

ATTACHMENT 3: AFFIDAVIT OF KATHERINE GORDON MAYNARD

STATE OF NORTH CAROLINA
DURHAM COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 INS 738

BLUE CROSS AND BLUE)
SHIELD OF NORTH CAROLINA,)

Petitioner,)

v.)

NORTH CAROLINA STATE)
HEALTH PLAN FOR)
TEACHERS AND STATE)
EMPLOYEES,)

Respondent,)

and)

AETNA LIFE INSURANCE)
COMPANY,)

Respondent-Intervenor.)

AFFIDAVIT OF
KATHERINE GORDON MAYNARD

Katherine Gordon Maynard, being duly sworn, deposes and says:

1. I am an adult citizen and resident of North Carolina and am not incompetent.

2. I have personal knowledge of the matters stated in this affidavit, except for the matters stated based on my reading or based on information and belief. I believe that the matters I have stated based on my reading or based on information and belief are true.

3. I have been a member in good standing of the North Carolina State Bar since 1999 and began practicing law with Robinson, Bradshaw & Hinson, P.A., in 2000.

4. I am a shareholder of the firm and serve as the firm's general counsel.

Robinson Bradshaw Has Not Represented the North Carolina State Health Plan for Teachers and State Employees

5. I am familiar with the firm's electronic client accounting recordkeeping system. That electronic system includes records of all firm clients since at least 1992.

6. I have reviewed the firm's electronic client accounting recordkeeping system and have confirmed that the North Carolina State Health Plan for Teachers and State Employees (the "Plan") is not a current client of Robinson Bradshaw. I have further reviewed those records to confirm that the Plan has not been established as a client of the firm during the past 30 years.

Communications Between Robinson Bradshaw and Counsel for the Department of State Treasurer and the Plan

7. On January 20, 2023, Ben Garner, General Counsel of the North Carolina Department of State Treasurer (the "Department"), wrote to Robinson Bradshaw lawyer Matt Sawchak. A true and accurate copy of the January 20, 2023 letter is attached hereto as Exhibit A.

8. On January 25, 2023, I had a telephone conversation with Mr. Garner regarding the questions raised in his January 20 letter.

9. On January 26, 2023, I wrote to Mr. Garner to provide written responses to his January 20 inquiries. My letter of January 26 provided a written version of the same explanations that I provided to Mr. Garner during our phone

call on January 25. A true and accurate copy of the January 26, 2023 letter is attached hereto as Exhibit B.

10. Mr. Garner acknowledged receipt of my letter on January 26, but did not respond in substance until February 16, 2023.

11. On February 16, 2023, at 5:36 pm, Mr. Garner emailed me a letter responding to my January 26 letter. A true and accurate copy of the February 16, 2023 letter is attached hereto as Exhibit C.

12. On March 9, 2023, I spoke by phone with Mr. Garner and with Justice Bob Edmunds of Fox Rothschild. During that call, I again explained our firm's analysis of the application of the North Carolina Rules of Professional Conduct to the firm's representation of Blue Cross and Blue Shield of North Carolina ("Blue Cross NC") in this bid-protest proceeding.

13. During the March 9, 2023 phone conversation, Mr. Garner and Justice Edmunds did not say that the Plan was considering moving to disqualify Robinson Bradshaw from the bid-protest proceeding.

14. On March 10, 2023, I wrote to Mr. Garner, providing a written response to his February 16 letter. My letter of March 10 provided a written version of the same explanations that I provided to Mr. Garner during our phone call on March 9. A true and accurate copy of the March 10, 2023 letter is attached hereto as Exhibit D.

15. In my written and oral communications with Mr. Garner and Justice Edmunds, they did not assert that the firm possesses confidential information belonging to or relating to the Plan.

16. After March 10, no one—including Mr. Garner, Justice Edmunds, or any other counsel on behalf of the Plan—contacted me or, to my knowledge, any other firm lawyer to contest the firm’s representation of Blue Cross NC in this bid-protest proceeding prior to April 24, 2023.

