

SUPREME COURT OF NORTH CAROLINA

Langdon B. Raymond)	
)	
Plaintiff/Appellee)	
)	
v.)	
)	<u>From Buncombe County</u>
North Carolina Police Benevolent Association,)	No. 08 CVS 04456
Inc., a North Carolina Corporation; Southern)	
States Police Benevolent Association, Inc., a)	
Florida Corporation; and John Midgette)	<u>From N.C. Court of Appeals</u>
)	No. COA 09-797
Defendants/Appellants)	

**AMICUS CURIAE BRIEF OF
NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS**

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NO. 230PA10

TWENTY-EIGHTH DISTRICT

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Defendants/Appellants)	

**AMICUS CURIAE BRIEF OF
NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS**

I. IDENTITY AND INTERESTS OF AMICUS CURIAE

Amicus Curiae National Association of Police Organizations (NAPO) is a nationwide association of police organizations. Since 1978, NAPO has served to enhance public safety and protect law enforcement officers through various forms of advocacy, educational programs, lobbying and special projects. NAPO represents over one thousand law enforcement organizations, with over 238,000 sworn officers, over 11,000 retired officers and over 100,000 citizens. These members share a dedication to more effective crime control and law enforcement throughout America.

II. STATEMENT OF CASE AND FACTS

Amicus Curiae National Association of Police Organizations (NAPO) adopts the statement of the case and of facts presented by Defendants.

III. SUMMARY OF ARGUMENT

North Carolina law enforcement officers risk their lives on a daily basis to protect the constitutional and other legal rights of citizens and suspects. In the current police legal environment, police officers will continue to frequently need the benefit of legal counsel. Because of horribly low pay, virtually all southern law enforcement officers have to obtain legal services through police associations, like the North Carolina Police Benevolent Association (PBA). PBA and other police associations throughout North Carolina and America provide legal counsel through tripartite attorney client relationships.

For the right to counsel to be meaningful, the attorney client privilege must be respected in the context of a tripartite relationship. In an opinion by then Judge Timmons-Goodson, and affirmed by this Court, North Carolina has recognized the application of the common interest or joint client doctrine in the highly analogous context of attorney client privilege in insurance litigation. *Nationwide Mutual Fire Ins. Co. v. Bournalon*, 172 N.C. App. 595, 605, 617 S.E. 2d 40 (2005), *aff'd per curiam*, 360 N.C. 356, 625 S.E. 2d 779 (2006). A valid tripartite attorney client relationship existed between PBA, Attorney Lovins and Timothy Foxx. The communications between them consequently should be deemed privileged.

NAPO respectfully submits that the issues before this Court are enormously important to virtually all of America's nearly nine hundred thousand police officers because, *inter alia*, the attorney client privilege issue in dispute will substantially impact the delivery of legal services to police officers and if the privilege is denied in the tripartite context, law enforcement officers will suffer a deprivation of their right to legal counsel.

IV. ARGUMENT

A) POLICE OFFICERS ARE ENTITLED TO USE LEGAL COUNSEL PROVIDED BY POLICE ASSOCIATIONS THROUGH TRIPARTITE ATTORNEY CLIENT RELATIONSHIPS AND THE DECISION BELOW WILL EFFECTIVELY DEPRIVE OFFICERS OF THE RIGHT TO COUNSEL

The American law enforcement profession is a distinct group of professional public servants whose core function is to promote public safety by enforcement of the rule of law. See e.g. *Parish v. Hill*, 350 N.C. 231, 513 S.E. 2d 547, 550 (N.C. 1999). The nature of law enforcement service often pits front line officers against the worst and most dangerous elements in society. Criminal suspects often not only present severe risks of harm to officers including death, many have also learned that there may be tactical advantages in challenging police officers through false and frivolous complaints filed with agencies, police certification commissions, the media, in courts and elsewhere. Police officers are often targets for a wide variety of administrative, state and federal legal challenges thereby giving rise to the frequent need for legal counsel for officers.

The issues in this case are enormously important to North Carolina's law enforcement profession, as well as all other North Carolina public employees serving in local, state, regional and federal governmental agencies where employment and other legal interests are at stake. North Carolina public employees are served by a wide variety of employees associations, such as the N.C. Police Benevolent Association, the N.C. Association of Educators, the Fraternal Order of Police, the N.C. Troopers Association, and the State Employees Association of North Carolina. Many employee associations provide and require tripartite attorney client relationships in order to provide legal services to employees.

The decision of the Court of Appeals below will have the effect of vastly disrupting the basic functioning and operations of these employee associations because, *inter alia*, the decision below jeopardizes the historical means of providing counsel to police officers and public employees through tripartite attorney client relationships.

