

PRIVILEGED COMMUNICATIONS

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- I. References.** A comprehensive reference on this topic is KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE §§ 125-130, 135 (7th ed. 2011) and its current cumulative supplement. I gratefully acknowledge the use of selected excerpts from Paul M. Newby, *Advanced Criminal Evidence: Privileges* (North Carolina Judicial College, May 21, 2015), and NORTH CAROLINA PROSECUTORS' TRIAL MANUAL, *Privileged Communications* 617-27 (5th ed. 2012).

For a discussion of federal HIPAA and its relationship to privileges and the disclosure of confidential health information in North Carolina state courts, see Jill Moore, [Disclosure of Confidential Health Information in Court Proceedings](#) (UNC School of Government, December 2011).

- II. Privilege against Self-Incrimination.** For a discussion of the self-incrimination privilege, see [Fifth Amendment Privilege and Grant of Immunity](#) in this Benchbook.
- III. Law Enforcement Officer-Informant Privilege.** The law enforcement-informant privilege provides that under certain circumstances the State is not required to reveal a confidential informant's identity. For a discussion of this issue, see ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA, 481-82, 564-65 (4th ed. 2011), and 2015 Cumulative Supplement, 80. Note that under criminal discovery provisions, the State is not required to disclose the identity of a confidential informant unless the disclosure is otherwise required by law. See G.S. 15A-904(a1). The duty to disclose is discussed in the reference cited above.
- IV. Spousal Privilege and Competency to Testify.** Because the spousal privilege and a spouse's competency to testify may arise at the same trial, both are discussed here.
- While the statutes and appellate cases speak of spouses as husband and wife, a question arises whether a state is required to include legally married people of the same gender within the provisions concerning spouse privilege and competency to testify in light of recent federal constitutional case law. See *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015) (couples of same gender have a federal constitutional right to marry).
- A. Competency to Testify.**
- 1. For Defendant.** A defendant's spouse is a competent and compellable witness for the defendant in a criminal proceeding, but the defendant's failure to call the spouse as a witness may not be used against the

defendant. G.S. 8-57(a); *State v. Robinson*, 74 N.C. App. 323, 324 (1985) (trial court's erroneous failure to give curative instruction after sustaining objection to the district attorney's comment during closing argument that the defendant's wife, whom the district attorney argued was "the one person who can corroborate the defendant's story," did not testify, was not harmless and required new trial).

2. **For State.** As a general rule, the defendant's spouse is competent but not compellable to testify for the State against the defendant in any criminal proceeding. Notwithstanding this general rule, the spouse is both competent and compellable in a prosecution of:

- Bigamy or criminal cohabitation, to prove the fact of marriage and facts tending to show the absence of divorce or annulment;
- Assaulting or communicating a threat to the other spouse;
- Trespass in or upon the separate lands or residence of the other spouse when living separate and apart from each other by mutual consent or court order;
- Abandonment of or failure to provide support for the other spouse or their child; or
- A spouse for any other criminal offense against the minor child of either spouse, including any child of either spouse who is born out of wedlock or adopted or a foster child.

G.S. 8-57(b).

3. **Relation to Spousal Communication Privilege.** Even if a spouse is competent to testify at a criminal proceeding, he or she cannot be compelled to disclose any confidential communication made by one spouse to the other spouse during their marriage. G.S. 8-57(c); see Section IV.B. below.
4. **Trial Practice.** If a party objects to the testimony of a spouse who is competent but not compellable, the trial court should advise the spouse that he or she cannot be compelled to testify and determine whether the spouse wants to testify against the other spouse. *State v. Britt*, 320 N.C. 705, 709 n.1 (1987).
5. **Admissibility of Spouse's Out-of-Court Statement.** Out-of-court statements by a defendant's spouse to a third party are admissible against the defendant. *State v. Rush*, 340 N.C. 174, 182 (1995) (State was permitted to offer, through a 911 dispatcher, out-of-state statements made by the defendant's spouse to the dispatcher on the night of a murder; the defendant had conceded that the statements were not confidential communications). Of course, the statements cannot include confidential communications between spouses and must be relevant and offered for a non-hearsay purpose or under an exception to the hearsay rule that does not violate a defendant's Confrontation Clause rights. For a discussion of the Confrontation Clause, see [A Guide to Crawford and the Confrontation Clause](#) in this Benchbook.
6. **Effect of Divorce.** If spouses are divorced when a spouse testifies, the non-defendant spouse is both competent and compellable to testify as any other witness, except the spousal communications privilege still applies to confidential communications made during their marriage.