17. On April 24, Justice Edmunds contacted Mr. Sawchak to advise him that the Plan would file a motion to disqualify the firm on or about April 25, 2023.

18. On April 26, Rick Starling informed Robinson Bradshaw that he was resigning from Robinson Bradshaw to join the McGuireWoods firm.

19. On May 1, 2023, Robinson Bradshaw and Rick Starling provided joint notice of Mr. Starling’s departure from the firm to clients with whom Mr. Starling had been working recently.

20. Out of an abundance of caution, the firm has implemented internal security controls to prevent firm lawyers representing Blue Cross NC in the bid-protest proceeding from accessing electronic or hard-copy files related to the firm’s representation of the Department and the Treasurer. The firm also instructed firm lawyers who have represented the Department or the Treasurer not to disclose any confidential information relating to those representations to the lawyers representing Blue Cross NC.

Further Affiant sayeth not.

This the 26th day of May, 2023.

Katherine Gordon Maynard
Katherine Gordon Maynard

Sworn to and subscribed before me,
this the 26th day of May, 2023.

Tammy Jo Dukarm
Notary Public

My commission expires: May 17, 2026

(Notary Stamp/Seal)

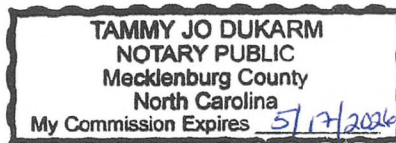


EXHIBIT A



Dale R. Folwell, CPA

January 20, 2023

Via Electronic Mail

Mr. Matthew Sawchak (msawchak@robinsonbradshaw.com)

Robinson Bradshaw

434 Fayetteville Street, Suite 1600

Raleigh, North Carolina 27601

Re: Inquiry regarding your and Robinson, Bradshaw & Hinson's ("RBH") representation of Blue Cross Blue Shield of North Carolina

Dear Matt:

The purpose of this letter is to ask about RBH's representation of Blue Cross Blue Shield of North Carolina ("BCBS") in a matter that is directly adverse to a division of the North Carolina Department of State Treasurer (the "Department").

RBH's and your appearance on behalf of BCBS in response to the North Carolina State Health Plan's (the "Plan") recent request for proposals for third-party administrative services (the "RFP") has raised serious concerns – specifically, how is your and RBH's representation of BCBS permissible given (1) your former representation of the Plan and (2) RBH's ongoing representation of the Department?

While the Department is organized in multiple divisions, as a North Carolina state agency led by the State Treasurer, it is a unified whole. There is no parent–subsidiary relationship within the Department. There is a single human resources team that supports the entire Department, a single legislative affairs and communications team. And as General Counsel for the Department, which, again, is currently a client of RBH, I lead and support a legal team made up of all the Department's attorneys who work in regular collaboration with each other.

We understand the North Carolina Rules of Professional Conduct are fashioned to not unduly constrain attorneys from moving between public and private practice. But that understanding does not mitigate the surprise we experienced upon learning of your and RBH's representation of BCBS through your letter on its behalf.

We would like to better understand RBH's analysis:

- How do the Rules of Professional Conduct allow you to represent BCBS when you previously represented the Plan?
- How do the Rules of Professional Conduct permit RBH's attorneys to represent the Department as bond counsel and as investment transactions counsel while simultaneously representing a client in a matter adverse to the Department and the Plan?



NORTH CAROLINA
DEPARTMENT OF STATE TREASURER

STATE TREASURER OF NORTH CAROLINA

DALE R. FOLWELL, CPA

Dale R. Folwell, CPA

As a final note, the responses sent today by Department and the Plan related to the RFP are in no way intended to waive any rights that the Department may have either from your prior representation or as a current client of RBH. The RFP process presented response deadlines that displaced, but did not eliminate, our concerns noted above.

I look forward to hearing back from you or the firm as soon as possible.

