UNC SCHOOL OF GOVERNMENT

2018 Juvenile Defender Conference

August 17, 2018 / Chapel Hill, NC

Sponsored by the

The University of North Carolina School of Government and

Office of Indigent Defense Services

ELECTRONIC COURSE MATERIALS

UNC SCHOOL OF GOVERNMENT

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AGENDA

8:00 to 8:45am	Check-in
8:45 to 9:00	**Welcome** *Austine Long, Program Attorney* UNC School of Government, Chapel Hill, NC
9:00 to 10:00	**Post Adjudication Strategies [60 min]** *Veronika Monteleone, Staff Attorney* Council for Children's Rights, Charlotte, NC
10:00 to 11:00	**JWise: Defender Access [60 min]** *Nichole Melton, Business Systems Analyst* NCAOC Training and Development Division, Raleigh, NC
11:00 to 11:15	Break
11:15 to 12:15	**Preparing Your Client for the Youth Development Center [60 min]** *Charles Dingle, Director,* Chatham Youth Development Center, Siler City, NC *Jameka Jackson, Director,* Edgecombe Youth Development Center, Rocky Mount, NC
12:15 to 1:00	Lunch *(provided in building)* *
1:00 to 2:00	**Case Law & Legislative Update [60 min]** *Hannah Love, Assistant Appellate Defender* Office of the Appellate Defender, Durham, NC
2:00 to 2:15	Break *(light snack provided)*
2:15 to 3:15	**Ethical Considerations When Representing Clients with Diminished Capacity [60 min - Ethics]** *Kristine Sullivan, Senior Attorney* Disability Rights North Carolina, Raleigh, NC
3:15 to 4:15	**Appeals: What's My Role? [60 min]** *Amanda Zimmer, Assistant Appellate Defender* Office of the Appellate Defender, Durham, NC

CLE HOURS: 6 (Includes 1 hour of ethics/professional responsibility)

* IDS employees may not claim reimbursement for lunch

Council for Children's Rights

Post-Disposition Advocacy

Role of Juvenile Defender Post-Disposition

- Review Disposition Order
- Discuss Right to Appeal
- CFTs/Team Meetings
- Review Hearings (Status Updates)
- Probation/PRS Violation Hearings
- YDC Review/Pre-Release Hearings
- Expungement

Review Disposition Order

- **REQUEST TO CONTINUE YOUR APPOINTMENT BEYOND DISPOSITION*****
- Does the disposition order accurately reflect the judge's orders/language?
- Does the disposition order reflect defense counsel's requests (e.g., counsel be notified of and permitted to participate in all CFTs)?
- Does the disposition order include any impermissible dispositional alternatives (e.g., 24 house arrest for level 1 disposition)?
- Explain what has been ordered to your client in age-appropriate language
- NOTE: 7B-2512(b) requires the court to include information on the expunction of juvenile records at the time it issues the dispositional order.

GENERAL TERMS & CONDITIONS OF PROBATION

- **School**: Attend school every day; do not receive any in-school or out-of-school suspensions; do not be late to class; attend all classes and complete all assignments.
- **Home**: Follow the rules of your home.
- **Services**: Cooperate with all professionals including, your attorney, court counselors, case managers, and any service providers ordered to assist you and your family.
- **Good Behavior**: Remain on good behavior and do not violate any local, state, or federal laws.
- **Court Counselor**: Cooperate with your court counselor and notify him/her of any changes in address or telephone, and meet with your court counselor whenever requested.
- **Substance Use**: Do not use or possess any controlled substance, any prescription drug that is not prescribed to you by a doctor, any alcoholic beverage, or any tobacco products. You will be subject to random drug tests.
- **Weapons**: Do not use or possess any deadly weapons (including but not limited to: firearms, brass knuckles, knives, etc.)
- **Placement**: Cooperate with any out-of-home placement efforts, including placement at a residential substance abuse treatment, group home, or other therapeutic placement.
- **Searches**: You will be subject to warrantless searches by your court counselor.
- **No Contact**: You are not allowed to have any contact with your co-defendants or the victims in your case. Do not associate with anyone that your parent/guardian or court counselor tells you to stay away from (you cannot speak to them in person, by text, or through social media).

CURFEW_____ p.m. to _____a.m. HOUSE ARREST _____

ELECTRONIC MONITORING _____

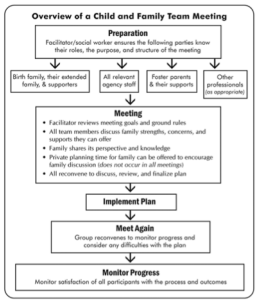
Curfew: You have to be inside your house at the time designated by the judge. You are NOT allowed to be in the backyard, on the front porch, or anywhere outside of the four walls of your home after curfew.
House Arrest: You cannot leave your home or be outside of your house AT ALL *unless* you are in school or with an adult over 21 who has been approved by your parent/guardian.
Electronic Monitor: Know that your location is monitored at all times by GPS. ***Do not tamper with or remove your monitor. You could face additional charges if you cut off your electronic monitor.

Right to Appeal

- The decision of whether to appeal belongs to your client!
- The following should be included in your discussion with your client:
  - Likelihood of success
  - Client's parent/guardian may be held responsible for costs of appeal***
  - Length of appeal process (no automatic right to expedited juvenile appeals)
  - Whether a new attorney will be appointed to handle the appeal
- **Timing**: notice must be given either (1) in open court at the time of the hearing or (2) in writing within 10 days after entry of a *final order*.
- **Secure Custody Pending Appeal**: Pending disposition of an appeal, the release of the juvenile, with or without conditions, should issue in *every* case *unless* the court orders otherwise. For compelling reasons which *must be stated in writing*, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State (7B-2605).

CFTs/Team Meetings

- If at all possible, attend monthly CFTs!
  - You will receive updates on placement, your client's compliance with the terms of probation, family background, school progress, etc.
  - Another opportunity for you to be an advocate for your client and make sure that his/her voice is heard.
    - NOTE: You client should be present at all CFTs (it is the *child* and family team after all) but this is not always the case in practice.
  - Attending CFTs will help you become acquainted with local mental health providers and emergency placements.
  - Present positive information about your client to team members (especially important if there are representatives from potential placements).
  - Gather positive information from collateral sources to present at future review hearings.



Review Hearings

- Defense counsel can request periodic review hearings!
- Reasons to request a review hearing:
  - Modify Conditions of Probation
    - Early termination
    - Remove an electronic monitor
    - Extend curfew
  - Placement Issues
  - Parent/Guardian Non-Compliance
  - Safety Concerns

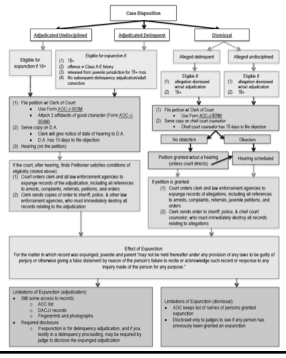
Probation/PRS Violation Hearings

- **Secure Custody**: 7B-1903 only allows a child to be detained pending an MFR *if* the MFR alleges damage to property or injury to persons.
- **Evidentiary Standard**: "greater weight of the evidence"
- *Beware*, if the judge finds that a violation has occurred the Juvenile Code allows the judge to increase your client's disposition level and double the term of confinement otherwise authorized.
- Factors to Consider:
  - Source of information (school records? angry parent?)
  - Nature of conduct (violent v. non-violent)
  - Multiple episodes? (violating curfew once v. violating curfew every night for two weeks)
  - Is the conduct also the basis of a pending or future charge?
  - Is the court counselor seeking to change the terms of the child's probation (i.e. does anything new need to be ordered by the court)?

YDC Release/YDC Review Hearings

- **Pre-Release Hearings**: anyone having these?
- **Post-release Supervision Planning Conference**
  - By statute, 7B-2514(a)(32), shall include as many as possible of the following: the juvenile, juvenile's parent, guardian or custodian, juvenile court counselors who have or will supervise the juvenile, YDC staff. *********Why not the juvenile's attorney?*

Expunction of Juvenile Records



* AOC forms for level 1 and level 2 dispositions now contain boxes prompting court to inform juveniles of expunction procedures
* A, B1, B2, C, D, and E felonies cannot be expunged
* Client must either pursue expunction on his/her own or hire an attorney
* Juvenile expunctions should not be a bar to receiving an adult expunction
* Statute provides no guidelines for conducting the hearing

Questions?

Veronika Monteleone
veronika@cfcrights.org
(704) 943-9642

DISPOSITION WORKSHEET

JUVENILE _____ CASE NUMBER _____- JB -_____

ATTORNEY _____ ATTORNEY'S PHONE 704-943-_____

DISPOSITION DATE _____ COURT COUNSELOR _____

MONTHS OF PROBATION _____

PROBATION TERMINATION DATE _____

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- **Good Behavior**: Remain on good behavior and do not violate any local, state, or federal laws.
- **Court Counselor**: Cooperate with your court counselor and notify him/her of any changes in address or telephone, and meet with your court counselor whenever requested.
- **Substance Use**: Do not use or possess any controlled substance, any prescription drug that is not prescribed to you by a doctor, any alcoholic beverage, or any tobacco products. You will be subject to random drug tests.
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This disposition worksheet is meant to provide guidance to the Juvenile and his/her parent/guardian on the terms of probation. In no way should this be interpreted as the court order, legal authority, or an excuse if the terms are not followed per the Judge's order. Should the terms of probation need to be clarified, contact the assigned court counselor or the Juvenile's attorney.

COMMUNITY SERVICE HOURS _____ RESTITUTION _____

COOPERATE WITH THE FOLLOWING PROGRAMS:

_____ DASH _____ SHIFT _____ GAP _____ HERO

_____ MCLEOD _____ YTC _____ STUDIO 345 _____ CCA

_____ TRESPORTS

OTHER TERMS OF PROBATION:

_____

_____

_____

_____

_____

_____

IMPORTANT PHONE NUMBERS
CMPD Electronic Monitoring – 704-432-8888
Council for Children's Rights – 704-372-7961
Department of Juvenile Justice and Delinquency Prevention – 704-330-4338
SHIFT Community Service – 980-319-0736

This disposition worksheet is meant to provide guidance to the Juvenile and his/her parent/guardian on the terms of probation. In no way should this be interpreted as the court order, legal authority, or an excuse if the terms are not followed per the Judge's order. Should the terms of probation need to be clarified, contact the assigned court counselor or the Juvenile's attorney.

Electronic Access to Juvenile Records

August 17, 2018

A  into Juvenile Delinquency Data Contained in the JWise Electronic Index

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Why the portal

- During the 2017-2018 legislative session, the North Carolina Administrative Office of the Courts (NCAOC) was mandated to provide prosecutors and attorneys representing juveniles access to delinquency information, which is currently maintained in an indexing system, referred to as JWISE. This mandate is a component of the Juvenile Justice Reinvestment Act, and became effective July 1, 2018.

What is JWISE

- A web-based application used by clerks.
- JWise was designed with all juvenile case types in mind.
  - Funding sources have determined JWise content

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When was JWISE implemented

- JWise was a point forward implementation that began in 2004 and was implemented in all 100 counties in NC by 2008.
  - What is it important to know this?
    - If you want a historical perspective of the juvenile's allegations for a 2005 case number and the county did not begin using JWise until 2007, you are only going to see allegations filed in 2007 or after since JWise was a point forward implementation.
    - This is a great example of when the attorney will need to view the court file.

