UNC SCHOOL OF GOVERNMENT

2019 Civil Commitment Conference

January 25, 2019 / Chapel Hill, NC

Sponsored by UNC School of Government &
NC Office of Indigent Defense Services

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

2019 Civil Commitment Conference

January 25, 2019/ Chapel Hill, NC

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

AGENDA

8:00 to 8:30 am	Check-in
8:30 to 8:45	Welcome *Austine Long, Program Attorney* *UNC School of Government, Chapel Hill, NC*
8:45 to 10:15	**Senate Bill 630 [90 min.]** *Mark Botts, Associate Professor* *UNC School of Government, Chapel Hill, NC*
10:15 to 10:30	*Break*
10:30 to 12:00	**Accessing Care after a Civil Commitment [90 min.]** *Britney M. Phifer, Utilization Management Clinical Manager* *Cardinal Innovations Healthcare, Charlotte, NC* *Justin B. Richman, Senior Associate General Counsel* *Cardinal Innovations Healthcare, Charlotte, NC*
12:00 to 1:00	Lunch *(provided in building)* *
1:00 to 1:45	**Appeals and Case Law Update [45 min.]** *David Andrews, Assistant Appellate Defender* *Office of the Appellate Defender, Durham, NC*
1:45 to 2:45	**The Price We Pay as Professional Problem Solvers (MH) [60 min.]** *Atiya Mosley, Attorney, Legal Aid of North Carolina, Raleigh, NC*
2:45 to 3:00	*Break* (light snacks provided)
3:00 to 4:00	**Handling Conflicts in Civil Commitment Cases (Ethics) [60 min.]** *Kristine Sullivan, Senior Attorney* *Disability Rights North Carolina, Raleigh, NC*
4:00 to 4:45	**Immigration Consequences of Commitment [45 min.]** *Joe Lambert, Attorney* *EMP Law, Winston-Salem, NC*

CLE HOURS: 6.50 (Includes 1 hour of ethics/professional responsibility and 1 hour of substance abuse/mental health awareness)

* IDS employees may not claim reimbursement for lunch.

Psychiatric Advance Directives and Health Care Powers of Attorney

G.S. 122C-71, et seq.; G.S. 32A-15, et seq.

Some Guiding Principles

Mark F. Botts, UNC School of Government

1. A Psychiatric Advance Directive or PAD (also called an Advance Instruction for Mental Health Treatment) gives an individual the ability to anticipate future mental health treatment needs and to put in writing helpful information and instructions for treatment providers in the event that the individual, due to the nature of an anticipated mental healthcare event, loses the mental capacity to make and communicate treatment decisions.
2. A PAD may be used by the individual (called the principal) to provide advanced consent to treatment that is offered to the individual at a future time when the individual, due to a psychiatric crisis, lacks the capacity to give informed consent to treatment.
3. A Health Care Power of Attorney or HCPA may be used to name a substitute or surrogate decision maker, someone the principal trusts, to make treatment decisions on behalf of the principal if the principal, at some point in the future, loses the mental capacity to consent to treatment (becomes "incapable").
4. An HCPA may address physical or mental health treatment, and the surrogate decision maker's (health care agent's) authority to make decisions on behalf of the principal is broad unless the principal writes limitations on this authority into the HCPA. An HCPA may include guidance or directions to the health care agent regarding the principal's health care.
5. A PAD may be executed without executing an HCPA. An HCPA may be executed without executing a PAD. Or, an HCPA may incorporate or be combined with a PAD. They are separate documents that stand alone from each other, except that if both are executed, then the health care agent's mental health treatment decisions made on behalf of the principal must be consistent with any instructions in the PAD. If no PAD exists, then the health care agent's decisions shall be consistent with what the agent believes in good faith to be the manner in which the principal would act if the principal did not lack capacity to make or communicate health care decisions.
6. A mental health treatment provider or attending physician who is presented with a PAD or HCPA must make the PAD, HCPA, or both, a part of the principal's medical record.
7. With a few exceptions, an attending physician or mental health treatment provider must act in accordance with the instructions in a PAD, or the instructions of a health care agent named in an HCPA, when the principal, in the opinion of a physician or psychologist, is determined to be incapable.
8. Once the principal regains capacity and is no longer "incapable," the principal regains the authority to make treatment decisions on his or her own, unless the principal is adjudicated incompetent and a guardian has been appointed to make treatment decisions.
9. An individual making a PAD may grant or withhold consent to treatment, including the use of medication, electroconvulsive treatment, and admission to an inpatient facility for mental illness. An individual who is incapable of giving consent to treatment may be admitted to an inpatient facility based on the individual's prior written consent in the PAD.
10. When an HCPA authorizes a health care agent to make mental health treatment decisions for a person who is incapable, the health care agent must act for the individual in applying for admission and consenting to treatment at an inpatient facility, consistent with any limitations expressed by the principal in the HCPA or, if one exists, PAD.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

SESSION LAW 2018-33
SENATE BILL 630

AN ACT REVISING THE LAWS PERTAINING TO INVOLUNTARY COMMITMENT IN ORDER TO IMPROVE THE DELIVERY OF BEHAVIORAL HEALTH SERVICES IN NORTH CAROLINA.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 122C-3 reads as rewritten:

"**§ 122C-3. Definitions.**

The following definitions apply in this Chapter:

…

(8a) "Commitment examiner" means a physician, an eligible psychologist, or any health professional or mental health professional who is certified under G.S. 122C-263.1 to perform the first examination for involuntary commitment described in G.S. 122C-263(c) or G.S. 122C-283(c) as required by Parts 7 and 8 of this Article.

…

(11) "Dangerous to ~~himself~~ self or others" means:

a. "Dangerous to ~~himself~~ "self" means that within the relevant past:

…

(16a) "Health screening" means an appropriate screening suitable for the symptoms presented and within the capability of the entity, including ancillary services routinely available to the entity, to determine whether or not an emergency medical condition exists. An emergency medical condition exists if an individual has acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the individual's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part.

(16b) "Incapable" with respect to an individual has the same definition set forth in G.S. 122C-72(4). An adult individual who is incapable is not the same as an incompetent adult unless the adult individual has been adjudicated incompetent under Chapter 35A of the General Statutes.

(17) "Incompetent adult" means an adult individual who has been adjudicated ~~incompetent.~~incompetent under Chapter 35A of the General Statutes.

…

(20) "Legally responsible person" means: (i) when applied to an adult, who has been adjudicated incompetent, a guardian; (ii) when applied to a minor, a parent, guardian, a person standing in loco parentis, or a legal custodian other than a parent who has been granted specific authority by law or in a custody order to consent for medical care, including psychiatric treatment; or (iii) when applied to an adult who is incapable as defined in ~~G.S. 122C-72(c)~~G.S. 122C-72(4) and who has not been adjudicated incompetent,

a health care agent named pursuant to a valid health care power of ~~attorney.~~attorney; provided that if an incapable adult does not have a health care agent or guardian, "legally responsible person" means one of the persons specified in subdivisions (3) through (7) of subsection (c) of G.S. 90-21.13, to be selected based on the priority indicated in said subdivisions (3) through (7).

…

(20b) "Local management entity" or "LME" means an area ~~authority, county program, or consolidated human services agency. It is a collective term that refers to functional responsibilities rather than governance structure.~~authority.

…

(27a) "Outpatient treatment physician or center" as used in Part 7 of Article 5 of this Chapter means a physician or center that provides treatment services directly to the outpatient commitment respondent. An LME/MCO that contracts with an outpatient treatment physician or center to provide outpatient treatment services to a respondent is not an outpatient treatment physician or center. Every LME/MCO is responsible for contracting with qualified providers of services in accordance with G.S. 122C-141, 122C-142(a), 122C-115.2(b)(1)b., and 122C-115.4(b)(2) to ensure the availability of qualified providers of outpatient commitment services to clients of LME/MCOs who are respondents to outpatient commitment proceedings and meet the criteria for outpatient commitment. A contracted provider with an LME/MCO shall not be designated as an outpatient treatment physician or center on an outpatient commitment order unless the respondent enrolled with an LME/MCO or is eligible for services through an LME/MCO, or the respondent otherwise qualifies for the provision of services offered by the provider.

…

~~(29a) "Program director" means the director of a county program established pursuant to G.S. 122C-115.1.~~

…."

SECTION 2. G.S. 122C-4 reads as rewritten:

"**§ 122C-4. Use of phrase "client or ~~his~~ the legally responsible person."**

(a) Except as otherwise provided by law, whenever in this Chapter the phrase "client or ~~his~~ the legally responsible person" is used, and the client is a minor or an incompetent adult, the duty or right involved shall be exercised not by the client, but by the legally responsible person.

(b) Except as otherwise provided by law, whenever in this Chapter the phrase "client or the legally responsible person" is used, and the client is an incapable adult who has not been adjudicated incompetent under Chapter 35A of the General Statutes, the duty or right involved shall be exercised not by the client but by a health care agent named pursuant to a valid health care power of attorney, if one exists, or by the client as expressed in a valid advance instruction for mental health treatment, if one exists. If no health care power of attorney or advance instruction for mental health treatment exists, the legally responsible person for an incapable adult who has not been adjudicated incompetent under Chapter 35A of the General Statutes shall be one of the persons listed in subdivisions (3) through (7) of subsection (c) of G.S. 90-21.13, to be selected based on the priority order indicated in said subdivisions (3) through (7)."

SECTION 3. G.S. 122C-53 reads as rewritten:

"**§ 122C-53. Exceptions; client.**

(a) A facility may disclose confidential information if the client or ~~his~~ the legally responsible person consents in writing to the release of the information to a specified person. This release is valid for a specified length of time and is subject to revocation by the consenting individual.

(b) A facility may disclose (i) the fact of admission or discharge of a client and (ii) the time and location of admission or discharge to the client's next of kin whenever the responsible professional determines that the disclosure is in the best interest of the client.

(c) Upon request a client shall have access to confidential information in ~~his client~~ the client's record except information that would be injurious to the client's physical or mental well-being as determined by the attending physician or, if there is none, by the facility director or ~~his~~ the facility director's designee. If the attending physician or, if there is none, the facility director or ~~his~~ the facility director's designee has refused to provide confidential information to a client, the client may request that the information be sent to a physician or psychologist of the client's choice, and in this event the information shall be so provided.

(d) Except as provided by G.S. 90-21.4(b), upon request the legally responsible person of a client shall have access to confidential information in the client's record; except information that would be injurious to the client's physical or mental well-being as determined by the attending physician or, if there is none, by the facility director or ~~his~~ the facility director's designee. If the attending physician or, if there is none, the facility director or ~~his~~ the facility director's designee has refused to provide confidential information to the legally responsible person, the legally responsible person may request that the information be sent to a physician or psychologist of the legally responsible person's choice, and in this event the information shall be so provided.

(e) A client advocate's access to confidential information and ~~his~~ the client's responsibility for safeguarding this information are as provided by subsection (g) of this section.

(f) As used in subsection (g) of this section, the following terms have the meanings specified:

(1) "Internal client advocate" means a client advocate who is employed by the facility or has a written contractual agreement with the Department or with the facility to provide monitoring and advocacy services to clients in the facility in which the client is receiving ~~services; and~~services.

(2) "External client advocate" means a client advocate acting on behalf of a particular client with the written consent and ~~authorization;~~authorization under either of the following circumstances:

a. In the case of a client who is an adult and who has not been adjudicated incompetent under Chapter 35A or former Chapters 33 or 35 of the General Statutes, of the ~~client; or~~client.

b. In the case of any other client, of the client and ~~his~~ the legally responsible person.

(g) An internal client advocate shall be granted, without the consent of the client or ~~his~~ the legally responsible person, access to routine reports and other confidential information necessary to fulfill ~~his~~ monitoring and advocacy functions. In this role, the internal client advocate may disclose confidential information received to the client involved, to ~~his~~ the legally responsible person, to the director of the facility or ~~his~~ the director's designee, to other individuals within the facility who are involved in the treatment or habilitation of the client, or to the Secretary in accordance with the rules of the Commission. Any further disclosure shall require the written consent of the client and ~~his~~ the legally responsible person. An external client advocate shall have access to confidential information only upon the written consent of the client and his legally responsible person. In this role, the external client advocate may use the information only as authorized by the client and his legally responsible person.

…."

SECTION 4. G.S. 122C-54 reads as rewritten:

"**§ 122C-54. Exceptions; abuse reports and court proceedings.**

…

(a1) Upon a determination by the facility director or ~~his~~ the facility director's designee that disclosure is in the best interests of the client, a facility may disclose confidential information for purposes of filing a petition for involuntary commitment of a client pursuant to Article 5 of this Chapter or for purposes of filing a petition for the adjudication of incompetency of the client and the appointment of a guardian or an interim guardian under Chapter 35A of the General Statutes.

…

(c) ~~Certified copies of written results of examinations by physicians and records in the cases of clients voluntarily admitted or involuntarily committed and facing~~ When an individual is held at a facility under involuntary commitment or voluntary admission proceedings that require district court hearings ~~and~~ or rehearings pursuant to Article 5 of this ~~Chapter~~ Chapter, certified copies of written results of examinations, gathered during the course of the current commitment or admission, shall be furnished by the facility to the client's counsel, the attorney representing the State's interest, and the court. Upon request, the facility shall disclose to respondent's counsel, the attorney representing the State's interest, and the court confidential information collected, maintained, or used in attending or treating the respondent during the proceeding for voluntary admission or involuntary commitment. Other medical records shall be furnished only upon court order. The confidentiality of client information shall be preserved in all matters except those pertaining to the necessity for admission or continued stay in the facility or commitment under review. ~~The relevance of confidential information for which disclosure is sought in a particular case shall be determined by the court with jurisdiction over the matter.~~

…

(e) Upon the request of the legally responsible person or the minor admitted or committed, and after that minor has both been released and reached adulthood, the court records of that minor made in proceedings pursuant to Article 5 of this Chapter may be expunged from the files of the court. The minor and ~~his~~ the minor's legally responsible person shall be informed in writing by the court of the right provided by this subsection at the time that the application for admission is filed with the court.

…

(g) A facility may disclose confidential information to an attorney who represents either the facility or an employee of the facility, if such information is relevant to litigation, to the operations of the facility, or to the provision of services by the facility. An employee may discuss confidential information with ~~his~~ the employee's attorney or with an attorney representing the facility in which ~~he~~ the employee is employed.

…."

SECTION 5. G.S. 122C-55 reads as rewritten:

"**§ 122C-55. Exceptions; care and treatment.**

(a) Any facility may share confidential information regarding any client of that facility with any other facility when necessary to coordinate appropriate and effective care, treatment or habilitation of the client. For the purposes of this section, ~~coordinate~~ the following definitions apply:

(1) "Coordinate" means the provision, coordination, or management of mental health, developmental disabilities, and substance abuse services and other health or related services by one or more facilities and includes the referral of a client from one facility to another.

(2) "Facility" and "area facility" include an area authority.

(3) "Secretary" includes any primary care case management programs that contract with the Department to provide a primary care case management program for recipients of publicly funded health and related services.

(a1) Any facility may share confidential information regarding any client of that facility with the Secretary, and the Secretary may share confidential information regarding any client with a facility when necessary to conduct quality assessment and improvement activities or to

coordinate appropriate and effective care, treatment or habilitation of the client. For purposes of this subsection, subsection (a6), and subsection (a7) of this section, the purposes or activities for which confidential information may be disclosed include, but are not limited to, case management and care coordination, disease management, outcomes evaluation, the development of clinical guidelines and protocols, the development of care management plans and systems, population-based activities relating to improving or reducing health care costs, and the provision, coordination, or management of mental health, developmental disabilities, and substance abuse services and other health or related services. ~~As used in this section, "facility" includes an LME and "Secretary" includes the Community Care of North Carolina Program, or other primary care case management programs that contract with the Department to provide a primary care case management program for recipients of publicly funded health and related services.~~

(a2) Any ~~area~~ or State facility or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill may share confidential information regarding any client of that facility with any other area facility or State facility or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill when necessary to conduct payment activities relating to an individual served by the facility. Payment activities are activities undertaken by a facility to obtain payment or ~~provide~~ receive reimbursement for the provision of services and may include, but are not limited to, determinations of eligibility or coverage, coordination of benefits, determinations of cost-sharing amounts, claims management, claims processing, claims adjudication, claims appeals, billing and collection activities, medical necessity reviews, utilization management and review, precertification and preauthorization of services, concurrent and retrospective review of services, and appeals related to utilization management and review.

(a3) Whenever there is reason to believe that a client is eligible for benefits through a Department program, any State or ~~area~~ facility or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill may share confidential information regarding any client of that facility with the Secretary, and the Secretary may share confidential information regarding any client with an area facility or State facility or the psychiatric services of the University of North Carolina Hospitals at Chapel Hill. Disclosure is limited to that information necessary to establish initial eligibility for benefits, determine continued eligibility over time, and obtain reimbursement for the costs of services provided to the client.

…

(c1) A facility may furnish confidential information in its possession to the sheriff of any county when requested by the sheriff regarding any client of that facility who is confined in the county's jail or jail annex when the inmate has been determined by the county jail medical unit to be in need of treatment for mental illness, developmental disabilities, or substance abuse. The sheriff may furnish to a facility confidential information in its possession about treatment for mental illness, developmental disabilities, or substance abuse that the county jail medical unit has provided to any present or former inmate if the inmate is presently seeking treatment from the requesting facility or if the inmate has been involuntarily committed to the requesting facility for inpatient or outpatient treatment. Under the circumstances described in this subsection, the consent of the client or inmate shall not be required in order for this information to be furnished and the information shall be furnished despite objection by the client or inmate. Confidential information disclosed pursuant to this subsection is restricted from further disclosure.

…."

SECTION 6. G.S. 122C-115.4 reads as rewritten:

"**§ 122C-115.4. Functions of local management entities.**

…

(b) The primary functions of an LME are designated in this subsection and shall not be conducted by any other entity unless an LME voluntarily enters into a contract with that entity under subsection (c) of this section. The primary functions include all of the following:

…

(7a) Community crisis services planning in accordance with G.S. 122C-202.2.

…."

SECTION 7. G.S. 122C-117 reads as rewritten:

"**§ 122C-117. Powers and duties of the area authority.**

(a) The area authority shall do all of the following:

…

(18) Develop and adopt community crisis services plans in accordance with G.S. 122C-202.2

…."

SECTION 8. Part 1 of Article 5 of Chapter 122C of the General Statutes is amended by adding a new section to read:

"**§ 122C-202.2. LME/MCO community crisis services plan; commitment examiners; transporting agencies; training; collaboration.**

(a) Every LME/MCO shall adopt a community crisis services plan in accordance with this section to facilitate first examination in conjunction with a health screening at the same location required pursuant to Parts 7 and 8 of this Article within its catchment area. The community crisis services plan for the LME/MCO's catchment area shall be comprised of separate plans, known as "local area crisis services plans" for each of the local areas or regions within the catchment area that the LME/MCO identifies as an appropriate local planning area, taking into consideration the available resources and interested stakeholders within a particular geographic area or region of the catchment area. Each LME/MCO may determine the number and geographic boundaries of the local planning areas within its catchment area. Each local area crisis services plan shall, for the local area covered by the local plan, do at least all of the following:

(1) Incorporate the involuntary commitment transportation agreement adopted pursuant to G.S. 122C-251(g) for the cities and counties within the local planning areas which identifies the law enforcement officers, designees under G.S. 122C-251(g), or individuals or entities otherwise required to provide custody and transportation of a respondent for a first examination in conjunction with a health screening at the same location required by G.S. 122C-263(a) and G.S. 122C-283. Notwithstanding the foregoing, counties and cities shall retain the responsibilities for custody and transportation set forth in this Article, except as otherwise set forth in a plan developed, agreed upon, and adopted in compliance with this section and G.S. 122C-251(g).

(2) Identify one or more area facilities or other locations in accordance with G.S. 122C-263 and G.S. 122C-283. Each LME/MCO shall contract with one or more facilities or other locations described in G.S. 122C-263 and G.S. 122C-283 for the provision of health screenings and first examinations required by G.S. 122C-263 and G.S. 122C-283 for the provision of first examination in conjunction with a health screening required by G.S. 122C-263 and G.S. 122C-283, to meet the needs of its local planning area.

(3) Identify available training for law enforcement personnel and other persons designated or required under G.S. 122C-251(g) to provide transportation and custody of involuntary commitment respondents. Law enforcement officers may request to participate in the training program identified by the LME/MCO. Persons who are designated in compliance with G.S. 122C-251(g) to provide all or part of the transportation and custody required for involuntary commitment proceedings under this Article and who are not law enforcement officers shall participate in the training. To the extent

feasible, the identified training shall address the use of de-escalation strategies and techniques, the safe use of force and restraint, respondent rights relevant to custody and transportation, the location of any area facilities identified by the LME/MCO pursuant to subdivision (1) of this subsection, and the completion and return of the custody order to the clerk of superior court. The training identified by the LME/MCO may be comprised of one or more programs and may include a Crisis Intervention Team program or other mental health training program or a combination of these programs.

(b) Law enforcement agencies, acute care hospitals, magistrates, area facilities with identified commitment examiners, and other affected agencies shall participate with the LME/MCO in the development of the local area crisis services plans described in this section. Other stakeholders and community partners identified by the LME/MCO may be invited to participate in the planning. No local area crisis services plan developed under this section shall be adopted or thereafter be effective or implemented unless such plan first has been mutually agreed upon in writing by all entities identified in the plan pursuant to subsection (a) of this section. If any member of the Crisis Planning Committee fails to agree to the plan in writing, the Secretary shall develop a procedure to attempt to resolve the conflict in order to achieve approval of the Plan.

(c) The plans adopted under this section may, by mutual agreement of all entities identified in the plan, address any other matters necessary to facilitate the custody, transportation, examination, and treatment of respondents to commitment proceedings under Parts 7 and 8 of this Article."

SECTION 9. G.S. 122C-206 reads as rewritten:

"**§ 122C-206. Transfers of clients between 24-hour ~~facilities.~~facilities; transfer of clients from 24-hour facilities to acute care hospitals.**

(a) Before transferring a voluntary adult client from one 24-hour facility to another, the responsible professional at the original facility shall: (i) get authorization from the receiving facility that the facility will admit the client; (ii) get consent from the client; and (iii) if consent to share information is granted by the client, or if the disclosure of information is permitted under G.S. 122C-53(b), notify the next of kin of the time and location of the transfer. The preceding requirements of this paragraph may be waived if the client has been admitted under emergency procedures to a State facility not serving the client's region of the State. Following an emergency admission, the client may be transferred to the appropriate State facility without consent according to the rules of the Commission.

(b) Before transferring a respondent held for a district court hearing or a committed respondent from one 24-hour facility to another, the responsible professional at the original facility shall:

(1) Obtain authorization from the receiving facility that the facility will admit the respondent; and

(2) Provide reasonable notice to the ~~respondent, or~~ respondent or the legally responsible person, and to the respondent's counsel, of the reason for the transfer and document the notice in the client's record.

No later ~~that~~ than 24 hours after the transfer, the responsible professional at the original facility shall notify the petitioner, the clerk of court, the respondent's counsel, and, if consent is granted by the respondent, or if the disclosure of the information is permitted under G.S. 122C-53 or other applicable law, the next of kin, that the transfer is ~~completed.~~complete. If the transfer is completed before the judicial commitment hearing, these proceedings shall be initiated by the receiving facility. If the respondent is a minor, an incompetent adult, or is deemed incapable, then the responsible professional at the original facility shall, not later than 24 hours after the transfer, notify the respondent's legally responsible person of the location of the transfer and that the transfer is complete.

(c) Minors and incompetent adults, admitted pursuant to Parts 3 and 4 of this Article, may be transferred from one 24-hour facility to another following the same procedures specified in subsection (b) of this section. In addition, the legally responsible person shall be consulted before the proposed ~~transfer.~~transfer and notified, within 24 hours after the transfer is complete, of the location of the transfer and that the transfer is complete. If the transfer is completed before the judicial determination required in G.S. 122C-223 or G.S. 122C-232, these proceedings shall be initiated by the receiving facility.

(c1) If a client described in subsections (b) or (c) of this section is to be transferred from one 24-hour facility to ~~another~~ another, or to an acute care hospital pursuant to subsection (e) of this section, and transportation is needed, the responsible professional at the original facility shall notify the clerk of court or magistrate, and the clerk of court or magistrate shall issue a custody order for transportation of the client as provided by G.S. 122C-251.

(d) Minors and incompetent adults, admitted pursuant to Part 5 of this Article and incapable adults admitted pursuant to Part 2A of this Article, may be transferred from one 24-hour facility to another provided that prior to transfer the responsible professional at the original facility shall:

(1) Obtain authorization from the receiving facility that the facility will admit the client; and

(2) Provide reasonable notice to the client regarding the reason for transfer and document the notice in the client's record; and

(3) Provide reasonable notice to and consult with the legally responsible person regarding the reason for the transfer and document the notice and consultation in the client's record.

No later than 24 hours after the transfer, the responsible professional at the original facility shall notify the legally responsible person that the transfer is completed.

(e) The responsible professional may transfer a client from one 24-hour facility to another or to an acute care hospital for emergency medical treatment, emergency medical evaluation, or emergency surgery without notice to or consent from the client. Within a reasonable period of time the responsible professional shall notify the next of kin or the legally responsible person of the client of the transfer.

(f) When a client is transferred from one 24-hour facility to another ~~facility~~ solely for medical reasons, the client shall be returned to the original facility when the medical care is completed unless the responsible professionals at both facilities concur that discharge of the client who is not subject to G.S. 122C-266(b) is appropriate.

(f1) When a client is transferred from a 24-hour facility to an acute care hospital solely for medical reasons, the hospital shall return the client to the original facility as soon as the next client space becomes available at the original facility after completion of the client's medical care. With the exception of facility-based crisis centers, the original facility must allow at least 12 hours for the client's return before assigning the client's room or bed to another patient, unless both facilities agree that return of the client in this time period is not feasible. The original facility must accept the return of the client in priority over other clients seeking admission, except in the cases of patients designated incapable to proceed to trial by court order. If the responsible professionals at both facilities concur that discharge of a client who is not subject to G.S. 122C-266(b) is appropriate, the client may be discharged. If, at the time of the transfer, a client is being held under a custody order pending a second commitment examination or a district court hearing under involuntary commitment proceedings, the custody order shall remain valid throughout the period of time necessary to complete the client's medical care and transport the client between the 24-hour facility and the acute care hospital; provided, however, that the requirement for a timely hearing under G.S. 122C-268(a) applies. Any decision to terminate the proceedings because the respondent no longer meets the criteria for commitment or because a

hearing cannot be held within the time required by G.S. 122C-268(a) shall be documented and reported to the clerk of superior court in accordance with G.S. 122C-266(c).

(g) The Commission may adopt rules to implement this section."

SECTION 10. G.S. 122C-210.1 reads as rewritten:

"**§ 122C-210.1. Immunity from liability.**

No ~~facility~~ facility, person, or entity, including an area facility, a facility licensed under this Chapter, an acute care hospital, a general hospital, an area authority, a law enforcement officer, an LME, or an LME/MCO, or any of ~~its~~ their officials, staff, or employees, or any other physician or ~~other~~ individual who is responsible for the custody, transportation, examination, admission, management, supervision, treatment, or release of a respondent or client and who ~~follows accepted professional judgment, practice, and standards~~ is not grossly negligent, is civilly or criminally liable, personally or otherwise, for that person's or entity's actions or omissions arising from these responsibilities or for the actions or omissions of ~~the~~ a respondent or client. This immunity is in addition to any other legal immunity from liability to which these ~~facilities~~ persons, entities, facilities, agencies, or individuals may be entitled and applies to actions performed in connection with, or arising out of, the ~~admission or commitment~~ custody, transportation, examination, commitment, admission, management, supervision, treatment, or release of any individual pursuant to or under the authority of this ~~Article.~~Article or otherwise."

SECTION 11. G.S. 122C-210.3 reads as rewritten:

"**§ 122C-210.3. Electronic and facsimile transmission of custody orders.**

A custody order entered by the clerk or magistrate pursuant to this Chapter may be delivered to the law enforcement officer or other person designated or required to provide transportation and custody pursuant to G.S. 122C-251 by electronic or facsimile transmission."

SECTION 12. G.S. 122C-211 reads as rewritten:

"**§ 122C-211. Admissions.**

(a) Except as provided in subsections (b) through ~~(f1)~~ (f) of this section, any individual, including a parent in a family unit, in need of treatment for mental illness or substance abuse may seek voluntary admission at any facility by presenting himself or herself for evaluation to the facility. No physician's statement is necessary, but a written application for evaluation or admission, signed by the individual seeking admission, or the individual's legally responsible person, is required. The application form shall be available at all times at all facilities. However, no one shall be denied admission because application forms are not available. An evaluation shall determine whether the individual is in need of care, treatment, habilitation or rehabilitation for mental illness or substance abuse or further evaluation by the facility. Information provided by family members regarding the individual's need for treatment shall be reviewed in the evaluation. If applicable, information provided in an advance instruction for mental health treatment by the client or the client's legally responsible person shall be reviewed in the evaluation. An individual may not be accepted as a client if the facility determines that the individual does not need or cannot benefit from the care, treatment, habilitation, or rehabilitation available and that the individual is not in need of further evaluation by the facility. The facility shall give to an individual who is denied admission a referral to another facility or facilities that may be able to provide the treatment needed by the client.

…

~~(e) When an individual from a single portal area seeks admission to an area or State 24-hour facility, the admission shall follow the procedures as prescribed in the area plan. When an individual from a single portal area presents himself for admission to the facility directly and is in need of an emergency admission, the individual may be accepted for admission. The facility shall notify the area authority within 24 hours of the admission. Further planning of treatment for the client is the joint responsibility of the area authority and the facility as prescribed in the area plan.~~

…

~~(f1) An individual in need of treatment for mental illness may be admitted to a facility pursuant to an advance instruction for mental health treatment or pursuant to the authority of a health care agent named in a valid health care power of attorney, provided that the individual is incapable, as defined in G.S. 122C-72(4) at the time of the need for admission. An individual admitted to a facility pursuant to an advance instruction for mental health treatment may not be retained for more than 10 days, except as provided for in subsection (b) of this section. When a health care power of attorney authorizes a health care agent to seek the admission of an incapable individual, the health care agent shall act for the individual in applying for admission to a facility and in consenting to medical treatment at the facility when consent is required, provided that the individual is incapable.~~

…."

SECTION 13. G.S. 122C-212 reads as rewritten:

"**§ 122C-212. Discharges.**

(a) Except as provided in ~~subsections~~ subsection (b) ~~and (c)~~ of this section, an individual who has been voluntarily admitted to a facility shall be discharged upon ~~his~~ the individual's own request. A request for discharge from a 24-hour facility shall be in writing.

(b) An individual who has been voluntarily admitted to a 24-hour facility may be held for 72 hours after ~~his~~ the individual's written application for discharge is submitted.

~~(c) When an individual from a single portal area who has been voluntarily admitted to an area or State 24-hour facility is discharged, the discharge shall follow the procedures as prescribed in the area plan.~~"

SECTION 14. Article 5 of Chapter 122C of the General Statutes is amended by adding a new Part to read:

"Part 2A. Voluntary Admissions and Discharges; Incapable Adults; Facilities for Individuals With Mental Illness and Substance Use Disorder.

"**§ 122C-213. Voluntary admission of individuals determined to be incapable.**

(a) An individual in need of treatment for mental illness and who is incapable, as defined in G.S. 122C-3 and G.S. 122C-72, may be admitted to and treated in a facility pursuant to an advance instruction for mental health treatment executed in accordance with Part 2 of Article 3 of this Chapter or pursuant to the authority of a health care agent named in a valid health care power of attorney executed in accordance with Article 3 of Chapter 32A of the General Statutes.

(b) Except as otherwise provided in this Part, G.S. 122C-211 applies to admissions of incapable adults under this Part.

(c) An advance instruction for mental health treatment shall be governed by Part 2 of Article 3 of this Chapter.

(d) When a health care power of attorney authorizes a health care agent pursuant to G.S. 32A-19 to make mental health treatment decisions for an incapable individual, the health care agent shall act for the individual in applying for admission and consenting to treatment at a facility, consistent with the extent and limitations of authority granted in the health care power of attorney for as long as the individual remains incapable.

(e) A 24-hour facility may not hold an individual under a voluntary admission who is determined to be incapable at the time of admission and who is admitted pursuant to an advance instruction for mental health treatment for more than 15 days, except as provided in G.S. 122C-211(b); provided, however, that an individual who regains sufficient understanding and capacity to make and communicate mental health treatment decisions may elect to continue his or her admission and treatment pursuant to the individual's informed consent in accordance with G.S. 122C-211. A 24-hour facility may file a petition for involuntary commitment pursuant to Article 5 of this Chapter if an individual meets applicable criteria at the conclusion of this 15-day period.

"**§ 122C-214. Discharge of individuals determined to be incapable.**

(a) The responsible professional shall unconditionally discharge an individual admitted to a facility pursuant to this Part at any time it is determined the individual is no longer mentally ill or in need of treatment at the facility.