Although there is no direct North Carolina appellate court ruling on this issue, such a ruling is highly likely. See KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 135, at 509-10 (7th ed. 2011).

7. **Invalid or Sham Marriage.** An invalid marriage bars the application of G.S. 8-57. *State v. Allred*, 298 N.C. 465, 472-73 (1979) (the defendant and a witness did not contract a valid common law marriage when living together in Pennsylvania).

Although there is no North Carolina ruling whether a sham marriage (e.g., marriage solely to establish residency status for spouse who is foreign citizen) bars the application of G.S. 8-57, such a ruling finds support in rulings in other jurisdictions. See, e.g., *Lutwak v. United States*, 344 U.S. 604, 615 (1953) (when there is a sham marriage, “the reason for the rule disqualifying a spouse from giving testimony disappears, and with it the rule”).

- B. **Spousal Communications Privilege.** Neither spouse may be compelled to disclose a confidential communication between the spouses during their marriage. G.S. 8-57(c).

1. **Elements of Privilege.**

- a. **Confidential.** The determination of whether a communication is confidential depends on whether it “was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship.” *State v. Freeman*, 302 N.C. 591, 598 (1981); see also *State v. McKinnish*, 110 N.C. App. 241, 247 (1993) (while in jail awaiting trial, the defendant sent his wife two threatening letters attempting to get her to testify to certain facts supporting his alibi defense and offering her material reward for her testimony; the letters were not privileged because they (1) contained threats against his wife, and (2) showed that the defendant was unable to rely on affection, confidence, and loyalty engendered by his marital relationship; rather defendant offered material reward in attempt to persuade wife to testify in his favor).

Because they are not made in confidence, communications made in the known presence of a third party are not covered by the privilege. *State v. Kirby*, 187 N.C. App. 367, 372-73 (2007) (the defendant yelled to his spouse in a voice loud enough so anyone in the house could have heard him, and he knew that a third person was present). However, if the third person is the spouses’ young child, the privilege may cover the communication. *Hicks v. Hicks*, 271 N.C. 204, 207 (1967) (privilege existed even though the couple’s eight-year-old daughter was present during the conversations, given her young age and because she was singing or playing during one of the conversations).

Nor does the privilege apply when the communication is made without a reasonable expectation of privacy. For example, the privilege does not apply to communications in a law enforcement agency’s interview room, public visiting area of a correctional facility, or in the presence of a law enforcement officer. *State v. Terry*, 207 N.C. App. 311, 317 (2010) (sheriff’s department interview room); *State v. Rollins*, 363 N.C. 232, 240 (2009) (public visiting area of state correctional facility).

Finally, a communication is not confidential, and the privilege does not apply, when the spouse who made the communication tells the other spouse to let other people know what he had told her. *State v. McLemore*, 343 N.C. 240, 247 (1996).

- b. Communication.** The privilege only applies when the defendant makes a confidential marital communication; the privilege does not apply to acts of the defendant not intended as a communication. *State v. Matsoake*, ___ N.C. App. ___, 777 S.E.2d 810, 814 (2015) (in a rape case, the privilege did not bar the defendant's then-wife from testifying for the State that the defendant wept upon seeing composite sketch of victim's assailant in newspaper; the defendant did not communicate anything to wife by his crying and thus privilege did not bar her testimony). However, when a confidential marital communication is made, acts accompanying that communication are covered. *State v. Holmes*, 330 N.C. 826, 835 (1992) (the defendant's act of taking his gun out of a kitchen cabinet in his wife's presence and leaving with it was included in the privilege because it was intended to be a communication and was induced by the marital relationship). *But see State v. Gladden*, 168 N.C. App. 548, 553 (2005) (the defendant's act of retrieving a gun from a bedroom he shared with his wife and in his wife's presence was not covered by the privilege because he did not intend act to be confidential communication; distinguishing *State v. Holmes, supra*); *State v. Hammonds*, 141 N.C. App. 152, 171-72 (2000) (the defendant's act of seeking to arm himself with a weapon under the bed was not privileged where his wife's presence in the bedroom and observation of the act was incidental; distinguishing *State v. Holmes, supra*, *aff'd per curiam*, 354 N.C. 353 (2001)).