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What can JWise do

- For the clerk, JWise provides the following functionality
  - Index of Juvenile Cases
  - Maintenance of Case Information
  - Calendar Generation
  - Forms Generation
  - Filtering

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Who currently uses jwise

- Juvenile clerks of court
- Family court personnel
- Guardian ad Litem staff
- Judges

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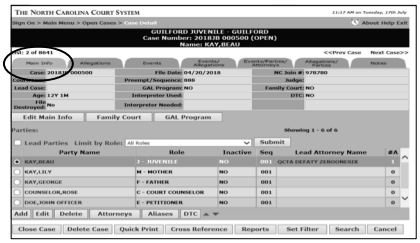
What case information is available



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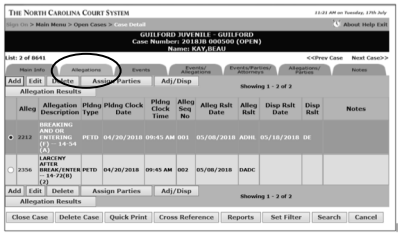
What case information is available



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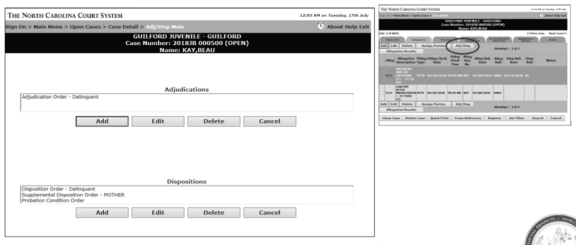
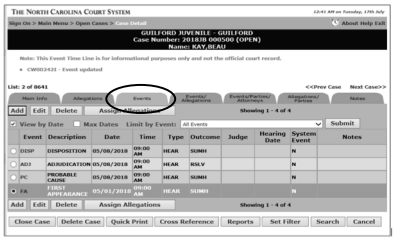
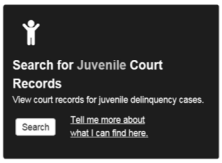
What case information is available



What case information is available



JWISE ⇨



REMINDER

- For a short tutorial on how to use and access the portal, the 15-minute video can be viewed at any of the links listed below.
  - https://youtu.be/q_YBhRjrJZQ
  - https://www.nccourts.gov/about/nc-administrative-office-of-the-courts/training/juvenile-delinquency-records-search
  - https://ncjuveniledefender.com/2018/07/

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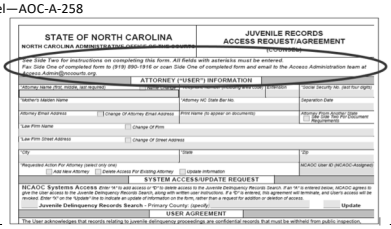
How to access the portal

Private Counsel—AOC-A-258



STATE OF NORTH CAROLINA
NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS

JUVENILE RECORDS
ACCESS REQUEST/AGREEMENT

ATTORNEY ("USER") INFORMATION

SYSTEM ACCESS/UPDATE REQUEST

USER AGREEMENT

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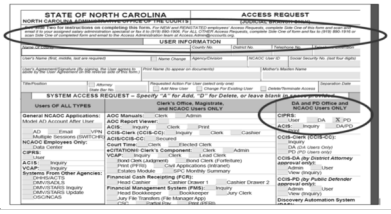
How to access the portal

Public Defender—AOC-A-151



STATE OF NORTH CAROLINA
NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS

ACCESS REQUEST

USER INFORMATION

SYSTEM ACCESS REQUEST – Specify "A" for Add, "D" for Delete, or leave blank to Leave Unchanged

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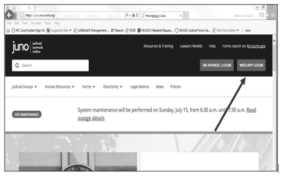
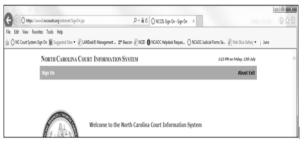
How to access the portal

https://juno.nccourts.org/



https://www3.nccourts.org



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Sign on

- Each user will be provided with a User ID: or RACF and initial password
- Click **Sign On** to enter the portal

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Sign on

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What can an attorney view

Yes

- Cases with a status of Open in JWise that the attorney has been assigned
- A case sharing the same NC JOIN number in another county
  - NC JOIN - North Carolina Juvenile Online Information Network

No

- An attorney who no longer represents the juvenile, who was marked as "inactive" in JWise, will not be able to access the case

  NOTE: If you are unable to view a case in the portal to which you have been appointed, please consult with the juvenile clerk to make sure you have been assigned to the case in JWise

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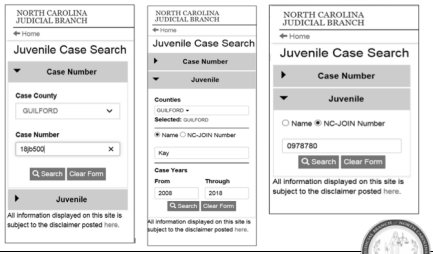
Search methods

- Case Number
- Juvenile Name
- NC-JOIN Number



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Accessing case information

- Click the row or the **View Case** Icon to review case information for Beau Kay

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Content of case information

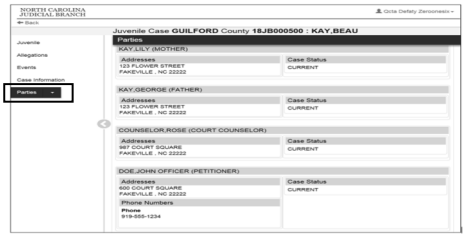
Content of case information cont'd

Content of case information cont'd

Content of case information cont'd

25

Content of case information cont'd



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Why is this information helpful

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RESOURCES

- NCAOC Help Desk for password or other technical issues at 919-890-2407
- The juvenile court file in your county clerk of superior court's office
- Staff with the NC Office of the Juvenile Defender at https://ncjuveniledefender.com/ or at 919-890-1650
- Assigned NCAOC field support specialists (specifically for staff in district attorney's or public defender's offices) at https://juno.nccourts.org/sites/default/files/Directories%20Files/county-district-field-assignments.pdf

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THANK YOU

NCAOC Training and Development Division
Nicky Melton
Nichole.Melton@nccourts.org

Preparing Your Client for the Youth Development Center

Department of Public Safety
Division of Adult Correction and Juvenile Justice
August 17, 2018

Jameka Jackson, Edgecombe YDC Facility Director
Charles Dingle, Chatham YDC Facility Director

Department of Public Safety Division of Adult Correction and Juvenile Justice

We are committed to…

- ❑ Reduction and prevention of juvenile delinquency
- ❑ Education and Treatment
- ❑ Foster communities to ensure safety
- ❑ Collaboration with other agencies
- ❑ Safe and secure housing
- ❑ Assessment, Treatment and Prevention

Juvenile Justice Division

Operates two types of secure commitment centers for youths in North Carolina:

- ❑ Juvenile Detention Centers (6 state operated 2county operated)
- ❑ Youth Development Centers (4 YDCs)

Detention Center

Juveniles may be detained for:

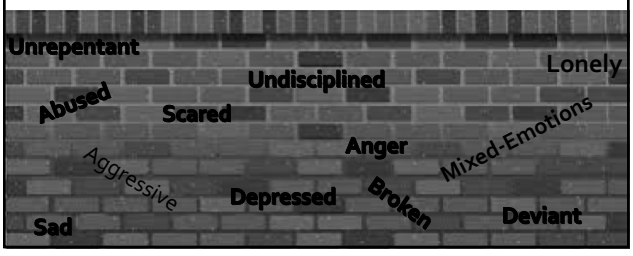
1. Serving dispositional days
2. Awaiting court proceedings
3. Community-based placement
4. Youth Development Center placement

Youth Development Center

Before we prepare you… how do we prepare for your client?

Admission Day

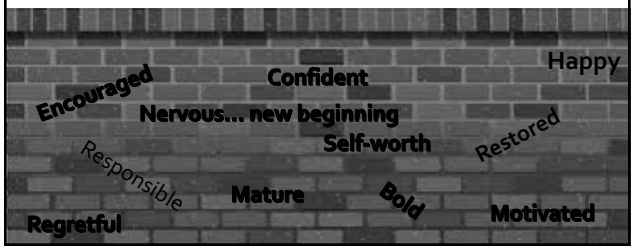
THE RESISTANCE WALL
ADMISSION DAY



BRICK BY BRICK

UNCOVER REVEAL REBUILD

THE REBUILD



Youth Development Center

What to Expect...

- Most restrictive, intensive dispositional option available to the juvenile courts in North Carolina
- Secure facility that provide education and treatment services
- Placement is for juveniles who have been adjudicated for violent or serious offenses or who have a lengthy delinquency history

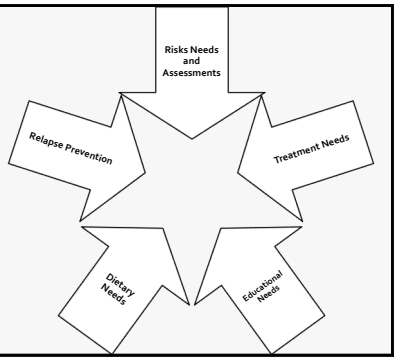
Youth Development Center Admission & Assessments

- ❑ Medical Screening
- ❑ Psychological Screening
- ❑ Educational Evaluation
- ❑ Parent Notification
- ❑ Spirituality Evaluation
- ❑ PREA (Prison Rape Elimination Act)
- ❑ Housing Unit Assignment

Youth Development Center Admission Assignments

Youth Development Center

Day 1 Evaluation Process Begins…



Youth Development Center

Risks & Needs

- Assigned LMHC
- Review History
- Contributing factors for delinquency
- Family Dynamics / Needs
- Victimization & Mental Health Services

Youth Development Center

Treatment Needs

- Assigned Social Worker
- Court Order
- Risk & Needs (Court Services)
- Social History (LMHC and child)

Youth Development Center

Treatment Needs

- Service Plan
  Medical * Spiritual Needs * Behavioral
  Substance Abuse * Pro-social skills
- Family Involvement
- Service Planning Meeting

Youth Development Center

Treatment Needs

- Assigned Youth Counselor
- Treatment goals are met
- Monitor daily Signature Card
- Navigate Stage Promotion

Youth Development Center

Education

- Core Curriculum
- EOG and EOC Exams
- Dept. of Instruction Guidelines
- Grades go back to home school

Youth Development Center

Additional Services

- Chaplaincy Services
- Medical Services
- Volunteer Services

Preparing the youth for tomorrow!

Program & Services

MODEL OF CARE

Therapeutic approach to managing behaviors and teaching pro-social skills

Implemented 2008

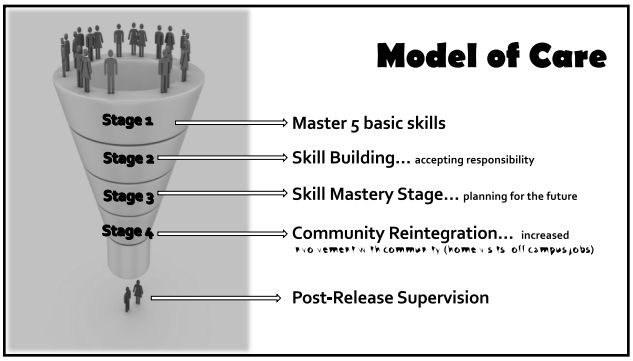
Evidenced-based literature working with juvenile offenders

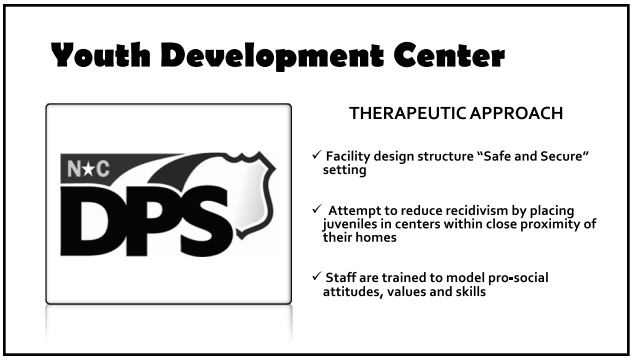
Model of Care

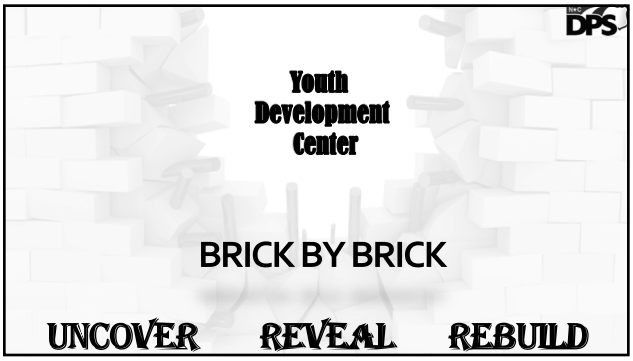
- Therapeutic Interactions
- Service Plan Goals
- Learning Theory
- Motivation System
- Skills Curriculum

Model of Care

- Level System
- Incentive-based program
- Canteen
- Home Visit Pass


Model of Care
Stage 1
Master 5 basic skills
Stage 2
Skill Building… accepting responsibility
Stage 3
Skill Mastery Stage… planning for the future
Stage 4
Community Reintegration… increased
Post-Release Supervision


Youth Development Center
N★C DPS
THERAPEUTIC APPROACH
✓ Facility design structure "Safe and Secure" setting
✓ Attempt to reduce recidivism by placing juveniles in centers within close proximity of their homes
✓ Staff are trained to model pro-social attitudes, values and skills


DPS
Youth Development Center
BRICK BY BRICK
UNCOVER
REVEAL
REBUILD

Case Law Update

Hannah Love, Assistant Appellate Defender

Adjudication Orders

In re L.F.,

COA17-875, 2018 N.C. App. Lexis 149 (Feb. 20, 2018) (unpublished).

