficient to support this determination." *Id*. The Court also noted that it had nothing to review because the trial court did not make any findings or fact or incorporate any physician's report. *Id*.

Unpublished Cases

The majority of the unpublished cases since 2011 have addressed the requirement that the trial court make sufficient written findings of fact to support its conclusions that a respondent is both mentally ill and a danger to himself or others. No less than twelve Court of Appeals opinions have reversed commitment orders based on a lack of sufficient written findings of fact, usually regarding dangerousness. In several of those cases the Court of Appeals stated that the facts were indistinguishable from *Allison*, (see *In re Spencer*, COA14-142 and *In re Fox*, COA11-1585), or *Whatley*, (see *In re Thompson*, COA14-654 and *In re Osteyee-Hoffman*, COA14-1287). Other cases where the Court of Appeals has reversed for insufficient findings of fact include *In re E.B.*, COA15-1087; *In re Johnson*, COA13-962; *In re Williams*, COA13-178; *In re Richardson*, COA12-119; *In re Richardson*, COA12-376; *In re Murrow*, COA12-148; *In re Church*, COA10-1598; and *In re Ramirez*, COA10-1162. By contrast, the Court of Appeals found the findings made by the trial court were sufficient in *In re D.M.B.*, COA15-315; *In re Richardson*, COA11-1124; and *In re Richardson*, COA11-616.

The Court of Appeals has also addressed the sufficiency of the evidence in *In re M.C.*, COA16-171; *In re Whatley*, COA13-387; *In re Richardson*, COA11-616; and *In re McCray*, COA09-1623. Significantly, in *McCray*, the Court of Appeals overruled its previous decisions in *In re Lowery*, 110 N.C. App. 67 (1993); and *In re Medlin*, 59 N.C. App. 33 (1982), which held that a respondent who was unable to provide for his basic needs for food, clothing, and shelter was dangerous to himself. The Court noted that *Lowery* and *Medlin* were decided under an older version of the definition of danger to self, which did not require proof of a reasonable probability of serious physical debilitation in the near future.

In *In Re B.J.G.*, COA14-669, the Court of Appeals directly applied *Watson* and held that the trial court had improperly allowed the respondent to represent himself without ensuring that his waiver of counsel was knowing and voluntary. Finally, in *In re Hedrick*, COA16-256, the Court of Appeals remanded a commitment order for a new hearing where the respondent was deprived of her right to appellate review due to an incomplete transcript and the trial court failed to record sufficient findings of fact in the commitment order.

CRITERIA FOR STAYS AND RESOURCES FOR INVOLUNTARY COMMITMENT CASES

Civil Commitment Conference
January 20, 2017
David Andrews, Assistant Appellate Defender

Criteria for Stays in Involuntary Commitment Appeals:

The Office of the Appellate Defender is open to seeking stays in appeals that match the following criteria:

1. The appeal is from an involuntary commitment order
2. The respondent is an adult
3. The respondent has not been subject to any prior commitment orders
4. There was no evidence of conduct involving violence, threats, or self-harm
5. The commitment period is a minimum of 30 days

Other Resources

The following resources will be available on the Office of Special Counsel website:

1. A sample notice of appeal
2. A sample motion to dismiss
3. A sample motion for funds to hire an expert
4. A handout for clients on commitment appeals

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
17 SPC 002

****

IN THE MATTER OF:)
)
RON RESPONDENT)

****

MOTION TO DISMISS

****

NOW COMES Ron Respondent, by and through counsel, and moves this Court to dismiss the above-captioned case. In support of this motion, Mr. Respondent shows the following:

STATEMENT OF THE FACTS

1. On January 1, 2017, a petition and affidavit were presented to an Orange County magistrate alleging that Mr. Respondent was mentally ill and dangerous to himself. The same day, a magistrate found that there were reasonable grounds to believe the facts alleged in the petition were true and issued a custody order for Mr. Respondent.

2. A psychologist examined Mr. Respondent on January 2, 2017 and issued a report stating that Mr. Respondent was mentally ill and dangerous to himself.

3. A psychiatrist then examined Mr. Respondent on January 5, 2017 and issued a report stating that Mr. Respondent was mentally ill and dangerous to himself.

4. The clerk then scheduled a commitment hearing for January 11, 2017. The clerk also assigned the following file number to the case: 17 SPC 001.

