



Put Into Practice: Risk Management Tips for Your Firm

FEBRUARY 9, 2012 - CARY

FEBRUARY 16, 2012 - GREENVILLE

FEBRUARY 17, 2012 - NEW BERN

FEBRUARY 23, 2012 - FAYETTEVILLE

FEBRUARY 24, 2012 - WRIGHTSVILLE BEACH



**LAWYERS
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Put Into Practice: Risk Management Tips for Your Firm

AGENDA

Registration

Statutes of Limitations: Traps for the Unwary; Escapes for the Needy

Lawyers Mutual claims attorneys will discuss common statute of limitations problems, along with solutions. Scenarios presented will include:

- Out of state claims
- Corporate defendants
- Suing municipality and other governmental entities
- Improper / insufficient process and service of process

(1 hour General CLE)

Break

Emerging Ethics: Regulating the New 2.0 Frontier

New technology and digital communication is pushing the limits of the Rules of Professional Conduct. Can we apply the rules designed for old school law practice to the internet, email, blogging and social media? Does this help or hurt the public? In this panel, we will discuss:

- Technology and communication issues before the ABA and state bars
- New and pending NC State Bar ethics opinions
- The use and misuse of social media from an ethics perspective

(1 hour Ethics CLE)

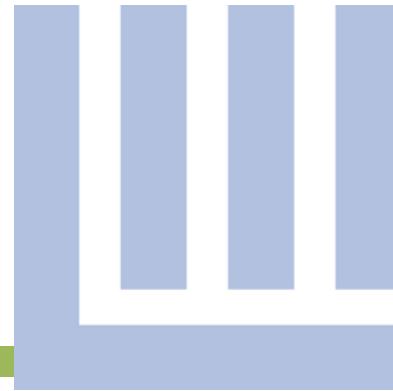
Break

60 Technology Tips in 60 Minutes

This lightning fast survey of law practice management tips will help get your firm running like a top, including:

- Calendar and docket control
- Legal research
- Building a practice

(1 hour General CLE)



Statutes of Limitations: Traps for the Unwary; Escapes for the Needy

OUTLINE

MANUSCRIPT



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Put Into Practice: Risk Management Tips for Your Firm 2011-2012 Series

Statutes of Limitations: Traps for the Unwary; Escapes for the Needy

1. Trap #1 – Out-of-State claims. Statutes of Limitations pertaining to personal injury claims vary by state. Malpractice claims occur when a lawyer fails to recognize the potential for a shorter statute of limitations than we have in North Carolina. Sometimes there's a fix for a potentially blown statute of limitations. E.g., it is sometimes possible to use North Carolina's longer statute of limitations. Sometimes the Service Members' Civil Relief Act will apply to toll any statute of limitations. Sometimes, a disability status will toll the statute of limitations. We will explore the trap of out-of-state claims and suggest ways to prevent the claim in the first instance and perhaps repair the problem if it appears a statute of limitations has been missed.
2. Trap #2 – Suing the wrong corporate defendant. This is a common occurrence and gives rise to many malpractice claims. It is a statute of limitations issue because there is no problem with amending the pleading to add or substitute the correct defendant, as long as the statute of limitations has not expired. We will explore the trap and recommend ways to avoid the trap and perhaps escape the trap once it appears the wrong corporate defendant has been sued and the statute of limitations has expired.
3. Trap #3 – Uninsured/Underinsured Motorist Claims. Some lawyers do not know the correct way to perfect a UM or a UIM claim. Failure to correctly sue a UIM or UM carrier can result in a statute of limitations problem. We will recommend the correct procedure for perfecting these claims, point out the differences procedurally between the two types of claims, and recommend "best practices" for avoiding a motion to dismiss filed by a UM or UIM carrier based on statute of limitations or other grounds.
4. Trap #4 – The problem with "dead defendants." Filing suit against an individual defendant, only to learn after the statute of limitations has possibly expired that the defendant is deceased, can give rise to a statute of limitations problem. We will explore the relationship between probate law and personal injury law and recommend ways to avoid this trap in the first instance and ways to escape the trap if ensnared.
5. Trap #5 – Suing a municipality and other governmental entities, as well as their employees, so as to avoid or mitigate the defense of governmental immunity. In order to avoid the defense of governmental immunity, one must correctly name the individual employees and must correctly allege acts of negligence on the part of the individual employees. Failure to do so can present a statute of limitations problem. We will recommend the correct procedure for suing municipalities and other governmental entities and their employees, so as to avoid dismissal of the employees based on governmental immunity and statute of limitations grounds.
6. Trap #6 – Rule of Civil Procedure 9(j) problems. Incorrectly complying with Rule 9(j) in medical malpractice cases gives rise to statute of limitations problems. We will discuss how to comply with Rule 9(j), some of the issues we have seen in malpractice claims arising from 9(j) problems, and some of ways potential problems can be repaired.

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7. Trap #7 – Improper/Insufficient process and service of process. We will discuss some of the problems that can arise with perfecting service under Rule of Civil Procedure 4, and we will recommend ways to avoid potential problems and ways to remedy problems should they arise.
8. Trap #8 – A & P summonses – Lapsed A & P summonses often give rise to statute of limitations problems. We will highlight our claims experience with lapsed and/or defective A&P summonses and endorsed summonses, and will suggest proper procedure for avoiding problems in this area.
9. Trap #9 – Liens of Mechanics, Laborers and Materialmen. Faulty perfection of laborers' and materialmens' liens can give rise to statute of limitations problems. We will discuss how to properly file and perfect a laborers' and materialmens' lien and will suggest ways to avoid statute of limitations problems with such liens.
10. Trap #10 – The agent/principal problem. Statute of limitations problems can arise with respect to a claim against a principal when one also sues the principal's agent but errs in obtaining service over the agent, or dismisses the claim against the agent. We will discuss whether it is necessary or advisable to sue the agent in most situations, and if one does decide to sue the agent, how to avoid statute of limitations problems with the claim against the principal.

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Statutes of Limitations: Traps for the Unwary; Escapes for the Needy

Trap #1 – Out-of-State claims. Statutes of Limitations pertaining to personal injury claims vary by state. Malpractice claims occur when a lawyer fails to recognize the potential for a shorter statute of limitations than we have in North Carolina.

Every year Lawyers Mutual receives numerous claims resulting from a missed statute of limitations in another jurisdiction. What usually happens is that a resident of North Carolina is injured in a car accident in another state and hires a North Carolina attorney to negotiate a settlement with the tortfeasor's insurance carrier. The attorney erroneously applies the North Carolina statute of limitations date to the accident that occurred in another state or procrastinates determining the out of state statute of limitations until too late. The attorney does not realize that although North Carolina has a three-year statute of limitation for personal injury actions, the foreign state only has one year. Settlement is not reached within the applicable statute of limitation period, a lawsuit is never filed, and the client seeks to recover his damages from his attorney.

<u>JURISDICTION</u>					
<u>CLAIMS</u>	<u>N.C.</u>	<u>S.C.</u>	<u>TN</u>	<u>VA</u>	<u>OH</u>
Personal Injury	3 years	3 years	1 years	2 years	2 years
Wrongful Death	2 years	3 years	1 years	2 years	2 years
Medical Malpractice	3 years	3 years	1 years	2 years	6 years

If you choose to undertake a representation of a claim that arose in a foreign jurisdiction, request an opinion letter from an attorney in that state as to the applicable statute of limitation period. Be sure

and docket the proper filing date. If this is done, you will have discharged your due diligence requirement and will be able to shift responsibility to someone else if an error is made. You should expect to pay for the attorney's services. If you feel the claim does not warrant the payment of a fee for receiving this advice, the claim is not worth pursuing.

Sometimes there's a fix for a potentially blown statute of limitations. E.g., it is sometimes possible to use North Carolina's longer statute of limitation if you are able to establish that the defendant has sufficient minimum contacts in North Carolina to obtain personal jurisdiction over the defendant here. Byrd Motor Lines, Inc. v. Dunlop Tire and Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983) (*Statute of limitations of the forum state applies to cause of action*). Sometimes the Service Members' Civil Relief Act will apply to toll any statute of limitations. Beaver v. Fountain, ___ N.C. App. ___, 701 S.E.2d 384 (2010). Sometimes, a disability such as minority or incompetency status will toll the statute of limitations. N.C.G.S. § 1-17.

Finally, if a staff member is in charge of intake on new personal injury cases, develop a checklist that includes a "red flag" for out-of-state accidents. In such a case, have the file go directly to a lawyer to determine the correct statute of limitations and the correct diary date on the file.

Trap #2 – Suing the wrong corporate defendant. After the proper statute of limitations period has been identified and the complaint filed, other pitfalls await the unwary attorney or paralegal. Law firms commonly make mistakes in naming and serving the proper parties. It is a statute of limitations issue because it is easy to amend the complaint to add or substitute the correct corporate defendant, as long as the statute of limitations has not expired. However, when a lawsuit is commenced at the eleventh

hour (just before the statutes of limitation expires), the attorney may not have time to correct such flaws, and the client may suffer prejudicial harm as a result.

Identify and Name the Proper Defendant

One of the most common mistakes attorneys make is that they fail to discover and identify the proper name of the corporate defendant whom the plaintiff seeks to sue. This error is especially prevalent in medical malpractice and premises liability cases. To avoid such errors, plaintiffs' attorneys should make every effort to ascertain the defendant's proper corporate name either well before filing the complaint or as soon as possible thereafter through discovery. A diligent effort should be made to determine all possible entities and persons who should be named as parties in the lawsuit.

In the North Carolina State courts, pleadings and process may be amended, pursuant to Rule 4(i) for process and Rule 15 for pleadings; however, the amendment will not relate back to the date of initial filing if it is deemed to add an entirely new party to the action, whether or not that party actually had notice of the institution of the action. See, Crossman v. Moore, 340 N.C. 185, 459 S.E.2d 715

(1995)(*Complaint dismissed because improperly named defendant "Van Dolan Moore" rather than "Van Dolan Moore, II"*), and Franklin v. Winn-Dixie Stores, Inc., 117 N. C. App. 28, 450 S.E.2d 24 (1994), aff'd 342 N.C. 404, 464 S.E.2d 46 (1995)(*Complaint dismissed even though defendant Winn-Dixie and its unnamed subsidiary had same headquarters and registered agent*). Unfortunately, even insurance company malfeasance in misrepresenting the correct identity of the corporate defendant does not prevent dismissal of a complaint where the true identity of the defendant should have been found from other sources. See, Bailey v. Handee Hugo's, Inc., 173 N. C. App. 723, 620 S.E.2d 312 (2005) (*Insurance adjuster's misrepresentation about name of defendant did not create estoppel because true identity of corporate defendant was on record at Register of Deeds*).

On the other hand, if the amendment merely changes a misnomer in the name of a party already served and properly before the court, it should relate back. Bailey v. McPherson, 233 N.C. 231, 63 S.E.2d 559 (1951). Obviously, this distinction is an important one where the statute of limitations on the plaintiff's claim expires between the initial filing date and the date of the amendment.

As indicated above, the law remains that "an amendment of process and pleading may be allowed in the discretion of the court to correct a misnomer or mistake in the name of a party." Id. at 235, 63 S.E.2d at 562. See also, Liss v. Seamark Foods, 147 N.C. App. 281, 555 S.E.2d 365 (2001):

[I]f the misnomer or misdescription does not leave in doubt the identity of the party intended to be sued, or, even where there is room for doubt as to identity, if service of process is made on the party intended to be sued, the misnomer or misdescription may be corrected by amendment at any stage of the suit.

Id.

Make sure to always check the Secretary of State website for corporate records, the Register of Deeds records for filed Certificates of Assumed Names, and even SEC records and filings that are available online. Take special care in correctly naming and serving foreign defendants. Foreign service requirements, including Hague Convention requirements, may need to be followed.