FACTS:

- The State filed a petition charging the juvenile with robbery with a dangerous weapon, a Class D felony.
- At the adjudication hearing, the juvenile entered an *Alford* admission of responsibility.
- The Transcript of Admission stated "the most serious/severe disposition on the charge" available for robbery with a dangerous weapon, based on the juvenile's prior record, was a "Level 2 disposition."
  - The juvenile, defense counsel, the trial court, and the State signed the Transcript of Admission.
- The trial court accepted the juvenile's plea and transferred the case to another county for a secure custody hearing to be held within ten days.
- The trial court did *not* enter a disposition order. The juvenile gave notice of appeal from the adjudication order.

In re L.F.,

COA17-875, 2018 N.C. App. Lexis 149 (Feb. 20, 2018) (unpublished).

- On appeal, the juvenile argued the trial court erred in accepting her admission where the juvenile was misinformed about the most serious disposition she could receive. *See* N.C.G.S. § 7B-2407(a)(6).
- The transcript of admission and the trial court incorrectly informed the juvenile that she faced, at most, a Level 2 disposition.
- Based on the charge, the juvenile *could have* received a Level 3 disposition.
- Because the juvenile's admission was not knowingly and voluntarily entered, the Court of Appeals vacated the juvenile's admission and the court's adjudication order. *See* N.C.G.S. § 7B-2407(b).

§ 7B-2407. When admissions by juvenile may be accepted

(a) The court may accept an admission from a juvenile only after first addressing the juvenile personally and:

(1) Informing the juvenile that the juvenile has a right to remain silent and that any statement the juvenile makes may be used against the juvenile;

(2) Determining that the juvenile understands the nature of the charge;

(3) Informing the juvenile that the juvenile has a right to deny the allegations;

(4) Informing the juvenile that by the juvenile's admissions the juvenile waives the juvenile's right to be confronted by the witnesses against the juvenile;

(5) Determining that the juvenile is satisfied with the juvenile's representation; and

(6) Informing the juvenile of the most restrictive disposition on the charge.

In re O.S.R.,

No. COA16-958, 2017 N.C. App. Lexis 711 (Sept. 5, 2017) (unpub.).

Relevant Facts:

- The trial court entered an adjudication order noting the juvenile admitted the offense of driving without a license. The order contained an offense date, classification of a Class 2 Misdemeanor, and the date of the adjudication next to the trial judge's signature.
- The adjudication order, however, left box #3 – which states: "The following facts have been proven beyond a reasonable doubt:" – **completely blank and attached no additional findings to the order**.

3. The following facts have been proven beyond a reasonable doubt: *(attach additional sheets if necessary)*

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CONCLUSIONS OF LAW

In re O.S.R.,

No. COA16-958, 2017 N.C. App. Lexis 711 (Sept. 5, 2017) (unpub.).

Applicable Law:

- Under N.C. Gen. Stat. § 7B-2409, "[t]he allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt."
- N.C. Gen. Stat. § 7B-2411 describes the findings required for a juvenile adjudication order:
  - If the court finds that the allegations in the petition have been proved as provided in N.C.G.S. § 7B-2409, the court shall so state in a written order of adjudication, which shall include, but not be limited to, the date of the offense, the misdemeanor or felony classification of the offense, and the date of adjudication.

In re O.S.R.,

No. COA16-958, 2017 N.C. App. Lexis 711 (Sept. 5, 2017) (unpub.).

- The Court of Appeals found that although the adjudication order "met most of the requirements of N.C. Gen. Stat. § 7B-2411, **the adjudication order was insufficient because "it failed to recite the facts that had been proven beyond a reasonable doubt**[.]"
- Furthermore, although the trial court's oral rendition of its ruling on adjudication stated the "facts have been proved beyond a reasonable doubt," and thus applied the correct legal standard, the Court of Appeals held that **the oral pronouncement could not cure the defects in the written adjudication order**.
- The Court of Appeals remanded the adjudication order to the trial court, for the trial court to add its previously articulated oral findings to the written order to comply with N.C. Gen. Stat. § 7B-2411.

KEY POINTS:

1. Written adjudication order must state that the facts in the petition have been proven by a reasonable doubt; failure to do so is reversible error.
2. The trial court's oral pronouncement cannot cure defects in the written adjudication order.

Disposition Orders

In re R.S.M.,

COA17-499, ___ N.C. App. ___, 809 S.E.2d 134 (2017).

January 2016
- Juvenile placed on probation for 12 months

August 2016
- Juvenile Court Counselor filed motions for review on probation violations.

September 2016
- Juvenile admitted violations alleged in August 2016 motions for review.

October 2016
- A dispositional hearing was conducted on the juvenile's admission of the probation violation.
- The judge orally announced that she was ordering that the juvenile be committed to YDC.
- Written disposition order #1→ Later that day, a written disposition order was entered referencing the September 2016 admission. The disposition order continued the juvenile on probation, and was signed by the judge. No other probation violation motions were pending at the time.

November 2016
- Written Disposition Order # 2 → The judge "entered a purported disposition order on the probation violations, committing the juvenile to YDC." *In re R.S.M.*, ___ N.C. App. ___, 809 S.E.2d 134, 135 (2017).

In re R.S.M.,

COA17-499, ___ N.C. App. ___, 809 S.E.2d 134 (2017).

- On appeal, the juvenile argued the trial court lacked subject matter jurisdiction to enter a second written dispositional order committing him to YDC when it had already filed a written dispositional order continuing him on probation. The Court of Appeals agreed.
- "Any conflict between the announcement of judgment in open court and the written order is resolved in favor of the written order." *In re R.S.M*, ___ N.C. App. ___, 809 S.E.2d 134, 135 (2017).
  - Therefore, "[t]he trial court's written disposition order filed 17 October 2016 controls over its earlier oral judgment committing [the juvenile] to the YDC." *Id*.
- Under § 7B-2510(d), (e), three requirements must be satisfied before the trial court may review the progress of a juvenile on probation: (1)There must be a motion by the court counselor, the juvenile, or the court; (2) notice; and (3) a hearing.
- Because none of the requirements under § 7B-2510 were met after the October 17, 2016 dispositional order, the Court of Appeals concluded **the trial court lacked subject matter jurisdiction to create a new disposition** order committing [the juvenile] to YDC." *In re R.S.M*, ___ N.C. App. at ___, 809 S.E.2d at 135.

In re I.W.P.,

COA17-94, 2018 N.C. App. Lexis 448 (May 1, 2018).

N.C. Gen. Stat. § 7B-2501(c)

(c) In choosing among statutorily permissible dispositions, the court shall select the most appropriate disposition ... [and] shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile, based upon:

1. The seriousness of the offense;
2. The need to hold the juvenile accountable;
3. The importance of protecting the public safety;
4. The degree of culpability indicated by the circumstances of the particular case; and
5. The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

- On appeal, the juvenile argued the dispositional order failed to comply with N.C. Gen. Stat. §§ 7B-2512(a) and 7B-2501(c), because the trial court failed to make written findings demonstrating that it considered each of the five factors in N.C. Gen. Stat. § 7B-2501(c).

In re I.W.P.,

COA17-94, 2018 N.C. App. Lexis 448 (May 1, 2018).

Trial Court MUST Consider Each of the Factors in N.C.G.S. § 7B-2501(c)

- *In re Ferrell*, 162 N.C. App. 175, 177, 589 S.E.2d 894, 895 (2004);
- *In re V.M.*, 211 N.C. App. 389, 391-92, 712 S.E.2d 213, 215 (2011);
- *In re K.C.*, 226 N.C. App. 452, 462, 742 S.E.2d 239, 246 (2013); and
- *In re G.C.*, 230 N.C. App. 511, 519, 750 S.E.2d 548, 553 (2013).

vs.

Trial Court Does NOT Need to Consider Each of the § 7B-2501(c) Factors

- *In re D.E.P.*, __ N.C. App. __, __, 796 S.E.2d 509, 514 (2017).

"This inconsistency has created a direct conflict in this Court's prior jurisprudence and must be reconciled."

In re I.W.P.,

COA17-94, 2018 N.C. App. Lexis 448 (May 1, 2018).

- **"The plain language of Section 7B-2501(c) compels us to find that a trial court must consider each of the five factors in crafting an appropriate disposition."**
- ***"Ferrell, V.M., G.C., and K.C. are controlling, and we hold that a trial court must consider each of the factors in N.C.G.S. § 7B-2501(c) when entering a dispositional order."***
- "The dispositional order specifically instructs the trial court to list any additional findings regarding the § 7B-2501(c) factors if they are not found elsewhere in the order or incorporated documents."
- *Here, the supplemental reports and assessments do not address these factors.*
  - NOTE→ The opinion implies that supplemental reports and assessments can satisfy the written findings required by § 7B-2501(c).
- The COA determined the trial court failed to address two of the five factors in § 7B-2501(c), and remanded to the trial court for further findings of fact.

This case is a big deal because it declines to follow *In re D.E.P.* and reaffirms that the trial court must make findings regarding each of the factors in § 7B-2501(c).

In re O.S.R.,

No. COA16-958, 2017 N.C. App. Lexis 711 (Sept. 5, 2017) (unpub.).

Relevant Facts:

- The disposition order indicated the trial court considered the predisposition report, risk assessment, and needs assessment and incorporated those documents by reference.
- Under section 5 of the disposition order – labeled "Other Findings" – the trial court stated "**See Attached page**[.]" The court then included a letter from the N.C. Dept. of Public Safety labeled "Other Findings (#5)" which contained a verbatim recitation of findings noted by the trial court at the disposition hearing.
- The trial court also attached another letter from the Dept. of Public Safety which described the juvenile as a "high flight risk" and recommended that he be kept in secure custody until placement at YDC and noted findings supporting this recommendation.

In re O.S.R.,

No. COA16-958, 2017 N.C. App. Lexis 711 (Sept. 5, 2017) (unpub.).

- The juvenile argued the trial court failed to make written findings of fact in the disposition order to demonstrate that it considered the factors in N.C. Gen. Stat. § 7B-2501(c).
- The Court of Appeals disagreed, and concluded the trial court's findings of fact were sufficient to demonstrate that it considered the factors in N.C. Gen. Stat. § 7B-2501(c).
- The Court of Appeals acknowledged that the trial court did not make written findings as to each of the factors in § 7B-2501(c).
- However, the Court concluded that the DPS document attached to the disposition order satisfied N.C. Gen. Stat. § 7B-2501(c)(3).
- Thus, the Court of Appeals allowed the documents attached to the disposition order to satisfy the trial court's fact finding duty under N.C. Gen. Stat. § 7B-2510(c).

Can supplemental reports attached to a disposition order satisfy the trial court's fact finding duty under N.C. Gen. Stat. § 7B-2501(c)?

- *In re I.W.P.*, COA17-94, 2018 N.C. App. Lexis 448 (May 1, 2018).
  - Before concluding that the trial court failed to consider each of the factors in § 7B-2501(c), the Court determined that the supplemental reports and assessments attached to the disposition order did not address the factors for which the trial court failed to make written findings.
- *In re O.S.R.*, No. COA16-958, 2017 N.C. App. Lexis 711, *12 (Sept. 5, 2017) (unpub.).
  - COA allowed DPS letter appended to disposition order to satisfy trial court's fact-finding duty under § 7B-2501(c)(3).

In re J.D.,

No. COA17-954, 2018 N.C. App. LEXIS 231 (March 6, 2018) (unpub.).