5. On January 11, 2017, the petition in 17 SPC 001 was dismissed by this Court because the psychologist and psychiatrist were not available to testify against Mr. Respondent at the January 11, 2017 hearing (*or state other reason*: i.e., because the affidavit was insufficient, because the petition was otherwise invalid, because the facility failed to follow some other procedural requirement). However, on the same day, the psychiatrist filed a new petition alleging that Mr. Respondent was mentally ill and dangerous to himself. A magistrate subsequently found reasonable grounds to believe the facts alleged in the new petition were true and issued a custody order for Mr. Respondent. The clerk assigned the following file number to

the case: 17 SPC 002. The clerk also scheduled a commitment hearing in 17 SPC 002 for January 21, 2017.

ARGUMENT

6. This Court should dismiss the new petition filed against Mr. Respondent in 17 SPC 002 because allowing the facility to proceed on the new petition would constitute an end-run around the procedures in Chapter 122C of the North Carolina General Statutes and violate Mr. Respondent's right to due process under N.C. Const. art. I, § 19 and U.S. Const. amend. XIV.

7. First, the procedures in Chapter 122C require strict adherence. Our courts have made clear that because involuntary commitment is a "drastic remedy, it is encumbent upon all [who] use it to do so with care and exactness." *In re Ingram*, 74 N.C. App. 579, 580 (1985). To that end, the procedures in Chapter 122C "must be followed diligently." *In re Hernandez*, 46 N.C. App. 265, 267 (1980). When a psychiatrist or eligible psychologist serves a report upon the clerk recommending inpatient commitment, the clerk "shall" schedule a commitment hearing. N.C. Gen. Stat. § 122C-264(b). The hearing "shall" then be held "within 10 days of the day the respondent is taken into law enforcement custody . . . ." N.C. Gen. Stat. § 122C-268(a). "[U]se of the language 'shall' is a mandate to trial judges" and the failure of a judge to comply with a statutory mandate "is reversible error." *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001). Here, the failure to hold a hearing on the petition in 17 SPC 001 because of the unavailability of the psychologist or psychiatrist *(or state other reason)* violated the statutory mandate that the commitment hearing be held within 10 days of the respondent being taken into custody. By filing a new petition based on grounds substantially similar to those in the first petition, the facility granted itself a *de facto* continuance without following the procedures outlined in § 122C-268(a). Mr. Respondent was deprived of his liberty during the pendency of both petitions. "Although the lack of flexibility provided in the statute may impose hardship on the State, the plain language of the statute, until amended, must control." *In re Jacobs*, 38 N.C. App. 573, 576, 248 S.E.2d 448, 450 (1978).

8. Second, the lack of any hearing within 10 days of Mr. Respondent being taken into custody violated his right to due process. Involuntary confinement in a mental health facility necessarily entails a "massive curtailment of liberty," *Humphrey v. Cady*, 405 U.S. 504, 509, 31 L. Ed. 2d 394, 402 (1972), that cannot be accomplished without "due process protection." *Addington v. Texas*, 441 U.S. 418, 426, 60 L. Ed. 2d 323, 300-31 (1979). Under N.C. Gen. Stat. § 122C-2, treatment must be provided to respondents "in ways consistent with the dignity, rights, and responsibilities of all North Carolina citizens." According to N.C. Gen. Stat. § 122C-201, "[a]ll admissions and commitments shall be accomplished under conditions that protect the dignity and constitutional rights of the individual." N.C. Gen. Stat. § 122C-201. Allowing the facility to pursue a new petition against Mr. Respondent without holding a hearing 10 days after he was taken into custody would violate Mr. Respondent's right to due process and deprive him of the protections that Chapter 122C affords respondents.

WHEREFORE, for the above reasons, Mr. Respondent respectfully requests that this Court dismiss the petition in 17 SPC 002 with prejudice and order such other relief as is just and proper.

Respectfully submitted, this the 15th day of January, 2017.

_____

Ann Attorney
Attorney at Law
123 Main Street
Chapel Hill, NC 27516

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was served on Ms. Jane Doe, 123 Main Street, Chapel Hill, North Carolina 27516, by deposit in the United States mail, first-class and postage prepaid.

This the 15th day of January, 2017.

_____

Ann Attorney
Attorney at Law

COLLATERAL CONSEQUENCES

Update on Commitment and Gun Rights in North Carolina

January 2017

For a more comprehensive discussion of the effect of commitment on gun rights, please refer to Chapter 12 and appendix D of the Civil Commitment Manual, 2nd edition, 2011, available through the UNC School of Government.

An Act to Amend Various Firearm Laws, passed in August of 2015, contained some changes to North Carolina law relating to possession of firearms by individuals who have been committed. (Session Law 2015-195, HB 562) Pertinent changes are summarized below.