Many of these public employee associations have historically also provided many other public services to North Carolina through various programs which go beyond the scope of the narrow interests of providing legal services to its members. For example, the North Carolina Association of Educators is well known for having substantially enhanced public education throughout North Carolina. The North Carolina Police Benevolent Association has been at the forefront of the fight against increasing crime in North Carolina for over twenty years. These associations will no longer be able to function in the same manner if the decision below is affirmed. The

use of legal counsel is crucial to the core advocacy services of PBA, NCAE and virtually all other employee associations. The decision below is in fact devastating to the core principles of these associations to ensure that police officers have a right to legal counsel.

Police officers very frequently need access to legal counsel for advice, counsel and representation on all types of disputes which arise out of their often dangerous duties.¹ Virtually every allegation of the use of any police force gives rise to internal investigations by the agency employer, licensing investigations by the Criminal Justice and Sheriffs Education and Training Standards Commissions, and criminal investigations by the State Bureau of Investigation and prosecutors.

In North Carolina and other southern states, police officers are substantially underpaid.² Some rank-and-file police officers live at near poverty levels, especially in small towns and rural counties that make up much of North Carolina. Consequently, most rank-and-file police officers cannot afford to retain specialized legal counsel to obtain advice and representation involving often complex legal

1. Scores of cases and other authorities demonstrate how police officers frequently become mired in every conceivable type of civil, criminal and administrative litigation in all types of state and federal forums. See e.g. *Muehler v. Mena*, 544 U.S. 93 (2005); *Brown v. Gilmore*, 278 F.3d 362 (4th Cir. 2002); *Toomer v. Garrett*, 155 N.C. App. 462, 574 S.E. 2d 76 (2002).

2. See <http://stats.bls.gov/oes/current/oes33351.htm>. (Occupational Employment and Wages, May 2009, 33-3051 Police and Sheriff's Patrol Officers). The Bureau of Labor Statistics reveals that police officers in Mississippi have an annual mean wage of \$31,170.00 annually. Id. The most current BLS data does not appear to reflect precise figures for North Carolina. However, police officers in the southern United States encounter a highly similar range of problems including but not limited to outrageously low salaries.

disputes. Thus, without associations like PBA, many North Carolina police officers would not have the benefit of legal counsel at all.

The logical conclusion of the decision below will seriously undermine and impair the constitutionally protected rights of police officers to engage in collective action undertaken to meaningfully access the courts. E.g., *United Transportation v. State Bar*, 401 U.S. 576, 584, 91 S. Ct. 1076 (1971); *United Mine Workers v. Illinios*, 389 U.S. 217, 88 S. Ct. 353 (1967). Therefore, the decision of the Court of Appeals has enormous implications for the North Carolina police community because it effectively takes away one of the few fundamental constitutional rights of police officers.

For decades, police officers, like many other public servants, have formed associations to help protect themselves. Legal advocacy for police officers is a crucial part of the core mission of police associations. The Southern States Police Benevolent Association is a regional police association with a large division in North Carolina, which has long been active in advocating for public safety and police officers.³ The North Carolina Police Benevolent Association has been active for over twenty years

3. Both the Southern States PBA and the North Carolina PBA have appeared before this Court in cases of special importance to public safety and the law enforcement profession. E.g., *Whitt v. Teeter*, 359 N.C. 625 (2005); *NCDENR v. Carroll*, 358 N.C. 649, 599 S.E. 2d 888 (2004); *Debnam v. N.C. Department of Correction* 334 N.C. 380, 432 S.E. 2d 324 (1993); *Toomer v. Garrett*, 155 N.C. App. 462, 574 S.E. 2d 76 (2002); *Harter v. Vernon*, 139 N.C. App. 85, 532 S.E. 2d 836 (2000). SSPBA has also been active in appearing before other appellate courts. E.g., *McMillian v. Monroe County*, 519 U.S. 1089 (1997); *Hollyday v. Rainey*, 506 U.S. 1014 (1992); *Burlson v. Hancock County*, 543 U.S. 1038 (2004).

in providing a vast array of public services. The *Preamble to the Constitution of the Southern States Police Benevolent Association* provides in pertinent part:

WE, the members of the various law enforcement agencies... do hereby associate ourselves for the following purposes: To support and defend the Constitution of the United States and the constitutions of the various states; to inculcate loyalty and foster the impartial enforcement of law and order; ..." R46

Article I, Section 2 of the SSPBA Constitution provides in pertinent part:

The general objectives and purposes of this organization shall be to promote professionalism among law enforcement officers; ... and to represent officers and other public employees in legal, labor, legislative, and political matters which affect the law enforcement profession." R46

The provision of legal services to its members through the PBA is very similar to other public employee associations such as the N.C. Association of Educators. Essentially, a local lawyer is retained to provide the advice and representation. The local counsel, however, must confer with PBA counsel to ensure compliance with representation procedures and PBA policy. A tripartite attorney client relationship is formed, highly similar to that utilized by the insurance industry.