March 2016

The trial court accepted the juvenile's admission of guilt, adjudicated him delinquent, and ordered a short term of confinement followed by six months of probation to expire in September of 2016.

No appeal was filed from the March 2016 adjudication and disposition orders.

September 2016

The juvenile admitted to violating the terms of his probation. Trial court extended the juvenile's probation for six months, to expire in March of 2017.

No appeal was filed from the September 2016 order extending probation.

February 2017

The juvenile admitted to violating the terms of his probation.
The trial court extended his probation for an additional six months, to expire in September of 2017.

The juvenile appealed from the February 2017 order extending his probation.

In re J.D.,

No. COA17-954, 2018 N.C. App. LEXIS 231 (March 6, 2018) (unpub.).

Arguments on Appeal:

- On appeal, the juvenile challenged the trial court's February 2017 extension of his probation, arguing that the trial court made several errors of law (1) in its initial disposition (March 2016); and (2) in its first extension of the juvenile's probation (September 2016).
- The juvenile did *not* argue that the trial court erred in finding that he had violated the terms of his probation at the February 2017 hearing, or that the February 2017 review hearing was in error.

The Court of Appeals' Ruling:

- The Court of Appeals held that the juvenile's "attempts to challenge the validity of the original adjudication and the first extension of his probation constitute **an impermissible collateral attack** on those orders." *In re J.D.*, 2018 N.C. App. LEXIS 231, *5 (emphasis added).
- The Court of Appeals held that by failing to appeal from the original judgments, the juvenile waived any challenge to those judgments, and cannot attack them in the appeal of a subsequent order extending his sentence. The Court concluded the juvenile may not now appeal the matters collaterally via a proceeding contesting the extension of the sentence imposed in the original judgment. *Id.*

In re J.D.,

No. COA17-954, 2018 N.C. App. LEXIS 231 (March 6, 2018) (unpub.).

- In reaching its conclusion, the Court relied on our Supreme Court's decisions in *State v. Pennell*, 367 N.C. 466, 758 S.E.2d 383 (2014) and *State v. Holmes*, 361 N.C. 410, 646 S.E.2d 353 (2007). Those cases involve an impermissible collateral attack in an adult probation violation case.
  - In *Pennell*, our Supreme Court held a defendant may not challenge a defective indictment on direct appeal from an order revoking probation. Such an argument is an impermissible collateral attack on the original judgment imposing probation.
  - Following the revocation of the defendant's probation, the defendant in *Holmes* attempted to challenge the sentence that the trial court imposed in the original judgment placing the defendant on probation, despite having failed to challenge the judgment suspending those sentences. *Holmes*, 361 N.C. at 412, 646 S.E.2d at 354. The Court concluded that the defendant's challenge to the original judgment was an impermissible collateral attack. *Id.* at 413, 646 S.E.2d at 355. The Court reasoned that if the defendant wanted to challenge the original judgment, he should have done so through a direct appeal from the original judgment itself. *Id.*

In re J.D.,

No. COA17-954, 2018 N.C. App. LEXIS 231 (March 6, 2018) (unpub.).

Key Point→ In a direct appeal, a juvenile cannot argue about defects in an earlier order that is not the subject of the current appeal.

- After *Pennell*, there are two ways to challenge a defective charging document on appeal:
  - Present the argument to the Court of Appeals through a motion for appropriate relief. *Pennell*, 367 N.C. at 472, 758 S.E.2d at 387; *State v. Smith*, No. COA13-742, 2014 N.C. App. LEXIS 874, *4-5 (Aug. 5, 2014) (unpub.).
  - Present the argument to the Court of Appeals through an application for writ of habeas corpus under N.C. Gen. Stat. §§ 17-1 *et. seq*. *Pennell*, 367 N.C. at 472, 758 S.E.2d at 387.

Subject Matter Jurisdiction

In re J.B.,

No. COA17-400, 2018 N.C. App. LEXIS 18 (Jan. 2, 2018) (unpub.).

Relevant Facts:

- A petition was filed alleging the juvenile committed the offense of injury to personal property by "damag[ing] a printer and computer after pushing it off the teachers [sic] desk[.]" *In re J.B.*, 2018 N.C. App. LEXIS 18 at *2. The petition identified the owner of the damaged property as "Charlotte Mecklenburg Board of Education." *Id*. at *5.

Applicable Law:

- For a larceny indictment to be sufficient (and confer jurisdiction), it must allege the owner or person in lawful possession of the stolen property. If the entity named in the indictment is not a person, it must be alleged that the victim was a legal entity capable of owning property.

In re J.B.,

No. COA17-400, 2018 N.C. App. LEXIS 18 (Jan. 2, 2018) (unpub.).

- On appeal, the juvenile argued, *inter alia*, that that the petition was insufficient because it failed to allege that the school was an entity capable of owning property.
  - The juvenile argued that pursuant to N.C.G.S. § 115C-40, the property owner should have been identified as "The Charlotte-Mecklenburg County Board of Education." *Id*. at *5-6.
  - During the juvenile's trial, however, the juvenile's attorney conceded that the petition correctly identified the Board of Education as a corporate body capable of owning property. *Id*. at *6.
- The Court of Appeals concluded that the argument was not properly before the Court because "the juvenile failed to raise an argument that the Board was not an entity capable of owning property [at trial], and in fact readily conceded the point." *Id*. at *6-7.

In re J.B.,

No. COA17-400, 2018 N.C. App. LEXIS 18 (Jan. 2, 2018) (unpub.).

My two cents:

- *In re J.B.* is bad law because it purports to say that a defense attorney can stipulate that a petition is sufficient to confer subject matter jurisdiction on the trial court.
- This is incorrect because **a party cannot consent to subject matter jurisdiction.** A pleading is either sufficient to confer subject matter jurisdiction, or it's not.
- "Jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties." *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (internal citation omitted).
- "Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to object to the jurisdiction is immaterial." *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (internal citation and quotation omitted).

Constitutionality of *Miller*-Fix Statutes

State v. James,

514PA11-2, ___ N.C. ___, 813 S.E.2d 195 (May 11, 2018).

- *State v. James* involved the constitutionality of North Carolina's *Miller*-fix statutes. *See* N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D.
- In *James*, our Supreme Court held that the *Miller*-fix statutes: (1) did not violate due process; and (2) did not contain a presumption in favor of life without parole.
- Our Supreme Court explained, in accordance with *Miller*, that "sentences of life imprisonment without the possibility of parole should be reserved for those juvenile defendants whose crimes reflect irreparable corruption rather than transient immaturity." *James*, ___ N.C. at ___, 813 S.E.2d at 207.
- According to the our Supreme Court , LWOP sentences for juveniles should be "exceedingly rare."

Motions to Suppress

State v. Miller,

(2PA17), ___ N.C. ___, 814 S.E.2d 81 (June 8, 2018).

Preservation of Suppression Issue for Appellate Review

- Plain error review is NOT available on appeal where the defendant did not move to suppress the evidence either before or during trial.
  - A suppression issue cannot be raised for the first time on appeal.
- Plain error review is ONLY available in cases where a suppression hearing was held but the trial attorney failed to renew his/her objection to the admission of the evidence at trial.

Takeaway → LITIGATE suppression issues at the trial court level.

- It is critical that attorneys **include an affidavit** in their motion to suppress. N.C.G.S. § 7B-2408.5 requires an affidavit and *State v. Holloway*, 311 N.C. 573, 319 S.E.2d 261 (1984) says that even if you get merits review in the trial court without an affidavit, the suppression issue is waived on appeal.
- See N.C.G.S. § 7B-2408.5 (procedures for motion to suppress before and during adjudicatory hearing); N.C.G.S. § 15A-974 (procedure for motion to suppress in criminal cases).

State v. Benitez,

___ N.C. App. ___, 813 S.E.2d 268 (March 20, 2018).

This case has a lengthy procedural history. The below summary is of the second Court of Appeals opinion (issued March 20, 2018) after remand from the Supreme Court of North Carolina.

Relevant Factual Background:

- In 2007, the defendant, age 13, provided a signed statement to police stating he shot a person in the head.
- The defendant's uncle, with whom defendant had been living, was present during the interrogation.
- Only two days after the interrogation, the trial court on its own motion entered an order appointing the director of DSS as guardian of the person for the defendant pursuant to N.C.G.S. § 7B-2001. In the order appointing the guardian, the district court found that "the juvenile appeared in court with no parent, guardian or custodian but he lived with an uncle who did not have legal custody of him" and "[t]hat the mother of the juvenile resides in El Salvador and the father of the juvenile is no where to be found and based on information and belief lives in El Salvador."
- In 2009, the defendant was indicted for first degree murder and was prosecuted as an adult.

State v. Benitez,

___ N.C. App. ___, 813 S.E.2d 268 (March 20, 2018).

Was the appropriate person present during the juvenile's interrogation?

Did the juvenile's uncle qualify as a guardian for purposes of N.C.G.S. § 7B-2101(b)?

- The applicable statutes do not define the term "guardian," and the Court of Appeals did not find any cases clearly defining that term as applied in N.C.G.S. § 7B-2101.
- Relying on *State v. Oglesby*, 361 N.C. 550, 555-56, 648 S.E.2d 819, 822 (2007), the Court of Appeals explained that whether a person is a "**guardian**" for purposes of § 7B-2101 depends on "whether the relationship was one established by legal process." *Benitez*, 813 S.E.2d at 275. The requirement of "legal process" means that the individual's authority was established through a court proceeding. *Id.*
- The Court of Appeals concluded that, "at a minimum, the legal authority held by a "**guardian**," within the meaning of N.C.G.S. § 7B-2101(b), requires authority gained through some legal proceeding." *Benitez*, 813 S.E.2d at 275.

N.C.G.S. § 7B-2101(b) (2018)

When the juvenile is less than 16 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney.

Note → Benitez involved the 2007 version of § 7B-2101(b), which applied to juveniles less than 14-years-old.

State v. Benitez,

___ N.C. App. ___, 813 S.E.2d 268 (March 20, 2018).

Did the trial court consider the totality of the circumstances in evaluating whether the juvenile knowingly and voluntarily waived his rights? [No]

- On appeal, the defendant challenged the trial court's findings of fact regarding whether the defendant knowingly and intelligently waived his right to remain silent.
- The COA concluded the trial court failed to make sufficient findings of fact to address the factors required by the "totality-of-the-circumstances approach" mandated by the U.S. Supreme Court. *See Fare v. Michael C.*, 442 U.S. 707, 724-25, 61 L. Ed. 2d 197, 212 (1979).
  - "The trial court must evaluate the evidence, consider its weight, and make the required findings, but here it simply did not." *Benitez*, 813 S.E.2d at 282.
- "**These considerations under *Fare* are not technicalities but are essential to any conclusion of whether defendant knowingly and intelligently waived his right to remain silent.**" *Benitez*, 813 S.E.2d at 282-83.
- The Court remanded for the trial court to make additional findings of fact addressing whether the defendant's waiver of his rights at age 13 was knowingly and intelligently made, taking into account the evidence regarding the defendant's experience, education, background, and intelligence and evaluation into whether he has the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving these rights. *Benitez*, 813 S.E.2da at 282-83.

Under former and current N.C.G.S. § 7B-2101(d), the trial court "shall" find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights *before* admitting into evidence any statement resulting from custodial interrogation.

State v. Benitez,

___ N.C. App. ___, 813 S.E.2d 268 (March 20, 2018).

Tips For Trial Counsel

1. Determine whether the juvenile was under the age of 16 at the time of police questioning.

2. If the juvenile was under 16, was the juvenile's parent, guardian, or custodian present during questioning? → If not, trial counsel should file a motion to suppress the juvenile's statement. → Even if the trial court denies the juvenile's motion to suppress:

If the case goes to trial:
- Object to the admission of the juvenile's statement at trial. (If there is a jury trial, the objection must be made in the presence of the jury.)
- Counsel must be vigilant and also object on previously stated grounds to any other subsequent evidence entered concerning the statement.

If the juvenile enters an admission of guilt:
- Preserve the right to appeal the denial of the motion to suppress *prior* to the juvenile entering an admission of guilt, and
- Give notice of appeal from the adjudication and disposition orders.