When faced with an allegation that the wrong corporate defendant was sued, make sure to conduct thorough discovery regarding the veracity of the allegation. Never let a summary judgment motion be determined on the defendants' affidavits without examining the truth of the facts alleged in the affidavits and exploring alternative theories that may hold up against the named defendant. For instance, there may be avenues of liability against the named defendant because it cloaked the actual

tortfeasor with apparent authority that the plaintiff relied upon when injured. As an example of the possible issues that you will want to investigate when determining whether you sued the right corporate entity, see the Appendix to this manuscript, which contains a detailed strategy-memorandum provided by Lawyers Mutual claims repair counsel to one of our insureds when a healthcare defendant alleged that the wrong defendant had been sued in a medical malpractice case.

Serve All Defendants Within Statutorily Prescribed Time Limits

Attorneys who commit errors in timely serving a complaint and summons on a defendant may also face malpractice liability. Attorneys must serve a defendant with a complaint and summons within the statutorily required time limitations. These limitations vary according to jurisdiction. For instance, the complaint must be served on a defendant to a lawsuit in federal court within 120 days of the filing of the complaint. Fed. R. Civ. P. 4(m). However, a defendant in a lawsuit in North Carolina State court must be served in most cases within 60 days after the date of the issuance of the summons. N.C. Gen. Stat. § 1A-1, Rule 4(c).

Attorneys who fail to perfect service upon a defendant within the statutory expiration period may request an extension of time for service of process. A federal court will grant an extension only if the attorney provides good cause for the delay in service. Fed. R. Civ. P. 4(m). On the other hand, a North Carolina court will issue an alias or pluries summons to extend the time period for service upon request, provided certain guidelines are met. N.C. Gen. Stat. § 1A-1, Rule 4(d)(2).

Thus, an attorney may be vulnerable to malpractice claims for failing to follow the rules of the particular court in which the case is being litigated. For instance, attorneys may request an alias or pluries summons “at any time within 90 days after the date of issue of the last preceding summons in the chain

of summonses.” Id. Provided that the request is not made in “violations of the letter or spirit of the rules for the purpose of delay or obtaining an unfair advantage,” an attorney may request numerous alias or pluries summonses and extend the service deadline for a lengthy period of time without committing malpractice. Smith v. Quinn, 324 N.C. 316, 319, 378 S.E.2d 28 (1989). However, an attorney who does not request an alias or pluries summons within the 90 day time period invalidates the old summons and begins a new action. See CBP Resources v. Ingredient Resource Corp., 954 F. Supp. 1106, 1110 (M.D.N.C. 1996). In addition, an attorney must refer to the original summons in an alias or pluries summons or else the alias or pluries summons is invalid. Integon Gen. Ins. Co. v. Martin, 127 N.C. App. 440, 441, 490 S.E.2d 242 (1997). An attorney risks malpractice liability if the statute of limitation runs before the alias or pluries summons is issued in such a situation.

Keep the Summons Alive or Enter Into Enforceable Tolling Agreements Within the Statutes of Limitations While Engaging In Settlement Discussions Or Until Answer Filed With No Service or Statute of Limitations Defenses and the period for amending as a matter of right has expired.

It is often in the client’s best interest to pursue settlement before spending the time and money involved to file or serve a complaint. In such cases, it is crucial to keep the required summons alive and/or enter into an enforceable tolling agreement with the opposing party. Such tolling agreements must be executed before the statutes of limitation passes. Regardless of how close the parties may be to settlement, do not let the statutes of limitation pass without invoking proper protections for your client.

It is also best practice to keep the summons alive until at least 30 days after the defendant has filed an answer that has no service or statute of limitations defenses. By waiting 30 more days after service of the answer, you avoid getting surprised by an amendment to the answer as of course under Rule 15(c)

that raises a service defense. If the answer raises such defenses, always keep the summons alive until the defenses are either withdrawn or ruled on by the trial court.

Trap #3 – Uninsured/Underinsured Motorist Claims. Failure to perfect a UIM or UM claim can result in a statute of limitations problem. G.S. §20-279.21(b)(3)a prescribes the method by which an uninsured motorist insurance carrier may be held liable in an action against an uninsured motorist. That statute provides, in pertinent part:

. . . [T]he insurer shall be bound by a final judgment taken by the insured against an uninsured motorist *if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law.* . . . The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings

G.S. §20-279.21(b)(3)a (2001) (emphasis added).

By its plain language, the statute clearly provides that an uninsured motorist insurer will be bound by a final judgment against an uninsured motorist *only* if the carrier has been served with process pursuant to the provisions of Rule 4.

The clear intent of the legislature in drafting G.S. § 20-279.21(b)(3)a to require service of process on an *uninsured* motorist insurer is further demonstrated by the contrast between the uninsured motorist statute and the underinsured motorist statute. In the context of *underinsured* motorist insurance, G.S. §20-279.21(b)(4) provides:

A party injured by the operation of an underinsured highway vehicle who institutes suit for the recovery of moneys for those injuries and in such an amount that, if recovered, would support a claim under underinsured motorist coverage *shall give notice* of the initiation of the

suit to the underinsured motorist insurer as well as to the insurer providing primary liability coverage upon the underinsured highway vehicle. *Upon receipt of notice, the underinsured motorist insurer shall have the right to appear in defense of the claim without being named as a party therein, and without being named as a party may participate in the suit as fully as if it were a party.*

(Emphasis added).

A comparison of the language of these two statutes reveals that, in the underinsurance context, the legislature has required only that a plaintiff with a potential underinsured motorist claim give notice to the underinsured motorist insurer. Upon receiving such notice, the underinsured motorist carrier is presented with the option to appear in defense of the claim, and to appear in the name of the tortfeasor. The UIM carrier may have arguments against its liability related to the lateness of notice and potential prejudice to its ability to defend the suit; however, the underinsured motorist insurer is not entitled to formal service of process, and is not automatically made a party to the action upon receipt of the notice.

A plaintiff instituting a claim against an *uninsured* tortfeasor, by contrast, is specifically required not only to notify the uninsured motorist insurer, but to serve the insurer with process. At that point, the uninsured motorist carrier is given no choice in the matter, but becomes by the mandate of the statute a party to the action. The sole choice given to the uninsured motorist insurer is whether to defend the suit in its own name or to appear in the name of the uninsured motorist.

Two cases worth consulting in this area are: Thomas v. Washington, 136 N.C. App. 750, 525 S.E.2d 839 (2000)(UM case) and Liberty Mut. Ins. Co. v. Pennington, 141 N.C. App. 495, 541 S.E.2d 503 (2000) (UIM case).

While not a statute of limitations issue, one problem we see with some frequency in this area is a lawyer allowing his or her client to sign a release that releases the tortfeasor and has the unintended effect of releasing the UIM or UM carrier. Sometimes this problem can be fixed by “reforming” the original release, but it probably cannot be fixed by simply substituting the proper release for the offending release. At least, not if the unintended beneficiary is aware of the offending release and takes action upon it. See Runnels v. Robinson, ___ N.C.App. ___, 711 S.E.2d 486 (2011).

Trap #4 – The problem with “dead defendants.” Filing suit against an individual defendant, only to learn after the statute of limitations has possibly expired that the defendant is deceased, can give rise to a statute of limitations problem. It is not unusual in our experience at Lawyers Mutual to receive a call from an insured who reports that he filed suit at the eleventh hour against an individual only to learn through a responsive pleading or from the adjuster that the defendant had previously died. What to do? In Speights v. Forbes, ___ N.C.App. ___, 699 S.E.2d 139 (2010), the plaintiff filed suit against the individual defendant 2 weeks prior to the expiration of the statute of limitations and served the defendant by personal service on his wife at the defendant’s residence. Defendant’s counsel filed a motion to dismiss, stating that the defendant, being deceased, was not a proper party. Contending that she was correcting a “misnomer,” plaintiff filed a motion to amend her complaint to substitute Mrs. Forbes, as executor of defendant’s estate, for defendant. The trial court granted the defendant’s motion to dismiss and denied the plaintiff’s motion to amend. The plaintiff appealed.

The Court of Appeals affirmed the trial court’s dismissal stating that because the defendant’s estate was closed, Mrs. Forbes no longer held any legal role related to defendant’s estate when she was served with the complaint. Speights, 699 S.E.2d at 3. Therefore, according to the Court of Appeals, “plaintiff’s

motion to amend would have, if granted, substituted one inappropriate defendant for another, and done so after the statute of limitations had expired.” Id. at 1. Neither a deceased person nor a closed estate is an appropriate defendant in a negligence lawsuit. Id. at 1.

Contrast this case with Boyd v. Sandling, et al., ___ N.C.App. ___, 708 S.E.2d 311 (2011). Two days shy of the expiration of the statute of limitations, plaintiff filed a complaint against defendant Alta D. Sandling, individually, and as executrix of the Estate of James A. Sandling, Jr.. Plaintiff’s counsel was aware that James Sandling had died as a result of the motor vehicle accident some three years before, and she had, in fact, sent a letter to Alta Sandling, as executrix of her husband’s estate, some three years earlier advising her of the plaintiff’s claim for personal injuries. Plaintiff’s counsel had also sent the same letter to the clerk of court and counsel for the estate. Notwithstanding notice to the contrary, the executrix certified that there were no outstanding debts owed by the estate. The executrix was discharged from her duty as executrix and the estate was closed. All of this occurred prior to plaintiff’s filing the civil action against the executrix.

The defendant filed a response to the plaintiff’s complaint and moved to dismiss the plaintiff’s complaint for failure to state a claim. She alleged that, because she had been discharged as executrix, she could not be a proper party to the suit as a matter of law. Sound familiar? See Speights v. Forbes, ___ N.C.App. ___, 699 S.E.2d 139 (2010), supra. Smartly, the plaintiff moved the clerk of court to re-open the estate *nunc pro tunc* to October 8, 2008, the date the estate was closed, and a date prior to the filing of the civil complaint. Because the executrix did not mail a personal notice to a known creditor, the plaintiff, the Clerk ordered that the estate be re-opened effective October 8, 2008.

Nonetheless, the trial court granted the defendant’s motion to dismiss and the plaintiff appealed to the Court of Appeals. The Court of Appeals reversed the dismissal, unlike the result in Speights v. Forbes,

supra. Of interest is the court's discussion of the intersection of personal injury law and estates law. In North Carolina, when a claim is brought against a decedent, there are two statutory mechanisms that limit the time in which a claimant can bring a suit against the decedent's estate: (1) the non-claim statute (Gen. Stat. § 28A-19-3) and (2) the applicable statute of limitations. A cause of action may be barred by either or both of these statutes.

Gen. Stat. § 28A-19-3(a) applies to claims that arose against the decedent's estate before his death. With some exceptions not applicable to this case, the statute requires such claims to be filed within 90 days of the date that either general notice to creditors is published or individual notices are sent to creditors. If the claim is not brought within that time period, it is barred as against the estate. However, in this case, the executrix did not send notice to a known creditor: the plaintiff. In this situation, the claim was barred three years after the death of the decedent under Gen. Stat. § 28A-19-3.

Of course, under the facts of this case, the time limitation prescribed by the "non-claim statute," Gen. Stat. § 28A-19-3, tracks identically with the statute of limitations for personal injury claims. (The decedent died on the same day as the accident.) Thus, the plaintiff filed her lawsuit before the expiration of either the statute of limitations or the time limit set by the non-claim statute.

The Court of Appeals went on to hold that although the estate was closed at the time the plaintiff brought her suit, the executrix was a proper party and it was error to dismiss the suit. Citing In re Miles, 262 N.C. 647, 652, 138 S.E.2d 487, 491 (1964), the court said the executor of a closed estate may, in some circumstances, still be a proper defendant in a lawsuit.

This case is difficult to square with Speights v. Forbes, supra, but a couple of lessons emerge:

1. File your lawsuit early enough to draw a responsive pleading alerting you to the fact that the defendant is deceased and giving you time within the statute of limitations to fix your pleading;
2. When you learn of a deceased defendant, immediately check to see if there is an open estate. If not, get one open so that you will have someone to sue. If necessary, have the court appoint the public administrator.
3. If it appears you are beyond the statute of limitations, check to see if the estate's personal representative complied with the estates statute in giving notice to creditors, and check on the date of death for the defendant. Your statute of limitations may not expire until three years after the death of the defendant, depending on whether or not the estates statutes were followed correctly.

