

Family Matters e-Newsletter



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NEWS FOR APRIL 2016

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Can My Spouse Spill the Beans in Court? Spousal Privilege in NC Civil Cases

By Amy A. Edwards

Witnesses called to testify in court generally have to answer questions posed to them in direct or cross examination. An exception to the general rule protects communications made between spouses in civil cases in our state. NC Gen. Stat. §8-56 states that ". . . no husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage." If the privilege applies, it means the spouse who said something (*i.e.*, communicated) can stop his or her spouse from testifying about that communication, even if the spouse wanted to testify about it. However, the spouse who is trying to assert marital privilege to keep the other spouse from "spilling the beans" has

the burden of proof to convince the court the communication was privileged.

Confidential Communication?

Not all communication between spouses is privileged. Privilege is only available when there was a "confidential communication" 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, 598 (1981). In one case, for example, the court made a wife testify about threats her husband made to her, stating that he was going to burn the house down. *Freeman v. St. Paul Fire & Marine Ins. Co.*, 72 NC App. 292 (1985). His communication was a threat, certainly not prompted by affection. The court must carefully consider the circumstances, not just rubber stamp any communication between spouses as confidential.

What About the Timing of the Communication?

There must be a valid marriage at the time the communication takes place. If the communication took place during the marriage while the spouses were living together, the privilege cannot be broken even if they later divorce. On the other hand, if the spouses remain married but are separated when the communication, it is a problem because it is unlikely the communication was prompted by affection, confidence and loyalty.

When is Spousal Privilege Denied?

When can the judge make your spouse spill the beans? Spousal privilege can be waived if the spouse who has a right to seek spousal privilege doesn't object when the other spouse attempts to testify. If the communication involves child abuse or neglect, it is not privileged. Nor is it privileged in paternity cases. Communication in the presence of a third party during the communication can break privilege, with the assumption being that communications aren't confidential if they were uttered while

someone else was there.

Amy A. Edwards is a family law attorney in Greenville, NC, certified by the NC State Bar Board of Legal Specialization as a Family Law Specialist, and is licensed only in NC. Laws change. This article is current as of April 2016.

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Thinking Outside the Box: Alternative Dispute Resolution

By Amy A. Edwards

When disputes arise, there are numerous ways to settle them. The traditional process of the court system, also known as [litigation](#) is an adversarial system.

The Court Process

Litigation is an ancient way to resolve disputes. It relies on force, such as the subpoena power and the demand made by a judge in his or her order. The court system also relies on competing rights and strategies, and sometimes fault and blame. Both parties usually take advantage of every opportunity solely for his or her own benefit at the expense of the other. An example of this concept is cross examination, historically the process by which the [truth](#) is eventually discovered. Instead of trying to reach an agreement between themselves, the parties participating in a trial are adversarial, competing with each other for the judge's decision. The judge must apply the applicable law, regardless of whether either or both parties like or dislike the judge's remedy. Participation in the trial process is mandatory and failure to do so when required will subject the person to a charge of contempt of court and various sanctions.

Alternative Dispute Resolution (ADR)

Growing in popularity, ADR in North Carolina family law cases is both voluntary and involuntary. As the name implies, settling disputes with ADR is an alternative to the court system. Although it does have an associated cost, it is usually shared by the parties. Some methods of ADR do have results that are imposed on the parties, but more frequently in family law cases, they are not. An ADR process is usually more flexible, less expensive and quicker than court. There are four recognized types of ADR, although parties are always free to reach an agreement through negotiation without ADR or the court process.

Mediation

In family law cases, the process of mediation is required when there are pending claims of equitable distribution or child custody are filed. [Child custody mediation](#) is available when a custody case is filed, and it is mandatory unless a judge enters an order excusing participation. It is free and includes only

the parents and a trained child custody mediator provided by the courts. Once an [equitable distribution](#) (marital property and debt) case is filed, [family financial mediation](#) is mandatory in Pitt County and many other North Carolina counties. The parties and their attorneys participate in that mediation at an office of one of the attorneys, and the parties share the cost of the mediator. In both custody mediator and family financial mediation, the mediator does not make any ruling. Instead, the mediator assists the parties by helping them reach a mutually agreeable settlement.