Probation

State v. Moore,

___ N.C. ___, 807 S.E.2d 550 (Dec. 8, 2017).

- *State v. Moore* is helpful in contested probation violation cases.
- N.C.G.S. § 15A-1345 discusses the procedures for an adult probation violation hearing. Under N.C.G.S. § 15A-1345(e), a defendant's right to due process requires the State to give the defendant "notice of the hearing and its purpose, including a statement of the violations alleged." *State v. Moore*, ___ N.C. ___, ___, 807 S.E.2d 550, 556 (2017) (Ervin, J., concurring).
- Our Supreme Court recently interpreted "notice," as stated in N.C.G.S. § 15A-1345(e), as requiring the State to provide the defendant with "a statement of the actions that [the] defendant has allegedly taken that constitute a violation of a condition of probation." *Moore*, ___ N.C. at ___, 807 S.E.2d at 555.

State v. Moore,

___ N.C. ___, 807 S.E.2d 550 (Dec. 8, 2017).

N.C.G.S. § 7B-2510

- N.C.G.S. § 7B-2510(d): The conditions or duration of probation may be modified … only after notice and a hearing.
- N.C.G.S. § 7B-2510(e): If the court, after notice and a hearing, finds by the greater weight of the evidence that the juvenile has violated the conditions of probation …, the court may continue the original conditions …, modify the conditions of probation, or, except as provided in subsection (f) of this section, order a new disposition.

N.C.G.S. § 15A-1345(e)

- Before revoking or extending probation, the court must … hold a hearing.
- The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. The notice, … must be given at least 24 hours before the hearing.
- At the hearing, evidence against the probationer must be disclosed to him, and the probationer may appear and speak on his own behalf, may present relevant information, and may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation.

In re Gault

- "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity." *In re Gault*, 387 U.S. 1, 33, 18 L. Ed. 2d 527, 549 (1967).

State v. Moore,

___ N.C. ___, 807 S.E.2d 550 (Dec. 8, 2017).

Key Points from *State v. Moore*:

- N.C.G.S. § 7B-2510(e), *In re Gault*, and N.C.G.S. § 15A-1345(e) require **notice** of the violations alleged for purposes of due process.
- *Moore* is emblematic of the argument that due process requires a juvenile to receive notice in a motion for review. *Moore* defines "notice" as a "statement of the actions that [the juvenile] has allegedly taken that constitute a violation of a condition of probation." *State v. Moore*, ___ N.C. ___, ___, 807 S.E.2d 550, 555 (2017) (Ervin, J., concurring).
  - Although the adult statute (N.C.G.S. § 15A-1345(e)) contains more specific language than in the Juvenile Code (§ 7B-2510(e)), the principles applied in *Moore* can be applied in contested hearings on a motion for review based on a violation of the juvenile's probation.

Sufficiency of the Evidence

In re T.T.E.,

COA17-648, 2018 N.C. App. Lexis 683 (July 17, 2018).

Relevant Facts:

- A school resource officer testified that he saw the juvenile throw a chair in the cafeteria. No one was hit with the chair and the officer testified that he did not see anyone that *could* have been hit by the chair.
- After throwing the chair, the juvenile ran out of the cafeteria; the officer followed and, without calling out to juvenile, grabbed him from behind.
- The juvenile initially cursed when the school resource officer caught him, and then told the officer he was playing with his brother.
- The State filed petitions alleging the juvenile had engaged in disorderly conduct and resisting a public officer.
- The juvenile was adjudicated delinquent for disorderly conduct and resisting a public officer.

In re T.T.E.,

COA17-648, 2018 N.C. App. Lexis 683 (July 17, 2018).

Sufficiency of the Evidence of Disorderly Conduct

N.C. Gen. Stat. § 14-288.4

(a) Disorderly conduct is a public disturbance intentionally caused by any person who does any of the following:

(1) Engages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence.

Petition for Disorderly Conduct

- The State filed a juvenile petition alleging that T.T.E. violated G.S. 14-288.4 when he "did intentionally cause a public disturbance at Clyde A. Erwin High School, Buncombe County NC, by engaging in violent conduct. This conduct consisted of throwing a chair toward another student in the school's cafeteria."

In re T.T.E.,

COA17-648, 2018 N.C. App. Lexis 683 (July 17, 2018).

Sufficiency of the Evidence of Disorderly Conduct

- Juvenile argued there was insufficient evidence of disorderly conduct.
- The State argued the evidence showed "arguably violent conduct" because ***if*** the juvenile had thrown the chair at another student and ***if*** it hit them, "it presumably would have hurt them."
- The Court of Appeals declined to consider "hypothetical events that could have happened if juvenile actually did something in addition to what the actual evidence shows" in evaluating the sufficiency of the evidence.

Court of Appeals' Decision (Majority)

- The Court found the evidence was insufficient "to show that the juvenile fought, engaged in violent conduct, or created an imminent risk of fighting or other violence."
- The Court pointed out that no one was hurt or threatened during the incident, and the juvenile did not escalate the situation.
- The Court concluded, "Throwing a single chair with no other person nearby and without attempting to hit another person and without hitting even any other item in the cafeteria is not disorderly conduct."
- Accordingly, the majority vacated the juvenile's adjudication and disposition orders.

In re T.T.E.,

COA17-648, 2018 N.C. App. Lexis 683 (July 17, 2018).

Sufficiency of the Evidence of Resisting a Public Officer

- On appeal, the juvenile argued there was insufficient evidence of resisting a public officer.

N.C. Gen. Stat. § 14-223

To adjudicate a juvenile for resisting a public officer there must be evidence:

1. That the victim was a public officer;
2. that the defendant knew or had reasonable grounds to believe that the victim was a public officer;
3. that the victim was discharging or attempting to discharge a duty of his office;
4. that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and
5. that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse.

In re T.T.E.,

COA17-648, 2018 N.C. App. Lexis 683 (July 17, 2018).

Sufficiency of the Evidence of Resisting Public Officer

Court of Appeals' Decision (Majority)

- Although the school resource officer was a public officer discharging a duty of his office, the Court found there was no evidence to support the remaining elements.
- The officer intentionally snuck up on the juvenile. Therefore, juvenile did not know or have "reasonable grounds to believe that the victim was a public officer" until *after* the school resource officer stopped him and he saw that it was a police officer who grabbed him.
- The Court found that, although the juvenile yelled "no" and cursed when the officer grabbed him, the juvenile's language did not rise to the level of a violation of § 14-223, particularly as his statements were made when he was grabbed and before he knew who was grabbing him from behind.
- Within less than two minutes after being "snuck up on" and grabbed from behind, the juvenile was "remarkably calm" and "very respectful[.]"
- Because the evidence was insufficient to show the juvenile was resisting an officer, the Court vacated the juvenile's adjudication and disposition for resisting a public officer.

In re T.T.E.,

COA17-648, 2018 N.C. App. Lexis 683 (July 17, 2018).

Judge Arrowood filed a separate opinion concurring in part and dissenting in part.

- Judge Arrowood **concurred** in the majority's opinion that there was insufficient evidence to support the juvenile's adjudication for resisting a public officer.
- Judge Arrowood **dissented** from the majority's holding that there was insufficient evidence to support the adjudication for disorderly conduct.

In re T.T.E.,

COA17-648, 2018 N.C. App. Lexis 683 (July 17, 2018).

Judge Arrowood's Dissent

- The juvenile argued the petition for disorderly conduct under N.C. Gen. Stat. § 14-288.4 was defective because it was not clear which subsection of the statute he was charged with violating.
- The majority did not address this argument because it found there was insufficient evidence of this charge.
- Judge Arrowood concluded the petition was not fatally defective, and the trial court had jurisdiction to enter the adjudication and disposition orders against juvenile for disorderly conduct.

Petition for Disorderly Conduct

- The State filed a juvenile petition alleging that T.T.E. violated G.S. 14-288.4 when he "did intentionally cause a public disturbance at Clyde A. Erwin High School, Buncombe County NC, by engaging in violent conduct. This conduct consisted of throwing a chair toward another student in the school's cafeteria."

In re T.T.E.,

COA17-648, 2018 N.C. App. Lexis 683 (July 17, 2018).

Judge Arrowood's Dissent

Sufficiency of the Petition for Disorderly Conduct

- Judge Arrowood held, "based on the totality of the circumstances, the petition averred the charge with sufficient specificity that juvenile was clearly apprised of the conduct for which he was charged."
- Judge Arrowood's "totality of the circumstances" analysis considered:
  - That the language in the petition "closely tracks the statutory language of N.C. Gen. Stat. § 14-288.4(a)(1)," and
  - That the petition lists the offense as N.C. Gen. Stat. § 14-288.4.

In re T.T.E.,

COA17-648, 2018 N.C. App. Lexis 683 (July 17, 2018).

Judge Arrowood's Dissent

Sufficiency of the Evidence of Disorderly Conduct

- Judge Arrowood dissented from the majority's holding that there was insufficient evidence to support the adjudication for disorderly conduct.
- Judge Arrowood would hold that the officer's testimony that the juvenile threw a chair, which the juvenile admitted he was throwing at another student, provided substantial evidence of violent conduct from which the trial court could reasonably determine that the juvenile's act of throwing a chair at another student amounted to violent conduct.
- Therefore, Judge Arrowood would "find no error in the trial court's denial of juvenile's motion to dismiss the disorderly conduct charge."

NOTE: The State filed a motion for temporary stay in the NCSC (238A18). This suggests the State will give notice of appeal based on Judge Arrowood's dissent.

Summary of Case Law Update
2018 Juvenile Defender Conference
Hannah Love, Assistant Appellate Defender

Adjudication Orders:

- Juvenile's Admission of Guilt (N.C.G.S. § 7B-2407)
    - *In re L.F.,* COA17-875, 2018 N.C. App. Lexis 149 (Feb. 20, 2018) (unpublished).
        - Court of Appeals vacated adjudication order where both the transcript of admission and the trial court failed to advise the juvenile of the most serious disposition that could be imposed in violation of N.C.G.S. § 7B-2407(a)(6), (b).

- Sufficiency of Adjudication Order
    - *In re O.S.R.*, No. COA16-958, 2017 N.C. App. Lexis 711 (Sept. 5, 2017) (unpublished).
        - Written adjudication order must state that the facts in the petition have been proven by a reasonable doubt; failure to do so is reversible error.
        - The trial court's oral pronouncement cannot cure defects in the written adjudication order.

Disposition Orders:

- Jurisdiction to Issue Dispositional Orders
    - *In re R.S.M.*, COA17-499, ___ N.C. App. ___, 809 S.E.2d 134 (Dec. 19, 2017).
        - Trial court's written disposition order controls over the court's oral pronouncement at the disposition hearing.
        - After a written disposition order on a probation violation is entered, the trial court lacks subject matter jurisdiction to enter a subsequent disposition order in the absence of a motion for review, notice, and hearing.
            - Under N.C.G.S. § 7B-2510, the trial court may only review a juvenile's probation after a (1) motion, (2) notice, and (3) hearing.

Disposition Orders:

- N.C.G.S. § 7B-2501(c)
  - *In re I.W.P.*, COA17-94, 2018 N.C. App. Lexis 448 (May 1, 2018).
    - "The plain language of Section 7B-2501(c) compels us to find that a trial court must consider each of the five factors in crafting an appropriate disposition."
    - The Court of Appeals held that *Ferrell, V.M., G.C.*, and *K.C.* are controlling. Therefore, the trial court must consider each of the factors in N.C.G.S. § 7B-2501(c) when entering a dispositional order.
    - This case is a big deal because it declines to follow *In re D.E.P.* and reaffirms that the trial court must make findings regarding each of the factors in § 7B-2501(c).
  - *In re O.S.R.*, No. COA16-958, 2017 N.C. App. Lexis 711 (Sept. 5, 2017) (unpublished).
    - The Court of Appeals concluded that the disposition order demonstrated the trial court considered each of the factors in § 7B-2501(c) where the documents attached to the disposition order addressed the factors not otherwise addressed by the trial court in its written findings.
- Impermissible Collateral Attack
  - *In re J.D.*, No. COA17-954, 2018 N.C. App. LEXIS 231 (March 6, 2018) (unpublished).
    - The Court of Appeals concluded the juvenile's challenges to earlier dispositional orders that were not previously appealed constituted an impermissible collateral attack.
    - In a direct appeal, a juvenile cannot argue about defects in an earlier order that is not the basis of the current appeal.