Sincerely,

/s/ Benjamin Garner

Benjamin Garner
General Counsel
The North Carolina Department of State Treasurer

EXHIBIT B

January 26, 2023

KMaynard@robinsonbradshaw.com
704.377.8101 : Direct Phone
704.339.3401 : Direct Fax

VIA E-MAIL

J. Benjamin Garner, Esq.
General Counsel
Department of State Treasurer
3200 Atlantic Avenue
Raleigh, NC 27604

Re: Response to your January 20 letter to Matt Sawchak

Dear Ben:

Thank you for your time yesterday. As I explained when we spoke, I serve as Robinson Bradshaw's general counsel. I am writing to respond to the inquiries in your January 20 letter to Matt Sawchak regarding our firm's analysis of conflicts of interest under the North Carolina Rules of Professional Conduct (the "Rules") relating to our representation of Blue Cross and Blue Shield North Carolina ("Blue Cross NC").

To fulfill our ethical obligations, the firm evaluates each potential new matter for conflicts of interest before accepting an engagement. We performed that analysis when we were first approached by Blue Cross NC to assist them with regard to the recent RFP process for third-party administrative services (the "TPA RFP") conducted by the North Carolina State Health Plan for Teachers and State Employees (the "State Health Plan" or "Plan"). In light of your January 20 letter, we have revisited and reaffirmed our original analysis. As I lay out in greater detail below, our firm's representation of Blue Cross NC in a bid protest arising from the State Health Plan's TPA RFP does not give rise to any conflicts of interest under the Rules.

In your letter to Mr. Sawchak, you have asked two questions. I will address each in turn:

How do the Rules of Professional Conduct permit you [Matt Sawchak] to represent BCBS when you previously represented the Plan?

Rule 1.11 of the North Carolina Rules of Professional Conduct specifically defines the duties of former government lawyers and sets forth the conflicts of interest analysis applicable to Mr. Sawchak's service in the Attorney General's office as state solicitor general. In relevant part, that rule states:

Rule 1.11 *Special Conflicts of Interest for Current and Former Government Officers and Employees*

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

....

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

As the comments to Rule 1.11 reflect and your letter acknowledges, the Rule's scope is intentionally narrow. In relation to the State Health Plan, Rule 1.11 applies only to limit Mr. Sawchak from representing other clients in connection with matters in which he "personally and substantially" participated on behalf of the Plan. The only such matter from Mr. Sawchak's tenure as solicitor general is the *Lake v. State Health Plan for Teachers and State Employees* litigation, where he appeared on behalf of the State Health Plan between 2017 and 2020. Because Blue Cross NC's bid protest arising from the State Health Plan's TPA RFP is wholly unrelated to the *Lake* case, it is not the same matter for purposes of Rule 1.11(a)(2). As a result, no conflict of interest exists under Rule 1.11 that impedes Mr. Sawchak's ability to represent Blue Cross NC here.

Nor does Rule 1.9(c) limit Mr. Sawchak's ability to represent Blue Cross NC. Recently revised, Rule 1.9(c) instructs all lawyers on their continuing obligations with regard to certain information relating to the representation of a former client:

Rule 1.9 *Duties to Former Clients*

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information is contained in the public record, was disclosed at a public hearing, or was otherwise publicly disseminated; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client. A lawyer may disclose information otherwise covered by Rule 1.6 that is contained in the public record, was disclosed at a public hearing, or was otherwise publicly disseminated unless the information would likely be embarrassing or detrimental to the client if disclosed.

Mr. Sawchak is aware of his continuing obligations under Rule 1.9(c) to each of his former clients and is vigilant in complying with those obligations. The State Health Plan's TPA RFP process has no factual or legal overlap with the issues litigated in the *Lake* case, which involved a constitutional challenge to the terms of the Plan's coverage of retirees. Mr. Sawchak has not used or disclosed any information protected by Rule 1.9(c), and he will remain careful not to do so.

How do the Rules of Professional Conduct permit RBH's attorneys to represent the Department [of State Treasurer] as bond counsel and as investment transaction counsel while simultaneously representing a client in a matter adverse to the Department and the Plan?