Trap #5 – Suing a municipality and county governmental entities. There was a time when most North Carolina county and city governments routinely agreed to waive governmental immunity to the extent of the limits of their liability insurance that covered claims arising out of the negligent acts of their employees. By alleging in the complaint waiver of governmental immunity through the purchase of liability insurance, the plaintiff's claim against the city or county would be viable whether or not the complaint named the negligent employee in either his official or individual capacities or even named him at all. **That day is gone.**

In recent years, most county and city governments in North Carolina have been playing a shell game by purchasing liability policies that purport to cover claims against the county or city for negligence but also contain a non-waiver or preservation of governmental immunity clause or special endorsement. The Non-Waiver Clause states that the insurance policy does not cover any claim that would otherwise be barred by governmental immunity and is not intended to waive such immunity as a defense. In other words, the city and county retain immunity because the policy does not cover the claim, and the claim is not covered by the policy because the city and county retain their immunity. The Court of Appeals has

given this shell game its seal of approval in several reported and unreported opinions, even as one opinion noted the “circular nature of the logic” behind the validity of the Non-Waiver Clause and approved it nonetheless. See Estate of Earley v. Haywood County Dept. of Soc. Serv., ___ N.C. App. ___, 694 S.E.2d 405 (2010) (leaving it to the legislature to address the public policy implications of the Non-Waiver Clause).

Regardless of the public policy implications of the Non-Waiver Clause, the prudent attorney bringing a negligence claim against a county or city should always sue the negligent employee(s) and their supervisors, if appropriate, as named parties and in their **individual capacities**. Denominating the allegations against the employees in their individual capacities should be explicit in the caption, body, and prayer for relief, and discovery should be directed to the individual employees. By making such allegations, the claim should survive the governmental immunity defense because such defense does not apply to employees in their individual capacities. Ironically, if the employee is sued individually in the complaint, the same county or city insurance policy with the Non-Waiver Clause is likely to provide coverage to the employee as an “insured” under the policy when the claim is against him in his individual capacity. If you fail to sue the employee in his individual capacity, an amendment of the complaint to specify an individual capacity claim after the statute of limitations runs will not relate back to the filing of the complaint. White v. Crisp, 138 N.C. App. 516, 530 S.E.2d 87 (2000). If the complaint is not clear about whether the lawsuit is against the employee in his official or individual capacity, courts will presume the lawsuit as only against the employee in his official capacity. Mullis v. Sechrest, 347 N.C. 548, 495 S.E.2d 721 (1998).

As an added safeguard, the prudent attorney should file a **contemporaneous uninsured and/or underinsured motorist claim** when suing a county or city for a motor vehicle accident caused by a

negligent employee. Until an answer is filed and discovery is conducted, the issue of whether the county or city's insurance policy provides coverage for the accident may remain uncertain. A claim for uninsured or underinsured motorist coverage is viable if the claim against the county or city is fully or partially barred by governmental immunity. William v. Holsclaw, 128 N.C. App. 205, 495 S.E.2d 166, aff'd, 349 N.C. 225, 504 S.E.2d 784 (1998). Should the statute of limitations expire before discovering that there is no insurance coverage for the county or city's negligence in a motor vehicle accident, any uninsured motorist claim would be barred unless it has been properly asserted under N.C.G.S. § 20-279.21(b)(3) prior to the statute of limitations running.

When suing for a tort caused by a deputy sheriff, remember that you should sue the deputy in his individual capacity and the elected Sheriff by his personal name and in his individual and official capacities. It is not proper to bring a claim against the county "Sheriff's Department." See Treadway v. Diez, ___ N.C. App. ___, 703 S.E.2d 832 (2011), review allowed by, ___ N.C. ___, 712 S.E.2d 881 (2011). A lawsuit against the Sheriff should also be brought against the Sheriff's public official bond by naming the surety as an additional defendant in the action. Because the bond waives the Sheriff's governmental immunity to the extent of its limits, which are usually around \$25,000, you must pursue the Sheriff's bond in order to also pursue a UM or UIM claim under your client's own automobile policy.

You may also call Lawyers Mutual should you have any questions or concerns about a present case you have filed or anticipate filing against a county or city. We may be able to assist you in drafting your pleadings, responding to a dispositive motion, or we may decide to consult or engage expert counsel under our claims repair program to work with you so that your client's claim is determined on its merits.

Trap #6 – Rule of Civil Procedure 9(j) problems in Medical Malpractice Cases. Many plaintiffs’ medical malpractice lawyers will tell you that the Rule 9(j) certification requirements are a legal malpractice minefield diabolically designed to trip up the attorneys and cause them to lose sleep and hair. A review of the North Carolina caselaw interpreting Rule 9(j) gives credence to their protestations. However, the biggest legal malpractice trap in Rule 9(j) that we see at Lawyers Mutual does not involve the validity of the expert’s review that is the subject of the required certification in the complaint. Instead, more legal malpractice claims arise out of plaintiffs’ errors in obtaining a 120-day extension of the statute of limitations or their attempts to amend the complaint or take a Rule 41 dismissal after filing the complaint.

At first blush, the extension appears easy to obtain -- Upon motion by the plaintiff before the statute of limitations expires, a resident superior court judge in the county where the cause of action arose may grant an extension not to exceed 120 days based upon a finding of “good cause” and that “the ends of justice would be served by the extension.” However, given the threshold nature of Rule 9(j), there are an inordinate number of appellate decisions that illustrate the rule’s peculiarities in practice and the North Carolina courts’ struggles to reach consensus on its application. See, e.g., Brown v. Kindred Nursing Ctrs. East, LLC, 364 N.C. 76, 692 S.E.2d 87 (2010) (4-3 Supreme Court decision reversing a split opinion of the Court of Appeals reversing the trial court that had relied on an earlier opinion of the Supreme Court). For example, Rule 9(j) does not specify

- whether the motion and order must be filed and served on anyone, and if so when that should happen;
- whether the motion and order need to have a caption or even identify any of the parties that will be included in the complaint when it is filed;

- whether the plaintiff's attorney should obtain summonses with the extension order;
- whether the 120-day extension is in lieu of, or in addition to, the 20-day extension to file a complaint that a plaintiff may otherwise obtain under Rule 3; or
- whether the one-year re-filing period after a Rule 41 voluntary dismissal may be taken if the original complaint was filed during the 120-day extension.

Should an attorney reach the wrong conclusion about any of these issues, the court may find that the complaint was filed after the expiration of the statute of limitations and dismiss the action.

Because Rule 9(j) has a more stringent procedure for plaintiffs in medical malpractice cases requiring an expert certification prior to filing the complaint, the legislature sought "to lessen the additional burden of this special procedure" by permitting trial courts to extend the statute of limitations "for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule."

Brown, supra, 364 N.C. at 80, 692 S.E.2d at 89-90. However, the "burden" of figuring out what the appellate courts will do with issues like the ones designated above can be particularly onerous for attorneys and their malpractice insurers. For instance, soon after the enactment of Rule 9(j), the North Carolina Supreme Court initially provided a broad interpretation of when a Rule 41 dismissal without prejudice could be taken after a medical malpractice complaint was initially filed without the required expert certification. See Brisson v. Santoriello, 351 N.C. 589, 528 S.E.2d 568 (2000) ("*Had the legislature intended to prohibit plaintiffs in medical malpractice actions from taking voluntary dismissals where their complaint did not include a [Rule 9\(j\)](#) certification, then it could have made such intention explicit.*"). But, subsequent appellate opinions have markedly narrowed the circumstances under which a medical malpractice plaintiff may avail himself of a voluntary dismissal or amend the complaint to correct an error therein -- so much so that one panel of the Court of

Appeals has opined that Brisson has been overruled. McKoy v. Beasley, ___ N.C. App. ___, 712 S.E.2d 712 (2011).

So with all of the uncertainty that still surrounds Rule 9(j) and its application, what are some of the questions that have been answered fairly clearly by the appellate courts?

- The extension motion and order may be *ex parte*, do not have to identify the potential defendants in the matter, and do not have to be served. See, Webb v. Nash Hosps., Inc., 133 N.C. App. 636, 516 S.E.2d 191 (1999).
- The extension order does have to be filed in order to be “completed” and effective, but the filing may occur concurrently or prior to the filing of the complaint. Watson v. Price, ___ N.C. App. ___, 712 S.E.2d 154 (2011), petition for disc. rev. pending.
- After obtaining a 120-day extension to file a medical malpractice complaint, the plaintiff may **not** get an additional 20 days to file the complaint under Rule 3. Carlton v. Melvin, ___ N.C. App. ___, 697 S.E.2d 360 (2010).
- Summons obtained during the 120-day extension period and filed prior to the complaint is void, therefore a subsequently filed and otherwise timely complaint is deemed never to have commenced the action unless a new summons is issued with, or within five days of, the filing of the complaint. Stinchcomb v. Presbyterian Medical Care Corp., ___ N.C. App. ___, 710 S.E.2d 320, review denied by, ___ N.C. ___, ___ S.E.2d ___ (2011).

- As a general proposition, a Rule 41 voluntary dismissal will not toll the statute of limitations if a medical malpractice complaint was initially filed without complying with Rule 9(j) certification requirements, unless the appropriate Rule 9(j) expert review occurred prior to the filing of the original complaint and the original complaint was filed timely without a 120-day extension. Brown v. Kindred Nursing Ctrs. East, L.L.C., 364 N.C. 76, 692 S.E.2d 87(2010).
- A 120-day extension motion and order are a sham if the Plaintiff then files a medical malpractice complaint based upon a res ipsa loquitur theory of negligence. Cartrette v. Duke Univ. Med. Ctr., 189 N.C.App. 403, 659 S.E.2d 98 (2008)(unpublished opinion).

Trap #7 – Improper/Insufficient process and service of process.

Beware of informal extensions of time – especially when you are bumping up against a statute of limitations. We had a situation at Lawyers Mutual some time ago where a defense lawyer purportedly agreed to consent to an order joining his corporate client in a lawsuit following additional discovery. After the statute of limitations had expired on any cause of action against to potential new defendant, the defendant refused to consent to the amendment adding the new defendant citing his client's refusal to do so. Nothing was in writing, so the fight was on.

Rule 3 – Extension of Time to File Complaint - Plaintiffs' counsel caught without sufficient time to prepare a complaint in the face of an impending statute of limitations may obtain additional time within

which to file the complaint through the procedure outlined in Rule 3 of the North Carolina Rules of Civil Procedure. Pursuant to Rule 3, an action may be timely commenced by the issuance of a summons alone, where counsel applies for and obtains an order allowing for delayed service of the complaint. This procedure, when accomplished correctly, will effectively toll the statute of limitations until the date the complaint is filed. The process is not often utilized, however, and the appellate cases construing Rule 3 are not in all instances abundantly clear. Consequently, counsel defending a lawsuit initiated in this manner should carefully scrutinize the initial pleadings for potential defects. A dismissal on this basis would, due to the expiration of the statute of limitations, forever bar the plaintiff's claim.

Rule 3 provides that a civil action may be commenced by the issuance of a summons, without an accompanying complaint, when:

- (1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and
- (2) The court makes an order stating the nature and purpose of the action and granting the requested permission.

G.S. §1A-1, Rule 3(a)

The Administrative Office of the Courts (AOC) provides a form Application and Order to be utilized for Rule 3 purposes. Unfortunately, the form itself is not a model of clarity and strict adherence to the Rule's requirements. The AOC form will of course be deemed sufficient, however, so long as it is filled out properly, and so long as it is signed by the attorney or party and appropriately issued by the Clerk of Court. In scrutinizing the application and order, defense counsel should look for the following:

1. Timely filing of the application and issuance of the order prior to the expiration of the statute of limitations;

2. Appropriate inclusion in the application of a statement indicating the “nature and purpose of the action,” or a brief indication as to what the lawsuit is about and the type of relief sought;
3. The inclusion of a request that the applicant be permitted to file a complaint within 20 days of the issuance of the Court’s order; See, Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825, cert. denied, 311 N.C. 303, 317 S.E.2d 678 (1984); and,
4. The appropriate attorney’s signature on the application and Clerk’s signature on the order.