Subject Matter Jurisdiction

- Sufficiency of Petition
  - *In re J.B.,* No. COA17-400, 2018 N.C. App. LEXIS 18 (Jan. 2, 2018) (unpublished).
    - On appeal, the juvenile argued, *inter alia*, that that the petition was insufficient because it failed to allege that the school was an entity capable of owning property.

- The Court of Appeals concluded the argument was not properly before the Court because "the juvenile failed to raise an argument that the Board was not an entity capable of owning property [at trial], and in fact readily conceded the point."
    - In my opinion, *In re J.B.* is bad law because a party cannot consent to subject matter jurisdiction.
        - "Jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties." *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006).
        - "Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to object to the jurisdiction is immaterial." *In re T.R.P.*, 360 N.C. at 595, 636 S.E.2d at 793.

Sufficiency of the Evidence

- Disorderly Conduct
    - *In re T.T.E.*, COA17-648, 2018 N.C. App. Lexis 683 (July 17, 2018).
        - *Sufficiency of the Petition*
            - The petition alleged the juvenile violated N.C.G.S. § 14-288.4 when he "did intentionally cause a public disturbance at Clyde A. Erwin High School, Buncombe County NC, by engaging in violent conduct. This conduct consisted of throwing a chair toward another student in the school's cafeteria."
            - Majority did not address the juvenile's argument that the petition for disorderly conduct was fatally defective.
            - In a dissenting opinion, Judge Arrowood held, "based on the totality of the circumstances, the petition averred the charge with sufficient specificity that juvenile was clearly apprised of the conduct for which he was charged." Therefore, the trial court had jurisdiction to enter the adjudication and disposition orders against juvenile for disorderly conduct.
        - *Sufficiency of the Evidence*
            - Majority concluded there was insufficient evidence of disorderly conduct under N.C.G.S. § 14-288.4(a)(1). "Throwing a single chair with no other person nearby and without attempting to hit another person and without hitting even any other item in the cafeteria is not disorderly conduct."

        - Judge Arrowood dissented, finding there was sufficient evidence of disorderly conduct.
    - *See* U.N.C. School of Gov't. Blog Post: Is It Disorderly Conduct? And How Should the School Respond?

- Resisting a Public Officer
    - *In re T.T.E.*, COA17-648, 2018 N.C. App. Lexis 683 (July 17, 2018).
        - There was insufficient evidence of resisting a public officer where the officer intentionally snuck up on the juvenile, the juvenile yelled "no" and cursed when the officer grabbed him, and, within less than two minutes after being "snuck up on" and grabbed from behind, the juvenile was "remarkably calm" and "very respectful[.]"

Constitutionality of Miller-Fix Statutes

- *State v. James,* 514PA11-2, ___ N.C. ___, 813 S.E.2d 195 (May 11, 2018).
    - *State v. James* involved the constitutionality of North Carolina's *Miller*-fix statutes. *See* N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D.
    - In *James*, the Supreme Court of North Carolina held that the *Miller*-fix statutes: (1) did not violate due process; and (2) did not contain a presumption in favor of life without parole.
    - Our Supreme Court explained, in accordance with *Miller*, that "sentences of life imprisonment without the possibility of parole should be reserved for those juvenile defendants whose crimes reflect irreparable corruption rather than transient immaturity." *James*, ___ N.C. at ___, 813 S.E.2d at 207.
    - According to our Supreme Court, LWOP sentences for juveniles should be "exceedingly rare."

Motions to Suppress:

- Preservation of Denial of Motion to Suppress for Appellate Review:
    - *State v. Miller* (2PA17), ___ N.C. ___, 814 S.E.2d 81 (June 8, 2018).
        - Plain error review is NOT available on appeal where the defendant did not move to suppress the evidence either before or during trial.
            - A suppression issue cannot be raised for the first time on appeal.

- Plain error is ONLY available in cases where a suppression hearing was held but the trial attorney failed to renew his/her objection to the admission of the evidence at trial.
- *See* N.C.G.S. § 7B-2408.5 (procedures for motion to suppress before and during adjudicatory hearing); N.C.G.S. § 15A-974 (procedure for motion to suppress in criminal cases)

- Waiver of Rights:
  - *State v. Benitez*, ___ N.C. App. ___, 813 S.E.2d 268 (March 20, 2018).
    - Whether a person qualifies as a juvenile's guardian under N.C.G.S. § 7B-2101(b), depends on "whether the relationship was one established by legal process." *Benitez*, 813 S.E.2d at 275. The requirement of "legal process" means that the individual's authority was established through a court proceeding. *Id*.
    - "[A]t a minimum, the legal authority held by a "guardian," within the meaning of N.C.G.S. § 7B-2101(b), requires authority gained through some legal proceeding." *Benitez*, 813 S.E.2d at 275.

Probation:

- *State v. Moore*, ___ N.C. ___, 807 S.E.2d 550 (Dec. 8, 2017).
  - N.C.G.S. § 7B-2510(e), *In re Gault*, and N.C.G.S. § 15A-1345(e) require notice of the violations alleged for purposes of due process.
  - *Moore* is emblematic of the argument that due process requires a juvenile to receive notice in a motion for review. *Moore* defines "notice" as a "statement of the actions that [the juvenile] has allegedly taken that constitute a violation of a condition of probation." *State v. Moore*, ___ N.C. ___, ___, 807 S.E.2d 550, 555 (2017) (Ervin, J., concurring).
  - Although the adult statute (N.C.G.S. § 15A-1345(e)) contains more specific language than in the Juvenile Code (§ 7B-2510(e)), the principles applied in *Moore* can be applied in contested hearings on a motion for review based on a violation of the juvenile's probation.

DISABILITY RIGHTS
NORTH CAROLINA
Champions for Equality and Justice

Representing Clients with Diminished Capacity, Including Minors: Ethical Considerations

Terminology

Intellectual Disability

- Present from childhood
- Cognitive capacity (IQ) and adaptive functioning
- Severity determined by adaptive functioning

Mental Illness

- Wide variety of conditions that may interfere with occupational, social and daily functions
- Not tied to IQ or age
- May be temporary, cyclical, or episodic

4

Developmental Disabilities

- Severe and chronic; likely to continue indefinitely
- Caused by mental and/or physical impairment
- Manifested before age 22 (exception: head injuries)
- Results in substantial functional limitations in 3 or more of major life activities listed in statute

5

Physical, Sensory and Neurological Disabilities

- Orthopedic impairments
- Deaf/hard-of-hearing
- Blind/low vision
- Spinal cord injury
- Traumatic Brain Injury
- Epilepsy
- Diabetes
- Cerebral palsy
- Dementia

6

Substance Use Disorder

- Presence of at least 2 of 11 criteria
- Severity determined by number of criteria
- Specific substance addressed as separate use disorder (e.g. alcohol use disorder)

7

Person-First Language

- Put the person *before* the disability
- Describe what a person *has*, not who a person *is*
- Reframe “problems” into “needs”

8

Examples

Say . . .	Instead of . . . .
Child / adult with disability	Handicapped or disabled
She has autism.	She’s autistic.
He has an intellectual disability.	He’s mentally retarded.
She uses a wheelchair.	She’s wheelchair-bound.
Congenital disability / Brain injury	Birth defect / Brain damage
Accessible parking	Handicapped parking

Attorney-Client Relationship

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Rule 1.14(a)

When a client's capacity to make "adequately considered decisions" in connection with a representation is diminished, whether because of minority or disability, the lawyer shall, as far as reasonably possible, maintain a "normal" relationship with the client.

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Commentary suggests reasons Rule 1.14 was needed

- Clients with diminished capacity may be unable to monitor their attorneys' performance.
- Studies found that attorneys spend less time interviewing clients with disabilities than other clients.
- There is a tendency to usurp decisions that should be left to the client.

12

Comments to Rule 1.14

"In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor."

13

Rule 1.14(b)

May take protective action if reasonably believe:

- Client has diminished capacity;
- Client is at risk of substantial physical, financial or other harm unless action is taken; and
- Client cannot adequately act in own interest

14

Examples

- Consulting with family members
- Consulting with professionals and/or adult protective services
- Alternatives to guardianship
- Appointment of GAL or guardian

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Factors to Consider

- Client's wishes and values, to the extent known
- Client's best interests
- Preserving client's decision-making autonomy to the greatest extent feasible
- Maximizing client's capabilities
- Respecting the client's family and social connections

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Confidentiality of Information

- Rule 1.6(a): shall not reveal information unless client gives informed consent, disclosure implicitly authorized to carry out representation, or permitted by rule.
- Rule 1.14(c): when taking protective action, lawyer is implicitly authorized to reveal information under Rule 1.6(a) only to extent reasonably necessary to protect client's interests.

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Effective Communication

Rule 1.4: Lawyer shall

- Promptly notify client of decision or circumstance that requires informed consent
- Reasonably consult with client about means to accomplish objectives
- Keep client reasonably informed about status of matter
- Respond to reasonable requests for information
- Consult about limitation on lawyer's conduct

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More Rule 1.4: Lawyer shall

- Consult about limitation on lawyer's conduct
- "Explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"

20

Effective Communication: General Tips for Children

- Consider developmental age and needs
- Be aware of trauma
- Break into sections
- Visual or other forms of communication
- Identify need for forensic interview

21

Effective Communication: General Tips for Disability

- Learn about client's disability
- Assess capacity and maximize it
- Ask about needs and preferences
- Talk to client
- Be aware of body language

22

Effective Communication: Client with ID

- Limit distractions, people present
- Begin by asking some basic questions to assess level of basic knowledge
- Ask questions a number of ways; ask the person to repeat or explain statements
- Avoid compound or complex sentences

23

More Communication: Client with ID

- Wait for a response before continuing
- Eye contact
- Concrete, not abstract
- Minimize and simplify written information

24

Effective Communication: Client with MI

- Be aware of possible processing difficulties
- Be aware of body language
- Wait for a response before continuing
- Let the person know you are prepared to believe them

25

Effective Communication: Client with Dementia

- Limit distractions
- Avoid compound or complex sentences
- Be aware of processing difficulties
- Ask yes/no questions
- Ask questions a number of ways

26

More Communication: Client with Dementia

- Do not confront untruths; work around them
- Don't finish sentence or find word unless asked
- Behavior is communication
- Have discussions earlier in the day

27

The Americans with Disabilities Act

Equal Access to Legal Services

- Prohibits discrimination on the basis of disability in any place of public accommodation -- including lawyer's office
- Discrimination includes failure to make reasonable modifications unless modification is fundamental alteration

29

ADA & Effective Communication

- Public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication
- If particular aid or service would result in fundamental alteration or undue burden, the public accommodation must provide an alternative aid or service (if one exists)

30

Effective Communication

- Meaningful, two-way communication
  - Qualified interpreter
  - "Companion interpreter"
  - Relay services and Video Remote Interpreting (VRI)

31

Effective Communication

- Fundamental alteration
- Undue burden
- Must provide alternative aid or service if exists

32

ADA & Effective Communication

- Must also provide auxiliary aids and services to companions with disabilities
- Should consult with individual to determine what type of auxiliary aid is needed to ensure effective communication (but ultimate decision rests with public accommodation)

33

Examples: Auxiliary Aids & Services

- Note-takers
- Real-time computer-aided transcription services
- Large print
- Text-to-speech technology
- Telephones compatible with hearing aids
- Video text displays
- TTYs or videophones
- Screen reader or magnifier

34

Service Animals

- Individually trained to do work or perform tasks directly related to disability
- May exclude if fundamental alteration
  - Not allergies or fear
- If exclude, still have to offer services

35

DOJ Enforces Equal Access

- 2010 Consent Decree with Colorado attorney
  - Adopt an ADA-compliant service animal policy and post in conspicuous location;
  - Post a “Service Animals Welcome” sign;
  - Undergo training and provide training to staff; and
  - Pay $50,000 in fees and penalties.

http://www.ada.gov/lehouillier.htm

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Contact Information

Disability Rights North Carolina
3724 National Drive, Suite 100
Raleigh, NC 27612

