
USE AND LIMITS OF PROTECTION

By

**Jon B. Kurtz
Tash & Kurtz, PLLC
Winston-Salem, North Carolina**

- Previously printed as: "Use and Limits of Protection," Evidentiary Issues in Child Custody Cases: Hot Topics in Family Law, North Carolina Bar Foundation, Continuing Legal Education Seminar, September 2004.
- Attachments from this manuscript have been omitted on this website.
- Please note that this manuscript is for informational purposes only. It is dated November 2006 and only purports to discuss issues relevant at that time. Laws and rules change, and this manuscript has not been updated to reflect any revisions in such laws and rules that may have become effective since September 1, 2004.
- Please see our Disclaimer on this website.
- These materials were part of a Continuing Legal Education program of the North Carolina Bar Association Foundation. They are reprinted with the express permission of the North Carolina Bar Association Foundation. All rights reserved.

USE AND LIMITS OF PROTECTION

I. Privilege in Custody Proceedings

Rule 501, of the North Carolina Rules of Evidence provides that "Except as otherwise required by the Constitution of the United States, the privileges of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with the law of this State." N.C.G.S. §8C Rule 501. This seemingly simple provision is in fact somewhat complex because North Carolina evidence rules, with regard to the issue of privilege, are based upon both common law principles and statutory principles. Sometimes these principles overlap and conflict with one another. Generally, N.C.G.S. § 8-53, *et. seq.*, § 8-56, *et. Seq.*, and Rule 1.6 of the Revised Rules of Professional Conduct address many of the common privileges that may be asserted at trial. This manuscript will review many of the common privileges that can be asserted at trial, before trial (in discovery or by subpoena) and those that are particularly relevant in custody litigation.

A knowledge of the law relating to privileges in custody litigation is important because not all evidence that a party attempts to obtain or introduce is admissible. Rule 26(b)(1) of the North Carolina Rules of Civil Procedure provides, in pertinent part, that "[P]arties may obtain discovery regarding any matter which is not privileged which is relevant to the subject matter involved in the pending action whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." N.C.G.S. § 1A-1, Rule 26(b)(1)(2001).

Any unprivileged matter that is relevant is discoverable. If the matter for which discovery is sought is privileged, then it is discoverable only if the interests of justice outweigh the protected privilege. See, Shellhorn v. Brad Ragan, Inc., 38 N.C. App. 310, 314, 248 S.E.2d 103, 106 (1979). In some other cases, as §8-53 *et. seq.* points out, not all information or witnesses are even qualified to be admissible even if the interests of justice outweigh the protected privilege.

II. N.C.G.S. § 8-53, Communications Between Physician and Patient

No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon, and no such information shall be considered public records under G.S. 132-1. Confidential information obtained in medical records shall be furnished

only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin. Any resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to G.S. 8-52.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge. N.C.G.S. § 8-53.

Pursuant to the terms of this statute, neither you nor your client, are permitted to compel the transfer of confidential medical records or confidential medical information from an opposing party's records, or physician, without the authorization of the other party, or his executor, administrator or next of kin, if deceased, unless a court makes a finding that disclosure of such confidential information is **necessary to a proper administration of justice**.

The legislative intent of the physician-patient privilege was that the privilege should be a shield and not a sword. The Legislature was "[C]areful to make provision to avoid injustice and suppression of truth by putting it in the power of the trial judge to compel disclosure. Judges should not hesitate to require the disclosure where it appears to them to be necessary in order that the truth be known and justice be done." State v. Bryant, 5 N.C.App. 21, 167 S.E.2d 841, 846 (1969). To determine whether disclosure of confidential information should be compelled, various factors may be considered. One of the easiest challenges to the claim of privilege is **implied waiver**.

Although not a family law case, the recent decision by the North Carolina Court of Appeals, Mims v. Wright, 578 S.E.2d 606 (2003) provides a good summary of the physician-patient privilege. The plaintiff was injured in an automobile accident by the defendant and plaintiff sued for damages. The plaintiff filed a request for production of documents and asked for all of the defendant's medical records for the five years prior to the accident. The defendant objected to the request for medical records and cited, among other reasons, the physician-patient privilege. The plaintiff subsequently filed a motion to compel the discovery. The trial court ordered the medical records turned over and held that the defendant, by driving, waived the privilege and that the records were relevant and material to the hearing and may lead to the discovery of admissible or relevant evidence and that they should be produced. Id. at 608.

Here, the Court of Appeals held that the trial court erred in its finding that the physician-patient privilege did not apply. The court further found that there was not a waiver of the privilege by merely driving. The court stated that the "physician-patient privilege is to **be strictly construed** and that the **patient bears the burden** of establishing the existence of the privilege and objecting to the discovery of such privileged information. Moreover, the privilege is not absolute and may be waived, either by **express waiver** or by **waiver implied from the patient's conduct**." Id. at 609.

(citations omitted)(Emphasis added).

The Court of Appeals stated that **implied waiver** occurs where:

[1][t]he patient fails to object to testimony on the privileged matter; [2] the patient herself calls the physician as a witness and examines him as to the patient's physical condition; or [3] the patient testifies to the communication between herself and the physician. Subsequent case law has also recognized an implied waiver [4] where a patient by bringing an action, counterclaim or defense directly placed her medical condition at issue." *Id.* at 609. (citations omitted)(numbers added).

The Court of Appeals further stated that, "Privileged medical information may still be discoverable if 'disclosure is necessary to a proper administration of justice.' N.C.G.S. § 8-53. "The decision that disclosure is necessary to a proper administration of justice 'is one made in the discretion of the trial judge, and the defendant must show an abuse of discretion in order to successfully challenge the ruling.'" Whether the trial court has to make a specific finding that disclosure is necessary for the proper administration of justice is unclear though. See *id.*, ("N.C.G.S. § 8-53 does not require such an explicit finding. The finding is implicit in the admission of the evidence." *Id.* at 609-610. (some citations omitted).

The purpose of North Carolina's statutory physician-patient privilege is to encourage a patient to fully disclose pertinent information to a physician so that "proper treatment may be prescribed, to protect the patient against public disclosure of socially stigmatized diseases, and to shield the patient from self-incrimination... the proviso [allowing for compelled disclosure of privileged information] was intended to refer to exceptional rather than ordinary factual situations" *Id.* at 610. (citations omitted).

Although a privilege may otherwise exist, a party will lose the right to the privilege if he **places a medical condition in issue** in his pleadings and such action is considered a **waiver** of the physician-patient privilege and any information which would otherwise be protected becomes subject to discovery. *Id.* at 609. See also, State v. Smith, 347 N.C. 453, 461, 496 S.E.2d 357, 362 (1998) (which stated that where a criminal defendant placed at issue his past state of mind, the prosecution could properly seek to rebut said evidence with his medical records); Green v. Maness, 316 S.E.2d 917 (1984) (in which it was held that a patient who voluntarily testified about his injuries and medical treatment waives the privilege and that the physician can be examined. "The bringing of an action in which an **essential part** of the issue is the existence of physical ailment should be a waiver of the privilege for all communications concerning that ailment.") *Id.*

One specific tip that can help prevent an attorney from committing an ethical violation is to follow Rule 26 of the North Carolina Rules of Civil Procedure when trying

to procure information from the opposing party's physician. Private interviews with the opposing party's doctor are prohibited without the other party's express consent. This applies even if the privilege has been waived. See, Crist v. Moffatt, 326 N. C. 326, 389 S.E.2d 41, 46 (1990), ("Once the statutory privilege has been waived, the confidential nature of the physician-patient relationship remains, even though medical information is being subject to discovery." Assuming the privilege has been waived, the proper procedure for discovery of the information is pursuant to the discovery provisions in the North Carolina Rules of Civil Procedure. Private interviews with nonparty treating physicians are prohibited without the other parties express consent. The statutorily recognized methods of discovery enumerated in Rule 26 must be utilized.")