(b) An individual who has been voluntarily admitted to a facility pursuant to this Part and who is no longer deemed incapable shall be discharged upon his or her own request. An individual's request for discharge from a 24-hour facility shall be in writing. A facility may hold an individual who has been voluntarily admitted to a 24-hour facility pursuant to this Part for up to 72 hours after the individual submits a written request for discharge, but the facility shall release the individual upon the expiration of 72 hours following submission of the written request for discharge unless the responsible professional obtains an order under Part 7 or 8 of this Article to hold the client.

(c) A health care agent named in a valid health care power of attorney or the legally responsible person may submit on behalf of an individual admitted to a facility under this Part a written request to have the individual discharged from the facility, provided (i) the individual remains incapable at the time of the request and (ii) the request is not inconsistent with the authority expressed in the health care power of attorney or other controlling document. A facility may hold an individual for up to 72 hours after a health care agent submits a written request for the individual's discharge but shall release the individual upon the expiration of 72 hours following submission of the written request for discharge unless the responsible professional obtains an order under Part 7 or 8 of this Article to hold the client.

(d) If, in the opinion of a physician or eligible psychologist, an individual admitted to a facility under this Part regains sufficient understanding and capacity to make and communicate mental health treatment decisions while in treatment, and the individual refuses to sign an authorization for continued treatment within 72 hours after regaining decisional capacity, the facility shall discharge the individual unless the responsible professional obtains an order under Part 7 or 8 of this Article to hold the client.

(e) In any case in which an order is issued authorizing the involuntary commitment of an individual admitted to a facility under this Part, the facility's further treatment and holding of the individual shall be in accordance with Part 7 or 8 of this Article, whichever is applicable."

SECTION 15. G.S. 122C-221 reads as rewritten:

"**§ 122C-221. Admissions.**

(a) Except as otherwise provided in this Part, a minor may be admitted to a facility if the minor is mentally ill or a substance abuser and in need of treatment. Except as otherwise provided in this Part, the provisions of G.S. 122C-211 shall apply to admissions of minors under this Part. Except as provided in G.S. 90-21.5, in applying for admission to a facility, in consenting to medical treatment when consent is required, and in any other legal procedure under this Article, the legally responsible person shall act for the minor. The application of the minor shall be in writing and signed by the legally responsible person. If a minor reaches the age of 18 while in treatment under this Part, further treatment is authorized only on the written authorization of the client or under the provisions of Part 7 or Part 8 of Article 5 of this Chapter.

…."

SECTION 16. G.S. 122C-224(c) reads as rewritten:

"**§ 122C-224. Judicial review of voluntary admission.**

…

(c) Within 24 hours after admission, the facility shall notify the clerk of court in the county where the facility is located that the minor has been admitted and that a hearing for concurrence in the admission must be scheduled. At the time notice is given to schedule a hearing, the facility shall (i) notify the clerk of the names and addresses of the legally responsible person and the responsible ~~professional.~~professional and (ii) provide the clerk with a copy of the legally responsible person's written application for admission of the minor and the facility's written evaluation of the minor, both of which are required under G.S. 122C-211(a)."

SECTION 17. Part 4 of Article 5 of Chapter 122C of the General Statutes is amended by adding a new section to read:

"**§ 122C-230. Applicability of Part 4.**

This Part applies to adults who are adjudicated incompetent by a court of competent jurisdiction. This Part does not apply to the admission of adults who are deemed incapable but who have not been adjudicated incompetent."

SECTION 18. G.S. 122C-232 reads as rewritten:

"**§ 122C-232. Judicial determination.**

(a) When an incompetent adult is admitted to a 24-hour facility where the incompetent adult will be subjected to the same restrictions on ~~his~~ freedom of movement present in the State facilities for the mentally ill, or to similar restrictions, a hearing shall be held in the district court in the county in which the 24-hour facility is located within 10 days ~~of~~ after the day ~~that~~ the incompetent adult is admitted to the facility. A continuance of not more than five days may be granted upon motion ~~of:~~any of the following:

(1) The ~~court;~~court.

(2) Respondent's ~~counsel; or~~counsel.

(3) The responsible professional.

The Commission shall adopt rules governing procedures for admission to other 24-hour facilities not falling within the category of facilities where freedom of movement is restricted; these rules shall be designed to ensure that no incompetent adult is improperly admitted to or remains in a facility.

(a1) Prior to admission, the facility shall provide the incompetent adult and the legally responsible person with written information describing the procedures for court review of the admission and the procedures for discharge.

(a2) Within 24 hours after admission, the facility shall notify the clerk of court of the county in which the facility is located that the incompetent adult has been admitted and that a hearing for concurrence in the admission must be scheduled. At the time the facility provides notice to the court to schedule a hearing for concurrence, the facility shall notify the clerk of the names and addresses of the legally responsible person and the responsible professional and provide a copy of the legally responsible person's written application for evaluation or admission of the incompetent adult and the facility's evaluation of the incompetent adult.

(b) In any case requiring the hearing described in subsection (a) of this section, no petition is necessary; the written application for voluntary admission shall serve as the initiating document for the hearing. The court shall determine whether the incompetent adult is mentally ill or a substance abuser and is in need of further treatment at the facility. Further treatment at the facility should be undertaken only when lesser measures will be insufficient. If the court finds by clear, cogent, and convincing evidence that these requirements have been met, the court shall concur with the voluntary admission of the incompetent ~~adult.~~adult and set the length of the authorized admission for a period not to exceed 90 days. If the court finds that these requirements have not been met, it shall order that the incompetent adult be released. A finding of dangerousness to self or others is not necessary to support the determination that further treatment should be undertaken.

…

(d) In addition to the notice of hearings and rehearings to the incompetent adult and his or her counsel required under Part 7 of this Article, notice shall be given by the clerk to the legally responsible ~~person,~~person or ~~his successor.~~a successor to the legally responsible person. The legally responsible ~~person, or his~~person or a successor to the legally responsible person may also file with the clerk of court a written waiver of ~~his~~ the right to receive notice."

SECTION 19. G.S. 122C-251 reads as rewritten:

"**§ 122C-251. ~~Transportation.~~Custody and transportation.**

(a) Except as provided in subsections ~~(f)~~ (c), (f), and (g), transportation of a respondent within a county under the involuntary commitment proceedings of this Article, including admission and discharge, shall be provided by the city or county. The city has the duty to provide transportation of a respondent who is a resident of the city or who is physically taken into custody in the city limits. The county has the duty to provide transportation for a respondent who resides in the county outside city limits or who is physically taken into custody outside of city limits. However, cities and counties may contract with each other to provide transportation.

(b) Except as provided in subsections ~~(f)~~(c), (f), and (g) or in G.S. 122C-408(b), transportation between counties under the involuntary commitment proceedings of this Article for a first examination as described in G.S. 122C-263(a) and G.S. 122C-283(a) and for admission to a 24-hour facility shall be provided by the county where the respondent is taken into custody. Transportation between counties under the involuntary commitment proceedings of this Article for respondents held in 24-hour facilities who have requested a change of venue for the district court hearing shall be provided by the county where the petition for involuntary commitment was initiated. Transportation between counties under the involuntary commitment proceedings of this Article for discharge of a respondent from a 24-hour facility shall be provided by the county of residence of the respondent. However, a respondent being discharged from a facility may use his own transportation at his own expense.

(c) Transportation of a respondent may be (i) by city- or county-owned ~~vehicles or~~ vehicles, (ii) by private vehicle by contract with the city or ~~county.~~county, or (iii) as provided in an agreement developed and adopted under subsection (g) of this section and G.S. 122C-202.2. To the extent feasible, law enforcement officers transporting respondents shall dress in plain clothes and shall travel in unmarked vehicles. Further, law enforcement officers, to the extent possible, shall advise respondents when taking them into custody that they are not under arrest and have not committed a crime, but are being taken into custody and transported to receive treatment and for their own safety and that of others.

(d) To the extent feasible, in providing transportation of a respondent, a city or county shall provide a driver or attendant who is the same sex as the respondent, unless the ~~law-enforcement~~ law enforcement officer allows a family member of the respondent to accompany the respondent in lieu of an attendant of the same sex as the respondent.

(e) In taking custody and providing transportation as required by this section, the ~~law-enforcement~~ law enforcement officer may use reasonable force to restrain the respondent if it appears necessary to protect ~~himself,~~the law enforcement officer, the respondent, or others. Any use of restraints shall be as reasonably determined by the officer to be necessary under the circumstances for the safety of the respondent, the law enforcement officer, and other persons. Every effort to avoid restraint of a child under the age of 10 shall be made by the transporting officer unless the child's behavior or other circumstances dictate that restraint is necessary. The law enforcement officer shall respond to all inquiries from the facility concerning the respondent's behavior and the use of any restraints related to the custody and transportation of the respondent, except in circumstances where providing that information is confidential or would otherwise compromise a law enforcement investigation. No ~~law-enforcement~~ law enforcement officer or other person designated or required to provide custody or transport of a client under G.S. 122C-251 may be held criminally or civilly liable for assault, false imprisonment, or other torts or crimes on account of reasonable measures taken under the authority of this Article.

(f) Notwithstanding the provisions of subsections (a), (b), and (c) of this section, a clerk, a magistrate, or a district court judge, where applicable, may authorize the family or immediate friends of the respondent, if they so request, to transport the respondent in accordance with the procedures of this Article. This authorization shall only be granted in cases where the danger to the public, the family or friends of the respondent, or the respondent himself or herself is not

substantial. The family or immediate friends of the respondent shall bear the costs of providing this transportation.

(g) The governing body of a city or county ~~may~~ shall adopt a plan known as an "involuntary commitment transportation agreement" or "transportation agreement" for the custody and transportation of respondents in involuntary commitment proceedings ~~in~~ under this ~~Article. Law enforcement personnel,~~ Article as follows:

(1) Law enforcement and other affected agencies, including local acute care hospitals and other mental health providers, shall participate in developing the transportation agreement. The area authority may participate in developing the transportation agreement.

(2) The transportation agreement may designate law enforcement officers, volunteers, or other public or private ~~agency~~ personnel ~~may be designated~~ who have agreed pursuant to subsection (g) of this section to provide all or parts of the custody and transportation required by involuntary commitment proceedings. Persons so designated or otherwise required to provide all or parts of the custody and transportation required by involuntary commitment proceedings shall be trained as set forth in G.S. 122C-202.2(a)(3), and the plan shall assure adequate safety and protections for both the public and the respondent. ~~Law enforcement, other affected agencies, and the area authority shall participate in the planning. If any person other than a law enforcement agency is designated by a city or county, the person so designated shall provide the transportation and~~ Any person or agency designated or required to provide all or parts of the custody and transportation required by involuntary commitment proceedings shall follow the procedures in this Article. References in this Article to a ~~law enforcement~~ law enforcement officer apply to ~~this person.~~any person or entity designated to provide custody or transportation. The transportation agreement may provide that private personnel or agencies may contract for transportation services to transport respondents under involuntary commitment from one entity to another.

(3) A person shall not be designated under subsection (g) of this section without that person's written consent and the written consent of his or her employer, if applicable. An agency, corporation, or entity shall not be designated without the written consent of that agency, corporation, or entity. Any person, agency, corporation, or other entity shall be designated to provide only the services which the person, agency, corporation, or other entity has previously consented in writing to provide and shall be permitted to withdraw from or discontinue providing services, in whole or in part, upon written notice to the designating governing body. The transportation agreement shall be submitted to the magistrates in the city or county's judicial district, to the county clerks of court, to the LME/MCO that serves the city or county, and to the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services on or before January 1, 2019. If the city or county modifies the transportation agreement, it will submit the modified agreement to their magistrates in their judicial district, county clerks of court, the LME/MCO that serves the city or county, and the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services at least 10 days prior to the effective date of the new plan.

(4) Counties and cities shall retain and be required to perform the responsibilities set forth in this Article, except as set forth in a plan developed, agreed upon, and adopted in compliance with this subsection.

(h) The cost and expenses ~~of transporting~~ of custody and transportation of a respondent ~~to or from a 24-hour facility is~~ as required by the involuntary commitment procedures of this Article, to the extent they are not reimbursed by a third-party insurer, are the responsibility of the county of residence of the ~~respondent.~~respondent, to the extent they are not reimbursed by a third-party insurer. The State (when providing transportation under G.S. 122C-408(b)), a city, or a county is entitled to recover the reasonable cost of transportation from the county of residence of the respondent. The county of residence of the respondent shall reimburse the State, another county, or a city the reasonable transportation costs incurred as authorized by this subsection. The county of residence of the respondent is entitled to recover the reasonable cost of transportation it has paid to the State, a city, or a county. Provided that the county of residence provides the respondent or other individual liable for the respondent's support a reasonable notice and opportunity to object to the reimbursement, the county of residence of the respondent may recover that cost from:

(1) The respondent, if the respondent is not indigent;
(2) Any person or entity that is legally liable for the resident's support and maintenance provided there is sufficient property to pay the cost;
(3) Any person or entity that is contractually responsible for the cost; or
(4) Any person or entity that otherwise is liable under federal, State, or local law for the cost."

SECTION 20. G.S. 122C-253 reads as rewritten:

"**§ 122C-253. Fees under commitment order.**

Nothing contained in Parts 6, 7, or 8 of this Article requires a private physician, private psychologist, commitment examiner, or private facility to accept a respondent as a client either before or after commitment. Treatment at a private facility or by a private ~~physician or private psychologist~~ physician, psychologist, or commitment examiner is at the expense of the respondent to the extent that the charges are not disposed of by contract between the area authority and the private facility. An area authority and its contract agencies shall set and recover fees for inpatient or outpatient treatment services provided under a commitment order in accordance with G.S. 122C-146."

SECTION 21. G.S. 122C-255 reads as rewritten:

"**§ 122C-255. Report required.**

~~Beginning January 1, 2012, each~~ Each 24-hour ~~residential~~ facility that (i) falls under the category of nonhospital medical detoxification, facility-based crisis service, or inpatient hospital treatment, (ii) is not a State facility under the jurisdiction of the Secretary of Health and Human Services, and (iii) is designated by the Secretary of Health and Human Services as a facility for the custody and treatment of individuals under a petition of involuntary commitment pursuant to G.S. 122C-252 and 10A NCAC 26C .0101 shall submit a written report on involuntary commitments each January 1 and each July 1 to the Department of Health and Human Services, Division of Mental Health, Developmental Disabilities, and Substance Abuse Services. The report shall include all of the following:

(1) The number and primary presenting conditions of individuals receiving treatment from the facility under a petition of involuntary commitment.
(2) The number of individuals for whom an involuntary commitment proceeding was initiated at the facility, who were referred to a different facility or program.
(3) The reason for referring the individuals described in subdivision (2) of this section to a different facility or program, including the need for more intensive medical supervision."

SECTION 22. G.S. 122C-261 reads as rewritten:

"**§ 122C-261. Affidavit and petition before clerk or magistrate when immediate hospitalization is not necessary; custody order.**

(a) Anyone who has knowledge of 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, may appear before a clerk or assistant or deputy clerk of superior court or a magistrate and execute an affidavit to this effect, and petition the clerk or magistrate for issuance of an order to take the respondent into custody for examination by a ~~physician or eligible psychologist.~~commitment examiner. The affidavit shall include the facts on which the affiant's opinion is based. If the affiant has knowledge or reasonably believes that the respondent, in addition to being mentally ill, is also mentally retarded, this fact shall be stated in the affidavit. Jurisdiction under this subsection is in the clerk or magistrate in the county where the respondent resides or is found.

(b) If the clerk or magistrate finds reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent is probably 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, the clerk or magistrate shall issue an order to a law enforcement officer or any other designated person ~~authorized~~ under ~~G.S. 122C-251~~ G.S. 122C-251(g) to take the respondent into custody for examination by a ~~physician or eligible psychologist.~~commitment examiner. If the clerk or magistrate finds that, in addition to probably being mentally ill, the respondent is also probably mentally retarded, the clerk or magistrate shall contact the area authority before issuing a custody order and the area authority shall designate the facility to which the respondent is to be taken for examination by a ~~physician or eligible psychologist.~~commitment examiner. The clerk or magistrate shall provide the petitioner and the respondent, if present, with specific information regarding the next steps that will occur for the respondent.

(c) If the clerk or magistrate issues a custody order, the clerk or magistrate shall also make inquiry in any reliable way as to whether the respondent is indigent within the meaning of G.S. 7A-450. A magistrate shall report the result of this inquiry to the clerk.

(d) If the affiant is a ~~physician or eligible psychologist,~~commitment examiner, all of the following apply:

(1) ~~The~~ If the affiant has examined the respondent, the affiant may execute the affidavit before any official authorized to administer oaths. This affiant is not required to appear before the clerk or magistrate for this purpose. This affiant shall file the affidavit with the clerk or magistrate by delivering to the clerk or magistrate the original ~~affidavit or~~ affidavit, by transmitting a copy in paper form that is printed through the facsimile transmission of the ~~affidavit.~~affidavit, or by delivering the affidavit through electronic transmission. If the affidavit is filed through electronic or facsimile transmission, the affiant shall mail the original affidavit no later than five days after the facsimile transmission of the affidavit to the clerk or magistrate to be filed by the clerk or magistrate with the facsimile copy of the affidavit.

(2) This affiant's examination shall comply with the requirements of the initial examination as provided in G.S. 122C-263(c). The affiant shall document in writing and file the examination findings with the affidavit delivered to the clerk or magistrate in accordance with subdivision (1) of subsection (d) of this section.

(3) If the ~~physician or eligible psychologist~~ commitment examiner recommends outpatient commitment according to the criteria for outpatient commitment set forth in G.S. 122C-263(d)(1) and the clerk or magistrate finds probable cause to believe that the respondent meets the criteria for outpatient commitment, the clerk or magistrate shall issue an order that a hearing before

a district court judge be held to determine whether the respondent will be involuntarily committed. ~~The physician or eligible psychologist shall provide the respondent with written notice of any scheduled appointment and the name, address, and telephone number of the proposed outpatient treatment physician or center. The physician or eligible psychologist~~ The commitment examiner shall contact the ~~local management entity~~ LME/MCO that serves the county where the respondent resides or the ~~local management entity~~ LME/MCO that coordinated services for the respondent to inform the ~~local management entity~~ LME/MCO that the respondent has been scheduled for an appointment with an outpatient treatment physician or center. The commitment examiner shall provide the respondent with written notice of any scheduled appointment and the name, address, and telephone number of the proposed outpatient treatment physician or center.

(4) If the ~~physician or eligible psychologist~~ commitment examiner recommends inpatient commitment based on the criteria for inpatient commitment set forth in G.S. 122C-263(d)(2) and the clerk or magistrate finds probable cause to believe that the respondent meets the criteria for inpatient commitment, the clerk or magistrate shall issue an order to a law enforcement officer to take the respondent into custody for transportation to ~~or custody at~~ a 24-hour facility described in G.S. 122C-252, provided that if a 24-hour facility is not immediately available or appropriate to the respondent's medical condition, the respondent may be temporarily detained under appropriate supervision and, upon further examination, released in accordance with G.S. 122C-263(d)(2).

…

(7) If a ~~physician or eligible psychologist~~ commitment examiner executes an affidavit for inpatient commitment of a respondent, a ~~second~~ physician who is not the commitment examiner who performed the examination under this section shall be required to perform the examination required by G.S. 122C-266.

(8) No commitment examiner, area facility, acute care hospital, general hospital, or other site of first examination, or its officials, staff, employees, or other individuals responsible for the custody, examination, detention, management, supervision, treatment, or release of an individual examined for commitment, who is not grossly negligent, shall be held liable in any civil or criminal action for taking measures prior to the inpatient admission of the individual to a 24-hour facility.

(e) Except as provided in subdivision (5) of subsection (d) of this section, upon receipt of the custody order of the clerk or magistrate or a custody order issued by the court pursuant to G.S. 15A-1003, a law enforcement ~~officer or other~~ officer, person designated under G.S. 122C-251(g), or other person identified in the order shall take the respondent into custody within 24 hours after the order is signed, and proceed according to G.S. 122C-263. The custody order is valid throughout the State.

~~(f) When a petition is filed for an individual who is a resident of a single portal area, the procedures for examination by a physician or eligible psychologist as set forth in G.S. 122C-263 shall be carried out in accordance with the area plan. Prior to issuance of a custody order for a respondent who resides in an area authority with a single portal plan, the clerk or magistrate shall communicate with the area authority to determine the appropriate 24-hour facility to which the respondent should be admitted according to the area plan or to determine if there are more appropriate resources available through the area authority to assist the petitioner or the respondent. When an individual from a single portal area is presented for commitment at a~~

~~24-hour area or State facility directly, the individual may not be accepted for admission until the facility notifies the area authority and the area authority agrees to the admission. If the area authority does not agree to the admission, it shall determine the appropriate 24-hour facility to which the individual should be admitted according to the area plan or determine if there are more appropriate resources available through the area authority to assist the individual. If the area authority agrees to the admission, further planning of treatment for the client is the joint responsibility of the area authority and the facility as prescribed in the area plan.~~

Notwithstanding the provisions of this section, in no event shall an individual known or reasonably believed to be mentally retarded be admitted to a State psychiatric hospital, except as follows:

(1) Persons described in G.S. 122C-266(b);
(2) Persons admitted pursuant to G.S. 15A-1321;
(3) Respondents who are so extremely dangerous as to pose a serious threat to the community and to other patients committed to non-State hospital psychiatric inpatient units, as determined by the Director of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services or his designee; and
(4) Respondents who are so gravely disabled by both multiple disorders and medical fragility or multiple disorders and deafness that alternative care is inappropriate, as determined by the Director of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services or his designee.

Individuals transported to a State facility for the mentally ill who are not admitted by the facility may be transported by appropriate law enforcement officers or designated staff of the State facility in State-owned vehicles to an appropriate 24-hour facility that provides psychiatric inpatient care.

No later than 24 hours after the transfer, the responsible professional at the original facility shall notify the petitioner, the clerk of court, and, if consent is granted by the respondent, the next of kin, that the transfer has been completed."

SECTION 23. G.S. 122C-262 reads as rewritten:

"**§ 122C-262. Special emergency procedure for individuals needing immediate hospitalization.**

(a) Anyone, including a law enforcement officer, who has knowledge of an individual who is subject to inpatient commitment according to the criteria of ~~G.S. 122C-261(a)~~ G.S. 122C-263(d)(2) and who requires immediate hospitalization to prevent harm to self or others, may transport the individual directly to an area facility or other place, including a State facility for the mentally ill, for examination by a ~~physician or eligible psychologist~~ commitment examiner in accordance with G.S. 122C-263(c).

(b) Upon examination by the ~~physician or eligible psychologist,~~commitment examiner, if the individual meets the inpatient commitment criteria ~~required~~ specified in ~~G.S. 122C-261(a), the physician or eligible psychologist~~ G.S. 122C-263(d)(2) and requires immediate hospitalization to prevent harm to self or others, the commitment examiner shall so certify in writing before any official authorized to administer oaths. The certificate shall also state the reason that the individual requires immediate hospitalization. If the ~~physician or eligible psychologist~~ commitment examiner knows or has reason to believe that the individual is mentally retarded, the certificate shall so state.

(c) If the ~~physician or eligible psychologist~~ commitment examiner executes the oath, appearance before a magistrate shall be waived. The ~~physician or eligible psychologist~~ commitment examiner shall send a copy of the certificate to the clerk of superior court by the most reliable and expeditious means. If it cannot be reasonably anticipated that the clerk will receive the copy within 24 hours, excluding Saturday, Sunday, and holidays, of the time that it

was signed, the physician or eligible psychologist shall also communicate the findings to the clerk by telephone.

(d) Anyone, including a law enforcement officer if necessary, may transport the individual to a 24-hour facility described in G.S. 122C-252 for examination and treatment pending a district court hearing. If there is no area 24-hour facility and if the respondent is indigent and unable to pay for care at a private 24-hour facility, the law enforcement officer or other designated person providing transportation shall take the respondent to a State facility for the mentally ill designated by the Commission in accordance with G.S. 143B-147(a)(1)a and immediately notify the clerk of superior court of this action. The ~~physician's or eligible psychologist's~~ commitment examiner's certificate shall serve as the custody order and the law enforcement officer or other designated person shall provide transportation in accordance with the provisions of G.S. 122C-251. If a 24-hour facility is not immediately available or appropriate to the respondent's medical condition, the respondent may be temporarily detained under appropriate supervision in accordance with G.S. 122C-263(d)(2) and released in accordance with G.S. 122C-263(d)(2).

In the event an individual known or reasonably believed to be mentally retarded is transported to a State facility for the mentally ill, in no event shall that individual be admitted to that facility except as follows:

(1) Persons described in G.S. 122C-266(b);
(2) Persons admitted pursuant to G.S. 15A-1321;
(3) Respondents who are so extremely dangerous as to pose a serious threat to the community and to other patients committed to non-State hospital psychiatric inpatient units, as determined by the Director of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services or his designee; and
(4) Respondents who are so gravely disabled by both multiple disorders and medical fragility or multiple disorders and deafness that alternative care is inappropriate, as determined by the Director of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services or his designee.

Individuals transported to a State facility for the mentally ill who are not admitted by the facility may be transported by law enforcement officers or designated staff of the State facility in State-owned vehicles to an appropriate 24-hour facility that provides psychiatric inpatient care.

No later than 24 hours after the transfer, the responsible professional at the original facility shall notify the petitioner, the clerk of court, and, if consent is granted by the respondent, the next of kin, that the transfer has been completed.

…

(f) If, upon examination of a respondent presented in accordance with subsection (a) of this section, the commitment examiner finds that the individual meets the criteria for inpatient commitment specified in G.S. 122C-263(d)(2) but does not require immediate hospitalization to prevent harm to self or others, the commitment examiner may petition the clerk or magistrate in accordance with G.S. 122C-261(d) for an order to take the individual into custody for transport to a 24-hour facility described in G.S. 122C-252. If the commitment examiner recommends inpatient commitment and the clerk or magistrate finds probable cause to believe that the respondent meets the criteria for inpatient commitment, the clerk or magistrate shall issue an order for transport to or custody at a 24-hour facility described in G.S. 122C-252; provided, however, that if a 24-hour facility is not immediately available or appropriate to the respondent's medical condition, the respondent may be temporarily detained under appropriate supervision in accordance with G.S. 122C-263(d)(2) and released in accordance with G.S. 122C-263(d)(2).

(g) This section applies exclusively to an individual who is transported to an area facility or other place for an examination by a commitment examiner in accordance with subsection (a) of this section."

SECTION 24. G.S. 122C-263 reads as rewritten:

"**§ 122C-263. Duties of ~~law enforcement~~ law enforcement officer; first ~~examination by physician or eligible psychologist.~~examination.**

(a) Without unnecessary delay after assuming custody, the law enforcement officer or the individual designated ~~by the clerk~~ or ~~magistrate under G.S. 122C-251(g)~~ required to provide transportation pursuant to G.S. 122C-251(g) shall take the respondent to ~~an area~~ a facility ~~for examination by a physician or eligible psychologist; if a physician or eligible psychologist.~~ or other location identified by the LME/MCO in the community crisis services plan adopted pursuant to G.S. 122C-202.2 that has an available commitment examiner and is capable of performing a first examination in conjunction with a health screening at the same location, unless exigent circumstances require the respondent be transported to an emergency department. If a commitment examiner is not ~~available in the area facility,~~available, whether on-site, on-call, or via telemedicine, at any facility or location, or if a plan has not been adopted, the person designated to provide transportation shall take the respondent to an alternative non-hospital provider or facility-based crisis center for a first examination in conjunction with a health screening at the same location. If no non-hospital provider or facility-based crisis center for a first examination in conjunction with a health screening at the same location for health screening and first examination exists, the person designated to provide transportation shall take the respondent to ~~any physician or eligible psychologist locally available.~~a private hospital or clinic, a general hospital, an acute care hospital, or a State facility for the mentally ill. If a ~~physician or eligible psychologist~~ commitment examiner is not immediately ~~available~~ available, the respondent may be temporarily detained in an area facility, if one is available; if an area facility is not available, the respondent may be detained under appropriate supervision in the respondent's home, in a private hospital or a clinic, in a general hospital, or in a State facility for the mentally ill, but not in a jail or other penal facility. For the purposes of this section, "non-hospital provider" means an outpatient provider that provides either behavioral health or medical services.

(a1) A facility or other location to which a respondent is transported under subsection (a) of this section shall provide a health screening of the respondent. The health screening shall be conducted by a commitment examiner or other individual who is determined by the area facility, contracted facility, or other location to be qualified to perform the health screening. The Department will work with commitment examiner professionals to develop a screening tool for this purpose. The respondent may either be in the physical face-to-face presence of the person conducting the screen or may be examined utilizing telemedicine equipment and procedures. Documentation of the health screening required under this subsection that is completed prior to transporting the patient to any general hospital, acute care hospital, or designated facility shall accompany the patient or otherwise be made available at the time of transportation to the receiving facility.

(b) The examination set forth in subsection (a) of this section is not required ~~if:~~under any of the following circumstances:

(1) The affiant who obtained the custody order is a ~~physician or eligible psychologist~~ commitment examiner who recommends inpatient ~~commitment;~~commitment.

(2) The custody order states that the respondent was charged with a violent crime, including a crime involving assault with a deadly weapon, and ~~he~~ the respondent was found incapable of ~~proceeding; or~~proceeding.

(3) Repealed by Session Laws 1987, c. 596, s. 3.

In any of these cases, the ~~law enforcement~~ law enforcement officer or person designated under G.S. 122C-251(g) shall take the respondent directly to a 24-hour facility described in G.S. 122C-252.

(c) The ~~physician or eligible psychologist~~ commitment examiner described in subsection (a) of this section shall examine the respondent as soon as possible, and in any event within 24

~~hours,~~hours after the respondent is presented for examination. When the examination set forth in subsection (a) of this section is performed by a ~~physician or eligible psychologis t~~commitment examiner, the respondent may either be in the physical face-to-face presence of the ~~physician or eligible psychologist~~ commitment examiner or may be examined utilizing telemedicine equipment and procedures. A ~~physician or eligible psychologist~~ commitment examiner who examines a respondent by means of telemedicine must be satisfied to a reasonable medical certainty that the determinations made in accordance with subsection (d) of this section would not be different if the examination had been done in the physical presence of the ~~physician or eligible psychologist. A physician or eligible psychologist~~ commitment examiner. A commitment examiner who is not so satisfied must note that the examination was not satisfactorily accomplished, and the respondent must be taken for a face-to-face examination in the physical presence of a person authorized to perform examinations under this section. As used in this ~~subsection,~~section, "telemedicine" is the use of two-way real-time interactive audio and video between places of lesser and greater medical capability or expertise to provide and support health care when distance separates participants who are in different geographical locations. A recipient is referred by one provider to receive the services of another provider via telemedicine.

The examination shall include ~~but is not limited to~~ an assessment of ~~the respondent's:~~at least all of the following with respect to the respondent.

(1) Current and previous mental illness and mental retardation including, if available, previous treatment ~~history;~~history.

(2) Dangerousness to self, as defined in G.S. 122C-3(11)a. or others, as defined in ~~G.S. 122C-3(11)b.;~~G.S. 122C-3(11)b.

(3) Ability to survive safely without inpatient commitment, including the availability of supervision from family, friends or ~~others; and~~others.

(4) Capacity to make an informed decision concerning treatment.

(d) After the conclusion of the examination the ~~physician or eligible psychologist~~ commitment examiner shall make the following determinations:

(1) If the ~~physician or eligible psychologist~~ commitment examiner finds ~~that:~~all of the following:

a. The respondent is mentally ~~ill;~~ill.

b. The respondent is capable of surviving safely in the community with available supervision from family, friends, or ~~others;~~others.

c. Based on the respondent's psychiatric history, the respondent is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness as defined by ~~G.S. 122C-3(11); and~~G.S. 122C-3(11).

d. The respondent's current mental status or the nature of the respondent's illness limits or negates the respondent's ability to make an informed decision to seek voluntarily or comply with recommended treatment.

The ~~physician or eligible psychologist~~ commitment examiner shall so show on the examination report and shall recommend outpatient commitment. In addition the ~~examining physician or eligible psychologist~~ commitment examiner shall show the name, address, and telephone number of the proposed outpatient treatment physician or ~~center.~~center in accordance with subsection (f) of this section. The person designated in the order to provide transportation shall return the respondent to the respondent's regular residence or, with the respondent's consent, to the home of a consenting individual located in the originating county, and the respondent shall be released from custody.