A defect in any of these areas should serve as grounds for dismissal of the action; however, the Court of Appeals has held on one occasion that an application and order “substantially complied” with Rule 3 and were thus effective, even where the application omitted the request for a twenty-day extension and the order contained several other deficiencies. Morris v. Dickson, 14 N.C. App. 122, 187 S.E.2d 409 (1972).

As a practical matter, it would appear that the summons issued pursuant to the Rule should be identical to a summons issued at the commencement of any civil action; however, the AOC has promulgated two separate summons forms to be utilized for Rule 3 practice. The first, “Civil Summons to be Served with Order Extending Time to File Complaint,” is to accompany the application and order. It resembles in all effects an ordinary summons, except that it refers to the “attached” order for delayed service of the complaint. This summons *must* be issued with the application and order, and must be issued prior to the expiration of the statute of limitations, as it marks the commencement of the action. Failure to timely issue this summons will subject the plaintiff’s claim to dismissal. Latham v. Cherry, 111 N.C. App. 871, 433 S.E.2d 478 (1993), cert. denied, 335 N.C. 556, 441 S.E.2d 116 (1994).

The second summons form promulgated by the AOC is entitled “Delayed Service of Complaint.” It also resembles an ordinary summons, except that it contains an explanation of delayed service. This

summons, though not specifically referred to in Rule 3, should probably issue when the complaint is filed, and should be served with it, but the failure to issue this summons will likely have no effect on the validity of the plaintiff's claim. Defense counsel should be aware, however, that this summons will *not* serve as a substitute for the issuance of the original summons, nor should it serve as a "link" in the chain of process following the original summons. Id. Plaintiff's counsel's attempt to utilize this form in this manner will serve as grounds for a motion to dismiss.

Rule 3 requires that the *initial* summons and the Court's order for delayed service be served in accordance with the provisions of Rule 4, which provides that a summons must be served within 30 days of its issuance and specifies the methods by which a summons may be served. Despite this specific requirement, failure to serve the initial summons and order will not necessarily bar the plaintiff's action, so long as the complaint is timely filed and some timely *extension* of the initial summons is obtained and served. This may be accomplished by either the issuance, within ninety days of the initial summons, of an alias or pluries summons or of an endorsement to the initial summons. Childress v. Forsyth County Hosp. Assoc., 70 N.C. App. 281, 319 S.E.2d 329 (1984), disc. rev. denied, 312 N.C. 796, 325 S.E.2d 484 (1985). Defense counsel should carefully monitor this chain of process, because the action will abate, pursuant to Rule 4, if no alias or pluries summons or endorsement is issued, if any summons or endorsement issued subsequent to the initial summons is untimely, or if the initial summons or some subsequent summons is not served within thirty days of its issuance.

One should make sure that the complaint is filed within the twenty-day period specified in the application and order. Late filing of the complaint will subject the claim to dismissal. Osborne v. Walton, 110 N.C. App. 850, 431 S.E.2d 496 (1993). Two older Court of Appeals cases suggest that Rule 6 would permit the plaintiff to obtain an additional extension of time to file the complaint upon a showing

of excusable neglect. Atkinson v. Tarheel Homes & Realty Co., 14 N.C. App. 638, 188 S.E.2d 703 (1972); Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985). However, Osborne specifically provides that such an extension would not relate back to the original application and order, and would thus result only in the deemed filing of a new action, which would, of course, be time-barred if the applicable statute of limitations has expired.

Finally, it should be noted that, while the complaint must be *filed* within the twenty-day extension period, it need not be *served* within any specific time, so long as the original chain of process is kept “alive” through the continued timely issuance of alias or pluries summonses or endorsements. Childress, supra; Lusk v. Crawford Paint Co., 106 N.C. App. 292, 416 S.E.2d 207, disc. rev. allowed, 332 N.C. 666, 424 S.E.2d 402, 403, 404 (1992), disc. rev. dismissed as improvidently allowed, 333 N.C. 535, 427 S.E.2d 871 (1993) (“*Rules 3 and 4 do not contain a stated requirement as to the time within which a complaint must be served.*”). See also, Hasty v. Carpenter, 40 N.C. App. 261, 252 S.E.2d 274, disc. rev. denied, 297 N.C. 453, 256 S.E.2d 806 (1979). The complaint and some extension or endorsement of the initial summons must, however, eventually be served, and service must be obtained properly, pursuant to Rule 4. The defendant is under no obligation to file answer or otherwise participate in the action until this occurs. Lusk, supra. Additionally, as with any other civil action, defects in the manner service of the summons and complaint may subject the action to dismissal pursuant to Rule 4, even where the provisions of Rule 3 were strictly observed.

“Misnomer” of parties vs. “new” party – This is a process/service of process issue that can give rise to a statute of limitations defense. In summary, an amendment of process and pleading may be allowed in the discretion of the court to correct a misnomer or mistake in the name of a party. Bailey v. McPherson, 233 N.C. 231, 63 S.E.2d 559 (1951); Liss v. Seamark Foods, 147 N.C. App. 281, 555 S.E. 2d

365 (2001). Such an amendment will relate back to the original filing date. On the other hand, an amendment will not relate back to the date of the initial filing if it is deemed to add an entirely new party to the action, whether or not that party actually had notice of the institution of the action. Crossman v. Moore, 341 N.C. 185, 459 S.E.2d 715 (1995); Bailey v. Handee Hugo's, Inc., 173 N.C.App. 723, 620 S.E.2d 312 (2005).

In the Federal courts, an amendment to pleadings and process which adds a new party, rather than merely correcting a misnomer, will be permitted if the requirements of Federal Rule 15(c)(1) are complied with. Federal Rule 15(c)(1) provides:

An amendment to a pleading relates back to the date of the original pleading when:

- (A) the law that provides the applicable statute of limitations allows relation back;
- (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or
- (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
 - (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
 - (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Rule 4(m) provides a 120-day time period in which a defendant must be served after a complaint is filed, and this 120-day period also applies to Rule 15(c)(1)(C)(i) and (ii)'s provisions. Tapp v. Shaw Envtl., Inc., 401 F. App'x. 930, 932-33 (5th Cir. 2010)

"Misdirected" Summons - In Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984), the Supreme Court held that process was merely voidable, and thus correctable by amendment, where one defendant was

mistakenly served with the summons directed to another defendant. There, both defendants were properly named in the caption of the summons and the Complaint, and the Court held that “the possibility of any substantial misunderstanding concerning the identity of the party being sued in this situation is simply unrealistic.” Harris, 311 N.C. at 544, 319 S.E.2d at 917 (quoting Wiles, supra, 295 N.C. at 85, 243 S.E.2d at 758). See also, Steffey v. Mazza Constr. Group, Inc., 113 N.C. App. 538, 439 S.E.2d 241, disc. rev. allowed, 336 N.C. 319, 45 S.E.2d 390 (1994), disc. rev. dismissed as improvidently allowed, 339 N.C. 734, 455 S.E.2d 155 (1995) (*summons directed to “Sheriff of Alamance County” not fatally defective, where defendant’s name and address properly set out in section below directory paragraph*).

Rule 4 (j2)(2) Savings Provision – Rule 4(j2) describes the requirements for proof of service of process by any method. Proof of service is required where the plaintiff seeks an entry of default or default judgment or where the defendant appears and challenges the effectiveness of service upon him. When proof of service is required, compliance with Rule (j2) creates a rebuttable presumption of valid service. Lewis Clarke Assocs. V. Tobler, 32 N.C. App. 435, 232 S.E.2d 458, review denied by, 292 N.C. 641, 235 S.E.2d 60 (1977).

Rule 4(j2)(1) describes the contents required in the affidavit of service, together with the return receipt signed by the person that received the mail, that creates the presumption of valid service. Where someone other than the addressee signs the return receipt, the appropriate affidavit raises a presumption that the party who signed the receipt was an agent of the addressee authorized by appointment or by law to be served or accept service or was a person of suitable age and discretion residing in the addressee’s dwelling house. Fender v. Deaton, 130 N.C. App. 657, 503 S.E.2d 707(1998). Should the defendant rebut the presumption “by proof that the person who received the receipt at the

addressee's dwelling house or usual place of abode was not a person of suitable age and discretion residing therein", Rule 4(j)(2) has a 60-day extension of the statute of limitations from the date the service is declared invalid.

Trap #8 – Chain of Process and A & P summonses – Problems with the chain of process and particularly lapsed A & P summonses often give rise to statute of limitations problems. Rule 4(c) of the North Carolina Rules of Civil Procedure provides that a summons must be served within sixty days of its issuance. An unserved summons is not rendered invalid, but may be extended through endorsement by the Clerk of Court or through the issuance of an alias or pluries summons within ninety days of the issuance of the last preceding summons. G.S. §1A-1 Rules 4(c), 4(d). When a summons expires without timely service or extension, the action is discontinued as to the defendant to whom the summons was issued. G.S. §1A-1, Rule 4(e); Dozier v. Crandall, 105 N.C. App. 74, 411 S.E.2d 635, disc. rev. allowed, 331 N.C. 116, 414 S.E.2d 753, disc. rev. dismissed as improvidently allowed, 332 N.C. 480, 420 S.E.2d 826 (1992). A summons issued thereafter, even if designated as an alias or pluries summons, will be deemed to institute a new action which does not relate back in any way to the original filing. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983), overruled on other grounds, Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995). If the statute of limitations has expired in the interim, the action will be subject to Rule 12(b)(6) dismissal based upon the running of the limitations period.

If one is met with a motion to dismiss based on the statute of limitations, note that Rule 41 does not entitle a plaintiff to re-file an action within a specified time period following a voluntary or involuntary dismissal where service of process is insufficient in the original action and where the new action is otherwise barred by the statute of limitations. Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986) (*Upon dismissing personal injury action without prejudice, trial court's granting plaintiff one year within*

which to re-file did not override applicable statute of limitations, and thus, second action brought on same claim, filed within one-year period but after expiration of limitations period, was time barred.);
Latham v. Cherry, 111 N.C. App. 871, 433 S.E.2d 478 (1993)(*Voluntary dismissal of action based on defective service does not toll statute of limitations.*)

At Lawyers Mutual, we regularly see mistakes relating to issuance and service of A&P summons that give rise to statute of limitations defenses. Usually, mistakes occur when there is an unusually long chain of summonses. Somewhere along the line, there will be a break in the chain and the statute of limitations will have expired between the initial filing date and the break in the chain. Since the action will be deemed to accrue as of the date of the next summons issued following the break in the chain, there arises a statute of limitations defense. The one precaution we can offer is to treat a chain of summons as a “red flag” that something could very easily go wrong if care is not exercised.

Also, one should be careful to fill out the A&P summons so that there is a clear reference indicating the A&P summons relation back to the original. An A&P summons issued without this reference discontinues the action and is deemed to institute an entirely new suit and does not relate back to the initial filing date. Mintz v. Frink, 217 N.C. 101, 6 S.E.2d 804 (1940); Integon Gen’l Ins. Co. v. Martin, 217 N.C. App. 440, 490 S.E.2d 242 (1997).

When faced with a possible statute of limitations defense related to process or service of process, one should consider Rule 6(b) motion for extension of time to serve summons. Rule 6(b) of the North Carolina Rules of Civil Procedure grants trial courts the discretion to extend the time period prescribed for the performance of any act “required or allowed to be done at or within a specified time.” Where a

motion for extension of time is made after the expiration of the prescribed period, the trial court may nonetheless allow the motion *nunc pro tunc*, in its discretion, where the failure to act was the result of excusable neglect. G.S. §1A-1, Rule 6(b) (2001). The powerful provisions of this Rule are, in practice, rarely utilized, mostly due to counsel's unfamiliarity with them; however, defense counsel should be aware of the possibility that a watchful plaintiff's attorney may file a Rule 6(b) motion in an attempt to thwart an otherwise well-supported jurisdictional motion to dismiss.