Other Types of ADR

[Collaborative Family Law](#) and arbitration are less common than mediation but are ADR methods available to parties who voluntarily participate. The parties can agree to let the arbitrator make a ruling on their case like a judge. Collaborative family law is similar to mediation because only the parties can settle their case, and no decision is imposed on them.

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Why Do I Have to Get All These Documents To Start My Case?

By Amy A. Edwards

When a client hires me, the first order of business is for me is to review documents my client has given me. The typical [list of documents](#) I request includes tax returns and W-2 or 1099 statements, bank and credit card statements, deeds and mortgage statements, health insurance and daycare costs, and vehicle registration (or title if there is no debt associated with it), to name a few. There are many reasons I need these documents.

This documentation is necessary because your attorney doesn't know (with enough detail) what assets and debts you have. For example, a client might not realize a cash/sweep account is

associated with an IRA, or could forget there is an outstanding loan against the account. Even if you are hoping to agree out-of-court without filing a lawsuit, your attorney relies on the documents to identify the marital estate. Only by analyzing the documentation can an attorney properly advise a client. It is the same idea as math class. You might know the answer but it doesn't matter much unless you "show your math" by showing the method you used to arrive at the answer as opposed to copying an answer from the person sitting next to you.

Locally, the Pitt County court rules are being evaluated and will most likely require at least two years of tax returns, one year of income records, and in some cases, credit card and bank statements for the last year. This would be a minimum required to file certain claims, regardless of whether there is discovery and/or subpoenas issued. If you check the [Pitt County Rules web site](#), they will be posted as they are changed.

Your documentation is evidence that supports your attorney's position, both when negotiating and in the event your case is litigated in court. Just because you don't plan to take your case to court doesn't mean your ex won't file a lawsuit. Beginning with the proper evidence in the first place means your attorney will be prepared to add new information to it instead of starting over again from square one when a lawsuit or settlement is pending. Often, the paperwork must be gathered for civil [discovery](#) anyway. Discovery is the process by which that evidence is made available to the opposing party before court. This also avoids the he said/she said problem. If you agreed on everything, you wouldn't need to be in court. In a family law case, your life is [an open book](#) so to speak.

If there is a lawsuit filed at some future date, you'll have the proof to show the classification of assets and debts, whether assets and debts are marital, separate or divisible. Another reason documents are necessary is to prove the value of assets and the balance of debts. For example, by itself, your house may be worth \$150,000.00 but the real value of it for court might be \$25,000.00, the equity in it after deducting the outstanding mortgage balance. The property is valued as of the date of separation, but the mortgage payments made after the date of separation might also be a point of negotiation.

Why do you have to obtain documentation for several years?

Sometimes you have to trace financial transactions to create links in the chain of evidence. For example, if you claim an asset is your separate property, it might be necessary to show whether any increase in value of the separate property is marital. Or, you might be asking the court to make a ruling that your credit card debt is marital when the account is in your sole name. That requires proof of what charges were made, charges that created the balance of the credit card account at the date of separation. This might mean tracing two or three years of charges on that credit card.

In most child support cases, attorneys request at least three years of tax returns, and at least a full years of your pay records. Even if there is no subpoena or discovery in a child support case, the North Carolina Child Support Guidelines automatically require both parties to include the following information, at a minimum:

"Income statements of the parents should be verified through

documentation of both current and past income." The Guidelines go on to say "Suitable documentation of current earnings (at least one full month) includes pay stubs, employer statements, or business receipts and expenses, if self-employed. Documentation of current income must be supplemented with copies of the most recent tax return to provide verification of earnings over a longer period." NC Guidelines, AOC-A-162.

If you don't normally keep these records, you should immediately get them. Credit card companies, investment firms and banks might charge a per-page fee to retrieve copies of old statements. The longer you wait to get the records, the more likely it is that these records will be expensive to obtain, or could become unavailable. As the economy changes, banks and other businesses merge or are bought out by others, which creates problems when you are seeking records. You should save all records and statements until your case is settled or the trial takes place. It is not uncommon for a family law case to take a year to reach the trial.

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Sincerely,
Amy A. Edwards

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