(2) If the ~~physician or eligible psychologist~~ commitment examiner finds that the respondent is mentally ill and is dangerous to self, as defined in G.S. 122C-3(11)a., or others, as defined in G.S. 122C-3(11)b., the ~~physician~~

~~or eligible psychologist~~ commitment examiner shall recommend inpatient commitment, and shall so show on the examination report. If, in addition to mental illness and dangerousness, the ~~physician or eligible psychologist~~ commitment examiner also finds that the respondent is known or reasonably believed to be mentally retarded, this finding shall be shown on the report. ~~The~~ Upon notification, the law enforcement officer or other designated person shall take the respondent to a 24-hour facility described in G.S. 122C-252 pending a district court hearing. To the extent feasible, in providing the transportation of the respondent, the law enforcement officer shall act within six hours of notification. The other designated person shall take the respondent to a 24-hour facility described in G.S. 122C-252 pending a district court hearing within six hours of notification. If there is no area 24-hour facility and if the respondent is indigent and unable to pay for care at a private 24-hour facility, the law enforcement officer or other designated person shall take the respondent to a State facility for the mentally ill designated by the Commission in accordance with G.S. 143B-147(a)(1)a. for custody, observation, and treatment and immediately notify the clerk of superior court of this action. If a 24-hour facility is not immediately available or appropriate to the respondent's medical condition, the respondent may be temporarily detained under appropriate supervision at the site of the first ~~examination,provided that at anytime that a physician or eligible psychologist~~ examination. Upon the commitment examiner's determination that a 24-hour facility is available and medically appropriate, the law enforcement officer or other designated person shall transport the respondent after receiving a request for transportation by the facility of the commitment examiner. To the extent feasible, in providing the transportation of the respondent, the law enforcement officer shall act within six hours of notification. The other designated person shall transport the respondent without unnecessary delay and within six hours after receiving a request for transportation by the facility of the commitment examiner. At any time during the respondent's temporary detention under appropriate supervision, if a commitment examiner determines that the respondent is no longer in need of inpatient commitment, the proceedings shall be terminated and the respondent transported and released in accordance with subdivision (3) of this subsection. However, if the ~~physician or eligible psychologist~~ commitment examiner determines that the respondent meets the criteria for outpatient commitment, as defined in subdivision (1) of this subsection, the ~~physician or eligible psychologist~~ commitment examiner may recommend outpatient commitment, and the respondent shall be transported and released in accordance with subdivision (1) of this subsection. Any decision to terminate the proceedings or to recommend outpatient commitment after an initial recommendation of inpatient commitment shall be documented and reported to the clerk of superior court in accordance with subsection (e) of this section. If the respondent is temporarily detained and a 24-hour facility is not available or medically appropriate seven days after the issuance of the custody order, a ~~physician or psychologist~~ commitment examiner shall report this fact to the clerk of superior court and the proceedings shall be terminated. Termination of proceedings pursuant to this subdivision shall not prohibit or prevent the initiation of new involuntary commitment proceedings when appropriate. A commitment examiner may initiate a new involuntary commitment proceeding prior to the expiration of this seven-day period, as long as the

respondent continues to meet applicable criteria. Affidavits filed in support of proceedings terminated pursuant to this subdivision may not be submitted in support of any subsequent petitions for involuntary commitment. If the affiant initiating new commitment proceedings is a ~~physician or eligible psychologist,~~commitment examiner, the affiant shall conduct a new examination and may not rely upon examinations conducted as part of proceedings terminated pursuant to this subdivision.

In the event an individual known or reasonably believed to be mentally retarded is transported to a State facility for the mentally ill, in no event shall that individual be admitted to that facility except as follows:

a. Persons described in G.S. 122C-266(b);
b. Persons admitted pursuant to G.S. 15A-1321;
c. Respondents who are so extremely dangerous as to pose a serious threat to the community and to other patients committed to non-State hospital psychiatric inpatient units, as determined by the Director of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services or his designee; and
d. Respondents who are so gravely disabled by both multiple disorders and medical fragility or multiple disorders and deafness that alternative care is inappropriate, as determined by the Director of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services or his designee.

Individuals transported to a State facility for the mentally ill who are not admitted by the facility may be transported by law enforcement officers or designated staff of the State facility in State-owned vehicles to an appropriate 24-hour facility that provides psychiatric inpatient care.

No later than 24 hours after the transfer, the responsible professional at the original facility shall notify the petitioner, the clerk of court, and, if consent is granted by the respondent, the next of kin, that the transfer has been completed.

(3) If the ~~physician or eligible psychologist~~ commitment examiner finds that neither condition described in subdivisions (1) or (2) of this subsection exists, the proceedings shall be terminated. The person designated in the order to provide transportation shall return the respondent to the respondent's regular residence or, with the respondent's consent, to the home of a consenting individual located in the originating county and the respondent shall be released from custody.

(e) The findings of the ~~physician or eligible psychologist~~ commitment examiner and the facts on which they are based shall be in writing in all cases. The ~~physician or eligible psychologist~~ commitment examiner shall send a copy of the findings to the clerk of superior court by the most reliable and expeditious means. If it cannot be reasonably anticipated that the clerk will receive the copy within 48 hours of the time that it was signed, the physician or eligible psychologist shall also communicate his findings to the clerk by telephone.

(f) When outpatient commitment is recommended, the ~~examining physician or eligible psychologist,~~commitment examiner, if different from the proposed outpatient treatment physician or center, ~~shall give the respondent a written notice listing the name, address, and telephone number of the proposed outpatient treatment physician or center and directing the respondent to appear at the address at a specified date and time. The examining physician or eligible psychologist before the appointment shall notify by telephone the designated outpatient treatment physician or center and shall send a copy of the notice and his examination report to the physician or center.~~shall contact the LME/MCO that serves the county where the respondent

resides or the LME/MCO that coordinated services for the respondent to inform the LME/MCO that the respondent is being recommended for outpatient commitment. The commitment examiner shall give the respondent a written notice listing the name, address, and telephone number of the proposed outpatient treatment physician or center.

(g) The ~~physician or eligible psychologist,~~commitment examiner, at the completion of the examination, shall provide the respondent with specific information regarding the next steps that will occur."

SECTION 25. G.S. 122C-263.1 reads as rewritten:

"**§ 122C-263.1. Secretary's authority to ~~waive requirement of first examination by physician or eligible psychologist;~~certify commitment examiners; training of certified ~~providers~~ commitment examiners performing first ~~examinations.~~examinations; LME/MCO responsibilities.**

(a) Physicians and eligible psychologists are qualified to perform the commitment examinations required under G.S. 122C-263(c) and G.S. 122C-283(c). The Secretary of Health and Human Services ~~may, upon request of an LME, waive the requirements of G.S. 122C-261 through G.S. 122C-263 and G.S. 122C-281 through G.S. 122C-283 pertaining to initial (first-level) examinations by a physician or eligible psychologist of individuals meeting the criteria of G.S. 122C-261(a) or G.S. 122C-281(a), as applicable, as follows:~~may individually certify to perform the first commitment examinations required by G.S. 122C-261 through G.S. 122C-263 and G.S. 122C-281 through G.S. 122C-283 other health, mental health, and substance abuse professionals whose scope of practice includes diagnosing and documenting psychiatric or substance use disorders and conducting mental status examinations to determine capacity to give informed consent to treatment as follows:

(1) The Secretary has received a ~~request from an LME to substitute for a physician or eligible psychologist, a licensed clinical social worker, a master's level psychiatric nurse, or a master's level certified clinical addictions specialist in accordance with subdivision (8) of this subsection to conduct the initial (first-level) examinations of individuals meeting the criteria of G.S. 122C-261(a) or G.S. 122C-281(a). In making this type of request, the LME shall specifically describe all of the following:~~request:

a. ~~How the purpose of the statutory requirement would be better served by waiving the requirement and substituting the proposed change under the waiver.~~To certify a licensed clinical social worker, a master's or higher level degree nurse practitioner, a licensed professional counsellor, or a physician's assistant to conduct the first examinations described in G.S. 122C-263(c) and G.S. 122C-283(c).

b. ~~How the waiver will enable the LME to improve the delivery or management of mental health, developmental disabilities, and substance abuse services.~~To certify a master's level licensed clinical addictions specialist to conduct the first examination described in G.S. 122C-283(c).

~~c. How the health, safety, and welfare of individuals will continue to be at least as well protected under the waiver as under the statutory requirement.~~

(2) The Secretary shall review the request and may approve it upon finding all of the following:

a. The request meets the requirements of this section.

~~b. The request furthers the purposes of State policy under G.S. 122C-2 and mental health, developmental disabilities, and substance abuse services reform.~~

c. ~~The request improves the delivery of mental health, developmental disabilities, and substance abuse services in the counties affected by the waiver and also protects the health, safety, and welfare of individuals receiving these services.~~

d. The Department determines that the applicant possesses the professional licensure, registration, or certification to qualify the applicant as a professional whose scope of practice includes diagnosing and documenting psychiatric or substance use disorders and conducting mental status examinations to determine capacity to give informed consent to treatment.

e. The applicant for certification has successfully completed the Department's standardized training program for involuntary commitment and has successfully passed the examination for that program.

~~(3) The Secretary shall evaluate the effectiveness, quality, and efficiency of mental health, developmental disabilities, and substance abuse services and protection of health, safety, and welfare under the waiver.~~

(4) A ~~waiver~~ certification granted by the Secretary under this section shall be in effect for a period of up to three years and may be rescinded at any time within this period if the Secretary finds the ~~LME~~ certified individual has failed to meet the requirements of this section. Certification may be renewed every three years upon completion of a refresher training program approved by the Department.

(5) In no event shall the ~~substitution~~ certification of a licensed clinical social worker, master's or higher level ~~psychiatric nurse,~~ degree nurse practitioner, licensed professional counsellor, physician assistant, or master's level certified clinical addictions specialist ~~under a waiver granted~~ under this section be construed as authorization to expand the scope of practice of the licensed clinical social worker, the master's level ~~psychiatric nurse,~~ nurse practitioner, licensed professional counsellor, physician assistant, or the master's level certified clinical addictions specialist.

(6) The Department shall require that individuals ~~performing~~ certified to perform initial examinations under ~~the waiver~~ this section have successfully completed the Department's standardized involuntary commitment training program and examination. The Department shall maintain a list of these individuals on its Internet Web site.

~~(7) As part of its waiver request, the LME shall document the availability of a physician to provide backup support.~~

(7a) No less than annually, the Department shall submit a list of certified first commitment examiners to the Chief District Court Judge of each judicial district in North Carolina and maintain a current list of certified first commitment examiners on its Internet Web site.

(8) A master's level ~~certified~~ licensed clinical addiction specialist shall only be authorized to conduct the initial examination of individuals meeting the criteria of G.S. 122C-281(a).

(b) The ~~Division of Mental Health, Developmental Disabilities, and Substance Abuse Services~~ Department shall expand its standardized certification training program to include refresher training for all certified providers performing initial examinations pursuant to subsection (a) of this section."

SECTION 26. G.S. 122C-264 reads as rewritten:

"**§ 122C-264. Duties of clerk of superior court and the district attorney.**

(a) Upon receipt of a ~~physician's or eligible psychologist's~~ commitment examiner's finding that the respondent meets the criteria of G.S. 122C-263(d)(1) and that outpatient commitment is recommended, the clerk of superior court of the county where the petition was initiated, upon direction of a district court judge, shall calendar the matter for hearing and shall notify the respondent, the proposed outpatient treatment physician or center, and the petitioner of the time and place of the hearing. The petitioner may file a written waiver of his right to notice under this subsection with the clerk of court.

(b) Upon receipt by the clerk of superior court pursuant to G.S. 122C-266(c) of a ~~physician's or eligible psychologist's~~ commitment examiner's finding that a respondent meets the criteria of G.S. 122C-263(d)(2) and that inpatient commitment is recommended, the clerk of superior court of the county where the 24-hour facility is located shall, after determination required by G.S. 122C-261(c) and upon direction of a district court judge, assign counsel if necessary, calendar the matter for hearing, and notify the respondent, his counsel, and the petitioner of the time and place of the hearing. The petitioner or respondent, directly or through counsel, may file a written waiver of ~~his~~ the right to notice under this subsection with the clerk of court.

(b1) Upon receipt of a ~~physician's or eligible psychologist's~~ commitment examiner's certificate that a respondent meets the criteria of G.S. 122C-261(a) and that immediate hospitalization is needed pursuant to G.S. 122C-262, the clerk of superior court of the county where the treatment facility is located shall submit the certificate to the Chief District Court Judge. The court shall review the certificate within 24 hours, excluding Saturday, Sunday, and holidays, for a finding of reasonable grounds in accordance with [G.S.] 122C-261(b). The clerk shall notify the treatment facility of the court's findings by telephone and shall proceed as set forth in subsections (b), (c), and (f) of this section.

…."

SECTION 27. G.S. 122C-265 reads as rewritten:

"**§ 122C-265. Outpatient commitment; examination and treatment pending hearing.**

(a) If a respondent, who has been recommended for outpatient commitment by ~~an examining physician or eligible psychologist~~ commitment examiner different from the proposed outpatient treatment physician or center, fails to appear for examination by the proposed outpatient treatment physician or center at the designated time, the physician or center shall notify the clerk of superior court who shall issue an order to a ~~law-enforcement~~ law enforcement officer ~~or other person authorized under G.S. 122C-251~~ to take the respondent into custody and take him immediately to the outpatient treatment physician or center for evaluation. The custody order is valid throughout the State. The law-enforcement officer may wait during the examination and return the respondent to his home after the examination.

(b) The examining ~~physician~~ commitment examiner or the proposed outpatient treatment physician or center may prescribe to the respondent reasonable and appropriate medication and treatment that are consistent with accepted medical standards pending the district court hearing.

(c) In no event may a respondent released on a recommendation that he or she meets the outpatient commitment criteria be physically forced to take medication or ~~forceably~~ forcibly detained for treatment pending a district court hearing.

(d) If at any time pending the district court hearing the outpatient treatment physician or center determines that the respondent does not meet the criteria of G.S. 122C-263(d)(1), ~~he~~ the physician shall release the respondent and notify the clerk of court and the proceedings shall be terminated.

(e) If a respondent becomes dangerous to ~~himself,~~ self as defined in G.S. 122C-3(11)a., or others, as defined in G.S. 122C-3(11)b., pending a district court hearing on outpatient commitment, new proceedings for involuntary inpatient commitment may be initiated.

(f) If an inpatient commitment proceeding is initiated pending the hearing for outpatient commitment and the respondent is admitted to a 24-hour facility to be held for an inpatient

commitment hearing, notice shall be sent by the clerk of court in the county where the respondent is being held to the clerk of court of the county where the outpatient commitment was initiated and the outpatient commitment proceeding shall be terminated."

SECTION 28. G.S. 122C-267 reads as rewritten:

"**§ 122C-267. Outpatient commitment; district court hearing.**

…

(c) Certified copies of reports and findings of ~~physicians and psychologists~~ commitment examiners and medical records of previous and current treatment are admissible in evidence.

…."

SECTION 29. G.S. 122C-268 reads as rewritten:

"**§ 122C-268. Inpatient commitment; district court hearing.**

(a) A hearing shall be held in district court within 10 days of the day the respondent is taken into law enforcement custody pursuant to G.S. 122C-261(e) or G.S. 122C-262. If a respondent temporarily detained under G.S. 122C-263(d)(2) is subject to a series of successive custody orders issued pursuant to G.S. 122C-263(d)(2), the hearing shall be held within 10 days after the day that the respondent is taken into custody under the most recent custody order. A continuance of not more than five days may be granted upon motion ~~of:~~of any of the following:

(1) The ~~court;~~court.

(2) Respondent's ~~counsel; or~~counsel.

(3) The State, sufficiently in advance to avoid movement of the respondent.

…

(f) Certified copies of reports and findings of ~~physicians and psychologists~~ commitment examiners and previous and current medical records are admissible in evidence, but the respondent's right to confront and cross-examine witnesses may not be denied.

(g) ~~Hearings may~~ To the extent feasible, hearings shall be held in an appropriate room ~~not used for treatment of clients~~ at the facility in which the respondent is being treated ~~if it~~ in a manner approved by the chief district court judge if the facility is located within the presiding judge's district court district as defined in ~~G.S. 7A-133, by audio and video transmission between a treatment facility and a courtroom in which the judge and the respondent can see and hear each other, or~~ G.S. 7A-133. Hearings may be held in the judge's chambers. A hearing may not be held in a regular courtroom, over objection of the respondent, if in the discretion of a judge a more suitable place is available. A hearing may be held by audio and video transmission between the treatment facility and a courtroom in a manner that allows (i) the judge and the respondent to see and hear each other and (ii) the respondent to communicate fully and confidentially with the respondent's counsel during the proceeding. Prior to any hearing held by audio and video transmission, the chief district court judge shall submit to the Administrative Office of the Courts the procedures and type of equipment for audio and video transmission for approval by the Administrative Office of the Courts. Notwithstanding the provisions of this subsection, if the respondent, through counsel, objects to a hearing held by audio and video transmission, the hearing shall be held in the physical presence of the presiding district court judge. Regardless of the manner and location for hearings, hearings shall be held in a manner that complies with any applicable federal and State laws governing the confidentiality and security of confidential information, including any information transmitted from the treatment facility by audio and video transmission. If the respondent has counsel, the respondent shall be allowed to communicate fully and confidentially with his attorney during the proceeding. Prior to the use of the audio and video transmission, the procedures and type of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the chief district court judge and approved by the Administrative Office of the Courts.

…."

SECTION 30. G.S. 122C-271 reads as rewritten:

"**§ 122C-271. Disposition.**

(a) If ~~an examining physician or eligible psychologist~~ a commitment examiner has recommended outpatient commitment and the respondent has been released pending the district court hearing, the court may make one of the following dispositions:

(1) If the court finds by clear, cogent, and convincing evidence that the respondent is mentally ill; that he is capable of surviving safely in the community with available supervision from family, friends, or others; that based on respondent's treatment history, the respondent is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness as defined in G.S. 122C-3(11); and that the respondent's current mental status or the nature of his illness limits or negates his ability to make an informed decision to seek voluntarily or comply with recommended treatment, it may order outpatient commitment for a period not in excess of 90 days.

(2) If the court does not find that the respondent meets the criteria of commitment set out in subdivision (1) of this subsection, the respondent shall be discharged and the ~~facility at which he was last a client~~ proposed outpatient physician center so notified.

(3) Before ordering any outpatient commitment under this subsection, the court shall make findings of fact as to the availability of outpatient treatment from an outpatient treatment physician or center that has agreed to accept the respondent as a client of outpatient treatment services. The court shall show on the order the outpatient treatment physician or center that is to be responsible for the management and supervision of the respondent's outpatient commitment. If the designated outpatient treatment physician or center will be monitoring and supervising the respondent's outpatient commitment pursuant to a contract for services with an LME/MCO, the court shall show on the order the identity of the LME/MCO. The clerk of court shall send a copy of the outpatient commitment order to the designated outpatient treatment physician or center and to the respondent client or the legally responsible person. The clerk of court shall also send a copy of the order to that LME/MCO. Copies of outpatient commitment orders sent by the clerk of court to an outpatient treatment center or physician under this section, including orders sent to an LME/MCO, shall be sent by the most reliable and expeditious means, but in no event less than 48 hours after the hearing.

(b) If the respondent has been held in a 24-hour facility pending the district court hearing pursuant to G.S. 122C-268, the court may make one of the following dispositions:

…

(4) Before ordering any outpatient commitment, the court shall make findings of fact as to the availability of outpatient ~~treatment.~~treatment from an outpatient treatment physician or center that has agreed to accept the respondent as a client of outpatient treatment services. The court shall also show on the order the outpatient treatment physician or center who is to be responsible for the management and supervision of the respondent's outpatient commitment. When an outpatient commitment order is issued for a respondent held in a 24-hour facility, the court may order the respondent held at the facility for no more than 72 hours in order for the facility to notify the designated outpatient treatment physician or center of the treatment needs of the respondent. The clerk of court in the county where the facility is located shall send a copy of the outpatient commitment order to the designated outpatient treatment physician or ~~center.~~center and to the respondent or the legally responsible person. If the designated outpatient treatment physician or center shall be

monitoring and supervising the respondent's outpatient commitment pursuant to a contract for services with an LME/MCO, the clerk of court shall how on the order the identity of the LME/MCO. The clerk of court shall send a copy of the order to the LME/MCO. Copies of outpatient commitment orders sent by the clerk of court to an outpatient treatment center or physician pursuant to this subdivision, including orders sent to an LME/MCO, shall be sent by the most reliable and expeditious means, but in no event less than 48 hours after the hearing. If the outpatient commitment will be supervised in a county other than the county where the commitment originated, the court shall order venue for further court proceedings to be transferred to the county where the outpatient commitment will be supervised. Upon an order changing venue, the clerk of superior court in the county where the commitment originated shall transfer the file to the clerk of superior court in the county where the outpatient commitment is to be supervised.

…."

SECTION 31. G.S. 122C-276 reads as rewritten:

"**§ 122C-276. Inpatient commitment; rehearings for respondents other than insanity acquittees.**

…

(c) Subject to the provisions of G.S. 122C-269(c), rehearings shall be held ~~at the facility in which the respondent is receiving treatment.~~as authorized in G.S. 122C-268(g). The judge is a judge of the district court of the district court district as defined in G.S. 7A-133 in which the facility is located or a district court judge temporarily assigned to that district.

…."

SECTION 32. G.S. 122C-281 reads as rewritten:

"**§ 122C-281. Affidavit and petition before clerk or magistrate; custody order.**

(a) Any individual who has knowledge of a substance abuser who is dangerous to ~~himself~~ self or others may appear before a clerk or assistant or deputy clerk of superior court or a magistrate, execute an affidavit to this effect, and petition the clerk or magistrate for issuance of an order to take the respondent into custody for examination by a ~~physician or eligible psychologist.~~commitment examiner. The affidavit shall include the facts on which the affiant's opinion is based. Jurisdiction under this subsection is in the clerk or magistrate in the county where the respondent resides or is found.

(b) If the clerk or magistrate finds reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent is probably a substance abuser and dangerous to ~~himself~~ self or others, ~~he~~ the clerk or magistrate shall issue an order to a ~~law enforcement~~ law enforcement officer or any other person ~~authorized by G.S. 122C-251~~ designated under G.S.122C-251(g) to take the respondent into custody for examination by a ~~physician or eligible psychologist.~~commitment examiner.

(c) If the clerk or magistrate issues a custody order, ~~he~~ the clerk or magistrate shall also make inquiry in any reliable way as to whether the respondent is indigent within the meaning of G.S. 7A-450. A magistrate shall report the result of this inquiry to the clerk.

(d) If the affiant is a ~~physician or eligible psychologist,~~commitment examiner who has examined the respondent, he or she may execute the affidavit before any official authorized to administer oaths. ~~He~~ The commitment examiner is not required to appear before the clerk or magistrate for this purpose. ~~His~~ The commitment examiner's examination shall comply with the requirements of the initial examination as provided in G.S. 122C-283(c). The affiant shall file the affidavit and examination findings with the clerk of court in the manner described in G.S. 122C-261(d)(1). If the ~~physician or eligible psychologist~~ commitment examiner recommends commitment and the clerk or magistrate finds probable cause to believe that the respondent meets the criteria for commitment, ~~he~~ the clerk or magistrate shall issue an order to a

law enforcement officer to take the respondent into custody for transportation to ~~or custody at~~ a 24-hour ~~facility or release the respondent,~~facility, or, if the respondent is released pending hearing, as described in ~~G.S. 122C-283(d)(1).~~G.S. 122C-283(d)(1), order that a hearing be held as provided in G.S. 122C-284(a). If a physician or eligible psychologist executes an affidavit for commitment of a respondent, a second qualified professional shall perform the examination required by G.S. 122C-285. Any person or entity who or which has been designated in compliance with G.S. 122C-251(g) shall be permitted to complete all or part of the duties of a law enforcement officer, in accord with the designation.

(e) Upon receipt of the custody order of the clerk or magistrate, a ~~law enforcement~~ law enforcement officer or other ~~person~~ designated person identified in the order shall take the respondent into custody within 24 hours after the order is signed. The custody order is valid throughout the State.

(e1) No commitment examiner, area facility, acute care hospital, general hospital, or other site of first examination, or their officials, staff, employees, or other individuals responsible for the custody, examination, detention, management, supervision, treatment, or release of an individual examined for commitment, who is not grossly negligent, shall be held liable in any civil or criminal action for taking measures to temporarily detain an individual for the period of time necessary to complete a commitment examination, submit an affidavit to the magistrate or clerk of court, and await the issuance of a custody order as authorized by subsection (d) of this section.

~~(f) When a petition is filed for an individual who is a resident of a single portal area, the procedures for examination by a physician or eligible psychologist as set forth in G.S. 122C-283(c) shall be carried out in accordance with the area plan. When an individual from a single portal area is presented for commitment at a facility directly, he may be accepted for admission in accordance with G.S. 122C-285. The facility shall notify the area authority within 24 hours of admission and further planning of treatment for the individual is the joint responsibility of the area authority and the facility as prescribed in the area plan.~~"

SECTION 33. G.S. 122C-282 reads as rewritten:

"**§ 122C-282. Special emergency procedure for violent individuals.**

When an individual subject to commitment under the provisions of this Part is also violent and requires restraint and when delay in taking ~~him~~ the individual to a ~~physician or eligible psychologist~~ commitment examiner for examination would likely endanger life or property, a ~~law enforcement~~ law enforcement officer may take the person into custody and take him or her immediately before a magistrate or clerk. The ~~law enforcement~~ law enforcement officer shall execute the affidavit required by G.S. 122C-281 and in addition shall swear that the respondent is violent and requires restraint and that delay in taking the respondent to a ~~physician or eligible psychologist~~ commitment examiner for an examination would endanger life or property.

If the clerk or magistrate finds by clear, cogent, and convincing evidence that the facts stated in the affidavit are true, that the respondent is in fact violent and requires restraint, and that delay in taking the respondent to a ~~physician or eligible psychologist~~ commitment examiner for an examination would endanger life or property, ~~he~~ the clerk or magistrate shall order the ~~law enforcement~~ law enforcement officer to take the respondent directly to a 24-hour facility described in G.S. 122C-252.

Respondents received at a 24-hour facility under the provisions of this section shall be examined and processed thereafter in the same way as all other respondents under this Part."

SECTION 34. G.S. 122C-283 reads as rewritten:

"**§ 122C-283. Duties of law-enforcement officer; first examination by ~~physician or eligible psychologist.~~commitment examiner.**

(a) Without unnecessary delay after assuming custody, the ~~law enforcement~~ law enforcement officer or the individual designated ~~by the clerk or magistrate~~ or required to provide transportation under G.S. 122C-251(g) ~~to provide transportation~~ shall take the respondent to ~~an~~

~~area~~ a facility ~~for examination by a physician or eligible psychologist if a physician or eligible psychologist is not available in the area facility, he shall take the respondent to any physician or eligible psychologist locally available.~~ or other location identified by the LME/MCO in the community crisis services plan adopted pursuant to G.S. 122C-202.2 that has an available commitment examiner and is capable of performing a first examination in conjunction with a health screening in the same location, unless exigent circumstances require the respondent be transported to an emergency department. If a commitment examiner is not available, whether on-site, on-call, or via telemedicine, at any facility or location, or if a plan has not been adopted, the person designated to provide transportation shall take the respondent to an alternative non-hospital provider or facility-based crisis center for a first examination in conjunction with a health screening at the same location. If no non-hospital provider or facility-based crisis center for a first examination in conjunction with a health screening at the same location, the person designated to provide transportations shall take the respondent to a private hospital or clinic, a general hospital, an acute care hospital, or a State facility for the mentally ill. If a ~~physician or eligible psychologist~~ commitment examiner is not immediately available, the respondent may be temporarily detained in an area facility if one is available; if an area facility is not available, he may be detained under appropriate supervision, in his home, in a private hospital or a clinic, or in a general hospital, but not in a jail or other penal facility. For the purposes of this section, "non-hospital provider" means an outpatient provider that provides either behavioral health or medical services.

(a1) A facility, or other location to which a respondent is transported under subsection (a) of this section, shall provide a health screening of the respondent. The health screening shall be conducted by a physician or other individual who is determined by the area facility, contracted facility, or other location to be qualified to perform the health screening. The respondent may either be in the physical face-to-face presence of the health screening examiner or may be examined utilizing telemedicine equipment and procedures. Documentation of the health screening required under this subsection that is completed prior to transporting the patient to any general or acute care hospital shall accompany the patient or otherwise be made available at the time of transportation to the receiving facility.

(b) The examination set forth in subsection (a) of this section is not required ~~if:~~under either of the following circumstances:

(1) The affiant who obtained the custody order is a ~~physician or eligible psychologist; or~~commitment examiner.

(2) The respondent is in custody under the special emergency procedure described in G.S. 122C-282.

In these cases when it is recommended that the respondent be detained in a 24-hour facility, the ~~law enforcement~~ law enforcement officer shall take the respondent directly to a 24-hour facility described in G.S. 122C-252.

(c) The ~~physician or eligible psychologist~~ commitment examiner described in subsection (a) of this section shall examine the respondent as soon as possible, and in any event within 24 hours, after the respondent is presented for examination. The examination shall include but is not limited to an assessment of the respondent's:

(1) Current and previous substance abuse including, if available, previous treatment history; and

(2) Dangerousness to himself or others as defined in G.S. 122C-3(11).

(d) After the conclusion of the ~~examination~~ examination, the ~~physician or eligible psychologist~~ commitment examiner shall make the following determinations:

(1) If the ~~physician or eligible psychologist~~ commitment examiner finds that the respondent is a substance abuser and is dangerous to ~~himself~~ self or others, ~~he~~ the commitment examiner shall recommend commitment and whether the respondent should be released or be held at a 24-hour facility pending hearing

and shall so show on ~~[the] his~~ the examination report. Based on the ~~physician's or eligible psychologist's recommendation~~ commitment examiner's recommendation, the ~~law-enforcement~~ law enforcement officer or other designated individual shall take the respondent to a 24-hour facility described in G.S. 122C-252 or release the respondent. If a 24-hour facility is not immediately available or medically appropriate, the respondent may be temporarily detained under appropriate supervision and the procedures described in G.S. 122C-263(d)(2) shall apply.

(2) If the ~~physician or eligible psychologist~~ commitment examiner finds that the condition described in subdivision (1) of this subsection does not exist, the respondent shall be released and the proceedings terminated.

(e) The findings of the ~~physician or eligible psychologist~~ commitment examiner and the facts on which they are based shall be in writing in all cases. A copy of the findings shall be sent to the clerk of superior court by the most reliable and expeditious means. If it cannot be reasonably anticipated that the clerk will receive the copy within 48 hours ~~of~~ after the time ~~that~~ it was signed, the ~~physician or eligible psychologist~~ commitment examiner shall also communicate ~~his~~ the findings to the clerk by telephone."

SECTION 35. G.S. 122C-284 reads as rewritten:

"**§ 122C-284. Duties of clerk of superior court.**

(a) Upon receipt by the clerk of superior court of a ~~physician's or eligible psychologist's~~ finding made by a commitment examiner or other qualified professional pursuant to G.S. 122C-285(c) that a respondent is a substance abuser and dangerous to ~~himself~~ self or others and that commitment is recommended, the clerk of superior court of the county where the facility is located, if the respondent is held in a 24-hour facility, or the clerk of superior court where the petition was initiated shall upon direction of a district court judge assign counsel, calendar the matter for hearing, and notify the respondent, ~~his~~ the respondent's counsel, and the petitioner of the time and place of the hearing. The petitioner or respondent, directly, or through counsel, may file a written waiver of ~~his~~ the right to notice under this subsection with the clerk of court.

(b) Notice to the respondent required by subsection (a) of this section shall be given as provided in G.S. 1A-1, Rule 4(j) at least 72 hours before the hearing. Notice to other individuals shall be given by mailing at least 72 hours before the hearing a copy by first-class mail postage prepaid to the individual at his or her last known address. G.S. 1A-1, Rule 6 shall not apply.

…."

SECTION 36. G.S. 122C-285 reads as rewritten:

"**§ 122C-285. Commitment; second examination and treatment pending hearing.**

(a) Within 24 hours of arrival at a 24-hour facility described in G.S. 122C-252, the respondent shall be examined by a qualified professional. This professional shall be a physician if the initial commitment evaluation was conducted by ~~an eligible psychologist.~~a commitment examiner who is not a physician. The examination shall include the assessment specified in G.S. 122C-283(c). If the physician or qualified professional finds that the respondent is a substance abuser and is dangerous to ~~himself~~ self or others, ~~he~~ the physician or qualified professional shall hold and treat the respondent at the facility or designate other treatment pending the district court hearing. If the physician or qualified professional finds that the respondent does not meet the criteria for commitment under G.S. 122C-283(d)(1), ~~he~~ the physician or qualified professional shall release the respondent and the proceeding shall be terminated. In this case the reasons for the release shall be reported in writing to the clerk of superior court of the county in which the custody order originated. If the respondent is released, the ~~law-enforcement~~ law enforcement officer or other person designated or required under G.S. 122C-251(g) to provide transportation shall return the respondent to the originating county.

(b) If the 24-hour facility described in G.S. 122C-252 is the facility in which the first examination by a ~~physician or eligible psychologist~~ commitment examiner occurred and is the

same facility in which the respondent is held, the second examination must occur not later than the following regular working day.

(c) The findings of the physician or qualified professional along with a summary of the facts on which they are based shall be made in writing in all cases. A copy of the written findings shall be sent to the clerk of superior court by reliable and expeditious means."

SECTION 37. G.S. 122C-286 reads as rewritten:

"**§ 122C-286. Commitment; district court hearing.**

(a) A hearing shall be held in district court within 10 days of the day the respondent is taken into custody. If a respondent temporarily detained under G.S. 122C-263(d)(2) is subject to a series of successive custody orders issued pursuant to G.S. 122C-263(d)(2), the hearing shall be held within 10 days after the day the respondent is taken into custody under the most recent custody order. Upon its own motion or upon motion of the responsible professional, the respondent, or the State, the court may grant a continuance of not more than five days.