The North Carolina Supreme Court has held that the physician-patient privilege "extend[s] only to those cases in which the physician and **patient relationship existed at the time of the communication** and where the information given was **necessary for diagnosis or treatment.**" State v. Mayhand, 298 N.C. 418, 259 S.E.2d 231, 238 (1979). (emphasis added). Just because a physician witnesses a matter relevant to a trial or has information relevant to a trial does not automatically disqualify her as a witness. The information must have been gained subject to the above parameters. The privilege created by N.C.G.S. § 8-53 is for **the benefit of the patient**, but that the privilege is **qualified** and can be waived by him or by the judge if doing so is necessary to the proper administration of justice.

The North Carolina Court of Appeals has stated:

Interpreting G.S. 8-53, our Supreme Court has held that the privilege created by that statute is for the benefit of the patient alone, and "extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe. The privilege may be waived by the patient, and in any event is a qualified, rather than an absolute, privilege and that the judge has discretion, either at the trial or prior thereto, to "compel such disclosure, if in his opinion the same is necessary to a proper demonstration of justice. Matter of Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979), (citations omitted) (emphasis added).

An element of N.C.G.S. § 8-53 which is vital to the issue of privilege is whether a communication was "confidential." The North Carolina Supreme Court discusses the "confidential" nature of such information in the case of Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987).

In Cates, the plaintiff and her child brought a malpractice action against

physicians as a consequence of the child being born mentally retarded and with cerebral palsy. One of the questions brought before the court was whether a plaintiff who has waived his physician-patient privilege as to nonparty treating physicians may preclude those physicians from testifying as experts for the opposing party. Cates, 361 S.E.2d at 740. The court held that there should be no preclusion and stated that "[o]nce a plaintiff waives his right to prohibit disclosures of confidences by his physicians he may not assert the physician-patient privilege to prevent them from testifying as experts for his opponent." *Id.*

In Cates, the plaintiff argued that although the physician-patient privilege as to "information" was waived, that her physicians "opinion" testimony was still privileged. The North Carolina Supreme Court disagreed. The court noted that the privilege extends beyond orally communicated information and covers "knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe." Cates, 361 S.E.2d at 742. The North Carolina Supreme Court noted that the **physician-patient privilege may be waived by the patient and that said waiver may be express or implied.** See also, Capps v. Lynch, 253 N.C. 18, 116 S.E.2d 137, 141 (1960). A **waiver by implication** is found when **"the patient calls the physician as a witness and examines him as to patient's physical condition, where patient fails to object when the opposing party causes the physician to testify, or where the patient testifies to the communication between himself and physician. The patient also waives his privilege by implication when he 'voluntarily goes into detail regarding the nature of his injuries and either testifies to what the physician did or said while in attendance.'"** Cates, 361 S.E.2d at 742. (emphasis added).

The principle is such that when a patient discloses, or allows disclosure of, information gained by the physician during the physician-patient relationship, that the privilege should then be lost. The physician-patient privilege belongs to the patient, but when the patient "breaks the fiduciary relationship with the physician by revealing, or permitting revelation of, the substance of the information transmitted to the physician, the patient has, in effect, determined it is no longer important that the confidences which the privilege protects continue to be protected. Having taken this position, the plaintiff may not silence the physician as to matters otherwise protected by the privilege." Cates, 361 S.E.2d at 742-743.

In Cates, the plaintiff was found to have impliedly waived the physician-patient privilege as to each of the treating physicians that she called as an expert witness. Not only was the privilege deemed waived with regard to information conveyed to the physicians, but it was also extended to any **"opinions"** that were held by the plaintiff's treating physicians and which were formed as a result of the information gained during their treatment of her. Therefore, the court held that there was "no statutory basis for allowing a patient to waive his privilege as to information gained by his physician while maintaining it as to his physicians opinions." Cates, 361 S.E.2d at 743.

Since the physician-patient privilege belongs to the patient, he or she must be

vigilant in objecting to any request for discovery, or subpoenas which are issued and which may attempt to gain information which would be protected by the privilege. Additionally, one must be aware of the need to immediately object at trial in the event that an attempt is made to breach the privilege. North Carolina General statutes §1A-1, **Rule 26** makes it clear that parties may obtain discovery regarding any non-privileged matter that is relevant to the subject matter involved in the pending action. It is not a proper ground for objection that the information sought will be inadmissible at trial if said information appears reasonably calculated to lead to the discovery of admissible evidence. In the event that a party seeks information through discovery relating to information which would be subject to the physician-patient privilege, the disclosure, without objection, of said information may serve to waive the privilege. In the event that a party seeks privileged information, the party asserting a privilege should object to said request.

Similarly, if there is an attempt to subpoena a doctor to deposition or trial for the purpose of testifying about information which may be privileged, or for her to produce copies of medical records, one may refer to Rule 45 of the North Carolina Rules of Civil Procedure. Rule 45 provides guidance regarding subpoenas, said rules being amended in 2003. As the changes to Rule 45 are fairly recent, a review of the statute is suggested as there have been substantial changes made. Rule 45(c) provides the procedure for requesting information pursuant to subpoena and for objecting to and requesting a protective order of same. It states, in pertinent part, that a subpoena may command that medical records be tendered but that said subpoena is not sufficient, in and of itself, to waive the physician-patient privilege or to require a privileged communication under law to be disclosed. See, N.C.G.S. § Rule 45(2). It is important, however, for the party asserting the privilege to promptly object to the information requested or to the testimony of a physician. Rule 45(3-5) discusses how an objection should be made.

Specifically, "[s]ubject to subsection (d) of this rule, a person commanded to appear at a deposition or to produce and permit the inspection and copying of records may, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection." N.C.G.S. § Rule 45(c)(3). **Once an objection has been properly made** pursuant to Rule 45, the information sought or the person's appearance at deposition, **shall not be compelled without an order** of the court. See, N.C.G.S. § 1A-1 Rule 45 (c)(4). Finally, a person who is subpoenaed to a trial, hearing or deposition, or who is subpoenaed to produce documents, within 10 days after service of the subpoena or before the time specified for compliance if less than 10 days after service, may file a motion to quash or modify the subpoena. The court "shall" quash or modify the subpoena if the subpoenaed person demonstrates the existence of certain factors, including the disclosure of privileged or other protected matters and where no exception or waiver applies to the privilege or protection. See, N.C.G.S. § 1A-1 Rule 45 (c)(5).

Although beyond the scope of this article, one should be familiar with the Health Insurance Portability and Accountability Act of 1996, ("HIPAA") which sets forth certain requirements regarding the privacy of medical information. The United States Department of Health and Human Services website located at <http://aspe.hhs.gov/admsimp/index.shtml>, provides valuable resources for understanding the intricacies that must be followed by attorneys in obtaining certain medical information.

III. N.C.G.S. § 8-53.13, Nurses Privilege

A nurse's privilege also exists and is codified at N.C.G.S. § 8-53.13. The statute has recently been amended by the Legislature and will be modified, effective December 1, 2004. The revised statute will provide:

No person licensed pursuant to Article 9A of Chapter 90 of the General Statutes shall be required to disclose any information that may have been acquired in rendering professional nursing services, and which information was necessary to enable that person to render professional nursing services, except that the presiding judge of a superior or district court may compel disclosure if, in the court's opinion, disclosure is necessary to a proper administration of justice and disclosure is not prohibited by other statute or rule. Nothing in this section shall preclude the admission of otherwise admissible written or printed medical records in any judicial proceeding, in accordance with the procedure set forth in G.S. 8-44.1, after a determination by the court that disclosure should be compelled as set forth herein. N.C.G.S. § 8-53.13 (effective, December 1, 2004). (Note that the pre-December 1, 2004 statutory provision omits the last sentence set forth above.)