In addition to oral testimony about prior confidential spousal communications, the privilege applies to the admission of such communications contained in letters and tape recordings. *McCoy v. Justice*, 199 N.C. 602 (1930) (letters); *Hicks v. Hicks*, 271 N.C. 204, 206-07 (1967) (tape recordings).

- c. Between Spouses.** The privilege covers confidential communications made during marriage, and it is enforceable even after the spouses divorce. *State v. Carter*, 156 N.C. App. 446, 457 (2003) (communications made one week before marriage were not covered by privilege); *State v. Jolly*, 20 N.C. 108 (1838) (the privilege protects marriage communications even after divorce).
- 2. Waiver of Privilege.** The privilege may be waived only by the party against whom the communication is offered. *State v. Holmes*, 330 N.C. 826, 835 (1992) (the trial court erred by allowing the defendant's wife to testify for the State and over the defendant's objection about confidential marital communications made to her by the defendant).
- 3. When Privilege Is Inapplicable.** The privilege is inapplicable to communications that are evidence of:
- Child abuse and neglect. G.S. 7B-310; G.S. 8-57.1;
 - Paternity. G.S. 8-57.2; G.S. 110-130;

- The existence of non-existence of grounds for termination of parental rights. G.S. 7B-1109; and
- Any proceedings under the Uniform Interstate Family Support Act. G.S. 52C-3-315(h).

Although there is no North Carolina ruling that the privilege is inapplicable to communications between spouses about crimes in which they are joint participants, federal courts have held that the parallel federal privilege is inapplicable to such communications. *United States v. Parker*, 834 F.2d 408, 411 (4th Cir. 1987); *United States v. Banks*, 556 F.3d 967, 974 (9th Cir. 2009); *United States v. Mendoza*, 574 F.2d 1373, 1381 (5th Cir. 1978); *United States v. Estes*, 793 F.2d 465, 467 (2d Cir. 1986).

V. Physician-Patient Privilege. Any information acquired by a physician in attending to a patient in a professional capacity is privileged and may be disclosed only with the consent of the patient or by a trial court order compelling disclosure if it is “necessary to a proper administration of justice.” G.S. 8-53; see Section V.B.2. below.

A. Elements of the Privilege.

- 1. Medical Personnel Covered.** By its terms, the privilege covers communications between patients and physicians. It also extends to a nurse or other medical personnel acting under a physician’s direction, to information recorded in a hospital as a result of a physician’s visit, and to other medical records made at a physician’s direction, such as the physician providing information to an assistant who enters it in a record. *State v. Efirid*, 309 N.C. 802, 807 (1983) (privilege under G.S. 8-53 does not apply when a nurse does not prepare medical record at a physician’s direction). *But see* Section IX.I. below (discussing the nurse privilege)).
- 2. Physician-Patient Relationship.** For the privilege to apply, a physician-patient relationship must exist at the time of the communication. *McGinnis v. McGinnis*, 66 N.C. App. 676, 677-78 (1984) (setting out the tenets of the privilege); *Smith v. Roper Lumber Co.*, 147 N.C. 62 (1908) (same).
- 3. Covered Information.** To be covered by the privilege, the information must have been necessary for the diagnosis or treatment of the patient, including information obtained from observation, oral communications, and entries made in a hospital or other medical records. *McGinnis*, 66 N.C. App. at 677 (setting out the tenets of the privilege); *Smith*, 147 N.C. 62 (patient’s description of accident details was not privileged when the description would have made no difference in treatment).

B. Waiver & Breach of the Privilege.

- 1. Waiver.** Only a patient can waive the privilege. KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 130, at 483-84 (7th ed. 2011) However, a court may order disclosure even absent a waiver by the patient. See Section V.B.2., below.

A patient may waive the privilege expressly or by implication, e.g., failing to object or by testifying or examining the physician concerning the matter at issue. *Capps v. Lynch*, 253 N.C. 18, 23 (1960) (patient waived his privilege by implication in a personal injury case by testifying to the nature and extent of his injuries and examination and treatment by

surgeon, so adverse party had right to call surgeon as witness). *Cf.* *Scott v. Kiker*, 59 N.C. App. 458, 461 (1982) (the defendant waived the spousal communication privilege by failing to object to testimony).