1. **NICS reporting requirements** for commitment have not changed, but have been recodified, moving from section 122C-54(d)(1) to section 14-409.43.

The following are reported to NICS:

Inpatient commitment –mentally ill and dangerous to self or others

Outpatient commitment – mentally ill and, based on the individual's treatment history, in need of treatment in order to prevent further disability or deterioration that would predictably result in a danger to self or others. (No finding of current dangerousness is required)

Substance abuse commitment – substance abuser and dangerous to self or others

Not guilty by reason of insanity or mentally incompetent to proceed to criminal trial

Adjudication of incompetence

A 2013 law added some vague NICS reporting requirements to the handgun permit section of our firearm regulations. Section 14-404(c1) required the clerk to report to NICS within 48 hours, "notice of any of the judicial findings, court orders, or other factual matters, relevant to any of the disqualifying conditions specified in subsection (c) of this section." Disqualifying conditions included being adjudicated incompetent or being committed to any mental institution, and being an unlawful user of or addicted to marijuana or any depressant, stimulant, or narcotic drug. Implementation of the law was delayed, and then in August of 2015 this section of the law was **repealed**.

2. **Relief from the firearm disability**: also moved, from section 122C-54.1 to section 14-409.42.

Petitioner has the burden to prove by a preponderance of the evidence that he will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. If relief is granted, this is reported to NICS. **The** commitment is then deemed not to have occurred for purposes of the federal gun control act. See #3 below for why "the" is in bold type.

The AOC form to petition for relief has been updated to reflect the change in codification described above. See AOC-SP-211, Rev. 2/16.

3. **Prior commitments are now being entered into NICS**.

The new law requires "all historical records" to be reported to NICS by May 31, 2019 –everything listed under #1 above is included. Clerks are currently tasked with reporting as far back as 1986.

This brings into doubt the usefulness of having relief granted after going through a commitment. If your client has been committed more than once, and one or more of his previous commitments are eventually added to NICS, then he could still be vulnerable to prosecution under the federal gun control act. Many clients will be able to tell you that they have been sent to the hospital on other occasions, but determining whether or not each hospitalization was in fact a "commitment" could be very difficult. Even if each prior commitment could be identified, it then could still be necessary to seek relief from the disability for each commitment in order to avoid exposure under the gun control act. Hence, seeking relief from the firearm disability is probably of most use to someone who has only been committed once and who has good information as to when and where the commitment occurred.

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STATE OF NORTH CAROLINA

_____ County

File No.

Originating Co. File No.

In The General Court Of Justice
District Court Division

IN THE MATTER OF:

Name And Current Mailing Address Of Petitioner

Race	*Sex*	*Date Of Birth*

PETITION AND ORDER FOR REMOVAL OF DISABILITY PROHIBITING THE PURCHASE, POSSESSION OR TRANSFER OF A FIREARM

G.S. 14-409.42

Name And Address Of Attorney For Petitioner

NOTE TO PETITIONER:

1. *This petition must be filed in the district court of the county where you were the subject of the most recent judicial determination that either inpatient or outpatient treatment was appropriate or in the district court of the county of your residence.*
2. *Upon request, you must sign a release for the district attorney to receive your mental health records.*
3. *You must serve a copy of this petition on the director of the relevant inpatient and/or outpatient treatment facility and the district attorney in your current county of residence.*

I. PETITION

The petitioner named above hereby moves, pursuant to G.S. 14-409.42, for the removal of the petitioner's mental commitment bar to purchase, possess, or transfer a firearm from the National Instant Criminal Background Check System, and in support of this petition states the following:

1. I am over the age of 18.
2. I am a resident of _____ County.
3. ☐ I have never been involuntarily committed.

   OR

4. The most recent judicial determination that I needed ☐ inpatient ☐ outpatient treatment was made in _____ _____ County, North Carolina.
5. I am not likely to act in a manner dangerous to public safety and granting the relief that I am seeking is not contrary to the public interest.
6. My most recent ☐ inpatient ☐ outpatient mental commitment expired on *(date)* _____.
7. ☐ *If applicable*, previously, I filed a petition in district court for the removal of the mental commitment bar, which was denied on *(date)* _____, in *(name of county)* _____.
8. ☐ *If applicable*, previously, I appealed the district court decision to the superior court on *(date)* _____, and my petition was denied. One year or more has passed since the date of the denial.