There presently does not exist any appellate decisions with regard to a specific nurse's privilege subsequent to the introduction of this statute, in large part, because the statutory provision was originally made effective October, 2003. The analysis with regard to physician-patient privilege set forth above would, however, likely be analogous with the nurse's privilege.

IV. N.C.G.S. § 8-53.1, Physician-Patient and Nurse Privilege Waived in Child Abuse

Although the physician-patient and nurse's privilege provide that certain information is privileged, said privilege is **qualified** in nature. Not only can a trial judge order this privileged information to be provided in the event that said information is found to be necessary to a proper administration of justice, N.C.G.S. § 8-53.1

specifically makes it clear that no such privilege shall apply in the event that said evidence relates to the abuse or neglect of a child under the age of 16. This statutory provision has been modified by the state Legislature and the modification will be effective as of December 1, 2004. The changes to said statute specifically add reference to the nurse's privilege. The statute will read as follows:

Notwithstanding the provisions of G.S. 8-53 **and G.S. 8-53.13**, the physician-patient **or nurse** privilege shall not be a ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the North Carolina Juvenile Code, Chapter 7B of the General Statutes of North Carolina. N.C.G.S. §8-53.1 (Effective, December 1, 2004). (Note that bold items have been added to represent the changes that will take effect in December, 2004).

In any proceeding in which a juvenile's abuse or neglect is an issue, evidence of abuse is admissible and a physician or a nurse can be compelled to testify with regard to knowledge that he or she has relating to said abuse. The North Carolina Supreme Court, in the case of State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987), held that the need for confidential medical treatment needed to be balanced against the need to protect child victims and found that the legislature intended to provide the broadest possible exceptions to the physician-patient privilege with regard to such circumstances. See, 352 S.E.2d at 677. This reasoning would also apply to the more recent statutory nurse's privilege and upcoming revision to N.C.G.S. § 8-53.1.

In the case of State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983), the North Carolina Supreme Court discussed a trial judge's discretionary authority to compel disclosure if he finds such disclosure to be "necessary to a proper administration of justice." The court found, in this criminal case, that an assault occurred and the defendant received treatment for gonorrhea. A minor child who was sexually assaulted by the defendant was subsequently afflicted with gonorrhea. The minor child had similar vaginal irritations which "could have been gonorrhea" approximately 11 days after the assault and the court found that females generally contract gonorrhea through sexual intercourse with an infected man. The trial court concluded that the **medical records of the defendant were relevant to a litigated issue** and that the trial court made sufficient findings to take the Defendant's medical records out of the privileged communication rule of N.C.G.S. § 8-53. Efird, Id at 230-31. "The statute affords trial judge's wide discretion in determining what is necessary for a proper administration of justice... [and] "[j]udges should not hesitate to require the disclosure where it appears to them to be necessary in order that the truth be known and justice be done." Id at 231. Although the court, here, specifically discussed the issue of whether or not the admission of said evidence would be admissible because of its necessity for a proper demonstration of justice, § 8-53.1 would clearly make the Defendant's medical records and information admissible as an issue if the case relates to the abuse of a child under

the age of 16 years. When such abuse or neglect exists as an issue, it should not be necessary for the court to determine whether or not such information would lead to the proper demonstration of justice as said privilege does not apply at all.

V. N.C.G.S. § 8-53.2, Communications between Clergymen and Communicants

N.C.G.S. § 8-53.2 sets forth the statutory privilege between clergymen and communicants. The statute provides:

No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be **competent** to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, provided, however, that this section shall not apply where communicant in open court waives the privilege conferred. N.C.G.S. § 8-53.2. (Emphasis added).

An important distinction exists between the clergymen-communicant privilege and the physician-patient and nurse's privilege described above. Both the physician-patient and nurse's privilege are **qualified**, and a court can compel disclosure in the event that said disclosure is **necessary to a proper demonstration of justice**. N.C.G.S. § 8-53.2 provides a **nonqualified** privilege with regard to communications with clergyman. Here, a clergyman is **not competent** to testify as a witness, provided that the clergyman's communication with the communicant was made in a professional capacity, that said communication was necessary in order for the clergymen to discharge his duties, and that the communicant seeks spiritual counsel and advice which relates to the information provided. The **privilege belongs to the communicant** and she **can waive** the privilege in open court. Otherwise, if all of the statutory elements are met, the clergyman's testimony cannot be compelled.

An example of this privilege being asserted can be found in the criminal case of State v. Andrews, 131 N.C.App. 370, 507 S.E.2d 305 (1998). In Andrews, the defendant alleged that the trial court should have refused to allow the testimony of Reverend Knight, who was a minister of a church as well as the chaplain for the Sheriff's office. The defendant was being held by the Sheriff's office and the Sheriff's

office paged Reverend Knight to come to the jail and counsel the defendant. The defendant contended that the admission of the reverend's testimony was plain error.

The Andrews court stated that the North Carolina Supreme Court had previously held that the wording of §8-53.2 has "**two requirements**" for the clergymen privilege to apply, including: (1) defendant must be seeking the counsel and advice of his minister; and (2) the information must be entrusted to the minister as a confidential communication. See, State v. West, 317 N.C. 219, 223, 345 S.E.2d 186, 189 (1986). ("In West, the minister was a personal friend of defendant and initiated contact with defendant instead of defendant seeking the advice of the minister. Thus, the Supreme Court concluded the privilege did not apply.") Andrews at 375.

The Andrews case was held to be distinguishable from the West, case because the "Sheriff's office called Reverend Knight to talk to the defendant because of the possibility of the defendant being suicidal. See, Andrews, at 375. Based on the potential conflict of interest because Reverend Knight worked for the Sheriff's office, the privilege would be applicable to protect defendant.

The clergy-communicant privilege was held inapplicable to statements made by a defendant to a friend concerning the rape of his daughter in the case of State v. Barber, 317 N.C. 502, 346 S.E. 441 (1986). Here, the trial court concluded that the friend was not an ordained minister of an established church nor a clergyman, and that the statute relating to the clergymen-communicants privilege did not therefore apply. The North Carolina Supreme Court concluded that the trial court was correct in concluding that the privilege was inapplicable. This conclusion, however, was not based upon a determination that the Christian Ministry of Tennessee from which the friend received a license for \$10 was not an established church within the meaning of the statute. It held that the privilege did not exist because (1) the friend was not an "ordained minister or clergyman at the time the defendant confessed to him." (2) The statements of the defendant were not "entrusted to him and his professional capacity and necessary to enable him to discharge the functions of his office... Wherein such person so communicating such information... is seeking spiritual counsel." Barber, 346 S.E.2d at 445.

VI. N.C.G.S. § 8-53.3, Communications between Psychologist and Client or Patient

A statutory privilege exists for communications between a psychologist and a patient. This privilege, as in the case of the physician-patient privilege, is **qualified** in nature and may be compelled by a Judge if it is deemed necessary to the proper administration of justice. The statute provides that:

No person, duly authorized as a licensed psychologist or licensed psychological associate, nor any of his or her employees or associates, shall be required to disclose any

information which he or she may have acquired in the practice of psychology and which information was necessary to enable him or her to practice psychology. Any resident or presiding judge in the district in which the action is pending may, subject to G.S. 8-53.6, compel disclosure, either at the trial or prior thereto, if in his or her opinion disclosure is necessary to a **proper administration of justice**. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge. (emphasis added).

Notwithstanding the provisions of this section, the psychologist-client or patient privilege shall not be grounds for failure to **report suspected child abuse or neglect** to the appropriate county department of social services, or for failure to report a disabled adult suspected to be in need of protective services to the appropriate county department of social services. Notwithstanding the provisions of this section, the psychologist-client or patient privilege **shall not be grounds** for excluding evidence regarding the abuse or neglect of a child, or an illness of or injuries to a child, or the cause thereof, or for excluding evidence regarding the abuse, neglect, or exploitation of a disabled adult, or an illness of or injuries to a disabled adult, or the cause thereof, in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B of the General Statutes, or to the Protection of the Abused, Neglected, or Exploited Disabled Adult Act, Article 6 of Chapter 108A of the General Statutes. (emphasis added).