(b) The respondent shall be present at the ~~hearing.~~hearing unless the respondent, through counsel, submits a written waiver of personal appearance. A subpoena may be issued to compel the respondent's presence at a hearing. The petitioner and the responsible professional of the area ~~authority~~ facility or the proposed treating physician or ~~his~~ a designee of the proposed treating physician may be present and may provide testimony.

(c) Certified copies of reports and findings of ~~physicians and psychologists~~ physicians, psychologists, and other commitment examiners and medical records of previous and current treatment are admissible in evidence, but the respondent's right to confront and cross-examine witnesses shall not be denied.

(d) The respondent may be represented by counsel of ~~his~~ choice. If the respondent is indigent within the meaning of G.S. 7A-450, counsel shall be appointed to represent the respondent in accordance with rules adopted by the Office of Indigent Defense Services.

(e) Hearings may be held at a facility if it is located within the judge's district court district as defined in G.S. 7A-133 or in the judge's chambers. A hearing may not be held in a regular courtroom, over objection of the respondent, if in the discretion of a judge a more suitable place is available.

(f) The hearing shall be closed to the public unless the respondent requests otherwise. The hearing for a respondent being held at a 24-hour facility shall be held in a location and in the manner provided in G.S. 122C-268(g).

(g) A copy of all documents admitted into evidence and a transcript of the proceedings shall be furnished to the respondent on request by the clerk upon the direction of a district court judge. If the respondent is indigent, the copies shall be provided at State expense.

(h) To support a commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent meets the criteria specified in G.S. 122C-283(d)(1). The court shall record the facts that support its findings and shall show on the order the area ~~authority~~ facility or physician who is responsible for the management and supervision of the respondent's treatment."

SECTION 38. G.S. 122C-287 reads as rewritten:

"**§ 122C-287. Disposition.**

The court may make one of the following dispositions:

(1) If the court finds by clear, cogent, and convincing evidence that the respondent is a substance abuser and is dangerous to ~~himself~~ self or others, it shall order for a period not in excess of 180 days commitment to and treatment by an area ~~authority~~ facility or physician who is responsible for the management and supervision of the respondent's commitment and treatment. Before ordering commitment to and treatment by an area facility or a physician who is not a physician at an inpatient facility, the court shall follow the procedures specified in G.S. 122C-271(a)(3) and G.S. 122C-271(b)(4), as applicable.

(2) If the court finds that the respondent does not meet the commitment criteria set out in subdivision (1) of this subsection, the respondent shall be discharged and the facility in which he was last treated so notified."

SECTION 39. G.S. 122C-290 reads as rewritten:

"**§ 122C-290. Duties for follow-up on commitment order.**

(a) The area ~~authority~~ facility or physician responsible for management and supervision of the respondent's commitment and treatment may prescribe or administer to the respondent reasonable and appropriate treatment either on an outpatient basis or in a 24-hour facility.

(b) If the respondent whose treatment is provided on an outpatient basis fails to comply with all or part of the prescribed treatment after reasonable effort to solicit the respondent's compliance or whose treatment is provided on an inpatient basis is discharged in accordance with G.S. 122C-205.1(b), the area ~~authority~~ facility or physician may request the clerk or magistrate to order the respondent taken into custody for the purpose of examination. Upon receipt of this request, the clerk or magistrate shall issue an order to a law enforcement officer to take the respondent into custody and to take him immediately to the designated area ~~authority~~ facility or physician for examination. The custody order is valid throughout the State. The law enforcement officer shall turn the respondent over to the custody of the physician or area ~~authority~~ facility who shall conduct the examination and release the respondent or have the respondent taken to a 24-hour facility upon a determination that treatment in the facility will benefit the respondent. Transportation to the 24-hour facility shall be provided as specified in G.S. 122C-251, upon notice to the clerk or magistrate that transportation is necessary, or as provided in G.S. 122C-408(b). If placement in a 24-hour facility is to exceed 45 consecutive days, the area ~~authority~~ facility or physician shall notify the clerk of court by the 30th day and request a supplemental hearing as specified in G.S. 122C-291.

(c) If the respondent intends to move or moves to another county within the State, the area ~~authority~~ facility or physician shall notify the clerk of court in the county where the commitment is being supervised and request that a supplemental hearing be calendared.

(d) If the respondent moves to another state or to an unknown location, the designated area ~~authority~~ facility or physician shall notify the clerk of superior court of the county where the commitment is supervised and the commitment shall be terminated."

SECTION 40. G.S. 122C-291 reads as rewritten:

"**§ 122C-291. Supplemental hearings.**

(a) Upon receipt of a request for a supplemental hearing, the clerk shall calendar a hearing to be held within 14 days and notify, at least 72 hours before the hearing, the petitioner, the respondent, his attorney, if any, and the designated area ~~authority~~ facility or physician. Notice shall be provided in accordance with G.S. 122C-284(b). The procedures for the hearing shall follow G.S. 122C-286.

(b) At the supplemental hearing for a respondent who has moved or may move to another county, the court shall determine if the respondent meets the criteria for commitment set out in G.S. 122C-283(d)(1). If the court determines that the respondent no longer meets the criteria for commitment, it shall discharge the respondent from the order and dismiss the case. If the court determines that the respondent continues to meet the criteria for commitment, it shall continue the commitment but shall designate an area ~~authority~~ facility or physician at the respondent's new residence to be responsible for the management or supervision of the respondent's commitment. The court shall order the respondent to appear for treatment at the address of the newly designated area ~~authority~~ facility or physician and shall order venue for further court proceedings under the commitment to be transferred to the new county of supervision. Upon an order changing venue, the clerk of court in the county where the commitment has been supervised shall transfer the records regarding the commitment to the clerk of court in the county where the commitment will be supervised. Also, the clerk of court in the county where the commitment has been supervised

shall send a copy of the court's order directing the continuation of treatment under new supervision to the newly designated area ~~authority~~ facility or physician.

…."

SECTION 41. G.S. 122C-292 reads as rewritten:

"**§ 122C-292. Rehearings.**

(a) Fifteen days before the end of the initial or subsequent periods of commitment if the area ~~authority~~ facility or physician determines that the respondent continues to meet the criteria specified in G.S. 122C-283(d)(1), the clerk of superior court of the county where commitment is supervised shall be notified. The clerk, at least 10 days before the end of the commitment period, on order of the district court, shall calendar the rehearing. If the respondent no longer meets the criteria, the area ~~authority~~ facility or physician shall so notify the clerk who shall dismiss the case.

(b) Rehearings are governed by the same notice and procedures as initial hearings, and the respondent has the same rights ~~he had~~ that were available to the respondent at the initial hearing including the right to appeal.

(c) If the court finds that the respondent no longer meets the criteria of G.S. 122C-283(d)(1), it shall unconditionally discharge him. A copy of the discharge order shall be furnished by the clerk to the designated area ~~authority~~ facility or physician. If the respondent continues to meet the criteria of G.S. 122C-283(d)(1), the court may order commitment for additional periods not in excess of 365 days each."

SECTION 42. G.S. 122C-293 reads as rewritten:

"**§ 122C-293. Release by area ~~authority~~ facility or physician.**

The area ~~authority~~ facility or physician as designated in the order shall discharge a committed respondent unconditionally at any time ~~he~~ the physician determines that the respondent no longer meets the criteria of G.S. 122C-283(d)(1). Notice of discharge and the reasons for the release shall be reported in writing to the clerk of superior court of the county in which the commitment was ordered."

SECTION 43. G.S. 122C-294 reads as rewritten:

"**§ 122C-294. Local ~~plan.~~plan and data submission.**

(a) ~~Each area authority shall develop a local plan with local law enforcement agencies, local courts, local hospitals, and local medical societies necessary to facilitate implementation of this Part.~~The local plan in accordance with G.S. 122C-202.2 and G.S. 122C-251(g) shall be submitted to the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services on or before October 1, 2019. If the area authority modifies the plan, the modified plan shall be submitted to the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services at least 10 days prior to the effective date of the new plan.

(b) The Department shall provide the data collected by the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services concerning the number of respondents receiving treatment under involuntary commitment in designated facilities to the Fiscal Research Division and the Joint Legislative Oversight Committee for Health and Human Services on October 1 of each year beginning in 2019 and any other time upon request."

SECTION 44. Each LME/MCO shall submit to the Department of Health and Human Services a copy of its current community crisis services plan adopted pursuant to G.S. 122C-202.2, as enacted by this act, by the earlier of (i) 12 months after the date the Department receives notification that the federal Centers for Medicaid and Medicare Services has approved all necessary waivers and State Plan amendments for Medicaid and NC Health Choice transformation as provided for in S.L. 2015-245, as amended, or (ii) six months prior to the date the Department actually initiates capitated contracts with Prepaid Health Plans, as defined in Section 4 of S.L. 2015-245, as amended, for the delivery of Medicaid and NC Health Choice services. The Department shall notify each LME/MCO when the earlier of these conditions occurs.

SECTION 45.(a) G.S. 35A-1105 reads as rewritten:

"**§ 35A-1105. Petition before clerk.**

A verified petition for the adjudication of incompetence of an adult, or of a minor who is within six months of reaching majority, may be filed with the clerk by any person, including any State or local human services agency or healthcare provider through its authorized ~~representative.~~representative without the need for legal counsel."

SECTION 45.(b) G.S. 35A-1112 reads as rewritten:

"**§ 35A-1112. Hearing on petition; adjudication order.**

…

(b) The petitioner and the respondent are entitled to present testimony and documentary evidence, to subpoena witnesses and the production of documents, and to examine and cross-examine witnesses. If the petitioner is a State or local human service agency or a health care provider, evidence may be presented without the need for legal counsel.

…."

SECTION 46. Sections 5(c1), 44, 45(a), and 45(b) of this act are effective when the act becomes law. The remainder of this act becomes effective October 1, 2019, and applies to proceedings initiated on or after that date.

In the General Assembly read three times and ratified this the 14th day of June, 2018.

s/ Philip E. Berger
President Pro Tempore of the Senate

s/ Tim Moore
Speaker of the House of Representatives

s/ Roy Cooper
Governor

Approved 9:19 a.m. this 22nd day of June, 2018

Cardinal Innovations HEALTHCARE

January 15, 2019

Cardinal Innovations HEALTHCARE

Accessing Care after a Civil Commitment

Justin Richman, JD, MA
Cardinal Innovations Senior Associate General Counsel

Britney Phifer, LMFT, LCAS
Cardinal Innovations Utilization Management Clinical Manager

Cardinal Innovations HEALTHCARE

Agenda

- Background of the North Carolina Mental Health System
- Treatment and Levels of Care
- Authorization, Access and Availability of Services
- Questions

Background of the North Carolina Mental Health System

Roles in the System

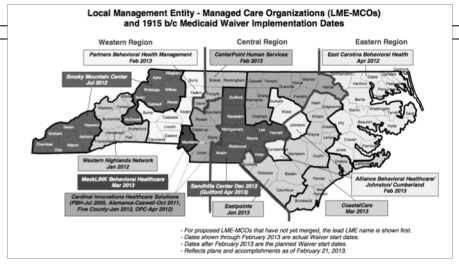
- Individuals
- Providers
- Private Payers (Blue Cross Blue Shield, Cigna, etc.)
- Public Payers (LME/MCOs)

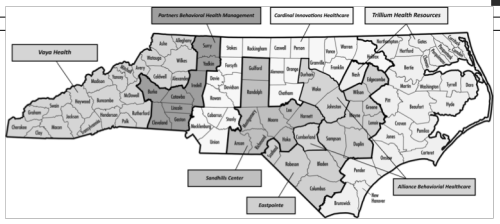
History of the LME/MCO Model

- Evolved from the county mental health system
- Statutorily organized pursuant to N.C. Gen. Stat. 122C
- Manage and oversee publicly funded MH/SUD/IDD care

LME/MCOs and Medicaid Reform

- Movement from fee-for-service Medicaid to Managed Care
- Session Law 2011-264 expanded the 1915(b) Medicaid Waiver statewide





Treatment and Levels of Care

Treatment and Levels of Care

- Treatment vs. placement
- Assessment, documentation and treatment planning
- Services must be *medically necessary*

Spectrum of Care

- Services for children vs. adults
- Outpatient, community-based, enhanced services
- Non-residential vs. residential care
- Coordination of care and clinical homes

Availability, Access and Authorization of Services

Access to Services

- Each LME/MCO has a 24/7/365 access line
- Coordination of care functions of LME/MCOs

Benefit Plans by Target Population

- Children with MH/SUD and Medicaid
- Adults with MH/SUD and Medicaid
- Children and adults with MH/SUD and without Medicaid
- Children and adults with IDD

Availability of Services

- Rural vs. urban areas
- Bed availability for residential treatment
- Patient milieu
- In-network vs. out-of-network providers

Collaboration and Other Stakeholders

- Schools and local education agencies
- Departments of Social Services
- Departments of Juvenile Justice
- System of Care

Authorization Process

- Prior approval by the LME/MCO
- Requests are reviewed for medical necessity
- Any decision to deny care is made by a psychologist or psychiatrist

Transitioning Back to the Community

- Length of inpatient stay determined by medical necessity
- Discharge planning begins at admission

Resources

- LME/MCO Directory:
  - https://www.ncdhhs.gov/providers/lme-mco-directory
- Behavioral Health Clinical Coverage Policies:
  - https://medicaid.ncdhhs.gov/providers/clinical-coverage-policies/behavioral-health-clinical-coverage-policies
- Cardinal Innovations' Website:
  - https://www.cardinalinnovations.org

Questions?

Child and Adolescent MH/SUD Residential Continuum

	Residential Level I: Therapeutic Foster Care	Residential Level II: Therapeutic Foster Care & Group Type	Residential Level III: Therapeutic Group Homes
HOME/LESS RESTRICTIVE TX	Difficulty maintaining in the family setting	Moderate to severe difficulty maintaining in the family setting /lower level of treatment	Severe difficulty maintaining in the family setting/lower level of treatment
	Frequent conflict or frequent difficulty accepting behavioral limits/structure	Severe conflict or severe difficulty accepting behavioral limits/structure	Frequent and severe conflict in the setting or frequently and severely limited acceptance of behavioral expectations/structure
		Impaired ability to form trusting relationships with caretakers or limited ability to consider the effect of inappropriate conduct on others	frequently and severely limited involvement in support or impaired ability to form trusting relationships with caretakers and inability to consider the effect of inappropriate conduct on others
AGGRESSION	Frequent verbal aggression	Frequent and Severely disruptive verbal aggression	
	Infrequent or moderate intensity physical aggression	Frequent and moderate property destruction and/or occasional moderate aggression towards self or others	Frequent physical aggression including severe property damage or moderate to severe aggression toward self or others
SCHOOL	Increasing functional problems in the school i.e. imminent risk of failure, frequent behavioral problems	Moderate to severe problems in school i.e. failure in school, frequent behavioral problems	Severe functional problems in school or vocational setting i.e. failure in school, frequent and severe behavioral problems
NEED FOR PROMPTING/ REDIRECTION	Consistent difficulty accepting age appropriate direction and supervision from caretakers/family members	Frequent and disruptive difficulty maintaining appropriate conduct in community setting or pervasive inability to accept age appropriate direction and supervision	Frequent and severely disruptive difficulty in maintain appropriate conduct or severe and pervasive inability to accept age appropriate direction/supervision, coupled with involvement in potentially life-threatening high-risk behaviors
MEDICATION		Medication management has been implemented and alleviated some symptoms but additional intervention needed	Medication administration and monitoring have alleviated some symptoms but other treatment interventions are needed to control severe symptoms

Cardinal Innovations HEALTHCARE

	Residential Level I: Therapeutic Foster Care	Residential Level II: Therapeutic Foster Care & Group Type	Residential Level III: Therapeutic Group Homes
		Limitations in ability to independently access/ participate in other services and requires active support and supervision to do this	Significant limitations in ability to independently access/participate in other services and require intensive active support to do this
HEALTH, WELFARE, SAFETY		Deficits in ability to manage personal health, welfare, and safety without intense support and supervision	Significant deficits in ability to manage personal health, welfare, and safety without intense support and supervision.
INAPPROPRIATE SEXUAL BEHAVIOR		For recipients identified with or at risk for inappropriate sexual behavior, safety plans can be put in place and assessment indicates community setting is appropriate	For recipients identified with or at risk for inappropriate sexual behavior that has occurred at an intensity/frequency that without constant supervision puts others at risk, as validated by a specific assessment.

*****For children who exhibit sexualized behaviors, a comprehensive evaluation of sexual harm should be completed. This should not identify a "Risk Level" as this is not considered a valid predictor for treatment, or future behaviors.**

Psychiatric Residential Treatment Facility (PRTF) LEVEL OF CARE:

A Certificate of Need must by signed by an MD, and another appropriately licensed clinician familiar with the consumer, and is valid for 15 days

All of the following criteria are necessary for admission:

A. Symptomatology consistent with a DSM-5, or any subsequent editions of this reference material, diagnosis which requires, and can reasonably be expected to respond to, therapeutic intervention.

B. Experiencing emotional or behavioral problems in the home, community or treatment setting and is not sufficiently stable either emotionally or behaviorally, to be treated outside of a highly structured 24-hour therapeutic environment

C. Demonstrates a capacity to respond favorably to rehabilitative counseling and training in areas such as problem solving, life skills development, and medication compliance training

D. History of multiple hospitalizations or other treatment episodes and/or recent inpatient stay with a history of poor treatment adherence or outcome

E. Less restrictive or intensive levels of treatment have been tried and were unsuccessful, or are not appropriate to meet the individual's needs

F. The family situation and functioning levels are such that the child/adolescent cannot currently remain in the home environment and receive community-based treatment

Psychiatric Residential Treatment Facility (PRTF) CONTINUATION CRITERIA

All of the following criteria are necessary for continuing treatment at this level of care:

a. The child/adolescent's condition continues to meet admission criteria at this level of care.

b. The child/adolescent's treatment does not require a more intensive level of care, and no less intensive level of care would be appropriate.

c. Treatment planning is individualized and appropriate to the individual's changing condition with realistic and specific goals and objectives stated. Treatment planning should include active family or other support systems involvement, along with social, occupational and interpersonal assessment unless contraindicated. The expected benefits from all relevant treatment modalities are documented. The treatment plan has been implemented and updated, with consideration of all applicable and appropriate treatment modalities.

d. All services and treatment are carefully structured to achieve optimum results in the most time efficient manner possible consistent with sound clinical practice.

e. If treatment progress is not evident, then there is documentation of treatment plan adjustments to address such lack of progress.

f. Care is rendered in a clinically appropriate manner and focused on the child/adolescent's behavioral and functional outcomes.

g. An individualized discharge plan has been developed which includes specific realistic, objective and measurable discharge criteria and plans for appropriate follow-up care. A timeline for expected implementation and completion is in place but discharge criteria have not yet been met.

h. Child/adolescent is actively participating in treatment to the extent possible consistent with his/her condition, or there are active efforts being made that can reasonably be expected to lead to the child/adolescent's engagement in treatment.

i. Unless contraindicated, family, guardian, and/or custodian is actively involved in the treatment as required by the treatment plan, or there are active efforts being made and documented to involve them.

j. When medically necessary, appropriate psychopharmacological intervention has been prescribed and/or evaluated.

k. There is documented active discharge planning from the beginning of treatment.

l. There is a documented active attempt at coordination of care with relevant outpatient providers when appropriate.

OVERVIEW OF ADULT SERVICE continuum

Service	Service Type	Description	Average Length of Treatment
Assertive Community Treatment Team (ACTT)	MH	Community-based treatment by a team for members with a serious and persistent mental health diagnosis. Includes MD, nursing, licensed clinicians and specialists. Intended for members with history of multiple hospitalizations and unsuccessful outcomes from less intensive treatment.	1 to 3 years
Assertive Community Treatment Team Step Down (ACTT-SD)	MH	Appropriate for members that have become stable through ACTT services but still need coordinated intervention through psychiatry, nursing, and qualified professional. Allows trial of less intensive treatment interventions, while maintaining the same psychiatrist for continuity.	1 year +
Community Support Team (CST)	MH	Intensive community-based team service that provides direct treatment and clinical interventions as well as case management. Must have identified needs in at least four functional areas. Includes crisis response.	6 months
Psychosocial Rehabilitation (PSR)	MH	Focuses on skill and resource development related to life in the community and increasing independence. Teaches management of illness and lives with as little professional intervention as possible. Focus on activities and interventions related to functional, social, educational and vocational goals. Site must be open five days a week for at least five hours, but also includes community activities.	May be long term
Supported Employment	MH + IDD	Provides assistance with choosing, acquiring and maintaining competitive paid employment in the community for members age 16 and older for whom employment has not been achieved and/or has been interrupted or intermittent. Slight differences between IDD and MH Supported Employment.	Varies
Peer Support (b3)	MH	Individualized, recovery-focused service that empowers members to manage their own recovery. Provided by individuals that are Certified Peer Support Specialists in recovery. Interventions include development of natural supports, as well as coping and self-management skills.	1 to 3 years
Individual Supports (b3)	MH	Support adults with a mental health diagnoses living in a private home, a licensed group home, an adult care home or a hospital that have a documented plan to transition to independent or shared housing. Services are hands-on individualized assistance with everyday activities that are required in order to live independently in the community.	9 months to 1 year
Transitional Living (b3)	MH	For members age 16 to 21 who are exiting the foster care, juvenile justice, or mental health systems, in learning the skills needed to succeed independently. Focus on self-sufficiency skills, community reintegration and education, coordination with therapeutic service providers, vocational skills and job training/experience.	9 months to 1 year
Community Guide (b3)	IDD	Focus on self-determination, increasing independence and enhance the member's ability to interact with and contribute to his or her local community. Emphasize, promote and coordinate the use of natural and generic supports (unpaid) to address the member's needs in addition to paid services.	Varies

Cardinal Innovations HEALTHCARE

Service	Service Type	Description	Average Length of Treatment
In Home Skill Building (b3)	IDD	Short term, intensive habilitation service to remediate one or more documented functional deficits. Members receive a comprehensive skill and preference assessment to identify potential skills to be developed. High involvement with caregivers in coaching and training.	1 year
Respite (b3)	IDD	Periodic relief for the primary caregiver. Member must live with the caregiver. Not intended to replace appropriate treatment services.	May be long term
Intensive Recovery Supports (b3)	SUD	For women who are pregnant or with minor children who have been diagnosed with a substance use disorder. Recovery-based, member-focused community program designed to facilitate an individual's recovery. The focus on increasing functioning, relapse prevention, and developing strong community supports.	6 months to 1 year
Opioid Treatment	SUD	Methadone or other drug approved by the (FDA) for the treatment of opiate addiction in conjunction with the provision of rehabilitation and medical services. Tool in the detoxification and rehabilitation process of an opiate-dependent individual.	May be long term
Substance Abuse Intensive Outpatient (SAIOP)	SUD	Structured individual and group addiction activities and services that are provided at an outpatient program at least three days a week, three hours per day. Includes therapy, case management, education, crisis management, and linkage.	12 to 14 weeks
Substance Abuse Comprehensive Outpatient Treatment (SACOT)	SUD	Structured individual and group intensive addiction activities and services that are provided at an outpatient program, at least five days a week, four hours per day. Includes therapy, case management, education, crisis management, and linkage.	90 to 120 days
Outpatient Therapy Services	MH + IDD + SUD	Various treatment interventions that should be consistent with best practices for the diagnosis. When families are impacted, their involvement in treatment is a key component. Services should be adjusted as progress is noted, or interventions modified if progress is not evident.	Varies, but progress should be noted
Medication Management	MH + IDD + SUD	Medication evaluation and management by a psychiatrist, nurse practitioner, or a physician assistant.	May be long term

For more detailed information on the services and the clinical approach of Cardinal Innovations, please refer to our Clinical Design Plan on the website: **https://www.cardinalinnovations.org/clinical-design-plan**.

Commitment Appeals

Civil Commitment Conference / January 25, 2019

David Andrews, Assistant Appellate Defender

Part I:
Case Law Update

Imagine the following

- You represent an 11-year old who has been at a facility for 9 weeks with no hearing.
- You were appointed after an audit uncovered the problem.
- A hearing is now scheduled to occur in 15 days.
- ***What, if anything, should you do?***

You could . . .

- File a motion to dismiss the case.
- Arrange for the client's family to speak to an attorney about suing the facility.
- Notify the NC Department of Health and Human Services.

In re P.S., 807 S.E.2d 631

- Multiple children were held for weeks at a mental health facility without a hearing.
- Once the problem was discovered, attorneys for the children filed a motion to dismiss, which was denied.
- The Court of Appeals held that the trial judge "did not err" by denying the motion because the motion would have resulted in the "denial of treatment."

Going forward

- You can *still* file a motion to dismiss, but it will likely be denied unless you can line up some form of treatment.
- You can and should arrange for the client's family to speak to an attorney about suing the facility.
- You can and should notify the NC Department of Health and Human Services.

Going forward

- *McLean v. Sale*, 38 N.C. App. 520 (1978): Wrongful commitment claim allowed against physician who failed to properly conduct examination process.
- *Samons v. Meymandi*, 9 N.C. App. 490 (1970): False imprisonment and abuse of process claims allowed against physician who failed to have statement resulting in the commitment properly acknowledged

Going forward

- N.C.G.S. § 122C-24.1: DHHS "shall impose" a penalty on any facility found in violation of applicable laws.
- N.C.G.S. § 122C-25: DHHS may review any records about the admission, treatment, or history of any individual who is or has been a patient of a licensable facility.

Going forward

- Don't forget about contempt.
- N.C.G.S. § 5A-11(a): Criminal contempt may be imposed for "willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction."
- N.C.G.S. § 5A-21: Failure to comply with an order of a court is a "continuing civil contempt . . . ."

Going forward

- Trial judge in *In re P.S.*: "They're on notice. If it happens again, I don't care whether you make me aware of it or not, ***I will issue show cause proceedings***."

Subject matter jurisdiction

- Voluntary admission cases are initiated by submission of a signed written application to the facility. N.C.G.S. § 122C-211.
- Cases involving minors or incompetent adults must be initiated by a legally responsible person. N.C.G.S. §§ 122C-221 and 122C-231.

Subject matter jurisdiction

- For minors, a legally responsible person is a parent, guardian, a person standing in loco parentis, or a legal custodian. N.C.G.S. § 122C-3(20).
- For adults who have been adjudicated incompetent, a legally responsible person is a guardian. N.C.G.S. §§ 122C-3(20).

Subject matter jurisdiction

- *In re Wolfe*, 803 S.E.2d 649 (2017):
  Jurisdiction over a voluntary admission case "does not vest" absent the written application for admission.

- *In re P.S.*, 807 S.E.2d 631 (2017):
  An application signed by a representative of the facility based on verbal authorization of a parent does not confer jurisdiction onto the court.

Subject matter jurisdiction


ADMISSION INFORMATION

Admission Authorization Form

CLERK OF SUPERIOR COURT

(Signature of Resident)

(Date)

(Signature of Parent/Guardian)

5/31/16 5:44pm

(Date)

5/31/16 5:44pm

(Signature of Witness)

5/31/16 5:44pm

CC: Admissions, Business Office

Official Verbal Consent Received

SBC Admission Packet Rev 07/06/13

Page 2 of 23

obtained by

Subject matter jurisdiction

- If you suspect that the person who signed the application was not a legally responsible person, let the court know.

- Although the application is presumed valid, "this presumption can be rebutted by evidence to the contrary." *In re P.S.*, 807 S.E.2d 631 (2017).

Subject matter jurisdiction

- *In re M.L.*, No. COA18-5 (unpublished):
  - The petition that initially triggered the commitment hearing was defective. However, a second petition was "somehow obtained" in the middle of the commitment hearing.
  - The commitment order was vacated.
  - The COA held that the second petition was improper because it did not provide the respondent with sufficient notice.

Danger to self

- Dissenting opinion in *In re K.B.*, No. COA17-1395:

"I concur with the Majority but write separately to note my apprehension over involuntarily committing persons suffering from mental illness before they have truly become dangerous to themselves or others."

Danger to self

- Dissenting opinion in *In re K.B.*, No. COA17-1395:

"Respondent has not made any argument on appeal that the evidence negated the State's prima facie showing under N.C.G.S. § 122C-3(11)(a) that he 'is unable to care for himself.' Further, Respondent **did not challenge this statutory presumption as unconstitutionally vague or overbroad or make any type of as applied challenge to the statute**."

Danger to self

- Dissenting opinion in *In re K.B.*, No. COA17-1395:

"Respondent and others similarly situated may be caught in **too large of an undefined funnel** depriving them of their rights to liberty and forcing them to undertake psychoactive drug regimens at **too remote a stage in their illness**."

Danger to self

- *In re Torski*, 339 Ill. App. 3d 1010 (2009):
  - Statute allowing commitment based on "threatening behavior" or "conduct that places another individual in reasonable expectation of being harmed" was vague.
  - The statute "poses a risk of arbitrary application to mentally ill individuals engaging in merely unusual or annoying behavior."

Danger to self

- What to do now?
- Look for a case involving only danger to self based on lack of self-care.
- Consider filing a motion to dismiss on the ground that N.C.G.S. § 122C-3(11)(a)(1)(II) is vague, overbroad, and violates due process as applied to the client.

Danger to self

- N.C.G.S. § 122C-3(11)(a)(1)(II):

A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a **prima facie inference** that the individual is unable to care for himself.

Danger to self

- Is there a risk that the definition of danger to self encompasses too many people, including those who really aren't dangerous to themselves?
- Don't forget about the second part of the definition: "That there is a reasonable probability of his suffering serious physical debilitation within the near future unless adequate treatment is given."

Danger to self

- The trial court found in *K.B.* that the respondent:
  - Stopped taking his medication, which led to his mental health deteriorating.
  - Has exhibited disorganized thinking, appeared to respond to internal stimuli, and accused doctors of poisoning him.
  - Has no insight into his mental illness and continues to refuse his medication, causing the deterioration of his mental health and impairing his ability to meet his daily basic needs.

Part II: What to Expect in 2019

Examination process

- *In re E.D.*, No. 125PA18:
  - The second exam was not completed by a physician, as required by N.C.G.S. § 122C-266(a).
  - The respondent won in the COA, but the SCONC granted review.
  - The SCONC might require an objection and a showing of prejudice.

Self-Representation

- *In re V.O.*, No. COA18-907:
  - The trial court allowed the respondent to represent himself after engaging in a colloquy based on N.C.G.S. § 15A-1242.
  - This was allowed in *In re Watson*, 209 N.C. App. 507 (2011).
  - But Chapter 122C does not contemplate waivers of counsel.
  - The SCONC rejected a similar procedure in *In re P.D.R.*, 365 N.C. 533 (2012).

Subject matter jurisdiction

- *In re K.J.*, No. COA18-639:
  - The only facts included in the petition were the following: "Aggressive behavior/HI/psychosis."
  - The respondent is asserting that the petition is defective and deprived the trial court of jurisdiction over the case.

Part III: How You Can Help

What happens when you appeal?

- Many people think appeals primarily involve issue-spotting and written / oral argument.
- But appeals are more than just legal analysis. And most appeals don't involve oral argument.
- There are some things that trials can do to help move appeals forward.

The timeline for appeals

- The court reporter has 60 days to prepare the transcript.
- The respondent has 35 days to prepare the record on appeal and the State has 30 days to respond.
- The respondent has 15 days to docket the record on appeal in the Court of Appeals.

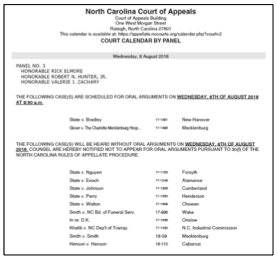
The timeline for appeals

- The respondent has 30 days to file a brief. The State has 30 to file its brief.
- The Court of Appeals must first decide on oral argument and then how to rule on the appeal.
- The respondent or the State must decide whether to appeal to the Supreme Court of North Carolina.

The timeline for appeals

- Appeals take 12-18 months in the Court of Appeals.
- Extensions can be granted at most stages of an appeal.
- Although there are deadlines for the parties, there are no deadlines for the appellate courts.

The timeline for appeals



North Carolina Court of Appeals

Court of Appeals Building
1 West Morgan Street
Raleigh, North Carolina 27601
This calendar is available at: https://appellate.nccourts.org/calendar.php?courtv2

COURT CALENDAR BY PANEL

Wednesday, 8 August 2018

PANEL NO. 3
HONORABLE RICK ELMORE
HONORABLE ROBERT N. HUNTER, JR.
HONORABLE VALERIE J. ZACHARY

THE FOLLOWING CASE(S) ARE SCHEDULED FOR ORAL ARGUMENTS ON **WEDNESDAY, 8TH OF AUGUST 2018 AT 9:30 a.m.**

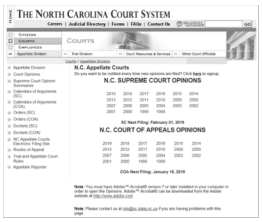
State v. Bradley	17-1341	New Hanover
Glover v. The Charlotte-Mecklenburg Hosp...	17-1344	Mecklenburg

THE FOLLOWING CASE(S) WILL BE HEARD WITHOUT ORAL ARGUMENTS ON **WEDNESDAY, 8TH OF AUGUST 2018.** COUNSEL ARE HEREBY NOTIFIED NOT TO APPEAR FOR ORAL ARGUMENTS PURSUANT TO 30(f) OF THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE.