Rule 1.7(a)(1) defines a concurrent client conflict as a situation where the firm is representing one current firm client in a matter directly adverse to another current firm client. An essential step in this conflicts analysis is to "clearly identify the client or clients" involved. Rule 1.7, Comment 2. When a client is an organization, a lawyer representing that organization "does not, by virtue of that representation, necessarily represent any constituent or affiliated organization." Rule 1.7, Comment 34. This is the case for private and governmental organization clients alike. See Rule 1.13, Comment 9.

A lawyer-client agreement that defines the identity of the governmental organization client controls whether the lawyer is representing any constituent or affiliate of the client, as well as the scope and purposes of the representation. Ethics opinions and judicial opinions in other jurisdictions caution that it is inaccurate and unwieldy to define a government client at too high a level of generality.

Your letter correctly notes that the firm has had recent and ongoing engagements with the North Carolina Department of State Treasurer (the "Department"). Specifically, the firm has had recent engagements with the Department for investment transaction matters and, although we have no active matters in which we are serving as bond counsel on a State bond issue, the firm remains a member of the pool of pre-qualified public finance and bond counsel firms who may provide such services to the Department. Those engagements are each governed by a written agreement:

- *Investment Transaction Engagements.* Our engagement agreements for investment transaction matters state that we are being engaged "[t]o represent you [the State Treasurer], through the North Carolina Department of State Treasurer (the 'Department'), in connection with the investment to be made by you or at your direction on behalf of the North Carolina Retirement System and other plans and funds managed by you (collectively, for purposes of this engagement letter, 'NCRS') in [the specific investment at issue]." Our engagement agreements are countersigned by the State Treasurer.
- *Public Finance Counsel and Bond Counsel Pool Agreement.* In our role as a member of a three-firm pool of pre-qualified public finance counsel and bond counsel for State bond issues, our written agreement is with the Department. That agreement contemplates that we will provide services to the Department and its State and Local Government Finance Division. The most recent extension of the agreement was countersigned by a

representative of the North Carolina Department of State Treasurer, State and Local Government Finance Division, and approved by the State Treasurer.

As these agreements confirm and you noted in your letter, our firm's existing client relationship is with the Department, or with the State Treasurer through the Department. Our firm has never represented the State Health Plan. Our engagement agreements with the Department for investment transaction and bond counsel matters do not contain any reference to the State Health Plan. Nor do the agreements recite that the firm is agreeing to represent the State Health Plan or describe any services the firm has been engaged to provide on behalf of or in relation to the State Health Plan.

Your inquiry as to how the firm can represent Blue Cross NC in a matter adverse to the State Health Plan while the firm represents the Department in unrelated matters, and your letter's description of the Department as a "unified whole," suggest that the Department and the State Health Plan are one and the same for purposes of analyzing conflicts of interest under the Rules. That suggestion overlooks the statutory structure and authority of the State Health Plan, as well as the Rules.

The State Health Plan is created by and exists under Article 3B of Chapter 135 of the North Carolina General Statutes, as amended. Those statutes define the State Health Plan as an entity that exists separate and apart from the Department. N.C.G.S. § 135-48.2 ("The Plan shall have all the powers and privileges of a corporation and shall be known as the State Health Plan for Teachers and State Employees."); N.C.G.S. § 135-48.1(14) ("Plan or State Health Plan" [means] "[t]he North Carolina State Health Plan for Teachers and State Employees. Depending on the context, the term may refer to the entity created in G.S. 135-48.2 or to the health benefit plans offered by the entity . . ."). With all of the powers and privileges of a corporation, the Plan has the power to sue and be sued in its own name, as has occurred over the years. The Plan has a Board of Trustees with substantive powers and responsibilities. See N.C.G.S. §§ 135-48.20, -48.22. Moreover, when the legislature transferred the Plan to the Department in 2012, it did so by a "Type II" transfer, as defined by N.C.G.S. § 143A-6. See Session Law 2011-85, Section 2.2. As a result of this Type II transfer, the State Health Plan and the Plan's Board of Trustees continue to "exercise all [their] prescribed statutory powers independently of the [State Treasurer as the head of the Department]." N.C.G.S. § 143A-6(b). Although the Plan is to be administered under the direction and supervision of the Department and certain "management functions" (e.g., planning, organizing, staffing, directing, coordinating, reporting and budgeting) are to be performed under the direction and supervision of the State Treasurer as head of the Department, see N.C.G.S. § 143A-6(b), this does not mean that the Plan has become indistinguishable from the Department as a result of the 2012 transfer.