Generally, where the plaintiff can establish through affidavits that the failure to obtain service of a summons within the time prescribed by Rule 4 results from the neglect of counsel, and not from that of the litigant, Rule 6(b) grants the trial court broad authority to retroactively extend the time for service of the summons, thus preventing the discontinuance of the action. Lemons v. Old Hickory Council, 322 N.C. 271, 367 S.E.2d 655, reh'g denied, 322 N.C. 610, 370 S.E.2d 247 (1988); Dozier v. Crandall, 105 N.C. App. 74, 411 S.E.2d 635, disc. rev. allowed, 331 N.C. 116, 414 S.E.2d 753, disc. rev. dismissed as improvidently allowed, 332 N.C. 480, 420 S.E.2d 826 (1992); Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994).

In Lemons, the Supreme Court first held that it was within the trial court's discretion to grant a motion for extension of time to serve an expired alias and pluries summons, where there had been no break in the chain of summonses prior to the issuance of the summons that was ultimately served. Lemons, 322 N.C. 271, 367 S.E.2d 655. There, the plaintiff had obtained a timely alias or pluries summons, which was served on the defendant thirty-three days after its issuance (Rule 4 at the time required that a summons be served within thirty days of its issuance). The statute of limitations on the plaintiff's claim ran shortly thereafter, and the plaintiff subsequently had another alias or pluries summons issued and served. This

summons, however, was issued more than ninety days after the issuance of the last preceding summons, and thus did not relate back to the date the chain of process commenced. The Superior Court denied the plaintiff's motion to extend time to serve the timely alias or pluries summons, concluding that it lacked authority to do so under Rule 6(b). Accordingly, it allowed the defendant's motion to dismiss for insufficient service of process and lack of personal jurisdiction.

The Supreme Court ultimately reversed the trial court's dismissal. The Court acknowledged that a summons not served within thirty days of its issuance loses its effectiveness, and that "service thereafter does not confer jurisdiction over the defendant upon the trial court." *Id.* at 274, 367 S.E.2d at 656. The court nevertheless concluded that "[t]he General Assembly has given our trial courts authority to breathe new life and effectiveness into such a summons retroactively after it has become functus officio . . . by enacting Rule 6(b)." *Id.* The Court reasoned that Rule 4 must be interpreted in conjunction with Rule 6, since "[n]o single rule is to be given disproportionate emphasis over another rule which also has application. Rather, the Rules ought to be applied as a harmonious whole." *Id.* at 275, 367 S.E.2d at 657. The Court further observed that "[t]he Rules of Civil Procedure were adopted by the General Assembly at the urging of the North Carolina Bar Association 'to eliminate the sporting element from litigation.'" *Id.* at 274, 367 S.E.2d at 657.

In *Dozier*, *supra*, the Court of Appeals limited the application of Rule 6(b) under *Lemons*, holding that the Rule does not grant trial courts the discretion to extend the time for the issuance of an alias or pluries summons after the chain of process has lapsed. In *Dozier*, the plaintiff filed her lawsuit four days prior to the expiration of the applicable statute of limitations. The initial summons was returned unserved, and the plaintiff obtained an alias or pluries summons on the ninety-second day following the

issuance of the initial summons. The defendant accepted service of the alias summons, but filed a motion for judgment on the pleadings asserting the statute of limitations as a defense to the plaintiff's claim. In response to the defendant's motion, the plaintiff filed a motion for *nunc pro tunc* extension of time, pursuant to Rule 6(b), for issuance of the alias or pluries summons. The trial court denied the plaintiff's motion and allowed the motion for judgment on the pleadings, and the Court of Appeals affirmed. The Dozier Court distinguished Lemons from the situation before it, noting that:

The failure to serve a summons within the required 30 days does not invalidate the summons, though it remains dormant and unserveable unless it is extended by endorsement or alias and pluries summons. Thus, in Lemons, the Court permitted extension of time to serve a dormant summons and thus revive it.

Dozier, 105 N.C. App. at 78, 411 S.E.2d at 638 (citations omitted).

The Court of Appeals offered a final clarification of the application of Rule 6(b) to Rule 4 in Hollowell, supra. In Hollowell, the plaintiff timely instituted his action and obtained the initial summons. No endorsement or alias or pluries summons was ever obtained; however, the parties stipulated that the original summons was served on the defendant at some point between sixty-eight and ninety days following its issuance (the thirty-day service period was in effect at the time). The trial court allowed the defendant's motion to dismiss for lack of personal jurisdiction, denying the plaintiff's motion for *nunc pro tunc* extension of time to serve the summons, despite a specific finding that the failure to timely serve the summons was the result of excusable neglect. Hollowell, 115 N.C. App. at 365, 444 S.E.2d at 681-82. On appeal, the Court analyzed both Lemons and Dozier, and ultimately reversed the trial court's

order, holding that Rule 6(b) authorizes the retroactive extension of time to serve a dormant summons, but only so long as service is accomplished within ninety days of the summons' issuance, prior to its expiration. Id. at 368, 444 S.E.2d at 683.

Trap #9 – Liens of Mechanics, Laborers and Materialmen. Faulty perfection of laborers' and materialmens' liens can give rise to statute of limitations problems. A claim of lien must be filed within 120 days of the last furnishing of labor or material to the job. To perfect the lien, a lawsuit to enforce the lien must be filed within 180 days of the last furnishing of labor or materials to the job. At Lawyers Mutual, we recently had a claim in which our insured represented a fencing subcontractor. Claims of lien were timely/properly filed within 120 days from the last furnishing of work/supplies. However, our insured failed to file the complaint to perfect the lien within 180 days after the last furnishing. He discovered the issue and reported it to us about a month and a half after the complaint deadline had passed. We advised him to go ahead and file a complaint for breach of contract, quantum meruit, etc. against the contractor to mitigate damages. He obtained a default judgment against the contractor but it was ultimately uncollectible because the contractor was outside of 120 days of the last furnishing of labor or material to the job. To perfect the lien, a lawsuit to enforce the lien must be filed within 180 days of the last furnishing of labor or materials to the job. At Lawyers Mutual, we recently had a claim in which our insured represented a fencing subcontractor. Claims of lien were timely/properly filed within 120 days from the last furnishing of work/supplies. However, our insured failed to file the complaint to perfect the lien within 180 days after the last furnishing. He discovered the issue and reported it to us about a month and a half after the complaint deadline had passed. We advised him to go ahead and file a complaint for breach of contract, *quantum meruit*, etc. against the contractor to mitigate damages. He obtained a default judgment against the contractor but it was ultimately uncollectible because the

contractor was out of business. Had the lien been perfected, there would have been a clear source of recovery. Sadly, our insured was forced to advise his client of the error and that the client had a potential malpractice claim against him.

In another recent case, a client came in to our insured's office one day before the deadline to file the claim of lien. The claim of lien was timely filed, but our insured failed to timely file the complaint to perfect the claim of lien. After discovering the issue, he immediately filed the complaint. The owner moved to dismiss the lien claim based on the late filing. There was also an issue about whether the complaint included the property parties. The client advised our insured that he had contracted with the owner, but actually but client had contracted with a related-entity that was acting as the general contractor. Our insured obtained consent to amend to name the contractor. Client ultimately reached a settlement with one party for a portion of the amount owed. A judgment was entered in favor of client and against other defendant on the *quantum meruit* claim after a bench trial. Unfortunately, the judgment is likely uncollectible.

These recent claims point out the complexity of claims of lien and the short timeframes with which the lawyer has to work.

Trap #10 – The agent/principal problem. Statute of limitations problems can arise with respect to a claim against a principal when one also sues the principal's agent but errs in obtaining service over the agent, or dismisses the claim against the agent. The general rule in North Carolina is that judgment on the merits in favor of the agent precludes any action against the principal where the principal's liability is purely derivative. Draughon v. Harnet Cty. Bd. of Educ., 166 N.C. App. 464, 469-70, 602 S.E.2d 721, 726 (2004). In Diggs v. Forsyth Memorial Hospital, Inc., ___ N.C. App. ___, 698 S.E.2d 200 (2010), though the procedural history is somewhat convoluted, the basic facts are that plaintiff sued anesthesiologists and

Forsyth Memorial Hospital for medical malpractice arising from gall bladder surgery. Plaintiff settled with the anesthesiologists and dismissed the claims against them with prejudice. The hospital moved for summary judgment. The trial court allowed the motion and plaintiff appealed.

The Court of Appeals affirmed, stating that dismissal with prejudice filed by plaintiff in accordance with the terms of the settlement agreement operated as adjudication on the merits and thus barred any action against the principal whose liability, if any, was purely derivative of the agent's liability.

At Lawyers Mutual, we are occasionally asked if one has to sue the agent in order to obtain a judgment against the principal. The answer is no, but if one chooses to sue the agent, one must be sure to properly serve the agent with process and must otherwise prevent a judicial determination that the agent is not liable for tortious conduct sought to be imputed to the principal based on the doctrine of *Respondeat superior*. In Atkinson v. Lesmeister et al., 186 N.C. App. 442, 651 S.E.2d 294 (2007), a passenger brought an action against her driver and the vehicle owner's estate for injuries suffered in a motor vehicle accident. The plaintiff failed to perfect service on the driver. After the statute of limitations had expired on any action against the vehicle owner's estate, the estate filed a motion to dismiss. The trial court granted the motion and the plaintiff appealed.

The Court of Appeals affirmed the trial court holding that since the summons as to Lesmeister (the agent) was allowed to lapse and the statute of limitations had expired, Lesmeister had no liability to impute to the principal's estate. Therefore neither the agent nor the principal could be judicially determined to be negligent. See also, Osman v. Reese et al., ___ N.C. App. ___, 692 S.E.2d 488 (2010). Reese, the only employee of Merchant's Tire who was involved in the accident, was dismissed from the action with prejudice. This dismissal "operate[d] as a disposition on the merits and preclude[d] subsequent litigation in the same manner as if the action had been prosecuted to a full adjudication against the plaintiff." Atkinson v. Lesmeister et al., 186 N.C. App. 442, 446, 651 S.E.2d 294, 297 (2007),

(citation omitted). Once it was judicially determined that Reese, the employee, could not be held liable, it necessarily followed that Merchant's Tire, Reese's employer, also could not be found liable. Id. at 444-46, 651 S.E.2d 296-97.

Appendix

1. Statute of Limitations Index for North Carolina
2. Brief in Support of Motion for *Nunc Pro Tunc* Order Extending Time to Serve Summons
3. Memo from Claims Repair Counsel to Insured Attorney re Discovery and Theories of Liability When Uncertainty about Identity of Corporate Defendant
4. Example Discovery Served With Complaint

Statute of Limitations Index for North Carolina

Note: Following is a list of time limitations for selected legal actions in North Carolina. This index was most recently updated in August 2011. It is not a substitute for legal research, but can be used as your first stop in locating the applicable statutory citations. In some situations, a case citation is listed as an additional research tool.

BONDS

<i>Action on payment bond</i>	1 year (from later date of last labor performed, last material furnished by claimant, or final settlement with contractor)	N.C. Gen. Stat. § 44A-28(b)
<i>Action upon official bond of a public officer</i>	3 years	N.C. Gen. Stat. § 1-52(1)(a)
<i>Action against executor, administrator, collector, or guardian on official bond</i>	6 years (after auditing and filing of audited account)	N.C. Gen. Stat. § 1-50(a)(2)

CONSTRUCTION

<i>Claim of lien</i>	120 days (after last furnishing of labor or materials to the project site)	N.C. Gen. Stat. § 44A-12 ¹
<i>Enforcement of lien</i>	180 days (after last furnishing of labor or materials to the project site)	N.C. Gen. Stat. § 44A-13

CONTRACTS

<i>Breach of express or implied contract</i>	3 years (after breach)	N.C. Gen. Stat. § 1-52(1)
<i>Breach of contract for sale of goods</i>	4 years (after breach)	N.C. Gen. Stat. § 25-2-725(1) <i>Parties may agree to reduce to not less than one year, but may not extend period.</i>
<i>Action upon sealed instrument against principal</i>	10 years	N.C. Gen. Stat. § 1-47(2)

CORPORATIONS

<i>Action against corporation or stockholder on account of dividends</i>	6 years	N.C. Gen. Stat. § 1-50(a)(4) <i>As to limitations period for unknown and certain other claims against a dissolved corporation, see N.C. Gen. Stat. § 55-14-07, as the limitations period may be less than 6 years.</i>
<i>Action against corporate directors</i>	3 years (from date on which effect of	N.C. Gen. Stat. § 55-8-33(c)

¹ This section is the subject of a proposed statutory amendment. See House Bill 489.