PBA members are represented through teams of advocates, much like other groups. The team typically consists of attorneys, paralegals, investigators, assistants, and consultants. See Legal Defense Benefit Policy 00-16 and affidavit of Joni Fletcher with attached exhibits. R113-184

The decision by the Court of Appeals below creates grave problems and unnecessary risks for North Carolina's law enforcement community and other public employees. First, the decision, if not reversed, will obstruct the ability of police officers to enjoy the right to legal counsel thereby further undermining important law

enforcement interests. Second, the decision is inconsistent with North Carolina law recognizing the application of attorney client privilege to tripartite relationships where there is a common interest among the three parties.

The Court of Appeals erred in not affording attorney client privilege protection to the communications in issue because it failed to recognize and apply the tripartite attorney client relationship doctrine. Police officers and other public employees are entitled to the benefit of the tripartite privilege, like the insurance industry and insureds, and others. The logical conclusion of the failure to apply the tripartite privilege doctrine in police legal representation will wreak havoc on the law enforcement community throughout North Carolina.

**B) A TRIPARTITE ATTORNEY CLIENT RELATIONSHIP
EXISTED BETWEEN PBA, ATTORNEY LOVINS AND
PBA MEMBER TIMOTHY FOXX**

The attorney/client privilege has been historically recognized in order to promote full and frank discussions between clients and counsel which promotes our system of justice. The requisite elements reaffirmed by this Court in *In Re Investigation of the Death of Miller*, 357 N.C. 316, 225 (2003) are:

- 1) that an attorney client relationship existed or was being formed at the time of the communication;
- 2) that the communication was in confidence;
- 3) the communication relates to a matter concerning which the attorney has been professionally consulted;

4) the communication was made in the course of seeking or giving legal advice for a proper purpose; and

5) the client has not waived the privilege.

The attorney client privilege applies if:

1) the asserted holder of the privilege is or sought to become a client;

2) the person to whom the communication was made is a member of the bar of a court or his agent or subordinate; and

3) the communication relates to a fact of which the attorney was informed by the client for purposes of securing primarily either an opinion on law, legal services or assistance in some legal proceeding. See, e.g., *United States v. Zolin*, 491 U.S. 554, 562 (1989)(recognizing attorney client privilege as "the oldest of the privileges for confidential communications"); *Upjohn v. United States*, 449 U.S. 383, 389 (1981)(holding that communications by a corporation's employees to outside counsel may be privileged); *Republican Party of N.C. v. Martin*, 136 F.R.D. 421, 425 (E.D.N.C. 1991).

The attorney client privilege has long been a crucial foundational component of our entire system of justice. See *Carey v. Carey*, 108 N.C. 267, 270, 12 S.E. 1038 (1891); *In Re: Investigation of the Death of Miller*, 357 N.C. 316, 328, 584 S.E.2d 772, 782 (2003)(where this Court reaffirmed the "public's interest in protecting the attorney client privilege and that attorney client privilege is "one of the oldest and must revered in law.") Accord *Chore-Time Equip., Inc. v. Big Dutchman, Inc.*, 255 F. Supp. 1020, 1021 (W.D. Mich. 1966)("[I]t generally is acknowledged that the

attorney client privilege is so sacred and so compellingly important that the courts must, within their limits, guard it zealously); *In Re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029, 1034 (S.D.N.Y. 1975)(any doubt should be resolved in favor of application of privilege).

The PBA legal benefit plan provides for a tripartite attorney client relationship. The only effective way that an employee association like PBA and other similar associations can effectively serve their members and provide legal services is through a tripartite attorney client relationship.

The tripartite attorney client relationship is a settled part of North Carolina law. See *Nationwide Mutual Fire Insurance Company v. Bournalon*, 172 N.C. App. 595, 617 S.E.2d 40 (2005), aff'd per curiam, 360 N.C. 356, 625 S.E. 2d 779 (2006); accord *United States v. Duke Energy*, 214 F.R.D. 383, 388 (2003); *In Re Mortgage & Realty Trust v. Zim Company*, 212 B.R. 649, 47 Fed. R. Evid. Serv. 1087 (C.D. Ca. 1997).

The sacred attorney client privilege must not be lightly eroded, and especially in a context that will substantially preclude police officers from enjoying the right to counsel. Here, all three parties to the relationship shared a common interest in the provision of legal services to Timothy Foxx. *Bournalon* recognized that it is anticipated that work product will be shared in a tripartite attorney client relationship. 172 N.C. App. at 602. Thus, the communications should be privileged.