State v. Nguyen	17-1150	Forsyth
State v. Enoch	17-1246	Alamance
State v. Johnson	17-1305	Cumberland
State v. Perry	17-1384	Henderson
State v. Walton	17-1394	Chowan
Smith v. NC Bd. of Funeral Serv.	17-1405	Wake
In re: D.K.	17-1406	Onslow
Khatib v. NC Dep't of Transp.	17-1430	N.C. Industrial Commission
Smith v. Smith	18-128	Mecklenburg
Henson v. Henson	18-110	Cabarrus

The timeline for appeals

- You can find appellate court opinions at nccourts.gov.



THE NORTH CAROLINA COURT SYSTEM

Careers | Judicial Directory | Forms | FAQs | Contact Us

COURTS

N.C. Appellate Courts

N.C. SUPREME COURT OPINIONS

2019 2018 2017 2016 2015 2014
2013 2012 2011 2010 2009 2008
2007 2006 2005 2004 2003 2002
2001 2000 1999 1998

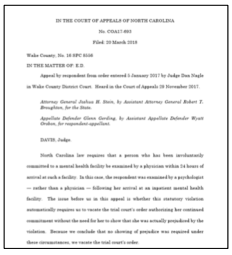
SC Next Filing: February 01, 2019

N.C. COURT OF APPEALS OPINIONS

2019 2018 2017 2016 2015 2014
2013 2012 2011 2010 2009 2008
2007 2006 2005 2004 2003 2002
2001 2000 1999 1998

COA Next Filing: January 15, 2019

The timeline for appeals



IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-893

Filed: 20 March 2018

Wake County, No. 16 SPC 8156

IN THE MATTER OF: E.D.

Appeal by respondent from order entered 5 January 2017 by Judge Don Naylo in Wake County District Court. Heard in the Court of Appeals 28 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert T. Broughton, for the State.

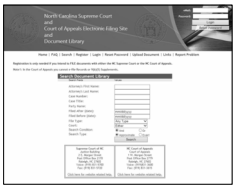
Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for respondent-appellant.

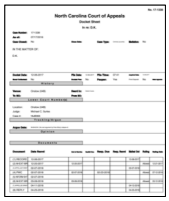
DAVIS, Judge.

North Carolina law requires that a person who has been involuntarily committed to a mental health facility be examined by a physician within 24 hours of arrival at such a facility. In this case, the respondent was examined by a psychologist — rather than a physician — following her arrival at an inpatient mental health facility. The issue before us in this appeal is whether this statutory violation automatically requires us to vacate the trial court's order authorizing her continued commitment without the need for her to show that she was actually prejudiced by the violation. Because we conclude that no showing of prejudice was required under these circumstances, we vacate the trial court's order.

The timeline for appeals

- You can check the status of an appeal at ncappellatecourts.org with the docket number.



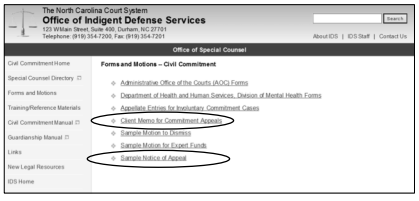


Notice of Appeal

- Must be written and filed within 30 days of the commitment order.
- Must be served on the State ***and***, if the respondent is committed to a private facility, counsel for the facility.
- There is a sample notice of appeal, which has a certificate of service for the State.

Sample notice of appeal

- The sample notice of appeal can be found on the Special Counsel section of the IDS webpage (www.ncids.org).



What happens when you appeal?

- When you give notice of appeal, the clerk must appoint the Appellate Defender to the case.
- The Appellate Defender must assign the case to a staff attorney or a contract attorney.
- The clerk must send a copy of the court file to the appellate attorney and recordings of the hearings to the court reporter.

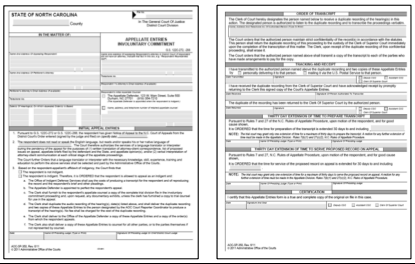
What happens when you appeal?

- Before an appeal reaches the Appellate Defender, there is no agency that tracks the appeal.
- There is no deadline for the clerk to serve the appellate entries on the court reporter and the clerk may not ever mail the appellate entries to the Appellate Defender.
- **This is where appeals get lost or delayed**.

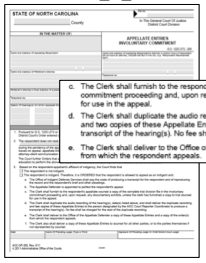
The appellate entries

- Appoints appellate counsel to the appeal.
- Assigns a court reporter to prepare the transcript.
- Starts the timeline for the appeal.
- Directs the clerk to send a copy of the court file to appellate counsel.

The appellate entries



The appellate entries



c. The Clerk shall furnish to the respondent's appellate counsel a copy of the complete trial division file in the involuntary commitment proceeding and, upon request, any documentary exhibits, unless the clerk has furnished a copy to trial counsel for use in the appeal.

d. The Clerk shall duplicate the audio recording of the hearing(s), date(s) listed above, and shall deliver the duplicate recording and two copies of these Appellate Entries to the person designated by the AOC Court Reporter Coordinator to produce a transcript of the hearing(s). No fee shall be charged for the cost of the duplicate recording.

e. The Clerk shall deliver to the Office of the Appellate Defender a copy of these Appellate Entries and a copy of the order(s) from which the respondent appeals.

The appellate entries

- The appellate entries is available on the forms page of the Judicial Branch website.
- The form number is: AOC-SP-350.
- The form is a PDF file that you can fill out electronically.

The appellate entries

- When you file notice of appeal, please fill out an appellate entries form and give it to the clerk.
- Please ask the clerk to assign a court reporter.
- If you have questions about who the court reporter will be, contact David Jester, Court Reporting Manager for the AOC.

The appellate entries

- Please file notice of appeal and the appellate entries *as soon as possible*.
- Please let the Office of the Appellate Defender know about the appeal.

Staying the order

- Please consider seeking a stay of the commitment order.
- According to N.C.G.S. § 122C-272, a commitment appeal is not stayed "unless so ordered by the Court of Appeals."
- The pleading to stay a commitment order is a combined motion for a temporary stay and petition for writ of supersedeas.

Staying the order

- Appellate Rule 23(c) states that the motion / petition must contain:
  - A "statement of any facts necessary to an understanding of the basis upon which the writ is sought," and
  - A "statement of reasons why the writ should issue in justice to the applicant."

Staying the order

- A potential argument for staying a commitment order could be:
  - Committing the respondent was not warranted or was otherwise legally erroneous. Thus, without a stay, the client will suffer an unjustified deprivation of liberty.
  - Be sure to remind the Court that an involuntary commitment is a "massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972).

Issue preservation

- Respondents retain two important rights in commitment hearings:
  - The right to due process.
  - The right to confrontation.

Issue preservation

- Generally, if a party does not exercise a right, the right is waived.
- If you disagree with some aspect of the case or the commitment order itself, ***object on due process grounds***.
- If the judge admits a report without allowing you to cross-examine the author, ***object on confrontation grounds.***

Issue preservation

- Be sure to scrutinize the procedures – such as the petition and examination process – that led to the commitment.
- If there was any problem, you should bring the problem to the attention of the judge and argue that it violates due process.

Join the community

- Ask (and answer) questions on the commitment listserv.
- Find materials on the Special Counsel section of the IDS webpage (www.ncids.org).
- Call the Office of the Appellate Defender or the Office of Special Counsel to brainstorm arguments.

The Price We Pay As Professional Problem Solvers

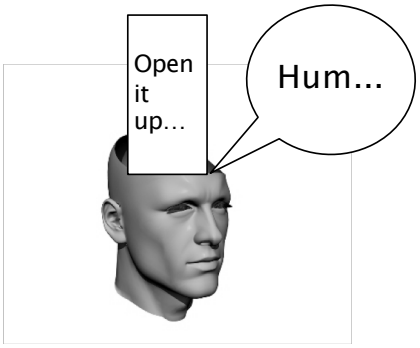
An examination of Compassion Fatigue

Brought to you by:
NC Lawyer Assistance Program
& LAP Foundation of NC, Inc.

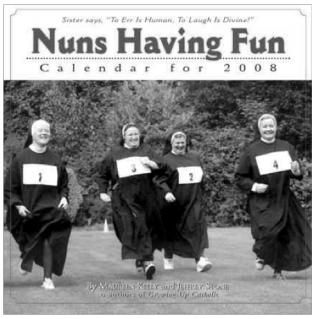
lapfoundationnc.org

Training Objectives

- Gain an understanding of what compassion fatigue is
- Understand the signs and symptoms
- Understand the contributing factors
- Understand best practices for prevention and mitigation of compassion fatigue



Lawyers are Human Beings



Fill in the blanks...

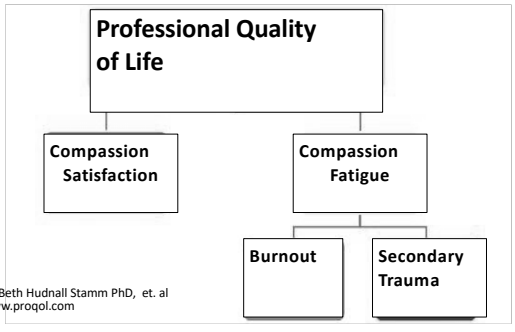
- The world is a _____ place.
- Life is _____.
- I am _____ as a human being.
- I want to change _____ about my job.
- I want to change _____ about myself.
- Most often I feel _____.

Compassion Fatigue Defined

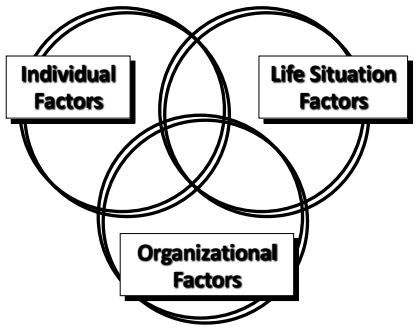
- The cumulative physical/ emotional/psychological effects of continual exposure to traumatic or distressing stories/events
- When working in a helping capacity
- Where demands outweigh resources

Doing…

- Too much
- For too long
- With too few resources
- And working with the "big uglies" in life

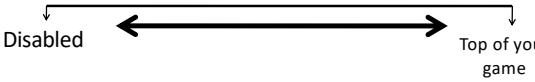


Factors that Influence a Person's Vulnerability to Compassion Fatigue



Compassion Fatigue Advisory...

- Any person regardless of race, gender, ethnicity, age, occupation…. develop this condition
- Doesn't imply weakness, just "human-ness"
- Is more about "dis-ease" than disease.



Typical Attorney Workload

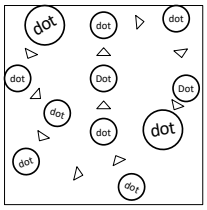
Our ideal employee can function without sleep while working a 120 hour week. And is, of course, highly family oriented.

Workload: Look & Feel Familiar?

Statistically significant correlation with CF

Individual Vulnerabilities and Life Situations

- History of or current trauma
- Health problems
- Alcohol or drug use/troubles
- Poor job performance
- Depression or anxiety
- Generic life problems-
  - Spouse/partner,
  - Children,
  - Parents
  - Finances



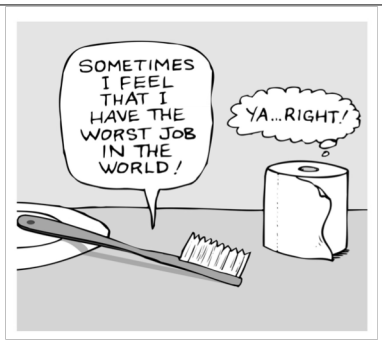
Organizational Stressors

- Unrealistic expectations
- Unrecognized accomplishments
- Budget cuts
- Eliminating positions
- Performing multiple jobs
- Personalities and politics
- Intense competition (within and without)

Client Expectations/Stressors

- Unrealistic
- Want it now
- Unhappy, sad, mad, frustrated
- Stress from the pressure
- Stress from the difficult material being reviewed and the workload yet expected to appear and be completely unaffected by it (i.e. not be human)

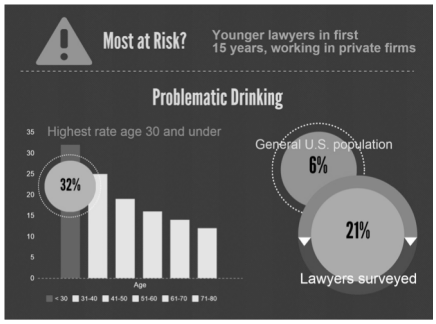
Competitive Nature of Stress



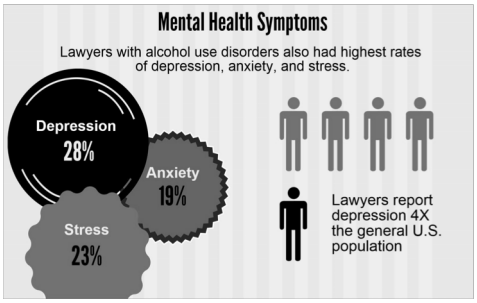
Lawyering - an At Risk Profession

- 2016 Landmark National ABA study
- 44% of lawyers feel they don't have enough time with families
- 54% feel they don't have enough time for themselves
- High percentage of job dissatisfaction ratings

Problematic Drinking



Mental Health

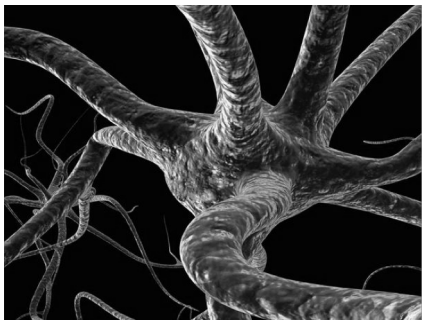


Symptoms Reported

- Intrusive thoughts
- Anger/anxiety/fear
- Sleep disturbance
- Fatigue
- Loss of Appetite
- Loss of empathy
- Loss of faith in humanity
- Sense of isolation from others
- Physical complaints

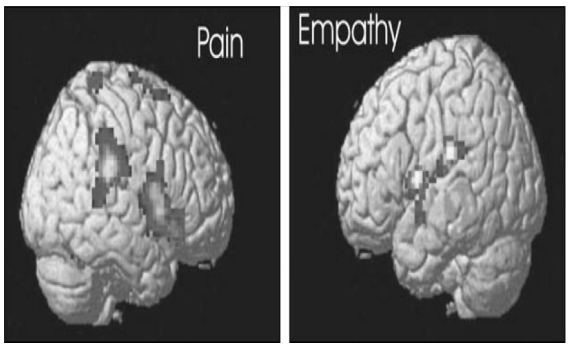
Source: Vrklevksi et sl. (2008) and Levin et al. (2003) and Jaffe et al. (2006)

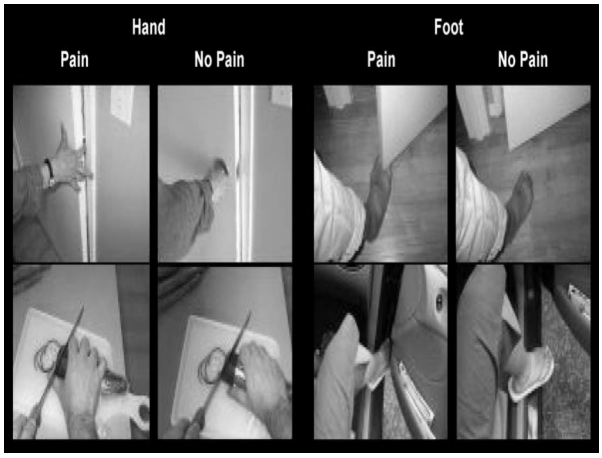
Role of Mirror Neurons in the Brain



Empathy

- Experience the experiences of someone else (Shane, 2008)
- Enduring those same experiences and emotions (Lydialyle Gibson)
- Empathy is involuntary: a shared emotion- this is hardwired into the brain (L. Gibson)
- *Human beings who spend time with other human beings who are empathetic tend to feel better*



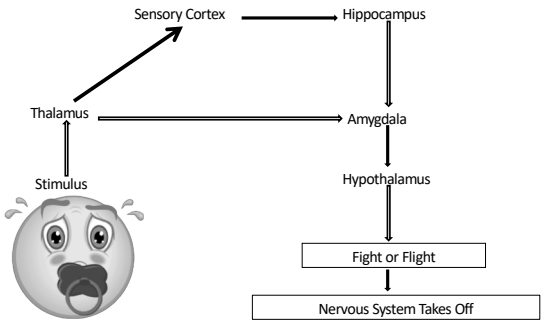


Brain Chemistry

- Reptilian Brain (instincts)
- Limbic Brain (emotion, memory)
- Frontal Lobe (reason)

- These work together, while we think, something else is going on.

The Fight or Flight Response

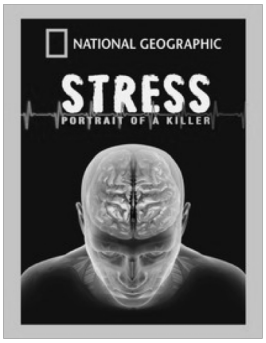


Stress: Portrait of a Killer

This movie sheds wonderful insight into the propagation of illness in today's society via the inner workings of the human stress response.

Only 50 minutes long.

Available on You Tube.



Impact on Primary Assumptions

- The World is Benevolent
- The World is Meaningful
- The Self is Worthy

Source: Bulman, Shattered Assumptions

Impact of Continual Exposure...

- Shattered assumptions about basic beliefs in our world for safety, security, trust, justice
- The world is not a good place, there is no meaning; pessimism, depression, irritability, sickness
- Heightened awareness of vulnerability and the fragility of life-increased anxiety/anger/...

One Attorney Says...

- "I think this happens to everyone whether they admit or not or show it or not. It is inevitable with that kind of caseload that one will at least at times go bonkers. This wears on all of us and on some of us more than others. We see colleagues severely affected all the time. I think the practice leaves scars. Some make it better than others, obviously, but everyone suffers..... "

--criminal lawyer

Source: WisLAP Program permission granted

JUDGES SPEAK OUT

Some of the things 58 Canadian judges told U.S. psychologist Isaiah Zimmerman about their jobs:

"Cases of horrible, sexual, predatory exploitation of children haunt me. I keep my balance and my job as a judge by profoundly guarding myself against being swept away by the gruesome evidence I have to confront."

"It's no fun to be disliked in a small community where you also need to be a member of the church, the neighborhood and raise your kids."

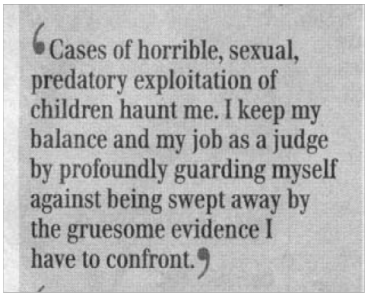
"So little of our work involves legal issues to be truly adjudicated. At our level in family court, we are the dumping ground for massive social and economic issues and the acts of very dysfunctional families. I feel I am more a social worker than a judge."

"I always take work home. I'm the workaholic. I work evenings, seven days a week. If I didn't do it, I'd be hopelessly behind. You speak of control? I can't even control the thermostat in my courtroom."

"I wasn't prepared for the isolation of this position. It slowly overtakes you, and then you realize indeed how alone often you are, despite your friends and family."

"You're always on – except in the sanctuary of your home. You watch in public what you say, how you appear, where you appear."

"The sheer volume of each day's work makes me fear I'm just processing people and have lost touch with my better self. Am I becoming indifferent to horror?"



Zimmerman, (2002). Trauma and Judges. Canadian Bar Association Annual Meeting

Impact on Lawyers

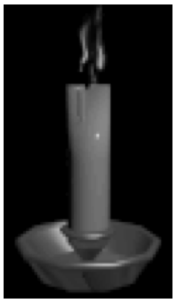
- Powerlessness
  - Indecisive/Anxious
- Alienate from others

Fill in the blanks

- The world is a _____ place.
- Life is _____.
- I am _____ as a human being.
- I want to change _____ about my job.
- I want to change _____ about myself.
- Most often I feel _____.

So slow, is it even moving?

That which is to give light must endure burning.....



Victor Frankl

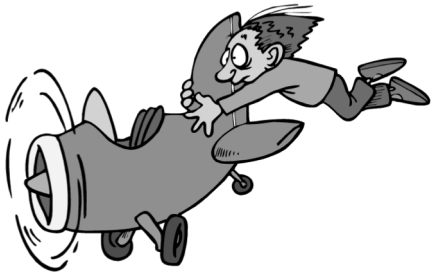
Rather slow and insidious.... then increases... then overwhelming.....

Burning

Uncomfortable

Overwhelming

So what happens?



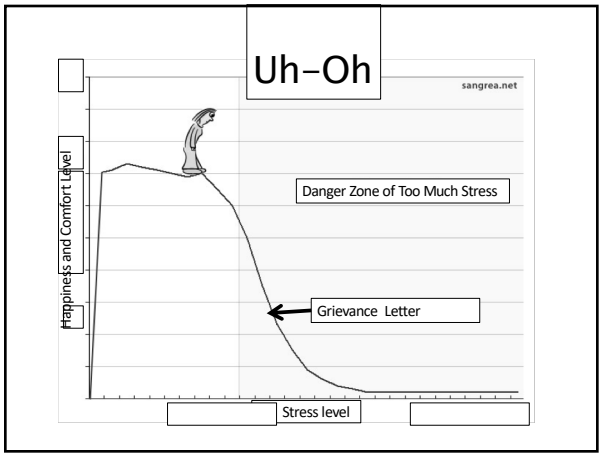
We crash.

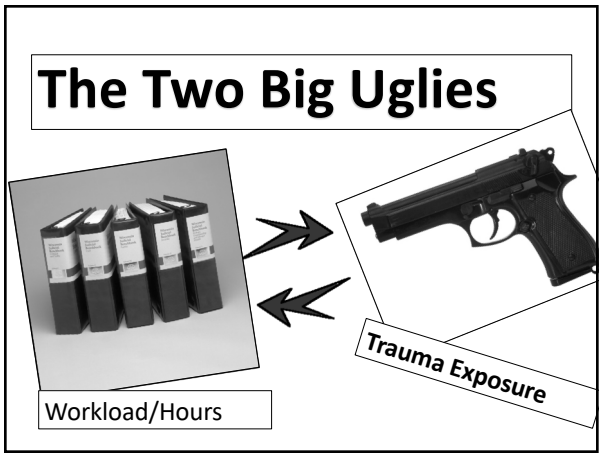
Visible Results

- Strong correlation with what is known as "Disruptive Behavior"
  - Intimidation, Anger and Lashing Out
    - At opposing counsel
    - At support staff
    - At associates
- "Kick the dog" syndrome
- Spouse/partner and kids take the brunt of the frustration
- Withdraw from clients and colleagues
- Enter the grievance and discipline process

Most common client complaints & grievance notices

- Lack of communication
- Apathy (improper advocacy)
- Lack of Diligence
- i.e. "I just don't care anymore."



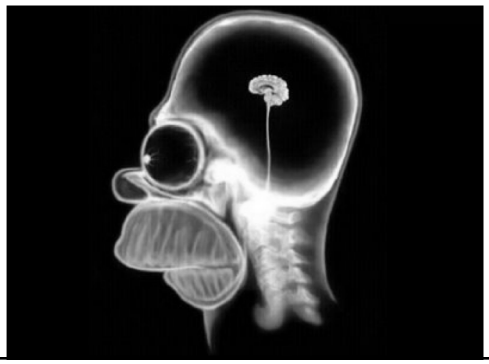


Who most at risk?

- Criminal or family law attorneys/judges*
- High caseloads; long work hours
- High % exposure to graphic evidence, 911 tapes, photos, videotapes, victim impact statements
- Serving clients who have high levels of distress
- Little if any education on the subject of CF
- Little support from peers-isolation

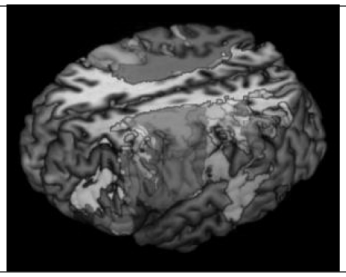
* Personal injury, workers comp, bankruptcy, wills, trusts and estates

There is Hope for all of us…



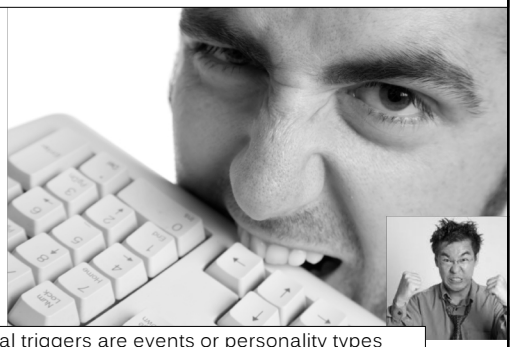
The things that cause the things that cause the things…..

Talking and Connections Help the Brain



What Individuals Can Do

Understanding Triggers

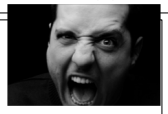


Emotional triggers are events or personality types that cause an intense emotional response.

Understanding Triggers

- Different for each one of us
- Examples:
  - Double Bind
  - Abuse of vulnerable populations
  - Disrespect from colleagues/judges/clients/people
  - Unfair, unjust realities of life and the system
  - The line at your door

Typical Responses to Triggers



- Anger,
- Depression, withdawal
- Anxiety; work harder
- Stop caring, looks like burnout but is really a defense mechanism
- Physical complaints, headaches, stomach problems, back pain, fatigue
- Coping mechanisms that hurt more than help

Research-based suggestions for improving mood, increasing life satisfaction and mitigating stress

- Recognize the **risks** for yourself
- Find a way to **debrief** distressing material
- Work on **self awareness** every day
- Take an **inventory** of how balanced your life is-be intentional about balancing it out
- **Evaluate** your tension reducing behaviors
- Be **intentional** about **protecting** yourself

How Many are You Spinning?...

Becoming Hap*pier*

- Spin fewer plates:
  - –Squeeze in less.
  - –Resume hobbies and activities that bring you joy and trigger the good stuff in the limbic brain

Becoming Happier

- It is the obvious:

Sleep
Exercise
Eat

What do you do at the end of the day to transition out of work?

If nothing, admit that. Then change it.

Becoming Happier

- Don't deny negative emotions [fear, sadness, anxiety] – move toward them and accept them.
- Identify and speak with a close person (or people) who you trust to share your internal experience.

Becoming Happier

- It is not state of status or bank account – "state of mind" is what matters most.
- While we may be paid well, money does not trigger the mirror neuron stimulus we (all humans) need to translate into better emotional health in our bodies and psyches.

Becoming Happier

- Intersect pleasure and meaning → interests are central.
- Express Gratitude
- Try making a gratitude list every morning of 3 things you are grateful for. Do it for a few months and see what you notice. It will change your life.

Adapted from T. Ben-Shahar

If you need to reach us:

Robynn Moraites
Executive Director
704-892-5699
Robynn@nclap.org

Cathy Killian
Charlotte and Areas West
704-910-2310
Cathy@nclap.org

Nicole Ellington
Raleigh and Areas East
919-719-9267
Nicole@nclap.org

Towanda Garner
Piedmont Triad Area
919-719-9290
Towanda@nclap.org

Thank you!

The Toll of TRAUMA

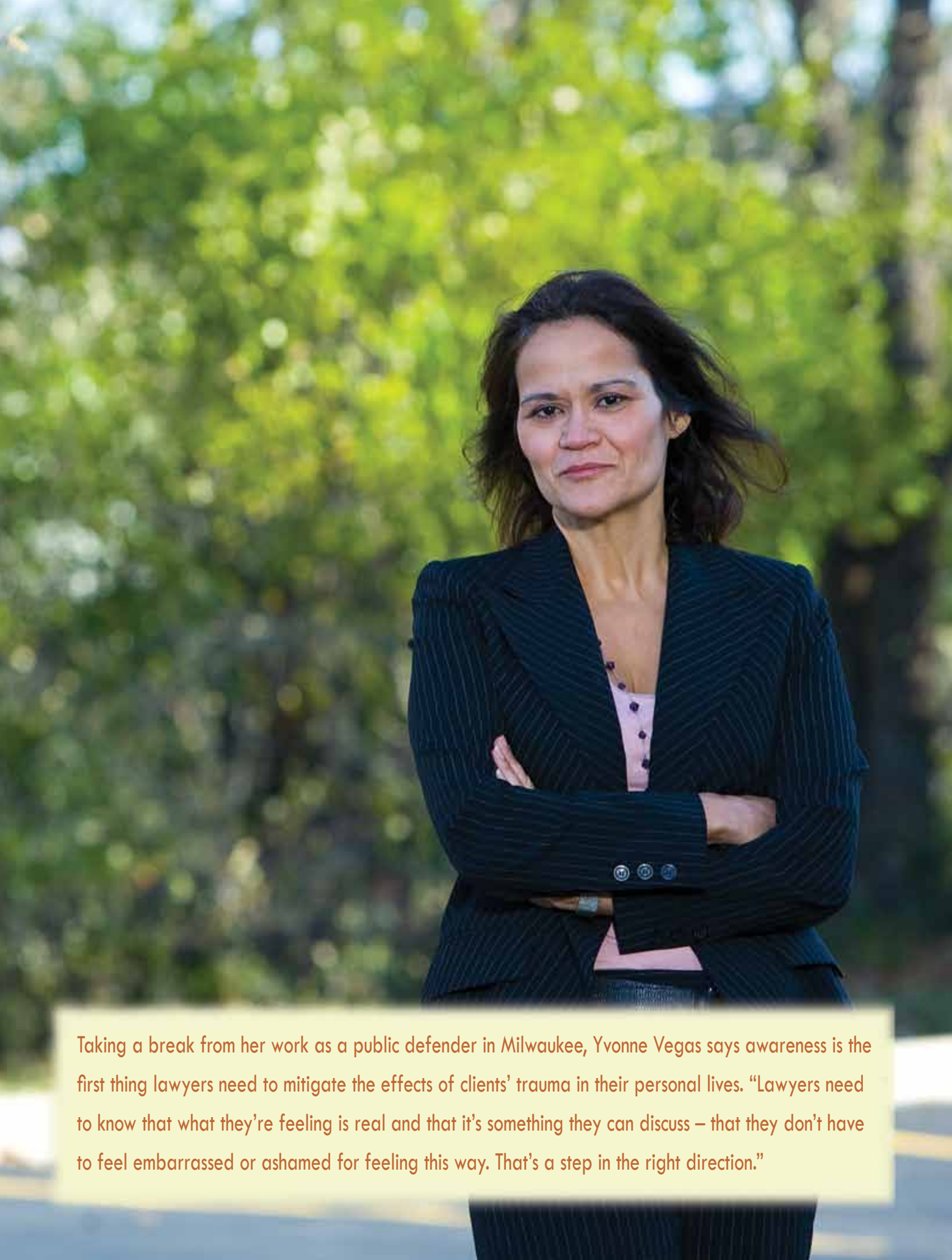
by Dianne Molvig

A groundbreaking study of Wisconsin State Public Defender attorneys examines the effects of "compassion fatigue" – the cumulative physical, emotional, and psychological effects resulting from continual exposure to others' traumatic experiences. This article discusses factors contributing to the risk any lawyer may face of experiencing its symptoms, and what can be done to mitigate it.

Ben Gonring spends his days representing 10 to 17 year olds who are in trouble with the law. After 15 years in the juvenile unit of the Wisconsin State Public Defender (SPD) Office in Madison, he says the best part of his job is getting to know his young clients well, so he can be an effective advocate for them in court. But gaining that knowledge also has a dark side.

"When you dig into these kids' stories," he says, "you realize what sort of life they're living and the trauma they see every single day. On the one hand, you marvel at their ability to survive. On the other hand, it makes you so sad. You learn about a lot of bad stuff, and you have to try to process that every day. It's hard. Really hard."

Judy Schwaemle retired from the Dane



Taking a break from her work as a public defender in Milwaukee, Yvonne Vegas says awareness is the first thing lawyers need to mitigate the effects of clients' trauma in their personal lives. "Lawyers need to know that what they're feeling is real and that it's something they can discuss – that they don't have to feel embarrassed or ashamed for feeling this way. That's a step in the right direction."

Key Study Findings

The study found that SPD attorneys reported significantly higher levels of compassion fatigue than administrative support staff and the general population, when data for the latter were available for comparison. The study's findings break down by specific symptoms of compassion fatigue as follows.

"A major finding of our study," Dr. Andrew Levin reports, "is that the extent of caseload and lawyers' exposure to other people's trauma were clearly related to symptoms of compassion fatigue." Interestingly, factors such as years on the job, age, office size, gender, and personal history of trauma made no significant differences in compassion fatigue levels.