N.C.G.S. § 8-53.3.

In the case of McGinnis, Sr. v. McGinnis, 66 N.C.App. 676, 311 S.E.2d 669 (1984), the defendant contended that the trial court erred in allowing the testimony of the Defendant's psychiatrist. Objection was made to the psychiatrist's testimony by the defendant on the grounds that said communications were privileged information. The court noted that it is the purpose of § 8-53.3 "[T]o induce the patient to make full disclosure that proper treatment may be given, to prevent public disclosure of socially stigmatized diseases, and in some instances to protect patients from self incrimination." McGinnis, 311 S.E.2d at 677.

"The physician patient privilege extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to

enable him to prescribe. The privilege is for the benefit of the patient alone; the patient may waive the privilege. The privilege is a qualified, rather than absolute, privilege in that the judge has discretion to compel such disclosure, if in his opinion the same is necessary to a proper administration of justice." (citations omitted), Id at 677-78.

Here, the defendant did not offer testimony of her psychiatrist which would have opened the door and waived the privilege. Instead, the psychiatrist was presented as a witness by the plaintiff and when said witness was offered, the defendant **objected** and refused to waive her legal right not to have the psychiatrist disclose the nature of her visits. Id. at 670-71.

The trial judge did not make findings that disclosure of the defendant's communications were necessary to the administration of justice. The trial judge admitted the psychiatrist testimony concerning the defendant's mental condition in its entirety even over the defendant's objection. The court held that:

The beneficial effects that may emerge from a therapeutic relationship cannot be fully achieved unless there is a trusting relationship between psychologist and patient which is founded on a sense of complete confidentiality. Only on that basis are most people willing to open up their innermost personalities and disclose the most private and sometimes painful aspects of their inner selves. Absent a finding that the interests of justice require the privilege be withheld, we hold that the breach of defendant's confidential therapeutic relationship in this jury trial constituted prejudicial error necessitating a new trial." (citations omitted).
Id. at 671.

In the case of State v. Williams, 350 N.C. 1, 510 S.E.2d 626 (1999), the North Carolina Supreme Court stated that "this court has held that no psychologist-client privilege is created when a defendant is examined by psychologist **appointed by the trial court**, at the request of defendant, for purposes of evaluating Defendant's mental status." Williams, 350 N.C. at 20. Here, where a doctor was appointed to determine the defendant's competency, and where there was no indication in the record that the doctor examined or communicated with the defendant for any purpose other than determining his competency, said communications were not protected by physician-patient, psychologist-client, or attorney work product privileges. Id. at 21. "Assuming *arguendo* that defendant's communications with the doctor was privileged, the trial court had the authority to compel disclosure of such privileged communications if it was "necessary to the proper administration of justice" pursuant to §8-53.3. Id. at 21.

In order to challenge the trial court's determination that disclosure is necessary to assure the proper administration of justice, a party must show "an abuse of discretion in order to successfully challenge the ruling." *Id.* at 21. Here, the defendant alleges that the statute used by the court in ordering his evaluation was limited to evaluations of criminal defendants and the resulting reports. The court held that "the limited scope of this statute does not preclude the trial court from exercising its discretion to compel discovery of other related documents when it is necessary to assure a proper administration of justice." *Id.* at 21.

Furthermore, it is not necessary to make findings of fact and conclusions of law that disclosure is necessary to a proper administration of justice. Such an "explicit finding" is unnecessary and such a **"finding is implicit in the admission of the evidence."** *Id.* at 21.

In the case of State v. Knight, 93 N.C.App. 460, 378 S.E.2d 424 (1989), defendant challenged the trial court's admission of a psychologist whom he telephoned for an appointment. When the psychologist recognized a conflict of interest, she telephoned the defendant to refer him to another psychologist. The defendant stated that he had been seduced by his stepdaughter. The trial court permitted this testimony over the Defendant's objection on the basis that it was necessary to the proper administration of justice. Knight, 03 N.C.App. at 466. Although the Court of Appeals was not convinced that the psychologist-patient relationship even existed, "[it was] convinced that the trial court properly admitted the evidence." *Id.* The court referred to the second paragraph of N.C.G.S. §8-53.3 which provides, inter alia, that the psychologist-client privilege shall not be grounds for excluding evidence regarding the abuse or neglect of a child and therefore found that although the trial court properly overruled the privilege, that no privilege existed pursuant to the above provision. *Id.* at 466.

VII. N.C.G.S. § 8-53.4, School Counselor Privilege

The school Counselor privilege can be found in N.C.G.S. § 8-53.4 and the statute provides:

No person certified by the State Department of Public Instruction as a school counselor and duly appointed or designated as such by the governing body of a public school system within this State or by the head of any private school within this State shall be competent to testify in any action, suit, or proceeding concerning any information acquired in rendering counseling services to any student enrolled in such public school system or private school, and which information was necessary to enable him to render counseling services; provided, however, that this section shall not apply where the student in open court waives the

privilege conferred. Any resident or presiding judge in the district in which the action is pending may compel disclosure, either at the trial or prior thereto, if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be the district court judge, and if the case is in superior court the judge shall be a superior court judge. (emphasis added) N.C.G.S. § 8-53.4.

In custody cases, it is not uncommon to seek the testimony of a school counselor who has had direct contact with the minor child at issue. In the event that a minor child has counseled with a school counselor, information acquired in rendering counseling services is deemed privileged. This privilege, however, would not apply to observations made by the counselor as a witness to events which took place outside of the counseling environment. For instance, in the event that the counselor had witnessed the minor child getting out of a parent's vehicle in the morning and walking into the school while said child was crying, would not likely be found to be information gained while rendering counseling services. Even if a counselor is not able to testify with regard to certain privileged information, a school counselor will often be in a good position to offer testimony that is not privileged.

For example, the counselor may have witnessed the minor child arriving to school tardy on a frequent basis; crying at school, not interacting appropriately with other students, and the like. The school counselor privilege applies to information acquired while rendering counseling services. Since many school counselors interact with students with whom they are not "counseling", they may be a viable source of information even though they are not able to testify as to certain privileged matters. Just because a counselor, or other person, may be subject to rules relating to privilege, said person is not automatically disqualified as a witness with regard to non-privileged matters. As the privilege statutes are strictly construed, there may be important non-privileged information available that can be discovered.

The statute is merely a **qualified privilege** and it can be waived by the student in open court or the presiding judge may compel disclosure in the event that said disclosure is necessary to a proper administration of justice. Although compelling otherwise privileged information through a "proper administration of justice" standard would seem appropriate where the child's mental or emotional health is at issue, a frequent part of a balancing test used by judges is whether or not the compelling of such information would damage the counseling relationship between the minor child and the counselor, especially if said counseling is ongoing. When your party does not desire privileged communications between a minor child and a school counselor to be compelled, it may be argued that an order compelling testimony of the privileged information would be detrimental to the best interests and welfare of the minor child and that it is likely that the child will not continue to seek help from the counselor if the confidential trust between the parties is violated. The proper determination as to this issue is with the trial judge, however, most judges are sensitive to issuing orders that would have a negative impact on a minor child.

VIII. N.C.G.S. § 8-53.5 & 8-53.6, Communications between licensed marriage and family therapist and client(s)

Generally, information acquired by a marriage counselor is privileged information. N.C.G.S. § 8-53.5 states that:

No person, duly licensed as a licensed marriage and family therapist, nor any of the person's employees or associates, shall be required to disclose any information which the person may have acquired in rendering professional marriage and family therapy services, and which information was necessary to enable the person to render professional marriage and family therapy services. Any resident or presiding judge in the district in which the action is pending may, **subject to G.S. 8-53.6, compel disclosure**, either at the trial or prior thereto, if in the court's opinion disclosure is necessary to a **proper administration of justice**. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge. (emphasis added).