2. **Breach of Privilege by Court Order.**

a. **Standard.** Any resident or presiding judge in a district, either before or at trial, may order the disclosure of privileged physician-patient communications if it is “necessary to a proper administration of justice.” G.S. 8-53; *Compare* *State v. Efird*, 309 N.C. 802, 806 (1983) (court stated that trial judges have “wide discretion” in determining what is necessary for the proper administration of justice and noted a prior case emphasizing that judges should not hesitate to require disclosure when it appears necessary that the truth be known and justice be done); *State v. Drdak*, 330 N.C. 587, 607 (1992) (effectively upholding the trial court’s order, upon district attorney’s application in DWI case, for hospital medical records containing a test of the defendant’s blood alcohol level); *and* *State v. Miller*, 80 N.C. App. 425, 431 (1986) (upholding the trial court’s order, on the district attorney’s application, for the defendant’s hospital records revealing results of blood test for use in involuntary manslaughter trial based on impaired driving); *with* *State v. Adams*, 103 N.C. App. 158, 161 (1991) (upholding the trial court’s ruling that the defendant was not entitled to the medical records of State’s witness when the records did not reveal evidence bearing on the credibility of the State’s witness, the only possible basis for their relevance).

In certain circumstances, the judge has authority to order the record-holder to court, if necessary to the disclosure determination. See *In re Albemarle Mental Health Center*, 42 N.C. App. 292, 298 (1979) (upon application of the district attorney, the superior court had jurisdiction to order a mental health center director and employees to appear in court so that the court could determine if they had information from a patient about a homicide for which the court might issue an order that disclosure is necessary to a proper administration of justice under G.S. 8-53 or G.S. 8-53.3).

- b. **Jurisdiction to Issue Order.** A district court judge must issue the order if the case is in district court; a superior court judge must do so for a case in superior court. For example, a district court judge has the jurisdiction to issue such an order when a felony case is pending in district court. *State v. Jones*, 133 N.C. App. 448, 463 (1999), *rev’d on other grounds*, 353 N.C. 159 (2000).
- c. **Judicial Findings.** Although the case law is not definitive, a cautious trial court should make findings if it orders disclosure of privileged communications based on the “necessary” reason set out in G.S. 8-53. See *generally* KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 130, at 485-86 (7th ed. 2011).
- d. **Defendant’s Constitutional Right to Access Information.** Aside from G.S. 8-53, there is a federal constitutional basis under *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), for a defendant to obtain access to child protective services files to determine

whether they contain materially favorable evidence, which may include physician-patient information subject to the privilege. For a discussion of this issue, see [Pennsylvania v. Ritchie: Defendant's Right to Third Party Confidential Records](#) in this Benchbook.

C. When Privilege Is Inapplicable.

1. **Certain Cases Involving Children.** The privilege is unavailable to exclude evidence of child abuse or neglect of a child under 16 years old or concerning an illness or injuries to such a child or the cause of the illness or injuries related to a report under Chapter 7B (e.g., G.S. 7B-301 which requires reporting of abuse, neglect, etc.). G.S. 8-53.1; G.S. 7B-310; G.S. 7B-601; see also *State v. Efirid*, 309 N.C. 802, 805 (1983) (noting statutes); *State v. Etheridge*, 319 N.C. 34, 39-40 (1987) (same).
2. **Court-Appointed Examinations.** The privilege does not apply to information gathered from a defendant by a court-appointed physician who is directed by a court to examine a defendant's capacity to stand trial. *State v. Taylor*, 304 N.C. 249, 271-72 (1981).

D. Patient's death. The privilege likely survives the patient's death, although there is no North Carolina case directly on point. See KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 130, at n.146 (7th ed. 2011); R.P. Davis, *Who May Waive Privilege of Confidential Communication to Physician By Person Since Deceased*, 97 A.L.R.2d 393 (1964 with current supplement).

E. Rule 45(c)(2) and Hospital Records. Rule 45(c)(2) of the Rules of Civil Procedure and G.S. 8-44.1, both of which set out procedures for the production of hospital medical records, are effectively subject to G.S. 8-53 for privileged information within the records. N.C. R. Civ. P. 45(c)(2); G.S. 8-44.1 (records "shall be received as evidence if otherwise admissible").

VI. Attorney-Client Privilege.

A. Elements. The court in *In re Investigation of Death of Miller*, 357 N.C. 316, 335 (2003), set out the following five elements of the privilege, which are discussed in more detail below:

1. The relationship of attorney and client existed when the communication was made;
2. The communication was made in confidence;
3. The communication concerns 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.

The burden is on the party asserting the privilege to demonstrate each of its essential elements. *Id.* at 336.