<i>for unlawful distribution</i>	distribution measured)	
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EMPLOYMENT

<i>Wrongful discharge</i>	3 years	N.C. Gen. Stat. §§ 1-52(2), 1-52(5)
<i>Charge filed with the EEOC</i>	180 days (from the unlawful employment practice)	42 U.S.C. § 2000e-5(e)(1)
<i>Commencement of civil action under Title VII or ADA</i>	90 days (from EEOC's right to sue letter)	42 U.S.C. § 2000e-5(f)
<i>Commencement of civil action under ADEA</i>	60 days (after charge is filed with the EEOC)	29 U.S.C. § 626(d)
<i>Filing complaint with Commissioner of Labor for Retaliatory Employment Discrimination</i>	180 days (from the violation)	N.C. Gen. Stat. § 95-242(a)
<i>Commencement of civil action under REDA</i>	90 days (from right to sue letter)	N.C. Gen. Stat. § 95-243

PERSONAL INJURY

<i>Personal injury</i>	3 years (after injury becomes or ought to have become apparent, but not more than 10 years after defendant's last act or omission giving rise to claim)	N.C. Gen. Stat. § 1-52(16)
<i>Wrongful death</i>	2 years (from the date of death)	N.C. Gen. Stat. § 1-53(4) <i>If decedent would have been barred, had he lived, from bringing an action for bodily harm, as a result of N.C. Gen. Stat. § 1-15(c) or 1-52(16), no action for his death may be brought.</i>
<i>Products liability</i>	If action is in tort for personal injury or wrongful death, the action must be brought within 3 years of the date of injury or 2 years from the date of death (statute of limitation) and 12 years after product's initial purchase for use of consumption (statute of repose).	N.C. Gen. Stat. § 1-46.1

<i>Worker's compensation claims</i>	2 years (after accident or after last payment of medical compensation when no other compensation has been paid and when employer's liability has not been established)	N.C. Gen. Stat. § 97-24(a)
<i>Occupational diseases</i>	2 years (after death, disability, or disablement)	N.C. Gen. Stat. § 97-58(c) <i>Claim for injury, disability, or death due to radiation will be barred unless filed 2 years after claimant first suffered incapacity due to exposure, and knew or should have known that the disease was caused by present or prior employment.</i>
<i>Medical negligence, including foreign object left in body</i>	3 years from last act of defendant/4 year statute of repose ("latent injury rule") The 4 year statute of repose is available when the injury is not apparent until 2 or more years after the last act of the defendant. Suit must be brought within 1 year of the discovery date, but cannot be brought more than 4 years (10 years in the case of foreign objects with no therapeutic or diagnostic purpose which are left in the body) from the last act of defendant.	N.C. Gen. Stat. §§ 1-15(c), 1-52(16) <i>See Horton v. Carolina Medicorp, Inc.</i> , 344 N.C. 133, 472 S.E.2d 778 (1996) (statute of limitation may be tolled by the continuing course of treatment doctrine).
<i>Personal injury or death due to defective, unsafe real property improvement</i>	If the action is in tort for personal injury or wrongful death, the action must be brought within 3 years of the date injury becomes or ought to have become apparent or 2 years from the date of death (statute of limitations) and 6 years after later of defendant's last act or omission, or substantial completion of improvement (statute of repose).	N.C. Gen. Stat. § 1-50(5)

PROPERTY AND ESTATES

<i>Real property title against private party under color of title</i>	7 years	N.C. Gen. Stat. § 1-38(a)
<i>Real property title against private party under adverse possession</i>	20 years	N.C. Gen. Stat. § 1-40
<i>Action on instrument conveying interest in real property</i>	10 years	N.C. Gen. Stat. § 1-47(2)
<i>Action to recover deficiency judgment on debt after foreclosure on mortgage or deed of trust securing such debt</i>	1 year (after delivery of deed pursuant to foreclosure sale)	N.C. Gen. Stat. § 1-54(6)
<i>Foreclosure of mortgage, deed of trust for creditors with power of sale</i>	10 years	N.C. Gen. Stat. § 1-47(3) <i>Where mortgagor or grantor has been in possession of the property, within 10 years after forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after last payment on the same.</i>
<i>Mortgage redemption</i>	10 years	N.C. Gen. Stat. § 1-47(4) <i>Where mortgagee has been in possession, or for a residuary interest under a deed in trust for creditors, where the trustee (or those holding under him/her) has been in possession, within 10 years after the right of action accrued.</i>
<i>Property damage</i>	3 years (after damage becomes or ought to have become apparent but not more than 10 years from defendant's last act or omission giving rise to claim)	N.C. Gen. Stat. § 1-52(16)
<i>Property damage due to defective, unsafe real property improvement</i>	If the action is in tort for physical damage to property, the action must be brought within 3 years of the date of damage becomes or ought to have become apparent (statute of limitations) and 6 years after later of defendant's last act or omission, or substantial completion of	N.C. Gen. Stat. § 1-50(5)

	improvement (statute of repose).	
<i>Conversion of or damage to goods or chattels</i>	3 years	N.C. Gen. Stat. § 1-52(4)

STATE AND LOCAL GOVERNMENT, PUBLIC OFFICERS

<i>Tort claims against State departments, institutions, and agencies</i>	3 years (after accrual of such claim)	N.C. Gen. Stat. § 143-299
<i>Wrongful death claims against State departments, institutions, and agencies</i>	2 years	N.C. Gen. Stat. § 143-299
<i>Action against local unit of government upon express or implied contract</i>	2 years	N.C. Gen. Stat. § 1-53(1) <i>Not applicable to actions based on bonds, notes, and interest coupons or when a different period of limitations is prescribed by N.C. Gen. Stat. §§ 1-46 through 1-55.</i>
<i>Action contesting validity of zoning ordinance or amendment</i>	1 year for actions challenging the validity of any zoning or unified development ordinance or any provision thereof 2 months for actions challenging the adoption or amendment of a zoning map or approving a special use, conditional use or conditional zoning district rezoning request 3 years for actions alleging a defect in the adoption process	N.C. Gen. Stat. §§ 1-54(10); 1-54.1; 153A-348(a), (b); 160A-364.1(a), (b) ²

TAXATION

<i>Refund payment of taxes</i>	Later of 3 years after due date of return or 2 years after payment of the tax	N.C. Gen. Stat. § 105-241.6(a) <i>See exceptions in N.C. Gen. Stat. § 105-241.6(b)</i>
<i>Suit for recovery of taxes paid under protest</i>	3 years (after 90 day refund period)	N.C. Gen. Stat. §§ 105-381(c); 1-52(15)

² Statutes amended effective July 1, 2011. S.L. 2011-384.

TORTS

<i>Criminal conversation</i>	3 years	N.C. Gen. Stat. § 1-52(5)
<i>Tortious interference with contract</i>	3 years	N.C. Gen. Stat. § 1-52(5)
<i>Abuse of process</i>	3 years	N.C. Gen. Stat. § 1-52(5)
<i>Malicious prosecution</i>	3 years	N.C. Gen. Stat. § 1-52(5)
<i>Intentional infliction of emotional distress</i>	3 years	N.C. Gen. Stat. §§ 1-52(5), (16)
<i>Libel or slander</i>	1 year (after date of publication or statement)	N.C. Gen. Stat. § 1-54(3)
<i>Assault or battery</i>	3 years	N.C. Gen. Stat. § 1-52(19)
<i>False imprisonment</i>	3 years	N.C. Gen. Stat. § 1-52(19)
<i>Trespass</i>	3 years (from original trespass)	N.C. Gen. Stat. § 1-52(3)

WILLS AND ESTATES

<i>Caveat to the probate of a will</i>	3 years	N.C. Gen. Stat. § 31-32 <i>Persons under legally recognized disability have 3 years after removal of disability to bring suit.</i>
<i>Presentation of claims against decedent's estate arising at or after death</i>	6 months (from due date of representative's or collector's performance if claim based on contract with representative or collector; or with respect to any other claim, from date on which claim arises)	N.C. Gen. Stat. § 28A-19-3(b)
<i>Action on unreferred claim rejected by representative or collector</i>	3 months (after written notice of rejection or after some part of claim comes due)	N.C. Gen. Stat. § 28A-19-16
<i>Creditor's action against representative of deceased</i>	7 years (after qualification of executor or administrator and publishing advertisement for creditors to present their claims,	N.C. Gen. Stat. § 1-49(2)

	where creditor not personally served)	
<i>Action for allowance of surviving spouse or children</i>	1 year	N.C. Gen. Stat. § 1-54(5)

OTHER

<i>Professional malpractice – Complex analysis</i>	3 years from last act of defendant/4 year statute of repose (“latent injury rule”) The 4 year statute of repose is available when the injury is not apparent until 2 or more years after the last act of the defendant. Suit must be brought within 1 year of the discovery date, but cannot be brought more than 4 years from the last act of the defendant.	N.C. Gen. Stat. § 1-15(c)
<i>Action grounded on fraud or mistake</i>	3 years (after aggrieved party knew or should have known facts constituting fraud or mistake)	N.C. Gen. Stat. § 1-52(9)
<i>Action grounded on Chapter 75 of the N.C. General Statutes; Unfair Trade Practices</i>	4 years (after cause of action accrued)	N.C. Gen. Stat. § 75-16.2
<i>Action upon liability created by state or federal statute</i>	3 years	N.C. Gen. Stat. § 1-52(2)
<i>Misappropriation of trade secret</i>	3 years (after misappropriation is or reasonably should have been discovered)	N.C. Gen. Stat. § 66-157
<i>Civil action for violation of the N.C. Securities Act</i>	For violations of N.C. Gen. Stat. §§ 78A-24 or 78A-36, 2 years (after sale or contract of sale); for all other violations of this chapter, 3 years (after violation is discovered), but no more than 5 years (after sale or contract of sale); if violator engages in fraudulent or deceitful acts that conceal the violations, 3 years (after fraudulent and deceptive acts are discovered or should have been discovered).	N.C. Gen. Stat. § 78A-56(f)

<i>Action to recover unpaid wages in violation of the Wage and Hour Act</i>	2 years	N.C. Gen. Stat. § 95-25.22(f)
<i>Action by tortfeasor to enforce contribution to judgment for injury or wrongful death against joint tortfeasor</i>	1 year (after judgment becomes final)	N.C. Gen. Stat. § 1B-3(c)
<i>Action to enforce judgment</i>	10 years (from date of rendition)	N.C. Gen. Stat. § 1-47(1)
<i>Action under usury statute</i>	2 years	N.C. Gen. Stat. §§ 1-53(2), 1-53(3) <i>Date claim accrues may depend on whether action is for recovery of penalty or forfeiture of all interest.</i>
<i>Actions not otherwise limited</i>	10 years (after the cause of action has accrued)	N.C. Gen. Stat. § 1-56

lane, when Defendant turned her vehicle onto XXXXXXXX Drive and operated her vehicle on the wrong side of the road, striking Plaintiff's vehicle head-on.

On June 16, 2004, Plaintiff retained attorney XXXXXXXX to represent her in pursuing her personal injury claim arising out of the Accident. On Plaintiff's behalf, Mr. XXXX timely filed the Complaint in this action, properly alleging negligence claims against Defendant, on May 18, 2007. On that date, Mr. XXXXX also obtained issuance of summonses properly directed to Defendant; however, the May 18, 2007, summons was not immediately forwarded to the XXXXX County Sheriff for service on Defendant, because Mr. XXXXX was hopeful that the provision of additional information to and continued negotiation with Defendant's liability insurer would lead to the amicable resolution of Plaintiff's claim.