Depression

Depressed mood, loss of interest or pleasure, disturbed sleep, loss of appetite, low energy, poor concentration, feelings of guilt or low self-worth

- General population: 10 percent
- SPD administrative support staff: 19.3 percent
- SPD attorneys: 39.5 percent

Post-traumatic Stress Disorder

PTSD, triggered by a terrifying event; symptoms include flashbacks, nightmares, severe anxiety, uncontrollable thoughts

- General population: 7 percent
- SPD support staff: 1 percent
- SPD attorneys: 11 percent

Functional Impairment

The extent to which exposure to traumatic material interferes with functioning in work, social/leisure life, and family/home life

- SPD support staff: 27.5 percent
- SPD attorneys: 74.8 percent

Secondary Traumatic Stress

The "cost of caring" about another person who has experienced trauma; symptoms are similar to those of PTSD

- SPD support staff: 10.1 percent
- SPD attorneys: 34 percent

Burnout

Job-induced physical, emotional, or mental exhaustion combined with doubts about one's competence and the value of one's work

- SPD support staff: 8.3 percent
- SPD attorneys: 37.4 percent

Compassion Satisfaction

The study also measured "compassion satisfaction," or the pleasure derived from one's work. Reports of high levels of satisfaction were as follows:

- SPD support staff: 25.7 percent
- SPD attorneys: 19.3 percent

What the Numbers Mean

Are we to conclude from the key findings that SPD attorneys are impaired on the job? Absolutely not, says Dr. Andrew Levin, medical director at the Westchester Jewish Community Center in Hartsdale, N.Y., and cofacilitator of the study. Bear in mind, he emphasizes, these results come from self-reporting instruments, which indicate trends, not diagnoses of conditions.

Take, for instance, the depression statistic. "It shows that almost 40 percent of attorneys are over the threshold number on the depression inventory," Levin explains. "That does not mean they have a clinical diagnosis of depression. All it means is that they have a likelihood for being at risk for depression."

Likewise, the functional impairment measure doesn't mean SPD lawyers are failing to function well on the job. "It may mean, for example, that you had a tough day at work," Levin explains, "and when you got home you weren't able to pay as much attention to your family as you would have liked, or you were irritable. Your job is interfering with your home life."

If anything, the data show just how resilient the study participants are, Albert points out. "Despite the fact that they endure ongoing exposure to trauma and have these high caseloads, they continue to meet the requirements of their employment," she says. "It's amazing that they do. They are handling the demands of the job, but not easily and not without it having an impact on their lives."

Dianne Molvig, Madison, is a frequent contributor to area and national publications.

Photos: Corey Hengen

County District Attorney's Office last year after 27 years. Many times in her career, she saw horrifying evidence of what one human did to another. Those disturbing images often lingered and intruded into her thoughts away from work. Even now that she's retired, memories remain.

"To this day," she says, "when I go past a place where a homicide occurred that I prosecuted, I think about it, every time. I drive past and think, that's where Sarah was killed."

Experiences such as these can take a toll on lawyers. Recently, the State Bar of Wisconsin undertook a study to learn just how significant that toll is and what can be done to mitigate it.

The study examined the prevalence of what's known as "compassion fatigue" – that is, the cumulative physical, emotional, and psychological effects of continual exposure to traumatic stories or events when working in a helping capacity.

On a late fall day, State Public Defender lawyers Ben Gonring and Deb Smith talk about how the nature of their jobs may contribute to compassion fatigue. "When you dig into kids' stories, you realize what sort of life they're living and the trauma they see every single day. … You learn about a lot of bad stuff, and you have to try to process that every day," says Gonring, who represents juveniles. "It's hard. Really hard."

Smith, SPD director of assigned counsel, agrees. "Many of us who have been around for a while know there can be a cost, emotionally and psychologically, to doing this kind of work. Even for lawyers who know how to maintain an appropriate professional demeanor and distance, this stuff seeps in. It changes your perspective on the world."

More from the authors ...

In this video, at www.wisbar.org/wl,WisLAP coordinator Linda Albert and Deb Smith, director of assigned counsel for the SPD, discuss the agency's involvement with the State Bar's compassion fatigue study, what it learned, and what it will do to help support its staff.

In psychological language, exposure to another person's trauma is referred to as secondary trauma. "There's research on the impact of secondary trauma on human beings, but it's never been looked at extensively with lawyers. We're on the forefront of this," says Linda Albert, coordinator of the State Bar's Wisconsin Lawyers Assistance Program (WisLAP) and cofacilitator of the compassion fatigue study.

Research exists on the effects of stress on attorneys, and some researchers have used some of the language related to compassion fatigue. "But no one has studied it systematically," says Dr. Andrew Levin, medical director at the Westchester Jewish Community Center in Hartsdale, N.Y., who facilitated the study with Albert. "So this was an effort to say, 'People have made these observations. They seem to have some validity. Can we establish that more rigorously?'"

Roots of the Study

As WisLAP coordinator, Albert has given presentations about compassion fatigue to many groups of legal professionals in recent years. She's seen the topic hit home again and again with various audiences.

"I've done this with bankruptcy lawyers, guardians ad litem, public defenders, prosecutors, judges, court commissioners. … Every time it's resonated," she says.

Levin and Albert learned of their mutual interest in the topic of compassion fatigue and decided to do a formal study of its effects on Wisconsin attorneys. They decided to focus on one specific group: state public defenders.

"Compassion fatigue is an important issue," says Deb Smith, director of assigned counsel for the SPD and the agency's point person for the study. "Many of us who have been around for a while know there can be a cost, emotionally and psychologically, to doing this kind of work. We deal with a lot of unpleasantness. Even for lawyers who know how to maintain an appropriate professional demeanor and distance, this stuff seeps in. It changes your perspective on the world."

To learn more about such effects, study questionnaires went out to a total of 474 SPD attorneys and administrative support staff. Response rates for completed surveys were remarkable: 78 percent of attorneys and 65 percent of support staff.

While the study's target group was public defenders, Smith believes it will have value for the profession as a whole. "There's a large community of lawyers who deal with trauma-exposed clients and who need to be aware of compassion fatigue," she says. "These lawyers need to make sure they're taking care of themselves. This isn't just a public defender issue; it's a lawyer issue."

Count judges among those affected by compassion fatigue, as well. Neal Nielsen, an eight-year veteran on the circuit court bench in Vilas County, says judges' exposure to trauma differs from lawyers'. "Attorneys are much more closely related to the facts of the case for a much longer period of time than are judges," he notes.

Still, judges sit on the bench hearing, day in and day out, about a procession of incidents of trauma inflicted or endured by people in their courtrooms. "And I can sit here now and call up in my mind with great accuracy all the autopsy photos I've ever seen," Nielsen says.

In the Trenches

Dana Smetana sees a key message her fellow SPD attorneys ought to take away from the study results: There's nothing wrong with you. "I think sometimes lawyers think they're going crazy," says Smetana of the SPD Eau Claire office, where her duties include trying cases as well as being a regional supervisor. She's been with the SPD for 27 years. "If lawyers are feeling this

> What you don't expect is that as you're trying to keep people safe – whether it's keeping an individual safe from an abuser or keeping society in general safe from a psychopath – you won't get the support you need to do your job.
>
> *– Robert Kaiser, Dane County assistant district attorney*

> To this day, when I go past a place where a homicide occurred that I prosecuted, I think about it, every time. I drive past and think, that's where Sarah was killed.
>
> *– Judy Schwaemle, Dane County assistant district attorney, retired*

way, it's the symptoms of what's going on with this job. It's nothing negative about you as a person. Awareness of that is a huge factor."

As a supervisor, she knows young SPD lawyers must learn to put up protective boundaries, to keep their emotions in check. "The older attorneys get good at that," she observes, "but then when they go home, they have trouble lifting those boundaries" with families and friends.

Not letting the effects of exposure to trauma spill over into one's personal life is one of the most difficult aspects for lawyers, agrees Yvonne Vegas, a 22-year SPD veteran who's now in the Milwaukee office. "Our clients have a lot of trauma in their lives: poverty, lack of education, homelessness, joblessness, mental health issues, substance abuse issues," she says. "Their issues become ours. You absorb that on a day-to-day basis, and you take it home with you. It can make you irritable and short-fused with your family."

Like Smetana, Vegas believes awareness of these dynamics is critical for lawyers exposed to clients' trauma. "Lawyers need to know that what they're feeling is real," she says, "and that it's something they can discuss – that they don't have to feel embarrassed or ashamed for feeling this way. That's a step in the right direction."

Some observers, of course, might point out that public defenders and prosecutors know what they're in for when they decide to pursue this type of law practice. True, says former district attorney Schwaemle. "You knew this would be coming," she says. "But there's knowing, and then there's *knowing*."

The effects can cut deeper than some might have imagined. Take, for instance, prosecuting a sexual assault case. "When you prepare for the trial," Schwaemle says, "you put yourself in the place of the victim. You have to ask yourself why the victim behaved a certain way because you have to explain that to the jury. You relive the victim's experience and put yourself in her shoes."

Robert Kaiser also has seen "inexplicably, indescribably horrible evidence" in his 34 years as a district attorney, the last 24 of those in Dane

Coping with Compassion Fatigue

Exposure to clients' trauma isn't going to stop. But you can mitigate the effects this exposure has on you. Here are a few strategies:

- **Debrief**. Talk with another lawyer who understands what you're going through and can offer support. Debriefing can become a part of the office culture. Remember, this is a discussion about how the case is affecting you as a person, not a rehashing of legal strategies.
- **Take care of yourself**. Eat healthy foods. Exercise regularly. Get enough sleep. Learn relaxation techniques so you can let go of stress and disturbing, repetitive thoughts. Know what truly brings you joy in life and make time for it.
- **Strive for balance and interconnection**. Give up the urge to be all things to all people, including clients. Allow time to connect with friends and family to counterbalance the stresses you feel at work and put everything back in perspective.
- **Come up with a plan**. When compassion fatigue is weighing on you, it can be difficult to get off the treadmill and set a new course. Stop long enough to notice how you're feeling, reacting, and behaving at work and at home. Develop a plan of action for yourself. What needs to change? Where can you start?
- **Seek help**. If you think compassion fatigue is interfering with your work or personal life, reach out for help. A good place to start is WisLAP. Call the 24-hour helpline, at (800) 543-2625, or coordinator Linda Albert at (800) 444-9404, ext. 6172. All inquiries are confidential.

"We have to acknowledge what people in criminal justice, not just public defenders, go through. We need to recognize how difficult it is to see people in crisis every single day. And we have to be able to talk about it."

– Kelli Thompson, State Public Defender

County and the remainder in Chicago. He never wanted to be anything but a district attorney, and he knew exposure to trauma would be part of the job.

"What you don't expect," Kaiser says, "is that as you're trying to keep people safe – whether it's keeping an individual safe from an abuser, or keeping society in general safe from a psychopath who will victimize anybody he can get his hands on – you won't get the support you need to do your job."

The combination of burgeoning caseloads and shrinking budgets makes it increasingly difficult for district attorneys to fulfill their duty to protect the public, Kaiser notes. In his eyes, lack of support sends a message that crime victims and the district attorneys' work don't matter.

"We're saddened by our work," he says. "We're certainly affected by it. But when you live it and then people act as though what you do is not important, that's trauma."

Public defenders, too, are hurt by budget cuts. And they're targets of public scorn for simply doing their job: defending people's constitutional rights.

Thus, heavy caseload and exposure to trauma aren't the only factors fueling compassion fatigue in attorneys. In the State Bar's study, SPD participants wrote in comments about additional contributing factors. The top three were lack of respect, lack of control in one's work life, and lack of enough time to process issues and give or get support.

"When you have those factors," observes WisLAP's Albert, "on top of exposure to trauma and heavy caseloads, that's where I see the perfect storm."

Next Steps

The State Bar's study puts compassion fatigue on the legal profession's radar. "We have to acknowledge what people in criminal justice, not just public defenders, go through," says State Public Defender Kelli Thompson. "We need to recognize how difficult it is to see people in crisis every single day. And we have to be able to talk about it."

Going forward, she says, the SPD will provide more staff training to educate people about compassion fatigue and to learn coping skills. Open day-to-day communication in the office is also critical, she says. "Our lawyers need to know it's okay to take a breath," she says. "You can't live with a terrible case for a year, close it, and then just say, 'On to the next one.'"

The results of the study, the first of its kind, appear in the December issue of the *Journal of Nervous and Mental Disease* and will draw wider attention to the topic of attorneys' compassion fatigue. Albert already has spoken about it at a Canadian conference and for the national conference of the American Bar Association's Commission on Lawyer Assistance Programs. In addition, Albert is working with the SPD to develop strategies that both individual attorneys and the agency can use to minimize work-related stress. She anticipates adapting these strategies for use by lawyers in other practice areas.

"I think these findings will be unsettling for the legal profession," Albert says. "The implications of this study definitely will go way beyond Wisconsin."

The State Bar is one of several bar associations participating in a second study that seeks information on factors, personal and professional, that contribute to life and career satisfaction or dissatisfaction. The study, to be conducted in May 2012, is headed by Dr. Kennon Sheldon, University of Missouri, Department of Psychology, and Prof. Lawrence Krieger, Florida State University College of Law. "WisLAP will use the data to develop ways to prevent and mitigate professionalism, ethics, and mental health and substance abuse problems within the profession," Albert says.

There's research on the impact of secondary trauma on human beings, but it's never been looked at extensively with lawyers. We're on the forefront of this.

– Linda Albert, WisLAP coordinator

First Self Assessment Exercise

Observe the work that you do. Does it have:

- A large volume of demand (and often increasing demands, such as more and more clients to see or more and more paperwork to do)?
- Continually dwindling resources?
- Exposure to difficult stories of loss, pain, death and suffering?
- Do you work with clients who face seemingly insurmountable obstacles, have chronic needs or even clients who get worse rather than get better?

All of these elements can contribute to compassion fatigue and vicarious trauma.

Ask yourself the four following questions:

1) Where do the stories go?

What do you do at the end of a work day to put difficult client stories away and go home to your friends and family?

2) Were you trained for this?

Did your training offer you an education on self care, compassion fatigue, vicarious trauma or burnout? If it did, how up to date are you on those strategies? If it didn't, which is still true for the majority of us over a certain age, how much do you know about these concepts?

3) What are your particular vulnerabilities?

Two things we know for sure about the field of helping: one, that a large percentage of helpers have experienced primary trauma at some point in their past, which may have led them to being attracted to the field in the first place. Two, that personality types who are attracted to the field of helping (rather than, say, mechanical engineering) are more likely to feel highly attuned and empathy towards others, which makes them good at their job and also more vulnerable to developing CF, VT and Burnout.

4) How do you protect yourself while doing this very challenging work?

Compassion Fatigue and Vicarious Trauma – Signs and Symptoms

Physical Signs and Symptoms

- ❑ Exhaustion
- ❑ Insomnia
- ❑ Headaches
- ❑ Increased susceptibility to illness
- ❑ Somatization and hypochondria

Behavioral Signs and Symptoms

- ❑ Increased use of alcohol and drugs
- ❑ Absenteeism
- ❑ Anger and Irritability
- ❑ Avoidance of clients
- ❑ Impaired ability to make decisions
- ❑ Problems in personal relationships
- ❑ Attrition
- ❑ Compromised care for clients
- ❑ The Silencing Response
- ❑ Depleted parenting

Psychological signs and symptoms

- ❑ Emotional exhaustion
- ❑ Distancing
- ❑ Negative self image
- ❑ Depression
- ❑ Sadness, Loss of hope
- ❑ Anxiety
- ❑ Guilt
- ❑ Reduced ability to feel sympathy and empathy
- ❑ Cynicism
- ❑ Resentment
- ❑ Dread of working with certain clients
- ❑ Feeling professional helplessness
- ❑ Diminished sense of enjoyment/career
- ❑ Depersonalization/numbness
- ❑ Disruption of world view/ heightened anxiety or irrational fears
- ❑ Inability to tolerate strong feelings
- ❑ Problems with Intimacy
- ❑ Intrusive imagery – preoccupation with trauma
- ❑ Hypersensitivity to emotionally charged stimuli
- ❑ Insensitivity to emotional material
- ❑ Difficulty separating personal and professional lives
- ❑ Failure to nurture and develop non work related aspects of life

Sources: Saakvitne (1995), Figley (1995), Gentry, Baranowsky & Dunning (1997), Yassen (1995)

EVALUATING YOUR CONTRIBUTING FACTORS:

Assess the following elements with this continuum in mind:

Annoying→Distressing⟶Traumatic

Nature of the work, the cases and the workplace; in your role:

--what events, incidents, cases, stories are the most difficult? Why?
-how much control do you have over your schedule?
-does this schedule work for you; can you adequately negotiate your workload?
-how has the workload changed over the years?
-do your work tasks vary from day to day; do you like the work you do;
-are you sufficiently trained to do the work you do?
-how much support do you have; is supervision adequate; helpful; supportive?

Nature of the clientele; in your role:

-how many clients do you have contact with each day?
-do you have variety with the types of clients you work with?
-what types of clients are the most difficult for you and why?
-how do your clients treat you?
-are you ever afraid of your clients? -ever been harmed by a client?
-how do you treat your clients?

Nature of the worker; for you personally:

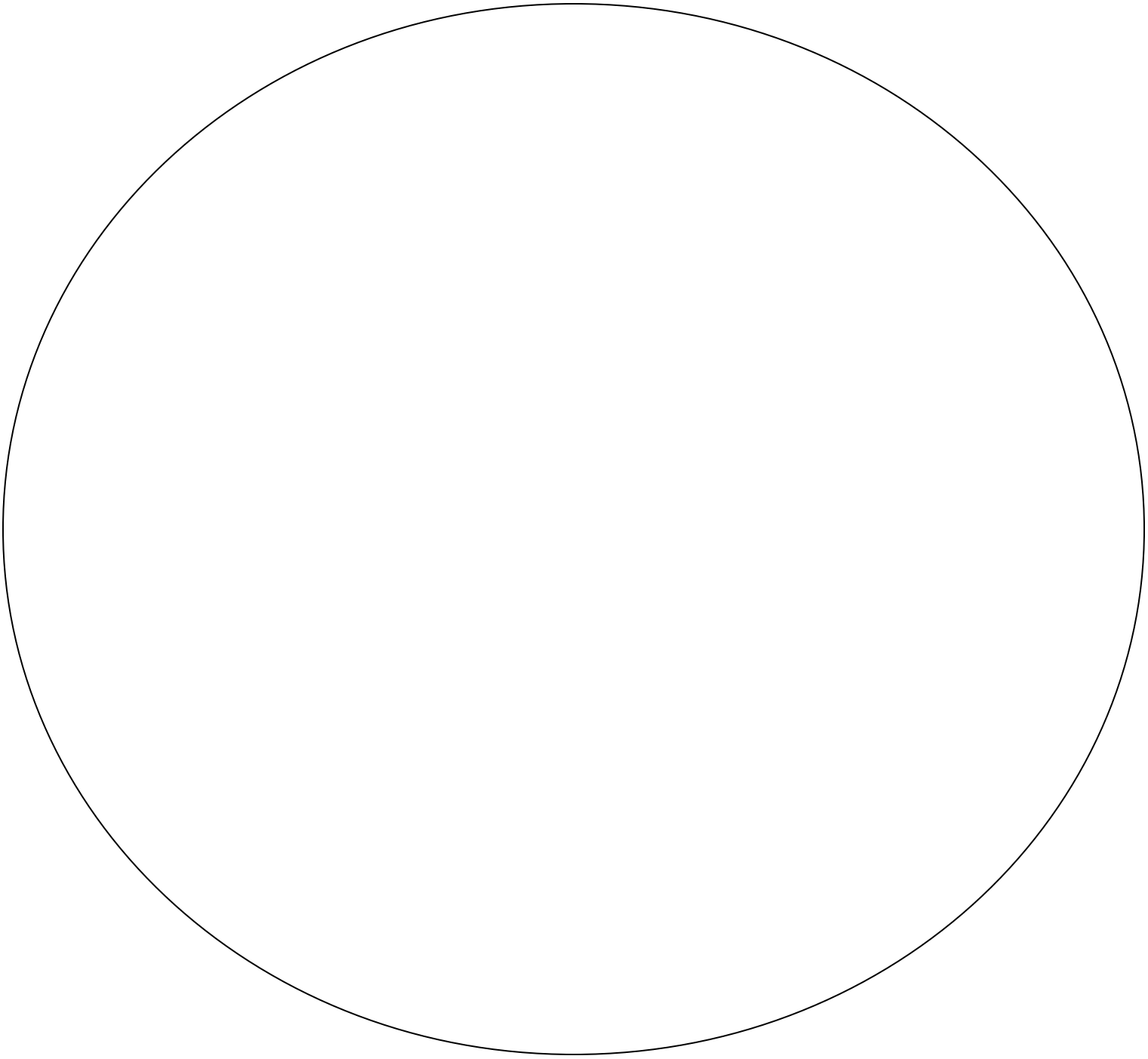
-how well suited are you personally for the work you do?
-how well does the work you do match your values and beliefs?
-what does your current stress index look like on a scale of 1(no stress) to 10 (extreme stress)?
-can you identify the factors in your life that produce the most stress?
-what coping mechanisms do you use to manage or decrease stress?
-do you have supportive interpersonal relationships?
-do you engage in a hobby or leisure activity every week?

Nature of the social/cultural context: in your role:

-what are the social obstacles to doing your work? (funding cuts, furlough days etc)
-how are you received within the community based on the work that you do and the work of your organization; do you feel respected?
-what does the community say about the clientele you serve?
-what effect, if any, does the above have upon you personally?

Excerpted from *Transforming the Pain* (1996) pp 53-55 and *Compassion Fatigue Train the Trainer Workbook* (2008) pp 42-43.

WHAT'S ON YOUR PLATE?



SELF CARE INVENTORY (Reprinted with permission)
Mark "X" for what you already do. Mark "O" for what you wish you did more often.

Physical Self-Care	
___ Eat Regularly (e.g. breakfast, lunch, and dinner)	___ Notice your inner experience – listen to your thoughts, judgments, beliefs, attitudes and feelings
___ Eat healthily	___ Let others know different aspects of you
___ Exercise	___ Engage your intelligence in a new area (e.g. go to an art museum, history exhibit, sports event, auction, theater performance)
___ Get regular medical care for prevention	___ Practice receiving from others
___ Get medical care when needed	___ Be curious
___ Take time off when sick	___ Say no to extra responsibilities sometimes
___ Get massages	___ Other:
___ Dance, swim, walk, run, play sports, sing, or do some other physical activity that is fun	
___ Take time to be sexual – with yourself, with a partner	***Emotional Self-Care***
___ Get enough sleep	___ Spend time with others whose company you enjoy
___ Wear clothes you like	___ Stay in contact with important people in your life
___ Take vacations	___ Give yourself affirmations, praise yourself
___ Take day trips or mini-vacations	___ Love yourself
___ Make time away from telephones	___ Reread favorite books, re-view favorite movies
___ Other:	___ Identify comforting activities, objects, people, relationships, places, and seek them out
Psychological Self-Care	___ Allow yourself to cry
___ Make time for self-reflection	___ Find things that make you laugh
___ Have your own personal psychotherapy	___ Express your outrage in social action, letters, donations, marches, protests
___ Write in a journal	___ Play with children
___ Read literature that is unrelated to work	___ Other:
___ Do something at which you are not expert or in charge of	
___ Decrease stress in your life	

Spiritual Self-Care	***Workplace or Professional Self-Care***
___ Make time for reflection ___ Spend time with nature ___ Find a spiritual connection or community ___ Be open to inspiration ___ Cherish your optimism and hope ___ Be aware of non-material aspects of life ___ Try at times not to be in charge or the expert ___ Be open to not knowing ___ Identify what you is meaningful to you and notice its place in your life ___ Meditate ___ Pray ___ Sing ___ Spend time with children ___ Have experiences of awe ___ Contribute to causes in which you believe ___ Read inspirational literature (e.g. talks, music) ___ Other:	___ Take a break during the work day (e.g. lunch) ___ Take time to chat with co-workers ___ Make quiet time to complete tasks ___ Identify projects or tasks that are exciting and rewarding ___ Set limits with clients and colleagues ___ Balance your caseload so no one day or part of a day is "too much." ___ Arrange your work space so it is comfortable and comforting ___ Get regular supervision or consultation ___ Negotiate for your needs (benefits, pay raise) ___ Have a peer support group ___ Develop a non-trauma area of professional interest ___ Other: **Balance:** ___ Strive for balance with your work life and work day ___ Strive for balance among work, family, relationships, play and rest

Developing a Compassion Fatigue Protection Plan

What components will go into my plan?

What are my warning signs and symptoms?

Who will I check in with to hold me accountable or to cue me?

What things do I have control over in my life?

How will I relieve stress in a way that works for me?
(Intervention)

What stress prevention/reduction strategies will I use?
(Prevention)

Adapted from Francoise Mathieu: Compassion Fatigue Train the Trainer Workbook (2008)

IDEA FACTORY

Commitment to Changes I could make in the next…

Week:

Month:

Year:

Mitigating Compassion Fatigue
EVALUATION FORM

Date of Program: _____

☐ Support/Clerical ☐ Investigator ☐ CSS ☐ Attorney ☐ Other: _____ ☐ Manager

Directions: Read each of the statements and rank your understanding of the issue before and after you participated in the Mitigating Compassion Fatigue program. Circle the appropriate number using the following range:
1 = no understanding
4 = little understanding
6 = moderate understanding
8 = quite a bit of understanding
10 = almost complete understanding

How would you describe your understanding of the following?	**My understanding before the program.**	**My understanding after the program.**
1. The definition of compassion fatigue	1 2 3 4 5 6 7 8 9 10	1 2 3 4 5 6 7 8 9 10
2. The brain's role in compassion fatigue	1 2 3 4 5 6 7 8 9 10	1 2 3 4 5 6 7 8 9 10
3. Your own personal level of compassion fatigue	1 2 3 4 5 6 7 8 9 10	1 2 3 4 5 6 7 8 9 10
4. What factors contribute to your compassion fatigue	1 2 3 4 5 6 7 8 9 10	1 2 3 4 5 6 7 8 9 10
5. Actions we can take as an office to decrease compassion fatigue	1 2 3 4 5 6 7 8 9 10	1 2 3 4 5 6 7 8 9 10
6. Actions you can take individually to decrease your compassion fatigue	1 2 3 4 5 6 7 8 9 10	1 2 3 4 5 6 7 8 9 10

What overall rating would you give the Mitigating Compassion Fatigue program?
Excellent Very Good Good Fair Poor
Explain Briefly:

What do you think was the most successful part of the experience?

What do you think was the least successful part of the experience?

Are there any compassion fatigue questions or related topics you would like to learn more about?

Do you have suggestions we can take as an agency to reduce the risks of compassion fatigue?

Thank you for taking the time to evaluate this program.

NCLAP
NORTH CAROLINA
LAWYER ASSISTANCE PROGRAM

Identifying Illness Based Impairment in Colleagues

Depression, Anxiety and Stress

Alcoholism and Substance Abuse

Every aspect of an addicted or depressed attorney's life is affected. When there are problems at work or home, with health or finances, or there is police involvement, chances are the attorney is suffering from a medically based illness which can be successfully treated. If you recognize the following warning signs in a colleague, call us. ***We can help.*** Visit NCLAP.org

Relationship Problems

- ❑ Complaints from clients
- ❑ Problems with supervisors
- ❑ Disagreements or inability to work with colleagues
- ❑ Avoidance of others
- ❑ Irritable, impatient
- ❑ Angry outbursts
- ❑ Inconsistencies or discrepancies in describing events
- ❑ Hostile attitude
- ❑ Overreacts to criticism
- ❑ Unpredictable, rapid mood swings
- ❑ Non-responsive communication

Performance Problems

- ❑ Missed deadlines
- ❑ Decreased efficiency
- ❑ Decreased performance after long lunches involving alcohol
- ❑ Inadequate follow through
- ❑ Lack of attention
- ❑ Poor judgment
- ❑ Inability to concentrate
- ❑ Difficulty remembering details or instructions
- ❑ General difficulty with recall
- ❑ Blaming or making excuses for poor performance
- ❑ Erratic work patterns

Personal Problems

- ❑ Legal separation or divorce
- ❑ Credit problems, judgments, tax liens, bankruptcy
- ❑ Decreased performance after lunches involving alcohol
- ❑ Frequent illnesses or accidents
- ❑ Arrests or warnings while under the influence of alcohol or drugs
- ❑ Isolating from friends, family and social activities

Attendance Problems

- ❑ Arrive late and/or leaving early
- ❑ Taking "long lunches"
- ❑ Not returning to work after lunch
- ❑ Missing appointments
- ❑ Unable to be located
- ❑ Ill with vague ailments
- ❑ Absent (especially Mondays/Fridays)
- ❑ Frequent rest room breaks
- ❑ Improbable excuses for absences
- ❑ Last minute cancellations

NCLAP

An Important Free Resource for Lawyers

One of the free resources available to you as a State Bar member is the **Lawyer Assistance Program (LAP)**. From time to time, lawyers encounter a personal issue that, left unaddressed, could impair his or her ability to practice law. Accordingly, the LAP was created by lawyers for lawyers to assure that free, confidential assistance is available for any problem or issue that is impairing or might lead to impairment.

Lawyers at Particular Risk

Of all professionals, lawyers are at the greatest risk for anxiety, depression, alcoholism, drug addiction, and even suicide. As many as one in four lawyers are affected. This means it is likely that you, an associate, a partner, or one of your best lawyer friends will encounter one of these issues. Whether you need to call the LAP for yourself or to refer a colleague, all communications are completely confidential.

Anxiety and Depression

Anxiety and depression often go hand-in-hand. These conditions can be incapacitating and can develop so gradually that a lawyer is often unaware of the cumulative effect on his or her mood, habits, and lifestyle. Each condition is highly treatable, especially in the early stages. Asking for help, however, runs counter to our legal training and instincts. Most lawyers enter the profession to help others and believe they themselves should not need help. The good news is that all it takes is a phone call. The LAP works with lawyers exclusively. The LAP has been a trusted resource for thousands of lawyers in overcoming these conditions.

Alcohol and Other Substances

Often a lawyer will get depressed and self-medicate the depression with alcohol. Alcohol is a central nervous system depressant but acts like a stimulant in the first hour or two of consumption. The worse you feel, the more you drink initially to feel better, but the more you drink, the worse you feel. A vicious cycle begins. On the other hand, many alcoholic lawyers who have not had depression report that their drinking started normally at social events and increased slowly over time.

There is no perfect picture of the alcoholic or addicted lawyer. It may be surprising to learn that he or she probably graduated in the top one-third of the class. Also surprising, lawyers may find themselves in trouble with addiction due to the overuse or misuse of certain prescription medications that were originally prescribed to address a temporary condition. Use of these kinds of medications, combined with moderate amounts of alcohol, greatly increases the chances of severe impairment requiring treatment. The LAP knows the best treatment options available, guides lawyers through this entire process, and provides on-going support at every stage.

LAP recognizes alcoholism, addiction, and mental illness as diseases, not moral failures. The only stigma attached to these illnesses is the refusal to seek or accept help.

Confidentiality

All communications with the LAP are **strictly confidential** and subject to the attorney-client privilege. If you call to seek help for yourself, your inquiry is confidential. If you call as the spouse, child, law partner, or friend of a lawyer whom you suspect may need help, your communication is also treated confidentially and is never relayed without your permission to the lawyer for whom you are seeking help. The LAP has a committee of trained lawyer volunteers who have personally overcome these issues and are committed to helping other lawyers overcome them. If you call a LAP volunteer, your communication is also treated as confidential.

The LAP is completely separate from the disciplinary arm of the State Bar. If you disclose to LAP staff or to a LAP volunteer any misconduct or ethical violations, it is confidential and cannot be disclosed. *See* Rules 1.6(c) and 8.3(c) of the Rules of Professional Conduct and 2001 FEO 5. The LAP works because it provides an opportunity for a lawyer to get ***safe, free, confidential*** help before the consequences of any impairment become irreversible.

Know the signs. Make the call.
You could save a colleague's life.

Take the Test for Depression

YES NO

- ❑ ❑ 1. Do you feel a deep sense of depression, sadness, or hopelessness most of the day?
- ❑ ❑ 2. Have you experienced diminished interest in most or all activities?
- ❑ ❑ 3. Have you experienced significant appetite or weight change when not dieting?
- ❑ ❑ 4. Have you experienced a significant change in sleeping patterns?
- ❑ ❑ 5. Do you feel unusually restless...or unusually sluggish?
- ❑ ❑ 6. Do you feel unduly fatigued?
- ❑ ❑ 7. Do you experience persistent feelings of hopelessness or inappropriate feelings of guilt?
- ❑ ❑ 8. Have you experienced a diminished ability to think or concentrate?
- ❑ ❑ 9. Do you have recurrent thoughts of death or suicide?

If you answer yes to five or more of these questions (including questions #1 or #2), and if the symptoms described have been present nearly every day for two weeks or more, you should consider speaking to a health care professional about treatment options for depression.

Other explanations for these symptoms may need to be considered. Call the Lawyer Assistance Program.

Adapted from *American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders*. Fourth Edition. Washington, DC. American Psychiatric Association: 1994.

Take the Test for Alcoholism

YES NO

- ❑ ❑ 1. Do you get to work late or leave early due to drinking?
- ❑ ❑ 2. Is drinking disturbing your home life?
- ❑ ❑ 3. Do you drink because you are shy with other people?
- ❑ ❑ 4. Do you wonder if drinking is affecting your reputation?
- ❑ ❑ 5. Have you gotten into financial difficulties as a result of drinking?
- ❑ ❑ 6. Does drinking make you neglect your family or family activities?
- ❑ ❑ 7. Has your ambition decreased since drinking?
- ❑ ❑ 8. Do you often drink alone?
- ❑ ❑ 9. Does drinking determine the people you tend to be with?
- ❑ ❑ 10. Do you want a drink at a certain time of day?
- ❑ ❑ 11. Do you want a drink the next morning?
- ❑ ❑ 12. Does drinking cause you to have difficulty sleeping?
- ❑ ❑ 13. Do you drink to build up your confidence?
- ❑ ❑ 14. Have you ever been to a hospital or institution because of drinking?
- ❑ ❑ 15. Do family or friends ever question the amount you drink?