919-856-2195
877-235-4210
888-268-5535 TTY

www.disabilityrightsnc.org

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Client-Lawyer Relationship

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

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

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

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

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

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

Comment

Allocation of Authority between Client and Lawyer

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

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

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

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

Independence from Client's Views or Activities

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

Agreements Limiting Scope of Representation

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

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

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

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

Criminal, Fraudulent and Prohibited Transactions

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

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

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

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

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

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997

Amended March 1, 2003

ETHICS OPINION NOTES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CASE NOTES

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

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Client-Lawyer Relationship

Rule 1.4 Communication

(a) A lawyer shall:

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

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

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

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

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

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

Comment

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

Communicating with Client

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

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

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

Explaining Matters

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

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

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

Withholding Information

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

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997

Amended March 1, 2003; October 2, 2014

ETHICS OPINION NOTES

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

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

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

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

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

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

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

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

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

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

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

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

CASE NOTES

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

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

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

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Client-Lawyer Relationship

Rule 1.6 Confidentiality of Information

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

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

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

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

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

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

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

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

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

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

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

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

Comment

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

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

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

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

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

Authorized Disclosure

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

Disclosure Adverse to Client

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

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

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

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

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

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

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

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

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

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

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

Detection of Conflicts of Interest

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

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

Acting Competently to Preserve Confidentiality

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

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

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

Former Client

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

Lawyer's Assistance Program

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

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997

Amended March 1, 2003; October 2, 2014

ETHICS OPINION NOTES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

not frivolous.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CASE NOTES

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

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

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

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

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

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Client-Lawyer Relationship

Rule 1.14 Client with Diminished Capacity

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

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

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

Comment

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

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

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

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

Taking Protective Action

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

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

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

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

Disclosure of the Client's Condition

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

Emergency Legal Assistance

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

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

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997

Amended March 1, 2003

ETHICS OPINION NOTES

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

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

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

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

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

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

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

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

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98 Formal Ethics Opinion 16

January 15, 1999

Representation of Client Resisting an Incompetency Petition

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

Inquiry #1:

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

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

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

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

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

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

Opinion #1:

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

Inquiry #2:

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

Opinion #2:

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

Inquiry #3:

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

Opinion #3:

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

Inquiry #4:

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

Opinion #4:

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

Inquiry #5:

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

Opinion #5:

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

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

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Effective Communication and the ADA

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

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

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

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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-230

Filed: 19 April 2016

Mecklenburg County, No. 13 CVD 11484

MICHAEL M. BERENS, Plaintiff,

v.

MELISSA C. BERENS, Defendant.

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

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

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

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

INMAN, Judge.

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

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

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

Factual and Procedural Background

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

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

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

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

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

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

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

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

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

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

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

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

The trial court concluded in pertinent part that:

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

Defendant and Ms. Adams timely appealed.

Ms. Adams's Appeal

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

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

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

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

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

Defendant-Appellant's Appeal

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

Standard of Review

A trial court's order compelling the production of documents that a party claims are protected by the attorney-client privilege or the work product doctrine is generally subject to review for an abuse of discretion. *Isom v. Bank of Am., N.A.*, 177 N.C. App. 406, 410, 628 S.E.2d 458, 461 (2006). "To demonstrate such abuse, the trial court's ruling must be shown to be manifestly unsupported by reason or not the product of a 'reasoned decision.'" *Id.* at 410, 628 S.E.2d at 461 (citation omitted)

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

Analysis

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

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

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

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

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

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

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

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

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

I. Attorney-Client Privilege

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

> A privilege exists if (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege. . . . Communications between attorney and client generally are not privileged when made in the presence of a third person who is not an agent of either party.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Work Product Doctrine

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

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

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

> The work-product doctrine shields from discovery all materials prepared in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent. This includes documents prepared after a party secures an attorney and documents prepared under circumstances in which a reasonable person might anticipate a possibility of litigation. Materials prepared in the ordinary course of business are not protected by the work-product doctrine. The test is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.

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

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

III. Remand

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

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

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

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

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

Conclusion

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

REVERSED AND REMANDED.

Judges CALABRIA and STROUD concur.

§ 122C-3. Definitions.

The following definitions apply in this Chapter:

. . .

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

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

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

c. Is likely to continue indefinitely;

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

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

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

. . .

Intellectual Disability

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

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

Disorder Characteristics

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

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

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

Name Change

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

Comprehensive Assessment

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

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

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

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

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

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

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

Substance-Related and Addictive Disorders

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

Substance Use Disorder

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

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

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

Addictive Disorders

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

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

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

Other Disorders of Interest

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

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

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

Alcohol, Other Drugs, and Health: Current Evidence

Informing you of the latest clinically relevant research on alcohol, illicit drugs, and health

Research Summary

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

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

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

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

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

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

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

Darius A. Rastegar, MD

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

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

The Defender's Role in Delinquency Appeals

AUGUST 17, 2018

AMANDA ZIMMER, ASSISTANT APPELLATE DEFENDER
DAVID ANDREWS, ASSISTANT APPELLATE DEFENDER
OFFICE OF THE APPELLATE DEFENDER

Do appeals matter?

- Remember *J.D.B. v. North Carolina*, 564 U.S. 261 (2011)?
- *J.D.B.* originated in Hillsborough, NC and has helped provide greater protections for juveniles in interrogations around the country
- These protections exist because the juvenile in *J.D.B.* appealed

Do appeals matter?

- There are also many appeals in which the evidence was insufficient to support an adjudication
- If an adjudication is vacated as part of the appeal and the disposition has been stayed, the juvenile will not have to submit to dispositional alternatives, such as probation or commitment to YDC

What happens when you appeal?

- Many people think that appeals primarily involve issue-spotting and written / oral argument
- But it's more complicated than that. Most appeals don't involve oral argument
- Plus, there's a lot more that happens *before* issue-spotting and argument occur
- There are some things that trial attorneys can do to help move the appeal forward

The timeline for appeals

- The court reporter has 60 days to prepare the transcript
- The juvenile has 35 days to prepare the record on appeal (a compilation of important documents from the court file)
- The State has 30 days to review the record on appeal
- The juvenile has 15 days to docket the record on appeal in the Court of Appeals

The timeline for appeals

- The juvenile has 30 days to file the brief
- The State has 30 days to file a response
- The Court of Appeals must first decide on oral argument and then how to rule on the appeal
- The juvenile 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
One West Morgan Street
Raleigh, North Carolina 27601
This calendar is available at: https://appellate.nccourts.org/calendar.php?court=2
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.**

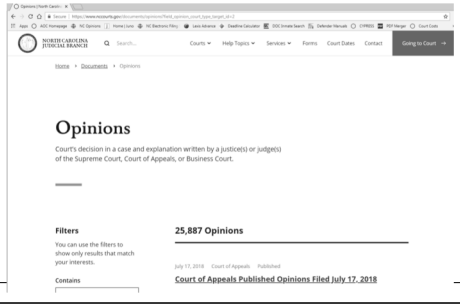
State v. Bradley	17-1561	New Hanover
Glover v. The Charlotte-Mecklenburg Hosp...	17-1368	Mecklenburg

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	17-1185	Forsyth
State v. Enoch	17-1246	Alamance
State v. Johnson	17-1368	Cumberland
State v. Perry	17-1330	Henderson
State v. Walton	17-1356	Chowan
[redacted]	[redacted]	[redacted]
In re: D.K.	17-1389	Onslow
Khatib v. NC Dept of Transp.	17-1400	N.C. Industrial Commission
Smith v. Smith	18-59	Mecklenburg
Henson v. Henson	18-110	Cabarrus

The timeline for appeals

- You can find appellate court opinions at nccourts.gov



The timeline for appeals

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-648

Filed: 17 July 2018

Buncombe County, No. 16 JB 315

IN THE MATTER OF: T.T.E.

Appeal by juvenile from adjudication and disposition entered 27 February 2017 by Judge Susan M. Dotson-Smith in District Court, Buncombe County. Heard in the Court of Appeals 13 December 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Janelle E. Varley, for the State.

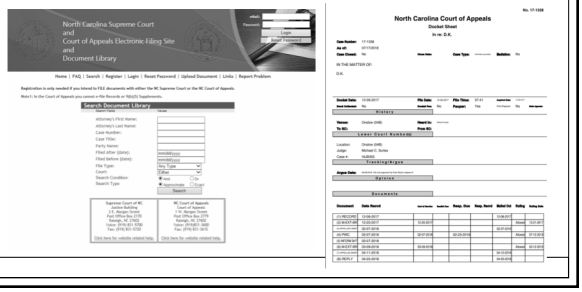
Morgan & Carter PLLC, by Michelle F. Lynch, for juvenile-appellant.

STROUD, Judge.

Juvenile appeals adjudication and disposition orders for disorderly conduct and resisting a public officer. Because there was insufficient evidence to support the adjudication for either offense, we vacate the juvenile court's adjudication and disposition orders.

The timeline for appeals

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



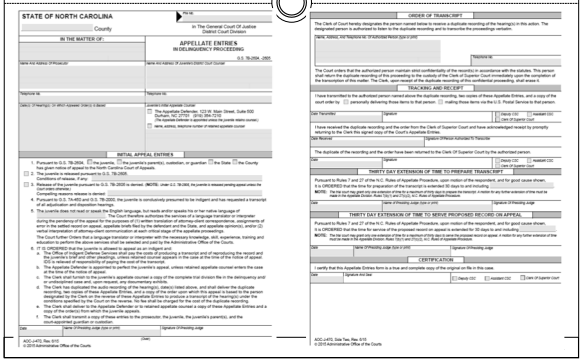
What happens when you appeal?

- When you give notice of appeal, the clerk must appoint the Appellate Defender to the case
- The Appellate Defender must assign the case to 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
- The clerk may or may not send the appellate entries to the Appellate Defender
- There is no deadline for the clerk to serve the appellate entries on the court reporter
- <u>This is where appeals get lost or delayed</u>

The appellate entries



STATE OF NORTH CAROLINA

County

In The General Court Of Justice
District Court Division

IN THE MATTER OF:

APPELLATE ENTRIES
IN DELINQUENCY PROCEEDING

G.S. 7B-2604, -2605

INITIAL APPEAL ENTRIES

ORDER OF TRANSCRIPT

TRACKING AND RECEIPT

THIRTY DAY EXTENSION OF TIME TO PREPARE TRANSCRIPT

THIRTY DAY EXTENSION OF TIME TO SERVE PROPOSED RECORD ON APPEAL

CERTIFICATION

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 is available on the forms page of the AOC website.
- The form number is: AOC-J-470
- The form is a PDF file that you can fill out electronically before the dispositional hearing

The appellate entries

- Please fill out the appellate entries, have the judge sign it, and put a copy in the court file
- Please ask the clerk to assign a court reporter and to send a copy of the court file to the appellate attorney
- Please fax a copy of the appellate entries to the Appellate Defender at (919) 354-7211
- If possible, do these things on the day you give notice of appeal, which will help reduce delays in the appeal

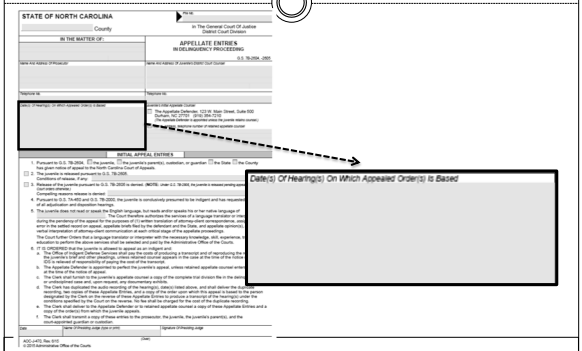
The appellate entries

- If you have questions about who the court reporter will be, contact David Jester, Court Reporting Manager for the AOC
- David can be reached at: David.E.Jester@nccourts.org

The appellate entries

- Please make sure the appellate entries lists the dates of any hearings that occurred in the case
- It is difficult and time-consuming for the appellate attorney to identify hearing dates
- Adding hearing dates later can significantly delay the appeal

The appellate entries



The right to appeal

- N.C. Gen. Stat. § 7B-2602:

Notice of appeal shall be given in open court at the time of the hearing or in writing within 10 days after entry of the order. However, if no disposition is made within 60 days after entry of the order, written notice of appeal may be given within 70 days after such entry. A final order shall include:

(1) Any order finding absence of jurisdiction;

(2) Any order which in effect determines the action and prevents a judgment from which appeal might be taken;

(3) Any order of disposition after an adjudication that a juvenile is delinquent or undisciplined; or

(4) Any order modifying custodial rights.