The separate legal existence and statutory powers of the State Health Plan are important for purposes of the conflicts of interest analysis. See Rule 1.7, Comment 34, and Rule 1.13. Because the State Health Plan is an entity separate from the Department and because the firm has never represented the State Health Plan, our representation of Blue Cross NC in the TPA RFP bid protest is not adverse to any current firm client. Thus, that representation does not involve a conflict of interest under Rule 1.7(a)(1).

I hope our discussion and this letter answer the questions you posed in your January 20 letter. We regard our ethical obligations seriously and have considered the circumstances

J. Benjamin Garner, Esq.
January 26, 2023
Page 5

involved here with much care and attention. We value our longstanding relationship with the Department, and we are proud to have the opportunity to represent the Department in its important work in the areas of investment transactions and public finance.

Best regards.

Sincerely,

ROBINSON, BRADSHAW & HINSON, P.A.

A handwritten signature in cursive script, reading "Kate G. Maynard".

Kate Gordon Maynard

EXHIBIT C



Dale R. Folwell, CPA

February 16, 2023

Via Electronic Mail

Kate Gordon Maynard (KMaynard@robinsonbradshaw.com)
Robinson Bradshaw & Hinson, P.A.
101 N. Tryon St., Ste 1900
Charlotte, North Carolina 28246

Re: Response to your January 26 letter

Dear Kate:

First, thank you for your phone call on January 25, 2023, and the letter you sent the next day.

We appreciate your thoughtful response and the effort taken to consider the relevant issues regarding both Mr. Sawchak's representation and also your firm's concurrent representation of Blue Cross Blue Shield of North Carolina ("Blue Cross NC") and the North Carolina Department of State Treasurer (the "Department"). We respectfully disagree, however, with your conclusions that distinguish the Department from the North Carolina State Health Plan for Teachers and State Employees (the "Plan") for purposes of the conflicts of interest analysis.

We certainly understand the statutes and the history you noted. But your letter unfortunately describes an artificial distinction that does not correspond with how the Department, including the Plan, is structured or functions. While you noted that a government client should not be defined at too high a level of generality, your analysis of this conflict situation suffers from going too far in the opposite direction. As I mentioned when we spoke, I would be glad to review the materials from other jurisdictions to which you referred.

In short, we believe that the conflict faced by your firm with respect to its concurrent representation of both the Department and Blue Cross NC continues to exist. We respectfully request that your firm address this, and we invite you to provide additional clarification that you think is appropriate.

Sincerely,

/s/ Benjamin Garner

Benjamin Garner
General Counsel
The North Carolina Department of State Treasurer

EXHIBIT D

March 10, 2023

VIA-EMAIL

J. Benjamin Garner, Esq.
General Counsel
Department of State Treasurer
3200 Atlantic Avenue
Raleigh, NC 27604

Dear Ben:

I am writing in response to your February 16, 2023 letter and to follow up to our conversation yesterday. I appreciate our continued dialogue. I offer this letter to further describe the nature of our firm's representation of the North Carolina Department of State Treasurer (the "Department") and explain our conclusion that our firm does not have a concurrent-client conflict of interest.

As I shared in my January 26, 2023 letter, the firm treats our ethical obligations to our clients with great consideration. We have conducted a thorough analysis of the circumstances related to our representation of the Department and our representation of Blue Cross and Blue Shield of North Carolina ("Blue Cross NC"). Under the North Carolina Rules of Professional Conduct (the "Rules"), a lawyer or law firm has a concurrent-client conflict of interest when it represents one client in a matter *adverse to another current client* of the firm. That is not the case here.