This provision is restricted even further by N.C.G.S. § 8-53.6 which states:

In an action pursuant to G.S. 50-5.1, 50-6, 50-7, 50-16.2A, and 50-16.3A if either or both of the parties have sought and obtained marital counseling by a licensed physician, licensed psychologist, licensed psychological associate, licensed clinical social worker, or licensed marriage and family therapist, the person or persons rendering such counseling shall **not be competent** to testify in the action concerning information acquired while rendering such counseling. (emphasis added).

In sum, if an action is pending between a husband and a wife pursuant to N.C.G.S. § 50-5.1 (grounds for absolute divorce in cases of incurable insanity), NCGS § 50-6 (divorce after separation of one year, on application of either party), NCGS § 50-7 (grounds for divorce from bed and board), NCGS § 50-16.2A (postseparation support) or, NCGS § 50-16.3A (alimony), then any of the stated persons that have provided marriage counseling shall **not be competent** to testify with regard to information which was acquired while rendering such counseling. This would apply whether the person performing counseling services is a licensed physician, licensed psychologist, licensed psychological associate, licensed clinical social worker, or licensed marriage and family therapist. **Review the definitions of these privileged categories to determine if the**

witness at issue qualifies. The statutes are strictly construed. Don't assume that the person at issue is licensed!

Based upon a strict reading of the statute, it does not appear that a licensed physician, licensed psychologist, licensed psychological associate or licensed clinical social worker would be subject to an automatic assertion of privilege with regard to an independent action that is not one of the five "Chapter 50" actions listed above, solely because it is an action between a husband and a wife. If for example, a husband and wife had received a judgment of absolute divorce and no claim for alimony or postseparation support was asserted prior to the entry of said judgment of absolute divorce, and only the issue of equitable distribution exists, it does not appear that this provision, § 8-53.6, would preclude those listed persons from testifying or providing information unless said person was also a licensed marriage and family therapist which would subject the person to the provisions of § 8-53.5.

In the event that a licensed marriage and family therapist or her employees or associates has obtained information as a consequence of offering professional marital and family therapy counseling, then, any information obtained as a consequence of said counseling cannot be compelled and is privileged. The judge may, however, issue order compelling said information in the event that the court finds that is necessary to the proper administration of justice. N.C.G.S. § 8-53.5 does not only apply to the divorce, bed and board, postseparation support and alimony actions listed in § 8-53.6. The privilege is more encompassing but applies to fewer persons in their professional capacities.

IX N.C.G.S. § 8-53.7 Social Worker Privilege

Social workers are also granted a **qualified** privilege with regard to information acquired while rendering professional social services and provided that the information was necessary to enable him to render professional social services. The statute provides:

No person engaged in delivery of private social work services, duly licensed or certified pursuant to Chapter 90B of the General Statutes shall be required to disclose any information that he or she may have acquired in rendering professional social services, and which information was necessary to enable him or her to render professional social services: provided, that the presiding judge of a superior or district court may compel such disclosure, if in the court's opinion the same is necessary to a **proper administration of justice** and such disclosure is not prohibited by G.S. 8-53.6 or any other statute or regulation. N.C.G.S. § 8-53.7.

As with the other qualified privileges listed above, the social worker privilege is subject to waiver and implied waiver and subject to a trial judge issuing an order to compel said information if the court finds that said information is necessary to a proper administration of justice. Disclosure may not be provided, however, in the event that such disclosure would be prohibited by North Carolina General Statutes § 8-53.6 and 8-53.7.

X. N.C.G.S. § 8-53.8 Counselor Privilege

The Counselor privilege is set forth in N.C.G.S. § 8-53.8 and reads as follows:

No person, duly licensed pursuant to Chapter 90, Article 24, of the General Statutes, shall be required to disclose any information which he or she may have acquired in rendering professional counseling services, and which information was necessary to enable him or her to render professional counseling services: Provided, that the presiding judge of a superior or district court may compel such disclosure, if in the court's opinion the same is necessary to a **proper administration of justice** and such disclosure is not prohibited by other statute or regulation. (emphasis added)
N.C.G.S. § 8-53.8.

Again, this privilege is **qualified** and may be either **expressly or impliedly waived** and a judge may issue an order compelling disclosure of said information if said information is necessary to a **proper administration of justice**. Additionally, the statute generally references other statutes or regulations which may also serve to bind the court hands with regard to issuing an order to compel and it would seem that in a family law context, the legislature intended N.C.G.S. § 8-53 (.5 & .6) to apply when litigation is pending between a husband and a wife and where marital or family counseling has taken place. In the event that § 8-53 (.5 & .6) are applicable in a given situation, the provisions of those sections would take priority over § 8-53.8.

How would the court handle a claim of privilege, counselor, social worker, or the like, with regard to information from Alcoholics Anonymous or other similar entity? The case of Sharpe v. Worland, 137 N.C.App. 82, 527 S.E.2d 75 (2000) tangentially discusses Alcoholics Anonymous in the context of privilege. In the Sharpe case, the plaintiff sued defendant Doctor and defendant hospital claiming negligence against them. The plaintiff sought information regarding the physician's participation in the "Physicians Health Program", a treatment program operated by the North Carolina Medical Society and which was designed to provide treatment for, physician impairment, which includes, inter alia, substance abuse and alcoholism. The defendant hospital moved for a protective order on the grounds that the documents sought by the plaintiff regarding the doctor's participation in the program were protected by the privilege set out in N.C.G.S. § 90-21.22.

North Carolina General Statutes §90-21.22(e) provides:

Any confidential patient information and other nonpublic information acquired, created, or used in good faith by [the North Carolina Medical Society and its local medical Society components and the North Carolina Academy of Physician Assistants] pursuant to this section shall remain confidential and shall not be subject to discovery or subpoena in a civil case. No person participating in good faith in the peer review or impaired physician or impaired physician assistant programs of this section shall be required in a civil case to disclose any information acquired or opinions, recommendations, or of valuations acquired or developed solely in the course of participating in any agreements pursuant to this section. (emphasis added).

(Note: A similar provision applies to attorneys, see, Revised Rules of Professional Conduct, Rule 1.6(c)).

In this particular situation, the court found that the legislature intended the aforementioned statute to encourage health care providers to seek treatment for their impairments. The plaintiff argued that the information that was sought was not "confidential patient information and other nonpublic information" as required by statute as a consequence of the doctor's participation in alcoholics anonymous and defendant hospital's knowledge of doctors' participation in the physicians health program. Sharpe, 527 S.E.2d at 88. The court stated that the definition of "nonpublic information" applied to the physicians health program and Alcoholics Anonymous, as neither provided their information to the general public. The court therefore found that the plaintiff sought to discover nonpublic information and held said information privileged. The court further found that the defendant hospital could be a third party participant in any agreements reached pursuant to § 90-21.22 thereby allowing it to claim privilege.

In analyzing whether or not privilege can be asserted with regard to information sought from Alcoholics Anonymous, or other self help program, one would need to determine, whether or not said program qualifies under any broad privilege statute, specifically, the Counselor privilege set forth in § 8-53.8 or the social worker privilege as set forth in §8-53.7. Both the counselor privilege and social worker privilege provisions reference the qualifications required to be certified or licensed by the state pursuant to Chapter 90 of the North Carolina General Statutes. A careful reading of the statutes can be useful in trying to answer this question because the person offering counseling or social work type services may not fall within the privilege protections of these statutes. Whether or not the person or persons leading an Alcoholics Anonymous type program meet those definitions would be important. It would also be important to distinguish between whether or not sessions were on an individual basis with a qualified

social worker or counselor or with another person who would have privileged status, compared with peer sessions with other members of the program.