B. Strictly Applied. Because the privilege tends to prevent disclosure of the truth, it is strictly confined to matters for which the privilege was created. *State v. Smith*, 138 N.C. 700 (1905).

- C. Timing of Determination.** The trial court determines the propriety of the privilege. N.C. R. EVID. 104(a). This can be accomplished by an initial inquiry, including an in camera inspection. See *In re Investigation of Death of Miller*, 357 N.C. 316, 320-21 (2003), *later appeal*, 358 N.C. 364 (2004).
- D. Holder of Privilege.** The privilege belongs to the client. When an attorney is called as a witness in any criminal or civil proceeding to testify about a client or is otherwise ordered to reveal information relating to the client's representation, the attorney must assert all non-frivolous claims of the privilege on the client's behalf, absent the client's informed consent to reveal the information. N.C. REV. R. PROF. CONDUCT, 1.6, Comment 14 (2015).
- E. Assertion of Privilege.** The privilege may be asserted whenever disclosure of privileged communications is sought, whether in litigation or not.
- 1. When Client Sues Attorney or Challenges Attorney's Competence.** When a client sues his or her attorney or otherwise alleges that the attorney provided incompetent representation, the client may not assert the privilege concerning the matter in issue. N.C. REV. R. PROF. CONDUCT, 1.6(b)(6) (2015); *State v. Taylor*, 327 N.C. 147, 152 (1990) (court rules defendant waived both attorney-client and work product privileges, but only concerning matters relevant to allegations of ineffective assistance of counsel). After *Taylor*, G.S. 15A-1415(e) was enacted to set out the scope of a waiver of privilege when a motion for appropriate relief alleges ineffective assistance of counsel. In *State v. Buckner*, 351 N.C. 401, 407-11 (2000), the court interpreted *Taylor* as not inconsistent with G.S. 15A-1415(e) and set out a judge's inherent authority to order disclosure.
- F. Attorney-Client Relationship.** As noted in Section VI.A. above, it is an element of the privilege that an attorney-client relationship existed when the communication was made. Thus, the privilege exists only when communications are made after the attorney-client relationship has begun. *State v. Smith*, 138 N.C. 700 (1905) (even if the witness was an attorney, defendant's statements to him were made before the relationship existed and thus would not be excluded at trial by the privilege). It applies to communication between the attorney and the client, including those made in the presence of those acting as the attorney's or client's agents. KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 129, at 476-77 (7th ed. 2011). Even if the attorney has not been specially retained for the particular matter, the privilege exists if there is an attorney-client relationship and the client made the communications seeking legal advice. *Guy v. Avery County Bank*, 206 N.C. 322 (1934).
- G. Communication Made in Confidence.** As noted in Section VI.A. above, the privilege applies only to communications made in confidence. For example, a communication is not confidential when made in the presence of another person whose presence is not essential to the communication. *State v. Van Landingham*, 283 N.C. 589, 602 (1973) (wife); *State v. Murvin*, 304 N.C. 523, 531 (1981) (aunt and friend). Nor is it confidential when the client intends that his or her communications be conveyed to a third party. *State v. McIntosh*, 336 N.C. 517, 524 (1994) (the defendant's statement to his lawyer that he wanted to

surrender to law enforcement was not privileged because the defendant intended statement to be conveyed to third party); *State v. Watkins*, 195 N.C. App. 215, 223 (2009) (a conversation between a defendant and his lawyer was not privileged when the defendant told his lawyer to convey the information to a prosecutor to show what testimony the defendant could offer against his co-defendants).

- H. Concerning Matter about Which the Attorney Was Consulted.** As noted in Section VI.A. above, the communication must relate to the matter for which the attorney was employed or consulted. *State v. Murvin*, 304 N.C. 523, 531 (1981) (the privilege did not apply to an affidavit when the defendant employed the attorney to represent her on receiving stolen goods charged and the affidavit had been prepared because the defendant was a witness to unrelated murder).
- I. Communication Made to Give/Seek Legal Advice for Proper Purpose.** As noted in Section VI.A. above, the communication must be made in seeking or giving legal advice for a proper purpose. The privilege does not cover advice being sought for a contemplated violation of law. N.C. REV. R. PROF. CONDUCT, 1.6(b)(2) (2015) (lawyer may reveal information otherwise subject to privilege to the extent lawyer reasonably believes necessary to prevent commission of a crime by client).
- J. Waiver.** The privilege belongs to the client, who may waive it. *State v. Bronson*, 333 N.C. 67, 76 (1992) (the defendant waived the privilege by not objecting to the prosecutor's questions). The waiver may be express or implied. For example, in *State v. Campbell*, 177 N.C. App. 520, 528 (2006), the defendant argued on appeal that defense counsel breached the attorney-client privilege by telling the jury that the defendant had lied to his attorneys. The defendant contended that the lies he told counsel were protected confidential communications. The court, however, held that because the defendant admitted in direct and cross-examination that he had lied to his attorneys, he had waived the privilege. See also *State v. Tate*, 294 N.C. 189, 194 (1978) (implicit waiver of attorney-client privilege when the defendant-client elicited testimony about content of attorney's letter to client).