On July 17, 2007, Plaintiff's counsel, aware that sixty days had elapsed since the issuance of the May 18, 2007, summons, took the summons to the XXXXX County Sheriff's Department to request that the Sheriff issue a return showing no service on Defendant, in order that Plaintiff's counsel could obtain the issuance of an alias or pluries summons. Instead of issuing a return showing no service, however, the XXXXX County Sheriff personally served the summons on Defendant on July 19, 2007, sixty-two (62) days after issuance of the summons.

Although Plaintiff's counsel fully intended to obtain timely issuance of an alias or pluries summons, Mr. XXXXX misread G.S. §1A-1, Rule 4, and mistakenly believed that he had ninety (90) days from the date of *service* of the May 18, 2007, summons within which to obtain issuance of an alias or pluries summons. Plaintiff's counsel thus did not immediately obtain an alias or pluries summons once he received the sheriff's return showing service on July 19, 2007. Plaintiff's counsel attempted to obtain the issuance of an alias or pluries summons on September

17, 2007, and then realized for the first time that such summons was required to issue within ninety (90) days of issuance of the prior summons, i.e., on or before August 16, 2007.

On _____, Plaintiff's counsel received a letter from XXXXXXXXXX attorney XXXXXX, indicating that he had been retained to represent Defendant in this action. Plaintiff's counsel thereafter spoke with Mr. XXXXXX briefly to indicate that Plaintiff remained interested in the amicable resolution of her claim and that he would shortly forward a settlement package to Mr. XXXXXXXX. To date, Defendant has not filed answer, motion, or other responsive pleading in this case, nor has Defendant obtained any extension of time, either from the Court or from Plaintiff's counsel, within which to file responsive pleadings in this case.

ARGUMENT

PLAINTIFF'S MOTION FOR *NUNC PRO TUNC* EXTENSION OF TIME WITHIN WHICH TO SERVE THE MAY 18, 2007, SUMMONS SHOULD BE ALLOWED.

G.S. § 1A-1, Rule 4(c), provides that a summons must be served within sixty (60) days of its issuance. An unserved summons is not rendered invalid, but may be extended through endorsement by the Clerk or issuance of an alias or pluries summons within ninety (90) days of the issuance of the last preceding summons. G.S. § 1A-1, Rules 4(c), 4(d) (2002). When a summons expires in without service or extension within ninety (90) days, the action is discontinued as to the defendant to whom the summons was issued. G.S. § 1A-1, Rule 4(e); *Dozier v. Crandall*, 105 N.C. App. 74, 78, 411 S.E.2d 635, 638, *disc. rev. allowed*, 331 N.C. 480, 414 S.E.2d 753, *disc. rev. dismiss'd as improvidently allowed*, 332 N.C. 480, 332 S.E.2d 480 (1992).

G.S. § 1A-1, Rule 6(b), however, grants trial courts the discretion to extend the time period prescribed for the performance of any act “required of allowed to be done at or within a specific time.” Where a motion for extension of time is made after the expiration of the prescribed period, the trial court may nonetheless allow the motion *nunc pro tunc*, in its discretion, where the failure to act was the result of excusable neglect. G.S. § 1A-1, Rule 6(b) (2002). Thus, where the plaintiff can establish through affidavits that the failure to obtain service of a summons within the time prescribed by Rule 4 results from the neglect of counsel, and not from that of the litigant, Rule 6(b) grants the trial court broad authority to retroactively extend the time for service of the summons, thus preventing the discontinuance of the action. *See Lemons v. Old Hickory Council*, 322 N.C. 271, 367 S.E.2d 655, *reh’g denied* 322 N.C. 610, 370 S.E.2d 247 (1988); *Dozier, supra*; *Hollowell v. Carlisle*, 115 N.C. App. 364, 444 S.E.2d 681 (1994); *Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 606 S.E.2d 407 (2005).

In *Lemons*, the Supreme Court first held that it was within the trial court’s direction to grant a motion for extension of time to serve an expired alias or pluries summons, where there had been no break in the chain of summonses prior to the issuance of the summons that was ultimately served. *Lemons*, 322 N.C. at 277, 367 S.E.2d at 657. There, the plaintiff had obtained a timely alias or pluries summons, which was served on the defendant thirty-three (33) days after its issuance.³ *Id.* at 272-73, 367 S.E.2d at 656. The statute of limitations on the plaintiff’s claim ran shortly thereafter, and the plaintiff subsequently had another alias or pluries summons issued and served. *Id.* at 273, 367 S.E.2d at 656. This summons, however, was issued more than ninety (90) days after the issuance of the last preceding summons, and thus did not

³ At the time, Rule 4 required that a summons be served within thirty (30) days of its issuance. The Rule has since been amended to allow a sixty (60) day service period.

relate back to the date the chain of process commenced. *Id.* The trial court denied the plaintiff's motion to extend time to serve the timely alias or pluries summons, concluding that it lacked the authority to do so under Rule 6(b). *Id.* Accordingly, the court allowed the defendant's motion to dismiss for insufficient service of process and lack of personal jurisdiction. *Id.*

The Supreme Court ultimately reversed the trial court's dismissal of the plaintiff's action. *Id.* at 277, 367 S.E.2d at 657. The Court acknowledged that a summons not served within thirty (30) days of its issuance loses its effectiveness, and that "service thereafter does not confer jurisdiction over the defendant upon the trial court." *Id.* at 274, 367 S.E.2d at 656. Nevertheless, the Court concluded that "[t]he General Assembly has given our trial courts authority to breathe new life and effectiveness into such a summons retroactively after it has become *functus officio*...by enacting Rule 6(b)." *Id.* The Court reasoned that Rule 4 must be interpreted in conjunction with Rule 6, since "[n]o single rule is to be given disproportionate emphasis over another rule which also has application. Rather, the Rules ought to be applied as a harmonious whole." *Id.* at 275, 367 S.E.2d at 657. The Court further observed that "[t]he Rules of Civil Procedure were adopted by the General Assembly at the urging of the North Carolina Bar Association 'to eliminate the sporting element from litigation.'" *Id.* at 274, 367 S.E.2d at 657.

In *Dozier, supra*, the Court of Appeals limited the application of Rule 6(b) under *Lemons* by holding that the Rule does *not* grant trial courts the discretion to extend the time *for the issuance of an alias or pluries* summons after the chain of process has lapsed. *Dozier*, 105 N.C. App. at 78, 411 S.E.2d at 638. There, the plaintiff filed her lawsuit four days prior to the expiration of the applicable statute of limitations. *Id.* at 75, 411 S.E.2d at 636. The initial summons was returned unserved, and the plaintiff obtained an alias or pluries summons on the

ninety-second day following the issuance of the initial summons. *Id.* The defendant accepted service of the alias or pluries summons, but filed a motion for judgment on the pleadings asserting the statute of limitation as a defense to the plaintiff's claim. *Id.* In response to the defendant's motion, the plaintiff filed a motion for *nunc pro tunc* extension of time, pursuant to Rule 6(b), for issuance of the alias or pluries summons. *Id.* The trial court denied the plaintiff's motion and allowed the defendant's motion for judgment on the pleadings, and the Court of Appeals affirmed. *Id.* The Court distinguished *Lemons* from the situation before it, noting that:

The failure to serve a summons within the required 30 days does not invalidate the summons, though it remains dormant and unservable unless it is extended by endorsement or alias or pluries summons. Thus, in *Lemons*, the court permitted extension of time to *serve* a dormant summons and thus revive it.

Id. at 78, 411 S.E.2d at 638 (citations omitted). The distinction in *Dozier*, however, was that the original summons had *not* been served, and that the chain of process had thus expired without service or extension by alias or pluries summons. The Court thus held that the late issuance of the alias or pluries summons instituted a new action which was barred by the statute of limitations, and that, while the Court *could* extend the time for service of a dormant summons, the Court *lacked* the discretion to revive the chain of process once it had discontinued without service.

The Court of Appeals offered a final clarification of the application of Rule 6(b) to Rule 4 in *Hollowell, supra*. In *Hollowell*, the plaintiff timely instituted his action and obtained the initial summons. *Hollowell*, 115 N.C. App. at 365, 444 S.E.2d at 681. However, no endorsement or alias or pluries summons was ever obtained, and the parties stipulated that the original summons was served on the defendant at some point between sixty-eight (68) and ninety

(90) days following its issuance.⁴ *Id.* The trial court allowed the defendant's motion to dismiss for lack of personal jurisdiction and denied the plaintiff's motion for *nunc pro tunc* extension of time to serve the summons, despite a specific finding that the failure to timely serve the summons was the result of excusable neglect. *Id.* at 365, 444 S.E.2d at 681-82. On appeal, the Court analyzed both *Lemons* and *Dozier* and ultimately reversed the trial court's order. The Court determined that *Lemons* controlled the facts of the case and held that Rule 6(b) authorized the retroactive extension of time to serve a *dormant* summons, but only so long as service is accomplished within ninety (90) days of the summons' issuance, prior to its expiration. *Id.* at 368, 444 S.E.2d at 683. *See also Wetchin, supra*, 167 N.C. App. 756, 606 S.E.2d 407 (2005) (citing *Lemons, Hollowell, supra*) (holding trial court erroneously concluded that it lacked discretion to extend the time for service of an alias or pluries summons which was served eighty-three (83) days after its issuance).

The present case is governed by *Lemons, Hollowell*, and *Wetchin*, and is distinguishable by its facts from *Dozier*. Plaintiff timely filed this action, and the May 18, 2007, summons was properly issued at the time this action was filed. The Sheriff's return shows appropriate personal service of the May 18, 2007, summons on Defendant on July 19, 2007, sixty-two (62) days following the issuance of the summons, just two (2) days later than the sixty (60) days permitted by G.S. §1A-1, Rule 4. Pursuant to *Lemons* and *Hollowell*, the May 18, 2007, summons had not expired as of the date of service, but was merely dormant, and this Court is authorized to extend the service period as requested by Plaintiff, so long as it finds that the service error was not related to personal fault on the part of Plaintiff herself. Specifically, the extension sought here is not, as in *Dozier*, for the issuance of alias or pluries summonses; rather,

⁴ The thirty (30) day service period for summonses was in effect at the time.

as in *Lemons*, *Hollowell*, and *Wetchin*, Plaintiffs seek only a brief extension of the period for service of the timely-issued May 18, 2007, summons. Under *Lemons* and *Hollowell*, this Court has the authority, in its discretion, to extend the period prescribed by Rule 4(c) for service of this summons if it finds that the failure to timely serve the summons resulted from excusable neglect.

Historically, the focus of the inquiry regarding excusable neglect of a party represented by counsel has centered on the neglect of the litigant, not the attorney:

The distinction between the neglect of parties to an action and the neglect of counsel is recognized by our courts, and except in those cases in which there is a neglect or failure of counsel to do those things which properly pertain to clients and not counsel, and in which the attorney is made to act as the agent of the client to perform some act which should be attended to by him, the client is held to be excusable for the neglect of the attorney to do those things which the duty of his office of attorney requires. . . . *[The] client is not presumed to know what is necessary. When he employs counsel and communicates the merits of his case to such counsel, and the counsel is negligent, it is excusable on the part of the client, who may reasonably rely on the counsel's doing what may be necessary on his behalf.*

Norton v. Sawyer, 30 N.C. App. 420, 424-25, 227 S.E.2d 148, 152, *disc. rev. denied*, 291 N.C. 176, 229 S.E.2d 389 (1976) (emphasis added) (neglect of attorney in failing to timely file answer not imputable to client).

The standard of care traditionally required of a party is to give his lawsuit that level of attention which a person of ordinary prudence would give to his important business affairs. *City Finance Co. of Goldsboro v. Boykin*, 86 N.C. App. 446, 358 S.E.2d 83 (1987). “Once a litigant engages an attorney, he must thereafter diligently confer with that attorney and generally try to keep informed of the proceedings.” *Id.* at 448, 358 S.E.2d at 84.

The mere employment of counsel is not enough. The client may not abandon his case on employment of counsel, and when he has a case in court he must attend to it.