This author is unable to find any information which will definitively answer the question as to a party's right to assert privilege with regard to Alcoholics Anonymous or a similar program, however, the author takes the position that any information acquired by a party who is granted certain privilege status, as otherwise provided in this manuscript, and which has been communicated with the intention of having said communication remain confidential, i.e., by not communicating in the presence of third parties, etc., should be subject to a privilege claim with regard to confidential information. It would seem that information obtained by other participants of the group, who are not granted special statutory status, may not be granted the same protections. An argument could be made, however, that the intention of such treatment programs is for all information acquired during sessions to remain confidential and that it should remain so. One may attempt to analogize a group led by a person with a statutory privilege right and attended by others who are part of said sessions (i.e. Alcoholics Anonymous participants), but do not have special status, as being treated similarly to those staff members of a doctor's office that have access to confidential information.

If a privilege were found to exist with regard to information which was acquired by a person as a consequence of Alcoholics Anonymous or similar self-help group, it would likely only be a qualified privilege which could be subject to a judge's order compelling said testimony in the event that it was necessary for the proper administration of justice. This would be consistent with the other qualified privileges. In a custody case, most circumstances would seem to warrant an order compelling said information if it would impact a judge's determination in determining the best interest and welfare of a minor child or children.

XI. N.C.G.S. § 8-53.9 Optometrist-Patient Privilege

No person licensed pursuant to Article 6 of Chapter 90 of the General Statutes shall be required to disclose any information that may have been acquired in rendering professional optometric services and which information was necessary to enable that person to render professional optometric services, except that the presiding judge of a superior or district court may compel this disclosure, if, in the court's opinion, disclosure is necessary to a **proper administration of justice** and disclosure is not prohibited by other statute or rule. N.C.G.S. § 8-53.9.

The optometrist-patient privilege has less statutory protection than communications between physician and patient. Whereas N.C.G.S. § 8-53 provides

that such medical information shall not be considered public records under §132-1, no such language exists here. §8-53 provides that confidential information obtained or records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin. The optometrist-patient privilege makes no such statement. The provision does provide, however, a qualified privilege, similar to that which has been set forth with regard to certain other privileges, such as the counselor and social worker privileges. The issues of explicit and implied waiver would still be applicable with this provision and a court may still issue an order compelling said information in the event that the court finds that is necessary to a proper administration of justice.

XII. N.C.G.S. § 8-53.10 Peer Support Group Counselors

This provision, § 8-53.10, applies solely to **law enforcement** employees or members of their immediate families who receive peer counseling services from the officer's employing law enforcement agency. A peer counselor is defined, in pertinent part, as any law enforcement officer or civilian employee of a law enforcement agency who has received training to provide emotional and moral support and counseling to law enforcement employees and their families and is designated by the head of a law enforcement agency to counsel said persons. See, N.C.G.S. § 8-53.10 (a) (3) (a. & b.).

Communications between the law enforcement employee, or their immediate family, to a peer counselor is deemed to be privileged information. The Counselor shall not disclose privileged communications which were necessary to enable the counselor to render counseling services unless the disclosure is authorized by the client, or if deceased, the executor, administrator or in the case of an unadministered estate, next of kin. Additionally, the disclosure must be deemed necessary to the proper administration of justice and compelled by a judge. N.C.G.S. § 8-53.10 (b), et seq.

The peer support group privilege does not exist if the peer counselor was an initial responding officer, a witness or a party to the incident that prompted the delivery of the peer counseling services. N.C.G.S. § 8-53.10 (c) (1). Nor does it exist if the communications were made while the peer counselor was not acting in his official capacity as a peer counselor. N.C.G.S. § 8-53.10 (c) (2). Nor does it exist with regard to communications related to a violation of criminal law. This specific provision does not require disclosure of otherwise privileged communications which relate to an officer's use of force. N.C.G.S. § 8-53.10 (c) (3).

[Finally,] the peer counselor privilege shall not be grounds for failure to report suspected **child abuse or neglect** to the appropriate county department of social services, or for failure to report a disabled adult suspected to be in need of protective services to the appropriate county department of social services. Notwithstanding the provisions of this

section, the peer counselor privilege shall **not be grounds for excluding evidence regarding the abuse or neglect** of a child, or an illness of or injuries to a child, or the cause thereof, or for excluding evidence regarding the abuse, neglect, or exploitation of a disabled adult, or an illness of or injuries to a disabled adult, or the cause thereof, in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B, or to the Protection of the Abused, Neglected, or Exploited Disabled Adult Act, Article 6 of Chapter 108A of the General Statutes. (emphasis added) N.C.G.S. § 8-53.10 (d).

XIII. N.C.G.S. § 8-53.12 Communications with Agents of Rape Crisis Centers and Domestic Violence Programs Privileged

Communications with agents of rape crisis centers and domestic violence programs are deemed privileged communications pursuant to N.C.G.S. § 8-53.12. Although agents of such a center shall not be required to disclose information which was acquired while providing services to a victim and which information was necessary to enable the agent to render her services, the victim, shall have the ability to **waive** the privilege conferred. A judge shall also be able to compel disclosure if the court finds, by a **preponderance of the evidence**, the good faith, specific and reasonable basis for believing that:

(i) the records or testimony sought contain information that is **relevant and material** to factual issues to be determined in a civil proceeding, or is **relevant, material, and exculpatory** upon the issue of guilt, degree of guilt, or sentencing in a criminal proceeding for the offense charged or any lesser included offense, (ii) the evidence is **not** sought merely **for character impeachment** purposes, and (iii) the evidence sought is **not merely cumulative** of other evidence or information available or already obtained by the party seeking the disclosure or the party's counsel. If the case is in district court, the judge shall be a district court judge, and if the case is in superior court, the judge shall be a superior court judge. (emphasis added) N.C.G.S. § 8-53.12 (b).

The court must find that the party seeking disclosure has made a sufficient showing that the records are likely to contain information subject to disclosure before issue an order to produce records. If such a showing has been made, the records shall be produced under seal and the court shall examine the records, *in camera*, and, after doing so, may allow disclosure of any portions of the records which contain information

subject to disclosure. Any records received by the court under seal shall be returned to the center after all appeals have been exhausted unless otherwise ordered by the court. Death of the victim terminates the privilege. See, N.C.G.S. § 8-53.12 (b).

This statutory provision does not relieve any person from any duty with regard to **abuse or neglect** of a child or disabled adult as required by law. N.C.G.S. § 8-53.12 (c).

XIV. N.C.G.S. § 8-56, Husband and Wife as Witnesses in Civil Action

The husband-wife privilege was originally a product of common-law and was much broader in scope before the North Carolina Legislature codified the privilege into a statute which seems to limit the common-law. N.C.G.S. § 8-56 represents the privilege which can be asserted by a husband or wife in civil actions and it states:

In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be **competent and compellable** to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. No husband or wife shall be **compellable** to disclose any **confidential communication** made by one to the other during their marriage. (emphasis added) N.C.G.S. § 8-56.

In custody cases, the privilege between a husband and a wife are primarily guided by the aforementioned statute. This statute provides, in sum, that spouses are competent to testify either for or against their spouse. The **choice** on whether or not do so testify will **belong to the witness** spouse. A distinction remains, however, in that neither spouse may be compelled to disclose a confidential communication which was made during the parties' marriage. A **confidential communication** is one, on any subject, that is induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship. State v. Freeman, 302 N. C. 591, 276 S. E. 2d 450 (1981).

The case of Cooper v. Cooper, see *infra*, is the only appellate case in North Carolina that addresses the issue of N.C.G.S. § 8-56 in a family law case. There exist several cases which discuss N.C.G.S. § 8-57 which relate to the privilege in a criminal

case. With minor exception, those cases are not specifically addressed in this manuscript because the focus of this seminar is on the custody case. They should, however, be considered in the event of a hearing involving a criminal matter as the provisions of the civil and criminal statutory privilege differ from one another and certain aspects of the common-law may be applicable.