A defendant's Sixth Amendment confrontation rights are not necessarily violated by being prevented from cross-examining accomplices about their conversations with their lawyers when the accomplices have not waived the privilege. *State v. Lowery*, 219 N.C. App. 151, 156 (2012) (rejecting the defendant's argument that his Sixth Amendment confrontation rights were violated when the trial court refused to allow defense counsel to cross-examine the defendant's accomplices about conversations with their attorneys regarding charge concessions State would make for their testimony against the defendant; the accomplices' private conversations with their attorneys were protected by the privilege, which was not waived when the accomplices testified against the defendant; noting that the defendant was permitted to inquire about plea agreements themselves).

- K. Client's Death.** The court in *In re Investigation of Death of Miller*, 357 N.C. 316 (2003), *later appeal*, 358 N.C. 364 (2004), held that:
- The attorney-client privilege survives the death of the client.

- When a client is deceased and a party makes a non-frivolous assertion that the attorney-client privilege does not apply, a trial court may conduct an in camera review of the substance of the communications.
 - To the extent any portion of the communications between the attorney and the deceased client relate solely to a third party, the communications are not privileged. If the trial court finds that some or all of the communications are outside the scope of the privilege, the trial court may compel the attorney to provide the substance of the communications to the party (in this case, the State) for its use in a criminal investigation, consistent with certain procedural formalities.
 - To the extent the communications relate to a third party but also affect the client's own rights or interests and thus remain privileged, the communications may be revealed only on a clear and convincing showing that their disclosure does not expose the client's estate to civil liability and that such disclosure would not likely result in additional harm to loved ones or reputation.
 - In the later appeal (see the citation above), after the trial judge had conducted a hearing on remand from the original appeal, the court held that information solely concerning a third person's involvement in a murder investigation that client shared with his attorney prior to client's death was not privileged and thus was not protected by the attorney-client privilege. No information incriminated the deceased client in any manner, directly or indirectly, in the death that was the subject of the murder investigation.
- L. Attorney Work Product.** Even if not protected by the attorney-client privilege, an attorney under discovery statutes may refuse to produce or disclose the contents of his or her work product. For a discussion of this issue, see [Discovery in Criminal Cases](#) in this Benchbook.
- M. Identity of Client.** The identity of a client by his or her attorney is not barred by the privilege. *State v. Tate*, 294 N.C. 189, 193 (1978) (substance of attorney-client communications are protected, but not the identity of a client, the fact that person had become a client, or that there have been communications between client and attorney; trial court properly admitted attorney's testimony that he had sent a letter to defendant on a particular date).
- N. Fact That Client Is No Longer Indigent.** Under G.S. 7A-450(d), when a defendant previously determined to be indigent becomes financially able to hire counsel and to provide other necessary expenses of representation, the defendant must inform appointed counsel, who must promptly inform the court. That information is not included within attorney-client privilege. G.S. 7A-450(d).
- O. Attorney as Witness.** The complex issue whether an attorney for a party can testify as a witness will not be discussed here, but see the discussion and comprehensive summaries of the pertinent cases in KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 129, at 474-75 (7th ed. 2011).