The right to appeal

- The primary way a juvenile gets appellate review is by appealing from a dispositional order
- There do not appear to be any delinquency appeals based on the "absence of jurisdiction," custodial rights, or orders that determine the action and prevent entry of judgment

The right to appeal

- As a general matter, a juvenile cannot appeal unless disposition has been entered
- For example, there is no right to appeal:
  - An order finding the juvenile capable to proceed
  - An order finding probable cause
  - An order placing the juvenile in secure custody

The right to appeal

- There is also no right to appeal an adjudication order unless disposition is not entered for 60 days and notice of appeal is given w/in 70 days of adjudication
- (Of course, a juvenile may challenge an adjudication order as part of an appeal from a dispositional order)
- A juvenile can appeal an order denying a suppression motion, but only "upon an appeal of a final order of the court in a juvenile matter." N.C. Gen. Stat. § 7B-2408.5(g)

The right to appeal: Transfer orders

- To appeal a transfer order, the juvenile must give notice of appeal in open court or in writing w/in 10 days of the order. N.C. Gen. Stat. § 7B-2603(a)
- The appeal goes first to superior court
- If the juvenile fails to appeal the transfer order to superior court, s/he cannot challenge the order in the Appellate Division. *State v. Wilson*, 151 N.C. App. 219 (2002)

The right to appeal: Transfer orders

- If the juvenile appeals the transfer order to superior court and pleads guilty, the juvenile has no right to appeal the transfer decision to the Appellate Division. *State v. Evans*, 184 N.C. App. 736 (2007)
- The juvenile might be able to get review through a writ of certiorari, but the writ of certiorari is discretionary and can be denied with no explanation

How to give notice of appeal

- Notice of appeal must be given in open court "at the time of the hearing" or in writing within 10 days after entry of the final order. N.C. Gen. Stat. § 7B-2602
- If no disposition is made within 60 days after adjudication, written notice of appeal may be given within 70 days

Notice of appeal: Hypo #1

- At the end of the dispositional hearing, the judge says, "The juvenile has been adjudicated delinquent for assault. The juvenile is a level one for disposition and will be on probation for one year."
- Defense Attorney: "We enter notice of appeal."
- Effective?

Notice of appeal: Hypo #2

- At the end of the dispositional hearing, the judge says, "The juvenile has been adjudicated delinquent for assault. The juvenile is a level one for disposition and will be on probation for one year."
- Defense Attorney: "We enter notice of appeal from the adjudication."
- Effective?

Notice of appeal: Hypo #3

- At the beginning of the dispositional hearing, the judge asks whether the juvenile intends to appeal and the defense attorney says yes.
- The judge then says, "Okay. The juvenile is a level one for disposition and will be on probation for one year."
- The defense attorney says, "Thank you, your Honor." The hearing ends.
- Effective?

Notice of appeal: Hypo #4

- Two days after the dispositional hearing, the defense attorney returns to court and says for the record, "Your Honor, my client was adjudicated delinquent for assault and given a level one disposition. At this time, we enter notice of appeal."
- Effective?

Notice of appeal: Hypo #5

- The judge adjudicates the juvenile delinquent for assault. Five weeks later, the defense attorney enters written notice of appeal from the adjudication order.
- Effective?

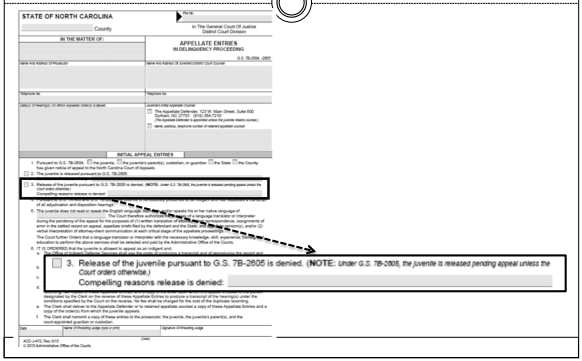
Staying disposition during the appeal

- When you give notice of appeal, be sure to ask the judge to stay the dispositional order while the appeal is pending
- If the adjudication is vacated as part of the appeal, the juvenile will not have to submit to the dispositional alternatives if the dispositional order has been stayed
- Stay motions have worked in past cases and a sample is available on the Juvenile Defender motions bank

Custody of the juvenile during the appeal

- If the judge does not stay disposition and commits the juvenile to YDC or places the juvenile in custody, make sure the judge states compelling reasons on the appellate entries
- Under N.C. Gen. Stat. § 7B-2605, the juvenile should be released while the appeal is pending "unless the court orders otherwise."
- The judge may not place the juvenile in custody during the appeal unless s/he provides "compelling reasons" in writing.

Custody of the juvenile during the appeal


STATE OF NORTH CAROLINA

In The General Court Of Justice
District Court Division

IN THE MATTER OF:

APPELLATE ENTRIES
IN DELINQUENCY PROCEEDING

INITIAL APPEAL ENTRIES

3. Release of the juvenile pursuant to G.S. 7B-2605 is denied. (**NOTE**: *Under G.S. 7B-2605, the juvenile is released pending appeal unless the Court orders otherwise.*)
Compelling reasons release is denied:

Pulling it all together

- Make sure the juvenile has the right to appeal
- Give proper and timely notice of appeal
- Prepare an appellate entries with all of the hearing dates and have the judge sign it on the day you give notice of appeal
- Ask the judge to stay the dispositional order
- If the dispositional order is not stayed and the order requires the juvenile to be placed in custody, argue that compelling reasons do not exist to keep the juvenile in custody during the appeal
- Make sure the clerk sends the recordings to the court reporter and the court file to the appellate attorney in a timely manner

Objections

- Object to any evidence that you suspect is inadmissible
- Provide specific grounds for your objections
- Constitutionalize your objections
- If you lost a suppression motion, renew the motion when the State introduces the evidence

Objections

- "A general objection is normally not sufficient to preserve an issue for review on appeal." *State v. Delsanto*, 172 N.C. App. 42 (2005)
- Get a ruling on the objection. Without a ruling, the argument is waived. *Walden v. Morgan*, 179 N.C. App. 673 (2006)

Objections

- The Rules of Evidence apply at adjudication hearings. N.C. Gen. Stat. § 7B-2408
- Use the Rules to keep evidence out
- Even if the evidence is admitted, you can preserve the argument by making a specific evidentiary objection
- Common arguments include: Non-corroborative hearsay, 404(b) evidence, opinion on guilt, vouching for the victim's credibility

Constitutional arguments

- If you anticipate making constitutional arguments, put the argument in a motion and litigate it.
- "Constitutional issues not raised . . . at trial will not be considered for the first time on appeal." *State v. Gainey*, 355 N.C. 73 (2002)
- If an unexpected issue arises and you cannot file a motion, constitutionalize your objection. Due Process is most likely an appropriate basis for your objection

Constitutional arguments

- Juveniles do not have the right to a jury trial and it is unclear whether they have the right to a speedy trial or to self-representation
- However, juveniles have the right to due process, to counsel, to confrontation, and to be free of self-incrimination
- *In re Gault*, 387 U.S. 1 (1967): "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."

Don't forget about the NC Constitution

- The protections in state constitutions often extend "beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977)
- N.C. Const. art. I, § 19 is the state-level equivalent of a due process clause
- If you raise a due process objection, be sure to note that the objection involves both the U.S. and N.C. constitutions

The motion to dismiss

- Always make a motion to dismiss at the close of the State's evidence and at the close of all the evidence. Failure to do so waives the argument on appeal. *In re Rikard*, 161 N.C. App. 150 (2003)
- Challenge each element of each offense
- Raise variance arguments
- Constitutionalize the argument under the due process clauses of the U.S. and N.C. constitutions

The motion to dismiss

- The defendant's sufficiency argument on appeal was waived because he presented a "different theory . . . than that he presented at trial . . . ." *State v. Euceda-Valle*, 182 N.C. App. 268 (2007)
- "Defendant moved to dismiss the habitual felon charge based upon double jeopardy and not based upon a variance between the indictment and proof. Defendant waived his right to raise this issue by failing to raise the issue at trial." *State v. Baldwin*, 117 N.C. App. 713 (1995)

The motion to dismiss

- "Your Honor, the juvenile moves to dismiss each petition on the grounds that the evidence is insufficient as a matter of law on every element of each offense and that adjudicating the juvenile delinquent would violate the Fourteenth Amendment to the U.S. Constitution and Article I, Section 19 of the North Carolina Constitution."

The motion to dismiss

- "Further, the juvenile asserts that, as to each petition, there is a variance between the offense alleged in the petition and any offense for which the state's evidence may have been sufficient and that adjudicating the juvenile delinquent would violate the Due Process clauses of the United States and North Carolina constitutions."

The motion to dismiss

- If there are specific elements that you believe are not satisfied by the evidence, argue about those elements
- If the judge asks for specific variance arguments and you are not aware of any, tell the judge that you are raising a variance argument to preserve the issue for appeal

Suppression motions

- N.C. Gen. Stat. § 7B-2408.5 governs suppression motions in juvenile court
- Under the statute, the suppression motion must include an affidavit
- In adult cases, the failure to include an affidavit waives the suppression issue, even on appeal. *State v. Holloway*, 311 N.C. 573 (1984)

Suppression motions

- If the trial attorney does not file any motion to suppress, the juvenile cannot raise a suppression issue on appeal. *State v. Miller*, 2018 N.C. LEXIS 425
- If the juvenile made a confession or was subject to a search or seizure, you should strongly consider filing and litigating a suppression motion

Suppression motions

- If the suppression motion is denied, object when the evidence is admitted at the adjudication hearing because the failure to do so creates a heavier burden on appeal
- A pretrial ruling on a motion to suppress is "preliminary," which means the juvenile must object when evidence is offered during the adjudication hearing. *State v. Waring*, 364 N.C. 443 (2010)
- The failure to object when the evidence is admitted subjects the argument to plain error review on appeal. *State v. Stokes*, 357 N.C. 220 (2003)

Suppression motions and admissions

- Give the prosecutor and the court notice of the juvenile's intent to appeal the suppression order before the juvenile enters the admission

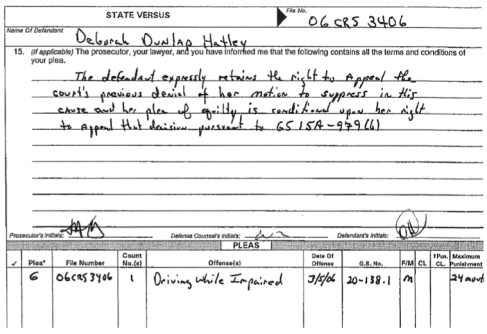
AND

- Enter notice of appeal from the dispositional order (not from the suppression order)

Suppression motions and admissions

- "The plea bargaining table does not encircle a high stakes poker game . . . . As such, it is entirely inappropriate for either side to keep secret any attempt to appeal the conviction." *State v. Reynolds*, 298 N.C. 380 (1979)
- The plea transcript form for juvenile cases is: AOC-J-410

Suppression motions and admissions



STATE VERSUS

File No. 06 CRS 3406

Name Of Defendant: Deborah Dunlap Hatley

15. (If applicable) The prosecutor, your lawyer, and you have informed me that the following contains all the terms and conditions of your plea.

The defendant expressly retains the right to appeal the court's previous denial of her motion to suppress in his case and her plea of guilty is conditioned upon her right to appeal that decision pursuant to GS 15A-979(b)

Prosecutor's Initials: _____ Defense Counsel's Initials: _____ Defendant's Initials: _____

PLEAS

✓	Plea*	File Number	Count No.(s)	Offense(s)	Date Of Offense	G.S. No.	F/M	CL	Thn. CL	Maximum Punishment
	G	06CRS3406	1	Driving while Impaired	7/4/06	20-138.1	M			24 mont

Resources

- Juvenile Defender website: ncjuveniledefender.com
- The Juvenile Defender Manual: defendermanuals.sog.unc.edu
- IDS Briefbank: www.ncids.org
- The North Carolina Criminal Law Blog: nccriminallaw.sog.unc.edu
- Juvenile Justice Case Compendium: www.sog.unc.edu/jjcc/