C) THE ATTORNEY CLIENT PRIVILEGE HAS BEEN HISTORICALLY APPLIED TO PROTECT COMMUNICATIONS AMONG ATTORNEYS, CLIENTS AND OTHER PERSONS WHO INHERENTLY WORK WITH ATTORNEYS AND CLIENTS IN CARRYING OUT THE ATTORNEY CLIENT RELATIONSHIP

Attorney client privilege law has evolved to extend the privilege to persons who necessarily work with counsel in carrying out the attorney client relationship. The actual provision of legal services often requires attorney client communications to be considered by others. A number of leading treatises sum up important attorney client privilege principles:

Technical and administrative difficulties involved in the practice of law and complex legal transactions often necessitate the assistance and special expertise of non-lawyers in order to render legal services. Lawyers simply cannot tackle the multitude of related tasks necessary to be an effective representative. Rice, *Attorney Client Privilege in the United States*, section 3.3 at 79 (1993, Lawyers Cooperative).

Other leading treatises similarly recognize the principle of extending the privilege:

"The attorney-client privilege has been extended to protect communications between the client and the attorney's agents and between the attorney and his or her agents, where these representatives of the attorney act as conduits of information between the attorney and the client or otherwise aid in the rendition of the professional legal services." Stone & Taylor, *Testimonial Privileges*, Vol. 1 section 1.11 at 1-36.

Professor Wigmore's statement of the rule extending privilege to counsel's agents confirms its long settled validity:

"It has never been questioned that the privilege protects communications to the attorney's clerks and his other agents (including stenographers) for rendering his services." 8 Wigmore, *Evidence Section* 2301 at 583 (McNaughton rev. ed. 1961).

"There has been a tendency to expand this class of protected 'agents' to include various specialists that an attorney must consult in effectively representing his client."

United States v. Smith, 425 F. Supp. 1038, 1047 (E.D.N.Y. 1976). In *Smith*, 425 F. Supp. at 1046, the court further explained:

Given the complexities of modern existence few, if any, lawyers could as a practical matter represent the interests of their clients without any assistance of a variety of trained legal associates not yet admitted to the bar, clerks, typists, messengers, and similar aides.... The privilege must include the persons who act as the attorney's agents.

Professor Rice's authoritative treatise demonstrates how "[c]ourts have extended the privilege to the substantive advice and assistance of associates, investigators, technical experts, accountants, physicians, patent agents and other specialists in a variety of social and physical sciences." Rice, *Attorney Client Privilege in the United States* section 3.3 at 80 - 85 (1993, Lawyers Coop.) (omitting numerous footnotes and references to cases). Those who assist counsel in the rendering of legal services have been historically included within the umbrella of counsel's privilege. Rice, *Attorney Client Privilege in the United States* section 3.3 at 80 - 85 (1993, Lawyers Coop).

Professor Saltzburg has also demonstrated:

The value of the privilege would be substantially diminished if it covered only statements between the attorney and the client. Often the attorney must retain agents, such as private investigators and psychiatric and forensic experts. If communications to these agents resulted in loss of privilege, then the agents could not be effectively used, and the effectiveness of the representation which the privilege serves to strengthen would suffer.

Saltzburg, *Federal Rules of Evidence Manual* 597 (6th ed. 1994). The United States Supreme Court has recognized application of the attorney client privilege to investigators. See *United States v. Nobles*, 422 U.S. 225 (1975).⁴

Courts have broadly recognized the extension of privilege to various types of persons who are assisting counsel in the provision of legal services. For example, polygraph examiners have been held to be within the ambit of the privilege.⁵ Patent agents have been held to be within the privilege.⁶

Here, communications by assigned counsel Lovins with PBA, the entity providing the legal services, is crucial in order for the services to be provided under the legal benefit plan.

V. CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

4. Accord *NLRB v. Harvey*, 349 F.2d 900, 907 (4th Cir. 1965)(private detective's communications held privileged); *United States v. McPartlin*, 595 F.2d 1321 (7th Cir. 1979)(communications of investigator, as agent of an attorney, held privileged).

5. E.g., *Brown v. Twigg*, 612 F. Supp. 1576, 1580 (D. Ind. 1985), aff'd 791 F.2d 598 (7th Cir. 1986).

6. *Mits v. Shred*, 112 F.R.D. 349, 352 (N.D. Ill. 1986).

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VI. CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **AMICUS CURIAE BRIEF BY NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS** has been served this 11th day of October, 2010 by depositing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in first-class postage-prepaid envelope properly addressed as follows:

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