VII. Clergy-Communicant Privilege.

- A. Elements.** Information is covered by this privilege if it is communicated by a person seeking spiritual counsel from a priest, rabbi, accredited Christian Science practitioner, or clergy person or ordained minister of an established church, and the communication was entrusted to the clergy person in his or her professional capacity and necessary to enable him or her to discharge a function of the office. G.S. 8-53.2.
- B. Waiver.** The communicant may waive the privilege in "open court." G.S. 8-53.2. It is unclear whether a court also would approve of an express or implied waiver made outside court.
- C. Clergy Member's Competency to Testify.** A member of the clergy is not competent to testify about the privileged information, and unlike other privileges, such as physician-patient, see Section V. above, there is no provision in the statute to allow a trial court to order testimony as necessary for the administration of justice. *State v. Barber*, 317 N.C. 502, 510 (1986) (noting statute had previously permitted trial court to order testimony, but provision was deleted in 1967).
- D. Illustrative Cases.** The statute has been interpreted in relatively few cases. For cases on point see:

State v. Jackson, 77 N.C. App. 832, 833-34 (1985) (error to allow the defendant's aunt, who also was a minister, to testify for the State; the aunt was acting at least in part in her professional capacity as the defendant's admission came after they prayed together; the comfort and encouragement she gave him may be described as spiritual counsel).

State v. Barber, 317 N.C. 502, 509 (1986) (no clergy-communicant privilege when the statement was made to a non-ordained minister who did not hold office in a church; the court held that the defendant was not seeking spiritual comfort and guidance; the statement was merely a conversation among friends).

State v. Crisco, ___ N.C. App. ___, 777 S.E.2d 168, 174 (2015) (no clergy-communicant privilege when the defendant told third party who was not a member of clergy that he had confessed to a pastor about a murder).

VIII. Psychologist-Patient Privilege.

- A. Elements.** Information is covered by this privilege if it was acquired from a patient by a psychologist in providing professional psychological services and was necessary to enable the psychologist to provide the services. G.S. 8-53.3. The privilege applies to a patient's communications with a psychologist, psychological examiner, or the psychologist's employees or associates. *Id.*
- B. Waiver & Breach of Privilege.**
- 1. Breach by Court Order.** As authorized with the physician-patient privilege, any resident or presiding judge in a district, either before or at trial, may order the disclosure of privileged psychologist-patient

communications if it is “necessary to a proper administration of justice.”
Id. For a discussion of the case law on this issue with the physician-patient privilege, which would likely be equally applicable to the psychologist-patient privilege, see Section V.B.2., above. See *also* State v. Williams, 350 N.C. 1, 20 (1999) (psychologist-patient privilege was not created when the defendant was examined at his request to evaluate his mental status; in any event, the court could have ordered disclosure of records if they were “necessary to the proper administration of justice”).

2. **Waiver.** Although G.S. 8-53.3 does not address a waiver of the privilege, presumably a patient may waive it expressly or by implication.

C. **When Privilege Inapplicable.** The privilege does not apply to bar the admission of evidence of child abuse or neglect, exploitation of a disabled adult, and related misconduct. See G.S. 8-53.3.

IX. **Other Statutory Privileges.** The privileges set out below rarely arise in criminal proceedings, and only a brief description is provided. All of these privilege statutes authorize a court to override the privilege if necessary to a proper administration of justice or under a related standard.

A. **School Counselor-Student Privilege.** This privilege involves a person certified by the State Department of Public Instruction as a school counselor who provides counseling services to students in a public or private school. G.S. 8-53.4.

B. **Licensed Marital and Family Therapist-Patient Privilege.** This privilege involves a person licensed as marriage and family therapist who renders professional marriage and family therapy services. G.S. 8-53.5.

C. **Social Worker-Client Privilege.** This privilege involves a person licensed to deliver private social work services to clients. G.S. 8-53.7.

D. **Licensed Professional Counselor-Client Privilege.** This privilege involves a person licensed to render professional counseling services to clients evaluating and treating mental disorders and other conditions. G.S. 8-53.8.

E. **Optometrist-Patient Privilege.** This privilege involves a person licensed as an optometrist in rendering optometric services to clients. G.S. 8-53.9.

F. **Peer Support Group Counselor-Client Privilege.** This privilege involves a person who is either a law enforcement officer or civilian employee of a law enforcement agency and provides peer counseling services to law enforcement employees and their immediate families. G.S. 8-53.10.

G. **Journalist Qualified Privilege.** A journalist has a qualified privilege against disclosure in any legal proceeding of any confidential or non-confidential information, document, or item obtained or prepared while acting as a journalist. G.S. 8-53.11.

H. **Rape Crisis Center and Domestic Violence Program Privilege.** This privilege involves a trained employee of a domestic violence program or rape crisis center providing services to a sexual assault or domestic violence victim. G.S. 8-53.12.

- I. **Nurse-Patient Privilege.** This privilege involves a person licensed to render professional nursing services to patients. G.S. 8-53.13.