If your answer is yes to two or more of these questions you may have a problem. Call the Lawyer Assistance Program.

FREE • SAFE • CONFIDENTIAL

Western Region
Cathy Killian 704.910.2310

Piedmont Region
Towanda Garner 919.719.9290

Eastern Region
Nicole Ellington 919.719.9267

DISABILITY RIGHTS NORTH CAROLINA

Conflicts in Civil Commitment Proceedings

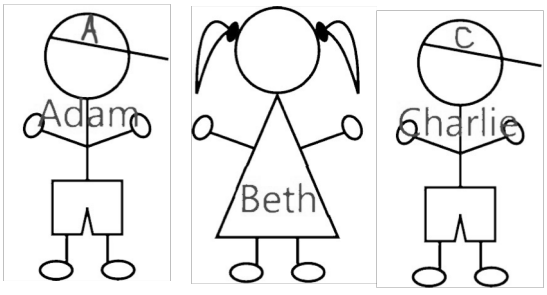
Kristine Sullivan January 25, 2019
Civil Commitment Conference

Hypos Part 1 – Fighting Clients

- Rules of Professional Conduct
- Hypothetical
  1. Is there conflict?
  2. Who can you rep?

DISABILITY RIGHTS NORTH CAROLINA
2

Meet Your Appointed Clients



DISABILITY RIGHTS NORTH CAROLINA
3

Fighting Clients v.1

- A, B and C had physical altercation
- Staff: shows none ready for discharge
- A, B and C: I want out

DISABILITY RIGHTS NORTH CAROLINA
4

Can I represent this person?

1. Clearly identify client(s)
2. Determine whether conflict exists
3. Decide whether rep may be undertaken despite conflict
4. If so, obtain informed consent, confirmed in writing

DISABILITY RIGHTS NORTH CAROLINA
5

Does conflict exist?

RPC 1.7 – Conflict of Interest: Current Clients

- Shall not* represent if rep involves concurrent conflict of interest
  - Rep of one client will be **directly adverse** to another; or
  - Rep of one or more clients may be **materially limited** by duty to another client, former client, third person, or lawyer's personal interest

DISABILITY RIGHTS NORTH CAROLINA
6

Fighting Clients v.2

- A, B and C had physical altercation
- Staff: B started it, but shows none ready for discharge
- A and C: B started it; self-defense; still ready; I want out
- B: A and C assaulted me in room last night, so I tried to hurt them today; I want out
    - And you can't use this in court

DISABILITY RIGHTS NORTH CAROLINA
7

Rep despite conflict?

RPC 1.7

- If there is concurrent conflict, *may represent if:
    1. Reasonably believe can provide competent rep to each affected client;
    2. Rep not prohibited by law;
    3. Rep is not client v. client in same proceeding; and
    4. Each gives informed, written consent.

DISABILITY RIGHTS NORTH CAROLINA
8

Conflict! Now what?

- If conflict arises after rep began, typically must withdraw
- RPC 1.16 – Declining or Terminating Rep
    - Shall not take on rep (or must withdraw) if will result in violation of law or RPC

DISABILITY RIGHTS NORTH CAROLINA
9

RPC 1.16 cont'd

- May withdraw if
  - Would not have material adverse effect on client's interests;
  - Client agrees to withdrawal;
  - Client persists in action involving lawyer's services that lawyer reasonably believes is criminal or fraudulent; or
  - Other good cause for withdrawal exists

DISABILITY RIGHTS NORTH CAROLINA
10

Conflict! Now what?

- Must or may withdraw from at least one
- Whether to continue rep of any clients
  - Your ability to comply with duties owed to former client
  - Your ability to adequately rep remaining client(s), given those duties

DISABILITY RIGHTS NORTH CAROLINA
11

Duty to Former Client

RPC 1.9

- Shall not* rep another person in same or substantially related matter in which person's interests are materially adverse to interests of former client
- *May represent if former client gives informed written consent

DISABILITY RIGHTS NORTH CAROLINA
12

RPC 1.9 cont'd

- Shall not use info relating to former client in new matter, to the disadvantage of former client, except
  - as Rules would permit or require with respect to client; or
  - when information has become generally known

DISABILITY RIGHTS NORTH CAROLINA
13

Hypos Part 2: Secrets

- What must you tell facility staff about your client's fight?
- What may you tell?

DISABILITY RIGHTS NORTH CAROLINA
14

Secrets v1

- A, B and C had physical altercation
- Staff: B started it, but shows none ready for discharge
- B: A and C assaulted me in room last night, so I tried to hurt them today; please don't tell anyone
- A and C get discharged

DISABILITY RIGHTS NORTH CAROLINA
15

Rules of Professional Conduct

1.6 - Confidentiality

- Shall not disclose information acquired during relationship unless
  - Informed consent
  - Implied authorization
  - Permitted by Rule (may)
    - Prevent commission of crime by client
    - Prevent reasonably certain death or bodily harm

DISABILITY RIGHTS NORTH CAROLINA
16

Secrets v.2

- B has physical altercation with Staff X
- Staff: B started it, shows not ready for discharge
- B: X assaulted me in my room last night, so tried to hurt him today; I want out

DISABILITY RIGHTS NORTH CAROLINA
17

Hypos Part 3: What You Witness

- What must you say to facility staff about the fight you witnessed?
- What may you say?

DISABILITY RIGHTS NORTH CAROLINA
18

Witness v.1

- A, B and C had physical altercation
- Staff did not witness fight
- A, B and C do not provide you any additional information

DISABILITY RIGHTS NORTH CAROLINA
19

Witness v.2

- B has physical altercation with Staff X
- Staff: B started it, shows not ready for discharge
- B: X assaulted me in my room last night, so tried to hurt him today; I want out
- Staff wants you to testify as witness in hearing

DISABILITY RIGHTS NORTH CAROLINA
20

Lawyer as Witness

RPC 3.7

- Shall not act as advocate at trial in which likely to be **necessary witness** unless
  - Testimony relates to uncontested issue;
  - Testimony relates to nature and value of legal services rendered in case; or
  - Disqualification of lawyer would be substantial hardship on client.

DISABILITY RIGHTS NORTH CAROLINA
21

Hypos Part 4: Client Violence

A assaults or threatens you during representation.

- May you withdraw? Must you?
- What must or may you say to staff?
- What must or may you say to court?

DISABILITY RIGHTS NORTH CAROLINA

22

DISABILITY RIGHTS NORTH CAROLINA

3724 National Drive, Suite 100
Raleigh, NC 27612
Toll-Free: (877) 235-4210
Phone: (919) 856-2195

Website: www.disabilityrightsnc.org
Email: info@disabilityrightsnc.org

23

CLIENT-LAWYER RELATIONSHIP

Search Rules

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(f) and (c).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29] to this Rule.

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the

option to withdraw from one of the representations in order to avoid the conflict. The withdrawing lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client may be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent a seller of commercial real estate, a real estate developer and a commercial lender is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself preclude the representation or require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.19.

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(n)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(f) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(c). See also Rule 1.0(o) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(c). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. See Comment [15]. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the

lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

Ethics Opinion Notes

I. GENERALCONFLICTS

CPR 9. An attorney may not give a title opinion to an individual and then represent another person in a boundary dispute against that individual.

CPR 15 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-15/). A lawyer/guardian may not give a title opinion to the purchaser of his ward's property.

CPR 46. Once it is determined that attorneys from same firm have undertaken to represent adverse parties, one must withdraw and the other may continue only with the consent of all involved.

CPR 55. An attorney appointed as examiner of title is not prohibited from representing petitioners or respondents in actions unrelated to the Torrens proceeding.

CPR 147. An attorney cannot defend an action brought by a former client when confidential information obtained during the prior representation would be relevant to the defense of the current action.

CPR 171. A part-time county attorney may not serve as guardian ad litem if official duties include advising Department of Social Services.

CPR 179. An attorney may not represent a municipality and a distributee of an estate suing the municipality.

CPR 216. An attorney may not serve as receiver and as attorney for a judgment creditor.

CPR 249. An attorney who owns an insurance agency may not represent claimants against persons insured by companies his agency represents.

CPR 255 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-255/). An attorney who is employed by an insurer to defend its insureds on a regular basis represents the insurer and the insureds and, if a conflict develops between the insurer and an insured, the attorney has a duty to advise the insured to seek independent counsel. The attorney may represent a plaintiff against the insurer, but he or she should notify the insurer and have the informed consent of plaintiff.

CPR 281. An attorney may sue another attorney for malpractice on behalf of a client even though the attorney for the plaintiff owns stock in the defendant's liability insurance company.

CPR 286. An attorney may participate in a mediation service with marriage counselors but should not later represent either party in domestic litigation.

CPR 317. An attorney appointed to represent a state official or agency may not represent other clients in a suit against the same official or agency, another official or agency under the jurisdiction of that same official or agency or another official or agency with authority over the official or agency. Nor should an attorney represent one official or agency while representing other clients against another official or agency if both of the officials or agencies are under the jurisdiction of the same official or agency.

CPR 323. An attorney may not act as a friend and attempt to mediate a domestic problem and later represent the wife in domestic litigation.

CPR 344. An attorney for a school board is not automatically disqualified from representing criminal defendants despite the school board's interest in fines and forfeitures.

RPC 18 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-18/). An attorney may not simultaneously represent shareholders in a derivative action and the corporation's landlord on a claim for backPCrent.

RPC 22 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-22/). An attorney may not represent the administratrix officially and personally where her interests in the two roles are in conflict without the consent of the heirs.

RPC 24 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-24/). An attorney may not purchase his client's property at an execution sale on his own account.

RPC 28 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-28/). An attorney may represent the estate of pilot and the estate of passenger in a wrongful death case against the airplane manufacturer if attorney is convinced that there was no pilot negligence and if the representatives of both estates consent.

RPC 54 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-54/). A lawyer who represents a criminal defendant from whose possession property was seized may not without consent seek the property as a fine or forfeiture on behalf of the local school board.

RPC 55 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-55/). A member of the Attorney General's staff may prosecute appeals of adverse Medicaid decisions against the Department of Human Resources, which is represented by another member of the Attorney General's staff.

RPC 56 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-56/). A lawyer may represent a plaintiff against an insurance company's insured while defending other persons insured by the company in unrelated matters.

RPC 59 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-59/). A lawyer may represent an insurer and its insured as co-plaintiffs in a declaratory judgment action.

RPC 60 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-60/). Subject to general conflict of interest rules, a lawyer may represent police officers who are referred by a professional organization of which they are members on a case-by-case basis and also represent criminal defendants.

RPC 65 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-65/). The public defender's office should be considered as a single law firm and staff attorneys may not represent codefendants with conflicting interests unless both consent and can be adequately represented.

RPC 72 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-72/). An attorney hired by the Bureau of Indian Affairs to prosecute criminal charges before a tribal court may represent defendants in state or federal court despite the fact that the defendants have been arrested by members of the tribal police force.

RPC 73 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-73/). Opinion clarifies two lines of authority in prior ethics opinions. Where an attorney serves on a governing body, such as a county commission, the attorney is disqualified from representing criminal defendants where a member of the sheriff's department is a prosecuting witness. The attorney's partners are not disqualified.

Where an attorney advises a governing body, such as a county commission, but is not a commissioner herself, and in that capacity represents the sheriff's department relative to criminal matters, the attorney may not represent criminal defendants if a member of the sheriff's department will be a prosecuting witness. In this situation the attorney's partners would also be disqualified from representing the criminal defendants.

RPC 74 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-74/). A firm which employs a paralegal is not disqualified from representing an interest adverse to that of a party represented by the firm for which the paralegal previously worked if the paralegal is screened from participation in the case.

RPC 91 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/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.

RPC 92 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/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 95 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-95/). An assistant district attorney may prosecute cases while serving on the school board.

RPC 100 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-100/). An attorney serving on a hospital ethics committee is not automatically disqualified from representing interests adverse to the hospital or its staff physicians.

RPC 102 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-102/). A lawyer may not permit the employment of court reporting services to be influenced by the possibility that the lawyer's employees might receive premiums, prizes or other personal benefits.

RPC 103 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/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 105 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-105/). A public defender may represent criminal defendants while serving on the school board.

RPC 109 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-109/). An attorney may not represent parents as guardians ad litem for their injured child and as individuals concerning their related tort claims after having received a joint settlement offer which is insufficient to fully satisfy all claims.

RPC 110 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-110/). An attorney employed by an insurer to defend in the name of the defendant pursuant to underinsured motorist coverage may not communicate with that individual without the consent of another attorney employed to represent that individual by her liability insurer, and the attorney employed by the liability insurer may not take a position on behalf of the insurer which is adverse to the insured.

RPC 111 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/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.

RPC 112 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/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.

RPC 123 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-123/). An attorney may represent parents and an independent guardian ad litem for their child concerning related tort claims under certain circumstances.

RPC 131 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-131/). An attorney employed to represent a county in appellate matters may also sue the county's department of social services if the county and the plaintiffs consent.

RPC 140 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-140/). There is no disqualifying conflict of interest where an attorney is retained by an insurer to represent an insured during the pendency of a declaratory judgment action relating to coverage in which the attorney is a nonparticipant.

RPC 151 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-151/). Where an insurance company and its policyholder are both parties to an action, a lawyer who is a full-time employee of the insurance company may not represent both the insurance company and the policyholder because of the "diluted responsibility" to the policyholder created by the employment relationship between the lawyer and the insurance company.

RPC 154 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-154/). An attorney may not represent the insured, her liability insurer and the same insurer relative to underinsured motorist coverage carried by the plaintiff.

RPC 160 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-160/). A lawyer whose associate is a member of a hospital's board of trustees may not sue the hospital on behalf of a client. (But see 2002 FEO 2)

RPC 168 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-168/). A lawyer may ask her client for a waiver of objection to a possible future representation presenting a conflict of interest if certain conditions are met.

RPC 170 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-170/). A lawyer may jointly represent a personal injury victim and the medical insurance carrier that holds a subrogation agreement with the victim provided the victim consents and the lawyer withdraws upon the development of an actual conflict of interest.

RPC 177 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-177/). A lawyer may represent the insured, his liability insurer, and the same insurer relative to underinsured motorist coverage carried by the plaintiff if the insurer waives its subrogation rights against the insured and the plaintiff executes a covenant not to enforce judgment.

RPC 207 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-207/). A lawyer may represent an insured in a bad faith action against his insurer for failure to pay a liability claim brought by a claimant who is represented by the same lawyer.

RPC 228 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-228/). A lawyer for a personal injury victim may not execute an agreement to indemnify the tortfeasor's liability insurance carrier against the unpaid liens of medical providers.

RPC 229 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-229/). A lawyer who jointly represented a husband and wife in the preparation and execution of estate planning documents may not prepare a codicil to the will of one spouse without the knowledge of the other spouse if the codicil will affect adversely the interests of the other spouse or each spouse agreed not to change the estate plan without informing the other spouse.

RPC 251 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-251/). A lawyer may represent multiple claimants in a personal injury case, even though the available insurance proceeds are insufficient to compensate all claimants fully, provided each claimant, or his or her legal representative, gives informed consent to the representation and the lawyer does not advocate against the interest of any client in the division of the insurance proceeds.

2000 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2000-formal-ethics-opinion-2/). Opinion rules that a lawyer who represented a husband and wife in a joint Chapter 13 bankruptcy case may continue to represent one of the spouses after the other spouse disappears or becomes unresponsive, unless the lawyer is aware of any fact or circumstance that would make the continued representation of the remaining spouse an actual conflict of interest with the prior representation of the other spouse.

2000 Formal Ethics Opinion 4 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2000-formal-ethics-opinion-4/). Opinion rules that a lawyer may sign a statement acknowledging a finance company's interest in a client's recovery subject to certain conditions.

2000 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2000-formal-ethics-opinion-9/). Opinion explores the situations in which a lawyer who is also a CPA may provide legal services and accounting services from the same office.

2001 Formal Ethics Opinion 6 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2001-formal-ethics-opinion-6/). Opinion examines when a lawyer has a conflict of interest in representing various family members on claims for a deceased employee's workers' compensation death benefits.

2002 Formal Ethics Opinion 1 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2002-formal-ethics-opinion-1/). Opinion rules that a lawyer may participate in a non-profit organization that promotes a cooperative method for resolving family law disputes although the client is required to make full disclosure and the lawyer is required to withdraw before court proceedings commence.

2002 Formal Ethics Opinion 3 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2002-formal-ethics-opinion-3/). Opinion rules that a lawyer for an estate may seek removal of the personal representative if the personal representative's breach of fiduciary duties constitutes grounds for removal under the law.

2002 Formal Ethics Opinion 6 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2002-formal-ethics-opinion-6/). Opinion rules that the lawyer for the plaintiff may not prepare the answer to a complaint for an unrepresented adverse party to file pro se.

2003 Formal Ethics Opinion 1. (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-1/) A lawyer must withdraw from joint representation of a general contractor and a surety if a position advanced on behalf of the general contractor is frivolous, for the purpose of delay or interferes with a legal duty owed by the surety to the claimant.

2003 Formal Ethics Opinion 7. (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-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.

2003 Formal Ethics Opinion 12 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-12/). Opinion rules that an insurance defense lawyer may give the insured and the insurance carrier an evaluation of a pending case, including settlement prospects, but may not give an opinion to the carrier on whether to decline to settle within policy limits and go to trial if the opinion is contrary to the wishes of the insured.

2005 Formal Ethics Opinion 1 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2005-formal-ethics-opinion-1/). Opinion rules that a lawyer may not appear before a judge who is a family member without consent from all parties and, although consent is not required, the other members of the firm must disclose the relationship before appearing before the judge.

2005 Formal Ethics Opinion 7 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2005-formal-ethics-opinion-7/). Opinion rules that an attorney may recommend that a prospective client use a computer in the attorney's office and the services of an Internet-based company to complete a required bankruptcy certification form.

2006 Formal Ethics Opinion 1 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2006-formal-ethics-opinion-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.

2006 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2006-formal-ethics-opinion-2/). A lawyer may only refer a client to a financing company if certain conditions are met.

2006 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2006-formal-ethics-opinion-5/). The county tax attorney may not bid at a tax foreclosure sale of real property.

2007 Formal Ethics Opinion 7 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2007-formal-ethics-opinion-7/). Opinion rules that a lawyer may continue to represent a husband and wife in a Chapter 13 bankruptcy after they divorce provided the conditions on common representation set forth in Rule 1.7 are satisfied.

2007 Formal Ethics Opinion 10 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2007-formal-ethics-opinion-10/). Opinion holds a lawyer employed by a school board may serve as an administrative hearing officer with the informed consent of the board.

2007 Formal Ethics Opinion 11 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2007-formal-ethics-opinion-11/). Opinion rules that a lawyer is not required to withdraw from representing one client if the other client revokes consent without good reason and an evaluation of the factors set out in comment [21] to Rule 1.7 and the Restatement (Third) of the Law Governing Lawyers indicates continued representation is favored.

2008 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-2/). A lawyer is not prohibited from advising a school board sitting in an adjudicative capacity in a disciplinary or employment proceeding while another lawyer from the same firm represents the administration; however, such dual representation is harmful to the public's perception of the fairness of the proceeding and should be avoided.

2008 Formal Ethics Opinion 12 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-12/). A lawyer may not initiate foreclosure on a deed of trust on a client's property while still representing the client.

2009 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-9/). Opinion describes reasonable procedures for a computer-based conflicts checking system.

2009 Formal Ethics Opinion 11 (/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-11/). A lawyer may undertake the representation of a debtor in a Chapter 13 bankruptcy, although the lender is a current client, if the lawyer reasonably believes that he will be able to provide competent and diligent representation to the debtor in the bankruptcy action while protecting the lender's interests in those matters where the lawyer represents the lender and both clients give informed consent.

2009 Formal Ethics Opinion 12 (/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-11/). A lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party provided the lawyer explains who he represents and does not give the unrepresented party legal advice; however, the lawyer may not prepare a waiver of exemptions for the adverse party.

2010 Formal Ethics Opinion 3 (/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-3/). A lawyer who currently represents a police officer in an internal affairs investigation may not concurrently represent a person charged with a criminal offense if the police officer is one of the prosecuting witnesses and will be subject to cross-examination.

2010 Formal Ethics Opinion 12 (/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-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.

2010 Formal Ethics Opinion 13 (/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-13/). A lawyer's self-interest in promoting his own financial services company must not distort his independent professional judgment in the provision of legal services to the client including referral of the client to the lawyer's own ancillary business.

2012 Formal Ethics Opinion 2. (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-2/) A lawyer-mediator may not draft a business contract for pro se parties to mediation.

2012 Formal Ethics Opinion 9. (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-9/)A lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer.

2014 Formal Ethics Opinion 6. (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-6/)A lawyer who provides free brief consultations to members of a nonprofit organization must still screen for conflicts prior to conducting a consultation.

2014 Formal Ethics Opinion 10. (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-10/)A lawyer who handles adoptions as part of her or his law practice and also owns a financial interest in a for-profit adoption agency may, with informed consent, represent an adopting couple utilizing the services of the adoption agency but may not represent the biological parents.

2015 Formal Ethics Opinion 4. (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2015-formal-ethics-opinion-4/) Opinion analyzes a lawyer's professional responsibilities when she discovers that she made an error that may adversely impact the client's case.

2016 Formal Ethics Opinion 3. (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2016-formal-ethics-opinion-3/) A lawyer working for a private law firm may not negotiate for employment with another firm if the firm represents a party adverse to the lawyer's client unless both clients give informed consent.

II. REAL PROPERTY CONFLICTS.

CPR 100 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-100/). (See also RPC 210 and 97 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/97-formal-ethics-opinion-8/).) In the usual residential loan transaction:

(a) A lawyer may ethically represent both the borrower and the lender.

(b) If the lawyer intends not to represent both the borrower and the lender, he must give timely notice to the one he intends not to represent of this fact, so that the one not represented may secure separate and timely representation.

(c) If the lawyer does not give such notice, he shall be deemed to represent both the borrower and the lender.

(d) If the lawyer represents only the borrower, he may nevertheless ethically provide the title and lien priority assurances required by the lender as a condition of the loan.

(e) The lawyer shall clearly state to his client(s), whether the borrower or the lender, or both, whom he represents and the general scope of his representation.

(f) If the lawyer does not represent both principals, and the one he does not represent retains another lawyer to represent him, both lawyers should fully cooperate with each other in serving the interests of their respective clients and in closing the loan promptly.

(g) If the lawyer represents both the borrower and the lender, he may be ethically barred from representing either one (without the consent of the other) if a controversy arises between the borrower and the lender before, during or after the closing.

It is not unethical for a lawyer representing the borrower and the lender (or either) in the usual residential loan transaction to prepare a deed from the seller to the buyer, collect the purchase price for the seller, or draft other documents (such as a second deed of trust and not secured thereby) as may be necessary to complete the transaction between the seller and the buyer in accordance with their agreement, and charge the seller therefor.

It is not unethical for the lawyer representing the borrower, the lender and the seller (or one or more of them) to provide the title insurer with an opinion on title sufficient to issue a mortgagee's title insurance policy, the premium for which is normally paid by the borrower.

CPR 137. An attorney/trustee in a foreclosure proceeding may not represent the lender when the foreclosure is contested by the borrower. (But see RPC 82 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-82/).)

CPR 166 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-166/). An attorney/trustee cannot ethically represent either the lender or the borrower in a role of advocacy at any state of the foreclosure proceeding. In the absence of controversy the trustee may present, on behalf of the lender, the evidence necessary to support the clerk's findings essential to a foreclosure order. Even if the proceeding is adversary, he may ethically perform for himself such legal services as are necessary to the performance of his fiduciary duties. (See also RPC 82 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-82/).)

CPR 201 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-201/). When an attorney/trustee learns that a foreclosure will be contested, he may resign as trustee and represent the lender. (See also RPC 82 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-82/).)

CPR 220 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-220/). An attorney's secretary may not be trustee if the attorney wishes to represent the lender at a contested foreclosure.

CPR 264. After initiating foreclosure, an attorney/trustee may not represent the lender in defense of the borrower's suit for injunctive relief. (See also RPC 82 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-82/).)

CPR 275. An attorney who is part owner of a mortgage brokerage firm may certify title to real property with respect to which the mortgage broker has arranged financing.

CPR 297 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-297/). An attorney/trustee cannot represent a husband-debtor in a partition action against his wife-debtor, but he may resign as trustee and then represent the husband. (See also RPC 82 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-82/).)

CPR 305 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-305/). An attorney/trustee cannot represent the lender in bankruptcy court in seeking relief from an automatic stay in order to commence foreclosure. (See also RPC 82 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-82/).)

RPC 3 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-3/). An attorney/trustee is not prohibited from continuing to serve as trustee in a contested foreclosure if he represented the seller at the closing. (See also RPC 82 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-82/).)

RPC 40 (/for-lawyers/ethics/adopted-opinions/rpc-40/). For the purposes of a real estate transaction, an attorney may, with proper notice to the borrower, represent only the lender, and the lender may prepare the closing documents. (See also RPC 41 (/for-lawyers/ethics/adopted-opinions/rpc-41/).)

RPC 44 (/for-lawyers/ethics/adopted-opinions/rpc-44/). A closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

RPC 46 (/for-lawyers/ethics/adopted-opinions/rpc-46/). An attorney acting as trustee in a foreclosure proceeding may not, while serving in that capacity, file a motion to have an automatic stay lifted in the debtor's bankruptcy proceeding. (See also RPC 82 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-82/).)

RPC 49 (/for-lawyers/ethics/adopted-opinions/rpc-49/). Attorneys who own stock in a real estate company may refer clients to the company if such would be in the clients' best interest and there is full disclosure, and such attorneys may not close transactions brokered by the real estate firm.

RPC 64 (/for-lawyers/ethics/adopted-opinions/rpc-64/). A lawyer who served as a trustee may after foreclosure sue the former debtor on behalf of the purchaser. (See also RPC 82 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-82/).)

RPC 78 (/for-lawyers/ethics/adopted-opinions/rpc-78/). A closing attorney cannot make conditional delivery of trustee account checks to real estate agent before depositing loan proceeds against which checks are to be drawn.

RPC 82 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-82/). This opinion comprehensively revises the ethical responsibilities of the attorney-trustee.

RPC 83 (/for-lawyers/ethics/adopted-opinions/rpc-83/). The significance of an attorney's personal interest in property determines whether he or she has a conflict of interest sufficient to disqualify him or her from rendering a title opinion concerning that property.

RPC 86 (/for-lawyers/ethics/adopted-opinions/rpc-86/). Opinion discusses disbursement against uncollected funds, accounting for earnest money paid outside closing and representation of the seller. (See also RPC 191 (/for-lawyers/ethics/adopted-opinions/rpc-191/).)

RPC 88 (/for-lawyers/ethics/adopted-opinions/rpc-88/). A lawyer may close a real estate transaction brokered by a real estate firm which employs the attorney's secretary as a part-time real estate broker.

RPC 90 (/for-lawyers/ethics/adopted-opinions/rpc-90/). A lawyer who as a trustee initiated a foreclosure proceeding may resign as trustee after the foreclosure is contested and act as lender's counsel. (See also RPC 82 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-82/).)

RPC 121 (/for-lawyers/ethics/adopted-opinions/rpc-121/). A borrower's lawyer may render a legal opinion to the lender.

RPC 185 (/for-lawyers/ethics/adopted-opinions/rpc-185/). A lawyer who owns any stock in a title insurance agency may not give title opinions to the title insurance company for which the title insurance agency issues policies.

RPC 188 (/for-lawyers/ethics/adopted-opinions/rpc-188/). A lawyer may close a real estate transaction brokered by the lawyer's spouse with the consent of the parties to the transaction.

RPC 201 (/for-lawyers/ethics/adopted-opinions/rpc-201/). Opinion explores the circumstances under which a lawyer who is also a real estate salesperson may close real estate transactions brokered by the real estate company with which he is affiliated.

RPC 210 (/for-lawyers/ethics/adopted-opinions/rpc-210/). Opinion examines the circumstances in which it is acceptable for a lawyer to represent the buyer, seller, and the lender in the closing of a residential real estate transaction.

RPC 248 (/for-lawyers/ethics/adopted-opinions/rpc-248/). A lawyer who owns stock in a mortgage brokerage corporation may not act as the settlement agent for a loan brokered by the corporation nor may the other lawyers in the firm certify title or act as settlement agent for the closing.

97 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/97-formal-ethics-opinion-8/). Opinion examines the circumstances in which it is acceptable for the lawyer who regularly represents a real estate developer to represent the buyer and the developer in the closing of a residential real estate transaction.

98 Formal Ethics Opinion 10 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-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 Formal Ethics Opinion 11 (/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-11/). Opinion rules that the fiduciary relationship that arises when a lawyer serves as an escrow agent demands that the lawyer be impartial to both the obligor and the obligee and, therefore, the lawyer may not act as advocate for either party against the other. Once the fiduciary duties of the escrow agent terminate, the lawyer may take a position adverse to the obligor or the obligee provided the lawyer is not otherwise disqualified.

99 Formal Ethics Opinion 1 (/for-lawyers/ethics/adopted-opinions/99-formal-ethics-opinion-1/). Opinion rules that a lawyer may not accept a referral fee or solicitor's fee for referring a client to an investment advisor.

99 Formal Ethics Opinion 8 (/for-lawyers/ethics/adopted-opinions/99-formal-ethics-opinion-8/). Opinion rules that a lawyer may

represent all parties in a residential real estate closing and subsequently represent only one party in an escrow dispute provided the lawyer insures that the conditions for waiver of an objection to a possible future conflict of interest set forth in RPC 168 are satisfied.

2004 Formal Ethics Opinion 3 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2004-formal-ethics-opinion-3/). Opinion rules that a lawyer may represent both the lender and the trustee on a deed of trust in a dispute with the borrower if the conditions for common representation can be satisfied.

2004 Formal Ethics Opinion 10 (/for-lawyers/ethics/adopted-opinions/2004-formal-ethics-opinion-10/). Opinion rules that the lawyer for the buyer of residential real estate may prepare the deed without creating a client-lawyer relationship with the seller provided the lawyer makes specific disclosures to the seller and clarifies her role for the seller.

2006 Formal Ethics Opinion 3 (/for-lawyers/ethics/adopted-opinions/2006-formal-ethics-opinion-3/). A lawyer who represented the trustee or served as the trustee in a foreclosure proceeding at which the lender acquired the subject property may, under some circumstances, represent all parties on the closing of the sale of the property by the lender provided the lawyer concludes that his judgment will not be impaired by loyalty to the lender and there is full disclosure and informed consent.

2007 Formal Ethics Opinion 9 (/for-lawyers/ethics/adopted-opinions/2007-formal-ethics-opinion-9/). Opinion rules that a closing lawyer must comply with the conditions placed upon the delivery of a deed by the seller, including recording the deed and disbursing proceeds, despite receiving contrary instructions from the buyer.

2008 Formal Ethics Opinion 7 (/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-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.

2008 Formal Ethics Opinion 11 (/for-lawyers/ethics/adopted-opinions/2008-formal-ethics-opinion-11/). A lawyer may serve as the trustee in a foreclosure proceeding while simultaneously representing the beneficiary of the deed of trust on unrelated matters and that the other lawyers in the firm may also continue to represent the beneficiary on unrelated matters.

2011 Formal Ethics Opinion 4. (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-4/)A lawyer may not agree to procure title insurance exclusively from a particular title insurance agency on every transaction referred to the lawyer by a person associated with the agency.

2011 Formal Ethics Opinion 5 (/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-5/). A lawyer may not represent the beneficiary of the deed of trust in a contested foreclosure if the lawyer's spouse and paralegal own an interest in the closely-held corporate trustee.

2012 Formal Ethics Opinion 2. (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-2/) A lawyer-mediator may not draft a business contract for pro se parties to mediation.

2013 Formal Ethics Opinion 4. (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-4/) Opinion examines the ethical duties of a lawyer representing both the buyer and the seller on the purchase of a foreclosure property and the lawyer's duties when the representation is limited to the seller.

2013 Formal Ethics Opinion 5. (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-5/) A lawyer/trustee must explain his role in a foreclosure proceeding to any unrepresented party that is an unsophisticated consumer of legal services; if he fails to do so and that party discloses material confidential information, the lawyer may not represent the other party in a subsequent, related adversarial proceeding unless there is informed consent.

2013 Formal Ethics Opinion 14. (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-14/) Common representation in a commercial real estate loan closing is, in most instances, a "nonconsentable" conflict meaning that a lawyer may not ask the borrower and the lender to consent to common representation.

2014 Formal Ethics Opinion 2. (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-2/) A lawyer may not represent both the trustee and the secured creditor in a contested foreclosure proceeding.