Communications made in the presence of a third-party are not deemed to be a confidential communication. *State v. Setzer*, 42 N. C. App. 98, 256 S. E. 2d 485, cert. denied, 298 N. C. 571, 261 S.E.2d 127 (1979). There have been holdings, however, that statements made in the presence of a small child may retain privileged status. The North Carolina Supreme Court has held that when a husband asked his guests to wait outside, and took a gun from a drawer while his wife was present and stated to his wife that he intended to kill the victim, said acts and statements were deemed confidential marital communications. *State v. Holmes*, 330 N. C. 826, 412 S. E. 2d 660 (1992), affirming 101 N.C. App. 229, 398 S. E. 2d 873 (1990). "Threats are not confidential communications." See, *State v. McQueen*, 324 N.C. 118, 377 S.E.2d 38, 49 (1989).

In 2002, the North Carolina Court of Appeals rendered an unpublished opinion in the case of *Cooper v. Cooper*, 150 N.C.App. 713, 564 S.E.2d 319, 2002 WL 1162919 (2003). Although unpublished opinions do not have precedential value, this case is one of the few that discusses the civil husband-wife privilege as set forth by N.C.G.S. § 8-56. In this case, the plaintiff filed a complaint against the defendant seeking divorce from bed and board, custody and spousal and child support. The defendant counterclaimed for custody, a deviation from the Child support guidelines and equitable distribution. Based upon the evidence at trial, the trial court made findings that the defendant had committed marital misconduct in the form of adultery and abandonment of his family and granted custody of the minor children to the plaintiff. The plaintiff was additionally awarded child support, alimony and partial attorney fees.

The defendant alleged that his adultery was not admissible as certain statements made to his wife were a confidential marital communication. The court noted that N.C.G.S. § 8-56 provides that "no husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage." "The privilege is limited to confidential communications." The court found that the evidence of the defendant's adultery in this case did **not** consist of privileged confidential marital communications. Although the defendant had stated to the plaintiff that he had met another woman and planned to leave the family, this conversation was **overheard by one of their children**. The parties' children were ages 17 and 15. Additionally plaintiff stated that the defendant would go back and forth from the marital home to his girlfriend's home and the plaintiff further testified that another woman repeatedly called the marital home. The court found that the defendant's statements to his wife were **admissions of a party opponent** and were **admissible** pursuant to N.C.G.S. § 8C-1 , Rule **801 (d)**, which provides "a statement is admissible as an exception to the hearsay rule if it is offered against a party and it is ... his own statement, in either his individual or a representative capacity..." *Cooper*, 564 S.E.2d 319.

In Cooper, the court found that communications between a husband and a wife in the presence of either a 15-year-old or a 17-year-old were not intended to be confidential communications. There have been other cases, however, which indicate that statements made in the presence of small children may not be deemed a waiver of the privilege. As a 15 or 17-year-old child is in a position to understand the nature of a conversation, the confidential nature of the communication does not exist.

Additionally, the wife was permitted to testify as to her observations, such that another woman called the marital residence, and that the husband would go back and forth from the marital home to his girlfriend's home. These observations would not be a confidential communication.

The courts holding, that Rule 801(d) of the North Carolina Rules of Evidence permits the statement of a party opponent, means that the statements of the husband would be admissible upon introduction by the wife, irrespective of the husband's claims of privilege. Even if Rule 801(d) did not apply, the statutory reference in § 8-56 of the North Carolina General Statutes indicates that a spouse will be competent to give testimony against the opposing spouse. The provision stating that a spouse may not be compelled to disclose confidential communications made by the other spouse means that a spouse may not be forced to testify against his or her will. In the event, however, that the spouse chooses to testify as to such confidential communications in an action in which the other spouse is a party opponent, such testimony is permissible.

In custody cases, which by their nature, pit a husband and a wife against each other as party opponents, there seems to be little opportunity to preclude confidential communications from being introduced as evidence at trial provided that said information is relevant to the issues of the case.

The husband-wife privilege is not a proper ground for excluding evidence regarding the **abuse or neglect** of a child under the age of 16 years or with regard to the illness of our injuries to such child or the cause thereof in any judicial proceeding relating to a report pursuant to the Child Abuse Reporting Law, Article 3 of chapter 7B of the North Carolina General Statutes. See, N.C.G.S. § 8-57.1

N.C.G.S. § 8-57.2 provides that when the issue of a child's **paternity** arises in a civil or criminal proceeding, the presumed father or mother is competent to give evidence as to any relevant matter regarding paternity of the child regardless of any privilege which may otherwise apply. In the event that such evidence is provided, the parent offering such evidence shall not be prosecuted based upon that evidence for any criminal act involved in the conception of the child at issue or for whom support is sought with the exception of perjury.

XV. Accountants

North Carolina does not recognize an accountant-client privilege. See, Miles v. Martin, 147 N.C.App. 255, 555 S.E.2d 361 (2001); State v. Agnew, 294 N.C. 382, 241 S.E.2d 684, *cert. denied*, 439 U. S. 830, 99 S. Ct. 107, 58 L.Ed.2d 124 (1978).

XVI. Attorney-Client Privilege

The attorney-client privilege governs the communications between an attorney and a client that relate to matters communicated to an attorney in professional confidence. The rule governing the confidentiality of information between an attorney and a client is found in Rule 1.6 of the Revised Rules of Professional Conduct, as Amended in 2003, pursuant to Title 27 of the North Carolina Administrative Code. The State Legislature authorized the North Carolina State Bar to formulate rules of professional ethics and competence of lawyers in N.C.G.S. §84-23. The Privilege is addressed here.

Rule 1.6 provides:

(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; or

- (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.

(c) the duty of confidentiality described in this Rule encompasses information received by a lawyer when 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 a lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court. Rule 1.6: Confidentiality of Information.

The Comment to Rule 1.6: Confidentiality of Information, provides many statements which will assist a practitioner in interpreting the attorney-client privilege. Several of the points below, are directly found in the official Comment and may be of interest in the context of a custody matter.

- [T]he confidentiality rule is subject to limited exceptions... 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.
- 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.

The appellate courts have held that an attorney-client 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 was 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. Miles v. Martin, 147 N.C. App. 255, 555 S.E.2d 361, 364 (2001).

The Miles case provided that a **party asserting the privilege** "can only meet its burden by providing some **objective indicia** that the exception is applicable under the circumstances. Mere assertions by a party or its attorneys in pleading will not suffice" Miles, 555 S.E.2d at 364. The Court of Appeals made clear that the **burden of proof** must be met by the party asserting the privilege that the privilege actually exists. Evidence of a retainer paid, fee contract, affidavit or testimony may assist a party in carrying his burden of proof. *Id.*

For the attorney-client privilege to apply, the communications must be "**confidential.**" If it appears from extraneous evidence or by the nature of a transaction or communication that communications were not regarded as confidential, or if they were made for the purpose of being conveyed by the attorney to others, said communications are not deemed confidential and are not privileged. See, Dobias v. White, 240 N.C. 680, 83 S.E.2d 785, 788 (1954).

The attorney-client **privilege belongs solely to the client.** See, Hulse v. Arrow Trucking Co., 161 N.C. App. 306, 587 S.E.2d 898 (2003). The client/claimant of the privilege has the burden of establishing that the privilege exists. This burden can be met by establishing the five-prong test listed above pursuant to the North Carolina Court of Appeals decision of Miles v. Martin, *supra*. The Hulse case involved an attorney-client relationship. The client consulted defense counsel regarding interrogatories relating to events surrounding a collision that he was involved in. The attorney obtained the client's hand written responses to interrogatories and those hand written responses were used by the attorney in preparing formal responses to the plaintiff's interrogatories. Opposing counsel attempted to obtain the client's hand written notes and the client objected. The court found that the first four elements necessary to prove the attorney-client privilege existed but that the client waived the privilege with regard to certain hand written responses in question.