Ethics opinions and other authorities instruct that written engagement agreements between a lawyer and a governmental client define the identity of a governmental client for purposes of the conflict-of-interest analysis, as is the case for other organizational clients. See N.C. R. Prof'l Conduct 1.7 [Comment 43]; ABA Formal Ethics Opinion 97-405; District of Columbia Bar Ethics Opinion 268; Restatement (Third) of the Law Governing Lawyers § 97(c). Authorities also instruct that each government entity should be treated as a distinct entity for conflicts purposes, and that representation of one government entity does not create a conflict that prevents a law firm from appearing adverse to another government entity. See, e.g., New York City Bar Ass'n Ethics Op. 2004-03; Mass. Bar Ass'n Op. No. 94-09. To conclude otherwise, absent express agreement between a lawyer and government client, would result in a lawyer having unmanageably broad obligations under the Rules, which in turn would make lawyers reluctant to represent any government client.

As you are aware, our firm has recently represented the Department in limited-scope engagements relating to (i) certain investments made by the Treasurer or Department on behalf of the North Carolina Retirement System ("Investment Transaction Matters") and (ii) bonds issued by the State of North Carolina ("Bond Counsel Matters"). The written engagement agreements we have with the Department for each of these categories of matters define our client as the

Department (or the Treasurer, through the Department) and describe the limited scope of our engagements.

Our firm's work on behalf of the Department is not related to the North Carolina State Health Plan for Teachers and State Employees (the "State Health Plan" or the "Plan") or the Plan's recent RFP for third-party administrative services (the "RFP"). In particular:

- The firm's work on the Department's Investment Transaction Matters and Bond Counsel Matters has not involved information related to the State Health Plan or the RFP;
- The firm lawyers who have represented the Department in Investment Transaction Matters and Bond Counsel Matters have never been engaged to perform legal services related to the State Health Plan or the RFP;
- The firm lawyers who have represented the Department in Investment Transaction Matters and Bond Counsel Matters have not had any contact with the Plan or the RFP; and
- The firm lawyers who have represented the Department in Investment Transaction Matters and Bond Counsel Matters have had no involvement in the firm's representation of Blue Cross NC in the RFP dispute.

The Department has been our firm's only client in the Investment Transaction Matters and Bond Counsel Matters. The Plan is not, and has never been, a client of our firm.

Your February 16th letter states that our analysis rests on an "artificial distinction" between the Department and the Plan. The statutory structure of the Plan and the designation of authority within the Plan, however, are far from artificial distinctions. By statute, the Plan is a body corporate that can sue and be sued. See N.C.G.S. § 135-48.2. In addition, even after the Type II transfer of the Plan to the Department in 2012, the Plan and its Board of Trustees are required to exercise their prescribed statutory powers independently. See Session Law 2011-85, Section 2.2; N.C.G.S. § 143A-6(b). The Plan's statutory structure and independent authority—and, indeed, the Plan's own statements in connection with the RFP—demonstrate that the Plan and Department are distinct entities for purposes of the conflict-of-interest analysis under the Rules.

In its petitions for judicial review, Blue Cross NC is adverse to the Plan, not the Department. The Plan is not a firm client. Thus, because our firm is not representing one firm client in a position adverse to another current client, the firm does not have a concurrent-client conflict under the Rules.

As I noted during our conversation yesterday, the firm lawyers who have represented the Department have no confidential information acquired from the Department related to the State Health Plan or the RFP, nor have those lawyers had any involvement in the firm's representation of Blue Cross NC in the RFP dispute. Nonetheless, out of an abundance of caution, the firm has implemented an ethical screen to confirm that no firm lawyer representing Blue Cross NC in the RFP dispute can access any confidential information of the Department that may be in the firm's possession.

March 10, 2023
Page 3

If you are aware of other facts or circumstances regarding our representation of the Department that you believe the firm should take into consideration or if you believe other screening measures would be helpful, please bring those to my attention. Thank you again for discussing these issues with me.

Sincerely,

ROBINSON, BRADSHAW & HINSON, P.A.

A handwritten signature in cursive script, reading "Kate G. Maynard".

Katherine Gordon Maynard

KGM/sef

Cc: Justice Bob Edmonds