Date	*Name Of Petitioner (type or print)*	*Signature Of Petitioner*

NOTE TO CLERK:

1. *Calendar the hearing for a session of district court when the court regularly hears commitment matters. (G.S. 14-409.42). If your county does not have a regular commitment hearing calendar, schedule the hearing before a district court judge at a time when the petition can be heard in a closed session of court.* ***HEARING IS CONFIDENTIAL. DO NOT PLACE ON A REGULAR DISTRICT COURT CALENDAR.***
2. *Complete AOC-G-180 (Notice Of Hearing), attach a copy of this petition and send to the Petitioner and the attorney who represented the State in the underlying case, or that attorney's successor.*

II. CERTIFICATE OF SERVICE: SERVICE ON DIRECTOR OF THE INPATIENT/OUTPATIENT TREATMENT FACILITY

I certify that a copy of this petition was served by:

☐ delivering a copy personally to the director of the inpatient/outpatient treatment facility that provided mental health treatment to me based on a judicial determination that I needed mental health treatment.

☐ depositing a copy of the enclosed in a postpaid properly addressed envelope in a post office or official depository under the exclusive care and custody of the U.S. Postal Service directed to the director of the inpatient/outpatient treatment facility that provided mental health treatment to me based on a judicial determination that I needed mental health treatment.

☐ leaving a copy with an employee at the office of the director of the inpatient/outpatient treatment facility that provided mental health treatment to me based on a judicial determination that I needed mental health treatment.

Name Of Person With Whom Copy Left (type or print)

Date	*Name (type or print)*	*Signature*

III. CERTIFICATE OF SERVICE: SERVICE ON DISTRICT ATTORNEY

I certify that a copy of this petition was served by:

☐ delivering a copy personally to the district attorney of my county of residence.

☐ depositing a copy of the enclosed in a postpaid properly addressed envelope in a post office or official depository under the exclusive care and custody of the U.S. Postal Service directed to the district attorney of my county of residence.

☐ leaving a copy at the office of the district attorney of my county of residence.

Name Of Person With Whom Copy Left (type or print)

Date	*Name (type or print)*	*Signature*

IV. FINDINGS OF FACT

This matter was heard before the undersigned judge upon the petition of the person named on the reverse. Having considered the petition, and after hearing the evidence, the Court finds by a preponderance of the evidence that:

1. The petitioner is over the age of 18.
2. The petitioner is a resident of _____ County.

☐ 3. The petitioner's most recent judicial determination that the petitioner needed ☐ inpatient ☐ outpatient treatment was made in _____ County, North Carolina.

☐ 4. The petitioner ☐ is ☐ is not likely to act in a manner dangerous to public safety and granting the relief requested ☐ would ☐ would not be contrary to the public interest. *(State reasons; G.S. 14-409.42 requires the court to make "specific findings of fact on which it bases its decision." G.S. 14-409.42 also requires the court to consider the circumstances regarding the firearms disabilities from which relief is sought, the petitioner's mental health and criminal history, the petitioner's reputation, and changes in the petitioner's condition or circumstances since the original determination.)*

☐ 5. The petitioner's most recent ☐ inpatient ☐ outpatient mental commitment expired on *(date)* _____.

☐ 6. If the petitioner has filed a previous petition for removal of the mental commitment bar that was denied, one year or more has passed since the date of the denial.

7. The petitioner ☐ was ☐ was not committed for mental health treatment based on a finding of not guilty by reason of insanity.

☐ 8. The petitioner has never been involuntary committed.

V. CONCLUSIONS OF LAW

After a hearing on this petition, and based on the foregoing findings, the Court concludes as follows: *(check one)*

☐ 1. The petitioner is not likely to act in a manner dangerous to public safety and granting the relief requested would not be contrary to the public interest. Therefore, the petitioner is entitled to the relief requested.

☐ 2. The petitioner is likely to act in a manner dangerous to public safety and granting the relief requested would be contrary to the public interest. Therefore, the petitioner is **not** entitled to the relief requested.

☐ 3. The petitioner has never been involuntarily committed.

VI. ORDER

It is hereby ordered that: *(check one)*

☐ 1. The relief requested by the petitioner is granted. The record of the petitioner's involuntary commitment transmitted to the National Instant Criminal Background Check System (NICS) shall be removed. The clerk will transmit a copy of this Order to NICS.

☐ 2. The relief requested by the petitioner is **NOT** granted. The record of the petitioner's involuntary commitment shall remain in NICS.

Date	*Name Of Judge (type or print)*	*Signature Of Judge*