The attorney-client privilege is **deemed to be waived** if the client **testifies** concerning the written communication thereby putting it into evidence. Hulse, 161 N.C. App. at 310. The Court of Appeals found that the communication itself "is the **best evidence** of what [the document] does and does not contain." *Id.* In this particular case, during deposition, the defendant was asked about the typed response to a particular interrogatory question. The defendant stated that that was not his answer and that he wrote something different. The court held that this testimony, by itself, which was offered by the client/claimant of the privilege, put the contents of the interrogatory responses into evidence by identifying obvious differences between his hand written response and the attorneys typed response. The court reviewed the hand written responses *in camera* and determined that the documents provided the best evidence of the Defendant's intended responses to those interrogatories. Although the hand written responses would otherwise have been privileged, the defendant waived that privilege. *Id.* This case is an excellent example of how easily a privilege can inadvertently be waived.

Another case which shows how easily a privilege can be waived is that of State v. Bronson, 333 N.C. 67, 423 S.E.2d 772 (1992). In this case, the defendant testified that his trial testimony was the correct version of events, but, the prosecutor attempted to show that the Defendant's versions of the crime differed from the period shortly after a murder as compared to the version offered in his trial testimony. The defendant was asked, at trial, if he "had discussed the concepts of premeditation and deliberation with his attorney before trial. **Without objection**, defendant testified that he had discussed premeditation and deliberation with his attorney." Bronson, 423 S.E.2d at 777 (emphasis added).

The defendant contended that it was improper for the prosecutor to ask such questions in the context of his conference with his attorney. The court held, that the attorney-client privilege belongs to the client and the privilege may be waived by him. *Id.* In this case, the **defendant did not object** to the questions and **did not raise the attorney-client privilege in advance of his voluntarily answering all of the prosecutor's questions**. Although the communications may have otherwise been privileged, the court found that the defendant, in this case, waived the attorney-client privilege. *Id.*

North Carolina General Statutes § 1A.-1, Rule 26 (b) (3) sets forth the "**Work-Product Rule**" which forbids the discovery of documents and other tangible things which are "prepared in anticipation of litigation unless the party has a substantial need for those materials and cannot without undue hardship... obtain the substantial equivalent of the materials by other means. Long v. Catawba Valley Bank, 155 N.C. App. 129, 574 S.E.2d 171, 176 (2002). Where the plaintiff, in interrogatory questions, asked the defendant whether the defendant's experts had produced an opinion in written form and did not request the work product of the defendants' attorneys, nor the work product of the defendants' expert witness, said interrogatory question did not

violate rule 26 (b)(3). *Id.* The defendant also contended that the information which had been requested regarding the expert witnesses was not known personally by the defendant and that only the attorney had the information required to answer said interrogatories. 574 S.E.2d 175. The Court of Appeals rejected the defendant's argument and noted that the "knowledge of an attorney hired by a client and doing work on behalf of that client is imputed to the client. *Id.* Knowledge which was held by the attorney was imputed to the client even though the client did not hire the expert witnesses or interview the experts. Therefore, the attorney's actions can be imputed to the client. *Id.*

The attorney work product privilege may be **waived** at trial where testimony is offered concerning the substance of the alleged privilege. In a bar disciplinary proceeding, the State Bar's investigator **testified regarding matters contained within his notes**, thus waiving the privilege and entitling defense counsel access to the notes and other memoranda. N. C. State Bar v. Harris, 137 N. C. App. 822, 535 S. E.2d 74, rev. denied, 353 N. C. 267, _____ S. E.2d _____ (2000).

In custody cases, attorneys sometimes learn information from clients which indicates that there is or has been abuse, neglect or dependency. North Carolina General Statutes § 7B-310 sets forth an affirmative duty to report such information. The statute states:

No privilege shall be grounds for any person or institution failing to report that a juvenile may have been abused, neglected, or dependent, even if the knowledge or suspicion is acquired in an official professional capacity, except when the knowledge or suspicion is gained by an attorney from that attorney's client during representation **only in the** abuse, neglect, or dependency case. No privilege, except the attorney-client privilege, shall be grounds for excluding evidence of abuse, neglect, or dependency in any judicial proceeding (civil, criminal, or juvenile) in which a juvenile's abuse, neglect, or dependency is in issue nor in any judicial proceeding resulting from a report submitted under this Article, both as this privilege relates to the competency of the witness and to the exclusion of confidential communications. N.C.G.S. § 7B-310.

None of the privileges listed in this manuscript are sufficient to permit any person or institution from failing to report that a juvenile may have been abused, neglected, or dependent with the sole exception of when the knowledge or suspicion is gained by the attorney who was representing the client in **the** abuse, neglect, or dependency case. Furthermore, this statute makes it clear that only the attorney-client privilege shall serve as proper grounds for excluding evidence of same when a juveniles' abuse, neglect, or dependency is in issue whether the privilege relates to the competency of a witness or to the exclusion of confidential communications. See also, N.C.G.S. §7B-301, Duty to

Report Abuse, Neglect, Dependency, or Death Due to Maltreatment (providing, *inter alia*, that "[a]ny person or institution who has cause to suspect that any juvenile is abused, neglected, or dependent... shall report the case of that juvenile to the Director of the Department of Social Services in the county where the juvenile resides or is found."); Kroh v. Kroh, 152, N.C. App. 347, 567 S.E.2d 760 (2002) (discussing whether husband's sexual relations with the family dog are privileged.)

In a custody case, it would be relevant, in evaluating the aforementioned statute, as to whether or not the pleadings set forth an issue of abuse, neglect or dependency. It could be argued that in a custody case which, for example, deals solely with the issue of which school a child should attend, does not constitute an abuse, neglect, or dependency case. Under this interpretation, § 7B-310 would indicate that even an attorney would have a duty to report her knowledge or suspicion with regard to N.C.G.S. § 7B-301. RPC 120 and RPC 175 provided ethics opinions prior to the most recent version of the reporting statute. RPC 175 was issued in January, 1995. The opinion states that a lawyer may ethically exercise his or her discretion to decide whether to reveal confidential information concerning child abuse or neglect. The ethical rule places the decision regarding the disclosure of a client's confidential information within the lawyer's discretion. When a lawyer "reasonably and in good faith concludes that revealing the confidential information will substantially harm the interests of his or her client and, as a matter of professional responsibility, declines to report confidential client information regarding suspected child abuse and neglect to DSS, the failure to report will not be deemed a violation of Rule 1.2 (b) and (d) (respectively defining misconduct as committing a criminal act and engaging in conduct prejudicial to the administration of justice... **it is recognized that the ethical rules may not protect a lawyer from criminal prosecution for failure to comply with the reporting statute.**" RPC 175 (1995). In sum, the ethics rules, at least at the time they were issued, give an attorney discretion to determine whether or not to communicate with DSS with regard to the reporting of abuse, neglect, dependency, or death due to maltreatment, and whether or not he wishes to obtain the title of **MOST ETHICAL ATTORNEY RESIDING IN CENTRAL PRISON!** Seriously though, this issue is one that will require careful study by a practitioner facing a similar factual circumstance. In the event of a question on how to proceed, it would be advisable to request an opinion from the North Carolina State Bar prior to taking action.

XVII. Conclusion

Custody cases are like other types of cases when it comes to following the Rules of Evidence and when determining whether or not a party can make any claim of privilege with regard to certain evidence or testimony. An understanding of the principles set forth in this manuscript should offer, at least some, practical guidance in determining whether or not a claim can be made and whether or not a claim of privilege can be defeated.