CLIENT-LAWYER RELATIONSHIP

Search Rules

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one or more of the clients in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent or the continued representation of the client(s) is not materially adverse to the interests of the former clients. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the information learned by the lawyer to establish a substantial risk that the lawyer has

information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented.See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Whether information is "generally known" depends in part upon how the information was obtained and in part upon the former client's reasonable expectations. The mere fact that information is accessible through the public record or has become known to some other persons, does not necessarily deprive the information of its confidential nature. If the information is known or readily available to a relevant sector of the public, such as the parties involved in the matter, then the information is probably considered "generally known." See Restatement (Third) of The Law of Governing Lawyers, 111 cmt. d.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). SeeRule 1.0(f). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

Ethics Opinion Notes

CPR 140. It is improper for an attorney who formerly represented a creditor to later represent the debtor in the same action.

CPR 147. An attorney cannot defend an action brought by a former client when confidential information obtained during the prior representation would be relevant to the defense of the current action.

CPR 159. It is proper for an attorney to prepare a will for a woman and later represent her husband in a domestic action so long as the prior representation is not substantially related to the present action.

CPR 195. An attorney may not act as a private prosecutor against a former client who sought his advice concerning the domestic problems which culminated in the subject homicide.

CPR 243. An attorney may certify title to the State for purposes of condemnation and later represent the landowner against the State in a suit for damages if all consent.

CPR 273. An attorney may not represent a neighborhood group in opposition to another group he previously represented concerning the same or substantially related subject matter.

RPC 32 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-32/). Opinion rules that an attorney who represented a husband and wife in certain matters may not represent the husband against the wife in a domestic action involving alimony and equitable distribution. Opinion further rules that an attorney associated with the firm which represented the husband and wife during marriage, but who did not himself represent the husband and wife during that time, may represent the wife in an action involving equitable distribution and alimony if he did not gain any confidential information from or on behalf of the husband.

RPC 137 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-137/). Opinion rules that a lawyer who formerly represented an estate may not subsequently defend the former personal representative against a claim brought by the estate.

RPC 144 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-144/). Opinion rules that a lawyer, having undertaken to represent two clients in the same matter, may not thereafter represent one against the other in the event their interests become adverse without the consent of the other.

RPC 168 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-168/). Opinion rules that a lawyer may ask her client for a waiver of objection to a possible future representation presenting a conflict of interest if certain conditions are met.

RPC 229 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-229/). Opinion rules that a lawyer who jointly represented a husband and wife in the preparation and execution of estate planning documents may not prepare a codicil to the will of one spouse without the knowledge of the other spouse if the codicil will affect adversely the interests of the other spouse or each spouse agreed not to change the estate plan without informing the other spouse.

RPC 244 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-244/). Opinion rules that 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 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-246/). Opinion rules that, 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.

2000 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2000-formal-ethics-opinion-2/). Opinion rules that a lawyer who represented a husband and wife in a joint Chapter 13 bankruptcy case may continue to represent one of the spouses after the other spouse disappears or becomes unresponsive, unless the attorney is aware of any fact or circumstance which would make the continued representation of the remaining spouse an actual conflict of interest with the prior representation of the other spouse.

2003 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-9/). Opinion rules that a lawyer may participate in a settlement agreement that contains a provision limiting or prohibiting disclosure of information obtained during the representation even though the provision will effectively limit the lawyer's ability to represent future claimants.

2003 Formal Ethics Opinion 14 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-14/). Opinion rules that if a current representation requires cross-examination of a former client using confidential information gained in the prior representation, then a lawyer has a disqualifying conflict of interest.

2009 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-8/). Opinion provides guidelines for a lawyer for a party to a partition proceeding and rules that the lawyer may subsequently serve as a commissioner for the sale but not as one of the commissioners for the partitioning of the property.

2010 Formal Ethics Opinion 3 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-3/). Opinion provides guidance on the cross-examination of current and former clients.

2011 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-2/). Opinion sets forth the factors to be taken into consideration when determining whether a former client's delay in objecting to a conflict constitutes a waiver.

2012 Formal Ethics Opinion 4 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-4/). Opinion rules that a lawyer who represented an organization while employed with another firm must be screened from participation in any matter, or any matter substantially related thereto, in which she previously represented the organization, and from any matter against the organization if she acquired confidential information of the organization that is relevant to the matter and which has not become generally known.

2012 Formal Ethics Opinion 10 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-10/). Opinion rules a lawyer may not participate as a network lawyer for a company providing litigation or administrative support services for clients with a particular legal/business problem unless certain conditions are satisfied.

2015 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2015-formal-ethics-opinion-8/). Opinion rules that a lawyer who previously represented a husband and wife in several matters may not represent one spouse in a subsequent domestic action against the other spouse without the consent of the other spouse unless, after thoughtful and thorough analysis of a number of factors relevant to the prior representations, the lawyer determines that there is no substantial relationship between the prior representations and the domestic matter.

CLIENT-LAWYER RELATIONSHIP

Search Rules

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of law or the Rules of Professional Conduct;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client; or

(2) the client knowingly and freely assents to the termination of the representation; or

(3) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; or

(4) the client insists upon taking action that the lawyer considers repugnant, imprudent, or contrary to the advice and judgment of the lawyer, or with which the lawyer has a fundamental disagreement; or

(5) the client has used the lawyer's services to perpetrate a crime or fraud; or

(6) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; or

(7) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(8) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; or

(9) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5.See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court

may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Forfeiture by the client of a substantial financial investment in the representation may have such effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or imprudent or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

[10] The lawyer may never retain papers to secure a fee. Generally, anything in the file that would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and canceled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. The lawyer's personal notes and incomplete work product need not be released.

[11] A lawyer who represented an indigent on an appeal which has been concluded and who obtained a trial transcript furnished by the state for use in preparing the appeal, must turn over the transcript to the former client upon request, the transcript being property to which the former client is entitled.

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

Ethics Opinion Notes

CPR 3 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-3/).

CPR 24. Withdrawing partners and remaining partners should send clients a common announcement of the firm's dissolution so that the client may elect whom he wishes to handle his legal business.

CPR 61. It is improper for a senior member of a law firm who is employed to represent a client to refer a case to a junior partner or associate without the client's consent.

CPR 269. An attorney whose motion to withdraw from representation of a corporation is denied must continue to represent the corporation.

CPR 315 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-315/).

CPR 322 (Revised) (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-322/).

RPC 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-8/). Opinion rules that a lawyer employed by an insurer to represent an uninsured motorist must not withdraw after settlement until he obtains permission of the tribunal and takes steps to minimize prejudice to his client [Originally published as RPC 8 (Revised)]

RPC 48 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-48/). Opinion outlines professional responsibilities of lawyers involved in a law firm dissolution.

RPC 58 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-58/). Opinion rules that another member of a lawyer's firm may substitute for the lawyer in defending a criminal case if there is no prejudice to the client and the client and the court consent.

RPC 79 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-79/). Opinion rules that a lawyer who advances the cost of obtaining medical records before deciding whether to accept a case may not condition the release of the records to the client upon reimbursement of the cost.

RPC 106 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-106/). Opinion discusses circumstances under which a refund of a prepaid fee is required.

RPC 153 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-153/). Opinion rules that in cases of multiple representation a lawyer who has been discharged by one client must deliver to that client as part of that client's file information entrusted to the lawyer by the other client.

RPC 157 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-157/). Opinion rules that a lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection.

RPC 158 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-158/). Opinion rules that a sum of money paid to a lawyer in advance to secure payment of a fee which is yet to be earned and to which the lawyer is not entitled must be deposited in the lawyer's trust account.

RPC 169 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-169/). Opinion rules that a lawyer is not required to provide a former client with copies of title notes and may charge a former client for copies of documents from the client's file under certain circumstances.

RPC 178 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-178/). Opinion examines a lawyer's obligation to deliver the file to the client upon the termination of the representation when the lawyer represents multiple clients in a single matter.

RPC 223 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-223/). Opinion rules that 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 227 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-227/). Opinion rules that a former residential real estate client is not entitled to the lawyer's title notes or abstracts regardless of whether such information is stored in the client's file. However, a lawyer formerly associated with a firm may be entitled to examine the title notes made by the lawyer to provide further representation to the same client.

RPC 234 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-234/). Opinion rules that an inactive client file may be stored in an electronic format provided original documents with legal significance are preserved and the documents in the electronic file can be reproduced on paper.

RPC 245 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-245/). Opinion rules that a lawyer in possession of the legal file relating to the prior representation of co-parties in an action must provide the co-party the lawyer does not represent with access to the file and a reasonable opportunity to copy the contents of the file.

98 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/98-formal-ethics-opinion-9/). Opinion rules that a lawyer may charge a client the actual cost of retrieving a closed client file from storage, subject to certain conditions, provided the lawyer does not withhold the file to extract payment.

2002 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2002-formal-ethics-opinion-5/). Opinion rules that whether electronic mail should be retained as a part of a client's file is a legal decision to be made by the lawyer.

2005 Formal Ethics Opinion 13 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2005-formal-ethics-opinion-13/). Opinion rules that a minimum fee that will be billed against at an hourly rate and is collected at the beginning of representation belongs to the client and must be deposited into the trust account until earned and, upon termination of representation, the unearned portion of the fee must be returned to the client.

2006 Formal Ethics Opinion 18 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2006-formal-ethics-opinion-18/). Opinion rules that, when representation is terminated by a client, a lawyer who advances the cost of a deposition and transcript may not condition release of the transcript to the client upon reimbursement of the cost.

2007 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2007-formal-ethics-opinion-8/). Opinion rules that a lawyer may not charge a client for filing and presenting a motion to withdraw unless withdrawal advances the client's objectives for the representation or the charge is approved by the court when ruling on a petition for legal fees from a court-appointed lawyer.

2009 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-8/). Opinion provides guidelines for a lawyer for a party to a partition proceeding and rules that the lawyer may subsequently serve as a commissioner for the sale but not as one of the commissioners for the partitioning of the property.

2010 Formal Ethics Opinion 1 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-1/). Opinion rules that a lawyer retained by an insurance carrier to represent an insured whose whereabouts are unknown and with whom the lawyer has no contact may not appear as the lawyer for the insured absent authorization by law or court order.

2013 Formal Ethics Opinion 8 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-8/). Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

2013 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-9/). Opinion provides guidance to lawyers who work for a public interest law organization that provides legal and non-legal services to its clientele and that has an executive director who is not a lawyer.

2013 Formal Ethics Opinion 15 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2013-formal-ethics-opinion-15/). Opinion rules that records relative to a client’s matter that would be helpful to subsequent legal counsel must be provided to the client upon the termination of the representation, and may be provided in an electronic format if readily accessible to the client without undue expense.

2015 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2015-formal-ethics-opinion-5/). Opinion provides that in post-conviction or appellate proceedings, a discharged lawyer may discuss a former client’s case and turn over the former client’s file to successor counsel if the former client consents or the disclosure is impliedly authorized.

ADVOCATE

Search Rules

RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(f) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

Ethics Opinion Notes

CPR 18. An attorney may testify on behalf of his former client after he has withdrawn, even if he is to be reimbursed for expenses advanced while he was employed from any recovery.

CPR 93. A law firm may not continue to represent a husband charged with his wife's murder after the public defender who had represented a codefendant who had agreed to testify against the husband in the same case joins the firm.

CPR 162. An attorney may testify as to the value of his services, but may not testify as to his client's emotional condition.

CPR 212. An attorney who is sued may have his partner represent him and may testify in his own behalf without his partner's having to withdraw.

CPR 350. An attorney may continue to serve as administrator C.T.A. even though his secretary may testify as a witness.

RPC 19. An attorney may represent a client even though his secretary must be called as a witness.

RPC 142 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-142/). Opinion rules that a lawyer may not represent an estate in litigation against a claimant where the lawyer's testimony may be necessary to resolve the validity of the claim.

2010 Formal Ethics Opinion 5 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-5/). Opinion rules that the lawyer for a child support enforcement program that brings an action for child support on behalf of the government does not have a client-lawyer relationship with the custodian of the children.

2011 Formal Ethics Opinion 1 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-1/). Opinion provides guidelines for the application of the prohibition in Rule 3.7 on a lawyer serving as both advocate and witness when the lawyer is the litigant.

2012 Formal Ethics Opinion 9 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-9/). Opinion holds that a lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer’s role and specifies the responsibilities of the lawyer.

2012 Formal Ethics Opinion 15 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-15/). Opinion rules that whether a lawyer is a “necessary witness” and thereby disqualified from acting as a client’s advocate at a trial is an issue left up to the discretion of the tribunal.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Search Rules

RULE 4.3 DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(a) give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client; and

(b) state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. To avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

Ethics Opinion Notes

CPR 296 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/cpr-296/). The attorney for the plaintiff in a domestic case may not make available to the defendant a form waiving the right to answer and other rights, nor may he allow his client to provide such a form to the defendant. (But see RPC 165)

RPC 15 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-15/). Opinion rules that attorney may interview person with an adverse interest who is unrepresented and make a demand or propose a settlement.

RPC 61 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-61/). Opinion rules that a defense attorney may interview a child who is the prosecuting witness in a molestation case without the knowledge or consent of the district attorney.

RPC 165 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-165/). Opinion rules that an attorney may provide a confession of judgment to an unrepresented adverse party for execution by that party so long as the lawyer does not undertake to advise the adverse party or feign disinterestedness.

RPC 189 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-189/). Opinion rules that the members of a district attorney's staff may not give legal advice about pleas to lesser included infractions to an unrepresented person charged with a traffic infraction.

RPC 193 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-193/). Opinion rules that the attorney for the plaintiffs in a personal injury action arising out of a motor vehicle accident may interview the unrepresented defendant even though the uninsured motorist insurer, which has elected to defend the claim in the name of the defendant, is represented by an attorney in the matter.

RPC 194 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-194/). Opinion rules that in a letter to an unrepresented prospective defendant in a personal injury action, the plaintiff's lawyer may not give legal advice nor may he create the impression that he is concerned about or protecting the interests of the unrepresented prospective defendant.

2002 Formal Ethics Opinion 6 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2002-formal-ethics-opinion-6/). Opinion rules that the lawyer for the plaintiff may not prepare the answer to a complaint for an unrepresented adverse party to file pro se.

2003 Formal Ethics Opinion 7 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2003-formal-ethics-opinion-7/). Opinion rules that 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.

2009 Formal Ethics Opinion 7 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-7/). Opinion rules that a criminal defense lawyer or a prosecutor may not interview an unrepresented child who is the alleged victim in a criminal case alleging physical or sexual abuse if the child is younger than the age of maturity as determined by the General Assembly for the purpose of an in-custody interrogation (currently age 14) unless the lawyer has the consent of a non-accused parent or guardian or a court order allows the lawyer to seek an interview with the child without such consent; a lawyer may interview a child who is this age or older without such consent or authorization provided the lawyer complies with Rule 4.3, reasonably determines that the child is sufficiently mature to understand the lawyer's role and purpose, and avoids any conduct designed to coerce or intimidate the child.

2009 Formal Ethics Opinion 12 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2009-formal-ethics-opinion-12/). Opinion rules that a lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party provided the lawyer explains who he represents and does not give the unrepresented party legal advice; however, the lawyer may not prepare a waiver of exemptions for the adverse party.

2014 Formal Ethics Opinion 10 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-10/). Opinion rules that a lawyer who handles adoptions as part of her or his law practice and also owns a financial interest in a for-profit adoption agency may, with informed consent, represent an adopting couple utilizing the services of the adoption agency but may not represent the biological parents.

2015 Formal Ethics Opinion 1 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2015-formal-ethics-opinion-1/). Opinion rules that a lawyer may not prepare pleadings and other filings for an unrepresented opposing party in a civil proceeding currently pending before a tribunal if doing so is tantamount to giving legal advice to that person.

2015 Formal Ethics Opinion 2 (https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2015-formal-ethics-opinion-2/). Opinion rules that when the original debt is $100,000 or more, a lawyer for a lender may prepare and provide to an unrepresented borrower, owner, or guarantor a waiver of the right to notice of foreclosure and the right to a foreclosure hearing pursuant to N.C.G.S. § 45-21.16(f) if the lawyer explains the lawyer's role and does not give legal advice to any unrepresented person. However, a lawyer may not prepare such a waiver if the waiver is a part of a loan modification package for a mortgage secured by the borrower's primary residence.

ADVOCATE OR WITNESS?

By Deanna S. Brocker *(This article appeared in Journal 2,4, December 1997)*

May a lawyer play the roles of both advocate and witness in a client's trial? The answer now depends upon whether the attorney is likely a "necessary" witness in his or her client's case. With some limited exceptions, Revised Rule 3.7, the "Lawyer as Witness" rule, disqualifies an attorney from appearing as an advocate when it is likely he or she will be a "necessary" witness at trial.[1] This rule, based upon Model Rule 3.7, improves upon ambiguous language in former Rule 5.2 which prohibited an attorney from acting as an advocate in any case where "it is obvious" the attorney "ought to be called as a witness" on the client's behalf. The revised rule also eliminates the former rule's automatic imputed disqualification of other lawyers in the firm of the testifying lawyer.

The adoption of the revised rule's narrower language was intended to remedy, among other things, abuses by opposing counsel moving to disqualify an attorney, and his or her firm, for purely tactical reasons, thereby divesting an opposing party of counsel of its choice. While "necessity" in Rule 3.7 has been interpreted in a wide variety of ways in various jurisdictions, cases based upon language in Model Rule 3.7, as opposed to language similar to our former rule, have required a greater showing by the movant before an attorney is forced from the case.[2] Certainly, if the client's case would fail but for the lawyer's testimony, the attorney must abandon the role of advocate. Moreover, if an attorney's testimony would be deemed by a "disinterested attorney" likely to be important to the client's success, the attorney should withdraw as advocate and testify instead.[3]

At the other end of the spectrum, an attorney should be permitted to continue representation at trial if the proposed testimony is merely cumulative or is obtainable from another source. Furthermore, an attorney should not be forced from a case if the anticipated testimony is, at most, relevant and somewhat useful. Ultimately, the trial court is vested with discretion to determine issues of "necessity" while balancing the interests of expediency and fairness in ruling upon motions to disqualify.

Having set forth the primary differences between Revised Rule 3.7 and its predecessor, some of the more confusing and often misunderstood aspects of the former rule remain the same. These misperceptions are best explained by reference to what the rule is not.

First, Revised Rule 3.7 is not waivable. The rule serves to protect the administration of justice rather then merely the interests of individual clients. Thus, the fact that a client is willing to forego his attorney's necessary testimony to retain his attorney as advocate at trial is immaterial.

Second, Revised Rule 3.7 not a conflict of interest rule. That is to say, the dual role of advocate and witness does not necessarily create a conflict. The inquiry is first, whether an attorney will likely be a "necessary" witness under Revised Rule 3.7. If not, the conflict rules, such as Revised Rules 1.7 and 1.10, determine whether disqualification is appropriate.[4] For example, a conflict may arise where the lawyer's truthful testimony will be adverse to that of his client. In such a case, continued representation would be improper under Revised Rule 1.7(b), and the conflict would be imputed to other members of that attorney's firm under Revised Rule 1.10.

Third, Revised Rule 3.7 does not render an attorney incompetent to testify. Instead, it gives a trial court discretion to determine whether an attorney may testify at trial without withdrawing from the case.[5]

Fourth, disqualification of the testifying attorney under this rule does not extend beyond "the trial." In other words, the witness attorney may continue representation of the client so long as he or she does not appear as the client's trial counsel. For example, notwithstanding that an attorney may be a necessary witness, it may be permissible for him or her to represent the client in pretrial discovery, pretrial motions, or in any capacity short of the advocate-at-trial role.[6] As stated earlier, even where the testifying attorney cannot make trial appearances, another attorney in his firm may.[7] In addition, it may be permissible for the witness attorney to assume representation at the appellate stage.

A final note: as distinguished from other rules of professional conduct, Revised Rule 3.7 is more aptly addressed in the courtroom rather than through the disciplinary process. Perhaps because it is only encountered in litigation or because it presumes substantial judicial discretion, the rule will ordinarily be an inappropriate basis for imposing attorney discipline.[8]

Endnotes

1. The Revised Rules of Professional Conduct were effective as of July 24, 1997.

2. See e.g. , Security Gen. Life Ins. Co. v. Superior Court , 718 P.2d 985 (Ariz. Sup. Ct. 1986); Cannon Airways Inc. v. Franklin Holdings Corp. , 669 F. Supp. 96 (D.C. Del. 1987).

3. Charles W. Wolfram , Modern Legal Ethics § 7.5, at 381 (1986). "[T]he decision to forego testifying in order to serve as advocate involves a potential conflict of interest. That is particularly true when the lawyer would earn a large fee for acting as advocate and little or no fee

if he or she withdrew to testify. The temptation for the lawyer to downplay the importance of his or her testimony should be discussed with the client, and the client should voluntarily consent to the lawyer's recommended choice of the role of advocate." Id. at 382, n.70 (citations omitted).

4. Revised Rule 1.7 (simultaneous conflicts); Revised Rule 1.10 (imputed disqualification).

5. A court may permit an attorney to serve both as "necessary" witness and advocate where:

- the testimony relates to an uncontested issue;
- the testimony relates to the nature and value of legal services rendered in the case; or
- disqualification of the lawyer would work substantial hardship on the client.

6. See Annotated Model Rules of Professional Conduct Rule 3.7 cmt. (3 rd ed. 1996); Wolfram , supra at 388.

7. Revised Rule 3.7(b).

8. Discipline may be appropriate where an attorney proceeds as advocate only and deprives the client of clearly necessary testimony or where the attorney can make no good faith argument for applicability of one of the exceptions in Revised Rule 3.7(a). See Wolfram , supra at 390.

OBTAINING INFORMED CONSENT

By Alice Neece Mine *(This article appeared in Journal 8,3 (/media/121165/journal-8-3.pdf), September 2003)*

The Rules of Professional Conduct ("the Rules") allow a client (or a former or prospective client) to consent to situations that would otherwise disqualify the lawyer from the representation or prohibit the lawyer from pursuing a course of conduct. When the Rules were revised this past spring, the standard for obtaining client consent was significantly clarified and a requirement for documenting the consent was added. Lawyers should take note of these global revisions to the Rules.

Why informed consent?

Throughout the Rules, as revised this spring, the phrase "consent after consultation" was replaced with "gives informed consent." Before revision, the Rules allowed client consent to a conflict of interest following "consultation" with the client which included an "explanation of the implications of the common representation and the advantages and risks involved." Rule 1.7, 1997 Rules of Professional Conduct. The terminology section of the 1997 Rules added little clarification of the duty to consult before asking a client to agree to an arrangement that would probably be beneficial to the lawyer and might be harmful to the client's interests. "Consultation" was defined as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Rule 0.3, Terminology, 1997 Rules of Professional Conduct. As noted in the Report to the ABA House of Delegates of the ABA Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct, May 2001,

... "consultation" is a term that is not well understood and does not sufficiently indicate the extent to which clients must be given information and explanation in order to make reasonably informed decisions. The term "informed consent," which is familiar from its use in other contexts, is more likely to convey to lawyers what is required under the Rules.

The numerous cases on informed consent to medical treatment help explain what is expected in the legal context.[1] In McPherson v. Ellis, 305 N.C. 266, 270, 287 S.E.2d 892, ___ (1982), for example, the North Carolina Supreme Court observed,

Consent to a proposed medical procedure is meaningless if given without adequate information and understanding of the risks involved. Therefore, the standard of professional competence prescribes that a physician or surgeon properly apprise a potential patient of the risks of a particular treatment before obtaining his consent....[A] physician "violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment." (Quoting Salgo v. Leland Stanford, Jr. University Board of Trustees, 154 Cal. App. 2d 560, 578, 317 P.2d 170, 181 (1957)).

How much information and explanation is required?

"Informed consent" is described in Rule 1.0(f), Terminology, of the 2003 Rules as "denot[ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate to the circumstances." Comment [6] to Rule 1.0, states that the lawyer must only make "reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision." Information that must ordinarily be disclosed to the client includes the following:

- the facts and circumstances giving rise to the situation,

- an explanation of the material advantages and disadvantages of the proposed course of conduct,

- a discussion of options and alternatives, and

- in some circumstances, a recommendation to seek the advice of other counsel.

Rule 1.0, Cmt. [6].

Although the information and explanation given need only be "reasonably adequate" under the circumstances, adequacy is judged subjectively by considering the sophistication of the particular person who must make an informed decision. The "relevant factors" to this determination include:

- whether the client or other person is experienced in legal matters generally,

- whether the client or other person is experienced in making decisions of the type involved, and

- whether the client or other person is independently represented by other counsel in giving the consent.

What documentation is required?

Another global revision to the Rules of Professional Conduct requires most consents to be "confirmed in writing." See e.g., Rule 1.7(b)(4), Rule 1.9(a) and (b), Rule 1.10(d), Rule 1.18(d). As explained in Rule 1.0 (c), this requirement can be satisfied with a written statement from the affected client or person or "a writing that a lawyer promptly transmits to the person confirming an oral informed consent." Paragraph (o) of the same rule explains that an e-mail will suffice. The Rules must be read carefully, however, because some consents require more than a written confirmation from the lawyer. When the importance of the consent must be emphasized to the person giving the consent or when a consent may be subject to later dispute, as when a client consents to a business transaction with the lawyer, the Rules may require the consent to be confirmed in a writing signed by the client. See e.g., Rule 1.8(a) and (g).

Endnote

1. In 1976, the General Assembly enacted specific legislation, codified as G.S. 90-21.13, on consent to medical treatment that utilizes an objective test for determining whether the consent was informed:

(a)(1) A reasonable person, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities.

Immigration Consequences of Commitment

Joseph Lambert
Elliot Morgan Parsonage PLLC- Winston-Salem, NC

Introduction

- Joseph (Joe) Lambert
- University of North Carolina at Chapel Hill
- Attorney at Elliot Morgan Parsonage in Winston-Salem, NC
- Speaks English and Spanish
- Practice largely focused on immigration law

Overview of Discussion

- Basics of Immigration Law
- Commitment and Mental Health in Immigration
  - Removal Process
  - Immigration
- Overview of Immigration in North Carolina

Common Immigration Status

- United States Citizen (From Birth or Naturalization
- Lawful Permanent Resident
- Non-Immigrant
- Asylee/Refugee
- Deferred Action
- Undocumented Immigrant

Basic Immigration Law

- Family-Based Immigration
  - U.S. family members file petitions for relatives who are outside are outside the United States or are eligible to "adjust status" (spouses, parents, children, siblings, fiancés)
  - Each approved petition has a "Priority Date". (Currently the priority dates range from "Immediately Available" to August 22, 1995)
  - Once a priority date is current, the immigrant can apply to immigrate or obtain legal status.
  - The immigrant submits a financial sponsorship, a medical exam, a criminal history, and application.
  - The immigrant is then interviewed by a government agent to decide whether he or she qualifies to immigrate or gain legal status.

Basic Immigration Law

- Employment-Based Immigration
  - Immigrant v. Non-Immigrant Visas
  - U.S. companies (or foreign companies with U.S. operations) petition for individuals to fill employment needs.
  - Many of the employment based visa categories require the business to "test the labor market" to show that there are not United States workers available to fill the job.
  - There are "Priority Dates" for many of the immigrant petitions and it could take a number of years to actually get someone here, especially from Asian countries.

Basic Immigration Law

- Removal (Deportation) Law
  - United States government's "civil" law process for removing non-citizens.
  - In reality, it largely mirrors criminal proceedings.
  - Proceedings can be detained or non-detained
  - US Department of Justice (EOIR) is the "court"
  - US Department of Homeland Security (ICE) is the "prosecutor"
  - Immigrant is the "Respondent" and can be represented by an attorney at no cost to the government
  - No right to government provided legal counsel

Immigration Law in North Carolina

- Immigrants who are detained in North Carolina are typically sent to Stewart Detention Center in Lumpkin, Georgia.
- Terrible situations involving mental health, multiple suicides in 2018.

Commitment and Immigration:

Removal or Deportation

- Commitment a Prelude to Detention and Removal
  - Commitment is often triggered by some type of criminal behavior.
  - When alien released from commitment:
    - Arrest warrant or
    - Criminal proceedings
  - Anytime an undocumented immigrant is in law enforcement custody, there is a high chance that they will be detained.
    - Detainer request (ICE Hold)
      - Some larger urban counties in NC no longer honoring
      - Focus is shifting to smaller, rural counties
      - Example of Omar.
    - Administrative Warrant
      - Loophole for 287(g) in Forsyth County (possibly others)
    - Probation
      - Very common method of apprehension in NC

Commitment and Immigration:

Removal or Deportation

- Severe mental health issues are not a deterrent to apprehension and removal for ICE currently.
- ICE can and will use that information to benefit their case against the alien.
- Bond Proceedings (detained):
  - ICE determines if there is a bond and the alien can petition for a immigration judge to review the bond determination.
  - Immigration judge uses to criteria:
    - Is the alien a "danger to the community"
      - ICE can use time in mental health treatment to argue alien is or could be danger to the community.
      - This is a common practice.
    - Is the alien a flight risk?

Commitment and Immigration:

Removal or Deportation

- Ground for Removal: Public Charge (INA § 237 (a)(5))
  - Has alien become a public charge within five years of entry?
  - If a public charge, did the circumstances causing public charge arise after entry?
  - Rare but could become more common in today's enforcement climate.

Commitment and Immigration:

Competency in Removal Proceedings

- Competency in removal proceedings
  - INA § 240(b)(3): Attorney General "shall provide safeguards to protect rights and privileges" of immigrant with mental health issues.
  - In 2011, the Board of Immigration Appeals (BIA) finally issued an opinion addressing the competency of an individual in removal proceedings. Matter of M-A-M 25 I&N Dec. 474 (BIA 2011).
    - Key concepts:
      - Indicia of mental incompetency
      - Does alien understand the nature of the proceeding?
      - Even if incompetent, can procedural safeguards be applied to protect the rights of the immigrant?
    - Safeguards:
      - Legal representation, appearance of friend/family to assist, guardian, continuances, waiver of appearance, and procedural allowances.
      - Compare to children in proceedings.

Commitment and Immigration:

Defensive Use of Incompetency in Removal Proceedings

- Asylum, Withholding of Removal and Conventions Against Torture
  - INA § 208
  - Persecution based on membership in a "particular social group".
  - "Particular social group" is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it. 8 CFR § 208.15(C)(1).
  - Will the individual be persecuted or not protected from persecution on account of their mental health?

Commitment and Immigration:

Defensive Use of Incompetency in Removal Proceedings

- 42(b) Cancellation of Removal
  - Criteria
    - Alien has been physically present in the United States continuously for at least ten years;
    - Alien has had good moral character for ten years;
    - Alien has not been convicted of certain offenses [crimes listed in INA sections 212(a)(2), 237(a)(2), or 237(a)(3)]; and
    - To deport alien would cause **exceptional and extremely unusual hardship** to LPR or U.S. citizen spouse, child, or parent.
  - Use mental health of alien or of alien's family member to satisfy fourth requirement.
  - Depending on the particular situation, this could make a strong case for cancellation of removal.
  - If case is granted, alien becomes an LPR.

Commitment and Immigration:

Defensive Use of Incompetency in Removal Proceedings

- Stay of Removal
  - Request made to ICE to stay the deportation for compelling reason.
  - Health of immigrant or family member in the past has been successful.
  - A stay is fully discretionary.
  - Current practice is that these are rarely granted.
    - Ex. Client with suicidal daughter who had been committed was denied stay.

Commitment and Immigration: Immigrating to the United States

- In order for an immigrant to gain legal status, he or she must be admissible.
- Two Mental Health Related Grounds for Inadmissibility:
  - Public Charge (INA § 212 (a)(4))
    - Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.
    - Becoming more common in CJD Consulate.
  - Health Ground (INA § 212 (a)(2)(A)(iii))
    - Current mental disorder with associated harmful behavior; or
    - Past mental disorder with associated harmful behavior that is likely to recur or lead to other harmful behavior.
    - Discretionary waiver available.

Commitment and Immigration: Immigrating to the United States

- Asylum
  - Affirmative asylum
  - Procedural differences from defensive asylum
  - Two chances to receive asylum
- Humanitarian Relief
  - Humanitarian deferred action or parole
  - Discretionary relief
  - Very rare to receive a grant for this currently.
  - Only most extreme cases would be considered.

Current Climate in North Carolina

- North Carolina is a very difficult jurisdiction for immigrants.
- ICE is very aggressive and many state and local law enforcement authorities actively assist ICE officers in their mission.
- Charlotte EOIR (or the Charlotte Immigration Court) has the third highest deportation rate in the country and it is a non-detained docket vs. detained docket.
- Favorable discretion is rarely exercised.
- Because of changes from municipalities and sheriffs, we expect to see more home and workplace raids.

BOLO Situations to Watch For

- Immigrant has USC spouse or parent
- Immigrant has a child in the military
- Immigrant has 21+ year old USC child
- Immigrant is in deportation proceedings
- Immigrant has USC/LPR family member with serious health condition
- Immigrant or immigrant's child has been a victim of a crime
- Immigrant is victim of domestic violence
- Child immigrant lives with only one or no legal parent(s)
- Immigrant fears returning to country because of persecution
- Immigrant was forced to work or was not compensated for work
- Immigrant has had someone file a petition for him or her

Questions?

- Please feel free to contact me if you have any questions:

Joseph Lambert
Elliot Morgan Parsonage PLLC
426 Old Salem Road
Winston Salem, NC 27101
336-714-4497
jlambert@emplawfirm.com