Moore v. Deal, 239 N.C. 224, 227, 79 S.E.2d 507, 510 (1954). In determining whether a party's neglect is excusable, the Court is to examine the relevant facts which gave rise to the neglect. *PYA/Monarch, Inc. v. Ray Lackey Enterprises, Inc.*, 96 N.C. App. 225, 227, 385 S.E.2d 170, 171 (1989). So long as the party herself has attended to her lawsuit in an appropriate manner, conferring regularly with her counsel and treating the matter as she treats her important business affairs, the negligence of counsel cannot be imputed to the party. *Id.*

In this case, the uncontroverted evidence is that the failure to obtain timely service of the May 18, 2007, summons was due solely to the neglect of Plaintiff's counsel, and not to any inattention by Plaintiff herself. As evidenced by Plaintiff's verified Motion, Plaintiff timely retained counsel, informed her counsel of all the circumstances surrounding her claim and cooperated fully in providing her counsel with all the necessary information to prepare and prosecute her claim. Plaintiff has maintained appropriate contact with her counsel regarding the status of her claim, and she reasonably relied on her counsel to properly file the lawsuit and to obtain proper service on Defendant.

The *Norton* court held that it was the duty of the attorney, and not of the client, to file the defendant's answer. *Norton*, 30 N.C. App. at 424, 227 S.E.2d at 155. Similarly, it was the duty of Plaintiff's counsel in the case at bar, and not the duty of Plaintiff herself, to obtain service on Defendant or to obtain appropriate extensions of the original summons. Because Plaintiff has fully met the standard of care required by *Boykin*, the mistake of her counsel may not be imputed to her, and this Court clearly has the discretion to extend the period for service of the May 18, 2007, summons by just two (2) days, to and including July 19, 2007. Plaintiff's motion seeks only this brief *nunc pro tunc* extension, and is well-founded in fact and law. Our

Rules of Civil Procedure were adopted, in part, to be certain that mistakes regarding procedural technicalities might not in all cases serve to defeat otherwise valid claims, and the slight irregularity of the extension sought by Plaintiff is more than outweighed by the unduly harsh results which will occur if Plaintiff's motion is denied. The relief sought by Plaintiff lies within the sound discretion of the trial court, and Plaintiff thus respectfully requests that her motion for extension of time be allowed.

CONCLUSION

The failure to obtain timely service of the May 18, 2007, summons in this action is related solely to the mistake and inadvertence of Plaintiff's counsel, and cannot be attributed in any way to Plaintiff's personal neglect of her lawsuit. The two-day *nunc pro tunc* extension of time sought by Plaintiff will cause no prejudice whatsoever to Defendant, and any irregularity is clearly outweighed by the harsh personal consequence to Plaintiff which would result from the Court's refusal to exercise its discretion in this way. On this basis, Plaintiff respectfully requests that the Court allow Plaintiff's motion for *nunc pro tunc* extension of time within which to serve the May 18, 2007, summons in this action by two (2) days, to and including July 19, 2007. In addition, Plaintiff respectfully requests that the Court treat the May 18, 2007, summonses as timely served in all respects.

Memo from Claims Repair Counsel to Insured Attorney re Discovery and Theories of Liability When Uncertainty about Identity of Corporate Defendant

Overview

The motion to dismiss filed by [Defendant Health Services], Inc. appears to challenge the veracity of the allegations that [Defendant Health Services], Inc. owns and operates Defendant Hospital. Since factual allegations in a complaint are presumed true on a Rule 12(b)(6) motion, the motion that is now set for hearing should be denied. Presumably, [Defendant Health Services] will eventually serve a proper motion for summary judgment: one alleging that it does not employ the hospital staff or provide healthcare, which is supported by evidence or affidavits. Therefore, the main question is how to either correct/amend the summons and complaint or otherwise survive a summary judgment motion by [Defendant Health Services]. We considered three potential theories for a solution:

- a) [Defendant Health Services], Inc. is a misnomer and amendment of the summons and complaint should be allowed under Rules 4 and 15 to show Defendant Hospital, Inc;
- b) The corporate veil of Defendant Hospital, Inc. should be pierced to hold its sole shareholder and parent, [Defendant Health Services], Inc., directly liable; and
- c) The doctrine of apparent agency supports holding [Defendant Health Services], Inc. liable for negligence of hospital staff because it holds the hospital staff out as its agents and plaintiff dealt with staff under the presumption they worked for [Defendant Health Services], Inc.

Theories one and two are briefly evaluated herein, but the apparent agency doctrine holds the most promise. Accordingly, it is explored in more depth, including what additional evidence may be necessary to make it more persuasive.

Background

Posture:

- Incident giving rise to liability: January 31, 2007
- Statute of limitations: 3 years
- Suit filed on: January 29, 2010
- Parties sued: [Defendant Health Services], Inc.

Complaint:

- [Defendant Health Services], Inc. operated the facility known as Defendant Hospital (§ 3)
 - *Denied, according to Answer*
- [Defendant Health Services], Inc. held itself out to the public as operating a hospital, and was engaged in the business of providing acute care services to its patients (§ 5)
 - *Denied, according to Answer*
- Defendant, its agents, servants and/or employees, provided medical and nursing care to Mr. Plaintiff during October of 2007 (§ 6)
 - *Denied, according to Answer*
- Defendant, its agents, servants and/or employees, in their dealings with Mr. Plaintiff, were engaged in the practice of medicine in Savage County, North Carolina, and Mr. Plaintiff was their patient within the meaning of the laws of North Carolina (§ 7)
 - *Denied, according to Answer*
- Acts of negligence complained of herein were committed by principals, members, agents, servants and/or employees of the Defendant (§ 8)
 - *Denied, according to Answer*
- Defendant is vicariously liable for the actions of its agents, servants, and/or employees under the doctrine of *respondeat superior* (§ 9)
 - *Denied, according to Answer*

Factual Analysis of Available Public Records:

- Savage County Register of Deeds
 - “[Defendant Health Services]” is a d/b/a/ for “[Defendant Health Services], Inc.” as of 12/15/1994
 - still current
 - “Defendant Hospital” is a d/b/a for “Defendant Hospital, Inc.” as of 9/18/1994
 - still current
- Secretary of State
 - [Defendant Health Services], Inc.
 - [Defendant Health Services], Inc. used to be known as “The Trustees of Defendant Hospital, Inc.”
 - Name change on 10/30/1994

- Registered Agent:
 - John Doe.
 - Principal place of business:
 - 123 Elm St.
 - Articles of Incorporation state that corporation is organized to, among other things:
 - “participate in and promote the provision of patient care”
 - “facilitate and promote the delivery of other services designed to promote the health and well-being of the citizens of North Carolina.”
- Defendant Hospital, Inc.
 - Registered Agent:
 - John Doe
 - Principal place of business:
 - 123 Elm St.
 - Articles of Incorporation state that corporation is organized to, among other things:
 - “own, lease, establish, maintain and operate hospitals, clinics, and other related facilities to provide for the care and treatment of persons suffering from illness, injuries, or disabilities which require hospital care”
 - Sole member of Defendant Hospital, Inc. is “[Defendant Health Services], Inc.
 - [Defendant Health Services], Inc. is parent entity of subsidiary Defendant Hospital, Inc.
- Savage County Tax Records
 - No property ownership for “[Defendant Health Services]”
 - 21 properties owned by “Defendant Hospital, Inc.”
 - Including 345 Oak Ave, which appears to be main campus of Defendant, as well as the hospital
 - Tax value in excess of \$100 million
 - “[Defendant Health Services]” website (www.defendanthealth.com)
 - “Quick Facts about Defendant” page
 - “[Defendant Health Services] has 400 beds . . . and treats nearly 20,000 inpatients each year.”
 - “More than 500 physicians are on the Defendant medical staff.”
 - “Defendant provides a variety of healthcare services throughout Savage County”
 - “Defendant Hospital—Main Campus”
 - “[Defendant Health Services] Main Campus” page
 - “When it comes to caring for your family, [Defendant Health Services] has the services you count on, when and where you need them. But don’t take our word for it. Just ask our patients, who prefer Defendant over any other hospital in Savage County.”

- “[Defendant Health Services] encompasses a 400-bed acute care hospital”
- “Defendant’s steadfast commitment to the health and well-being of the community begins with its own employees. As one of the largest employers in Savage County with nearly 1,500, Defendant prides itself on the strength of its workforce.
- No independent website for “Defendant Hospital”

Analysis

I. Defending Motion to Dismiss filed by [Defendant Health Services], Inc.:

- Rule 12(b)(6)
 - Grounds alleged:
 - “does not operate, manage, or control the facility known as Defendant Hospital”
 - “is not a health care provider”
 - “was not involved in the provision of medical services to Plaintiff”
 - “does not employ or affiliate any health care providers who may have provided treatment to the Plaintiff in January 2007.”
 - Suggested Defense to Pending Motion:
 - Standard on 12(b)(6)
 - “A motion to dismiss for failure to state a claim upon which relief may be granted under G.S. 1A-1, Rule 12(b)(6) is addressed to whether the facts alleged in the complaint, when viewed in the light most favorable to the plaintiffs, give rise to a claim for relief on any theory.” *Ford v. McCain*, 192 N.C. App. 667, 674, 666 S.E.2d 153, 159 (2008)
 - All facts, even though denied in answer, are taken as true on motion to dismiss
 - Allegations 3 through 9 of the Complaint are taken as true
 - [Defendant Health Services] Inc. owns the hospital, operated it, and its agents assisted the care of Mr. Plaintiff
 - Any argument that the allegations are false can only be tested by summary judgment
 - If Defendants try to convert 12(b)(6) argument to one for summary judgment pursuant to Rule 12(b) by seeking admission of evidence or affidavits
 - Object, and ask for a continuance to conduct discovery and produce additional evidence under Rule 56(f). *See Blackburn v. Carbone*, No. 10-602, 2010 N.C. App. LEXIS 2448 (N.C. App. Dec. 21, 2010); *Raintree*

Homeowners Asso. v. Raintree Corp., 62 N.C. App. 668, 673, 303 S.E.2d 579, 582 (1983).

- Also argue and point to pending discovery that, when answered, may prove beneficial (or create a genuine issue of material fact under a Rule 56 standard) as to which entity could be liable.

II. Defending Future Motion for Summary Judgment:

A. [Defendant Health Services], Inc. is a misnomer and amendment of the summons and complaint should be allowed under Rules 4 and 15 to show Defendant Hospital, Inc

- Posture
 - Defendant Hospital, Inc. is a validly existing corporation at the time of suit
 - [Defendant Health Services], Inc. is a validly existing corporation at the time of suit
 - Fictitious name for Defendant Hospital, Inc. is not “[Defendant Health Services], Inc.” or “[Defendant Health Services]”
 - Same registered agent for Defendant Hospital, Inc. as [Defendant Health Services], Inc.
- Case law supports likely conclusion that amending the complaint to substitute Defendant Hospital, Inc. would be adding a new party, not correcting a misnomer
 - *Compare Franklin v. Winn Dixie Raleigh, Inc.*, 117 N.C. App. 28, 34-35, 450 S.E.2d 24, 28 (1994) (“Winn Dixie Stores, Inc. was the correct name of the wrong corporate party defendant, a substantive mistake which is fatal to this action. Quite simply, plaintiffs sued the wrong corporation.”); *Seagle v. Cross*, No. 08-911, 2009 N.C. App. LEXIS 1119 (N.C. App. July 7, 2009) (unpublished opinion) (denying misnomer and upholding summary judgment where a parent (or related) corporation was sued instead of the subsidiary (or related) corporation that actually owned a hospital in Asheville); and *Ludemann v. Bradford Clinic, Inc.*, No. 07-50, 2007 N.C. App. LEXIS 2332 (N.C. App. Nov. 20, 2007) (unpublished opinion) (“Plaintiff in this case did not sue WRHC under its trade name ‘Bradford Clinic’ but instead sued ‘Bradford Clinic, Inc.’ As in *Franklin*, it is undisputed that Bradford Clinic, Inc. was a separate and distinct legal entity from WRHC.”); *with Kimbrell’s of Sanford v. KPS, Inc.*, 113 N.C. App. 830, 833, 440 S.E.2d 329, 331 (1994) (amendment allowed because corrected a misnomer where the plaintiff sued the fictitious name for the correct entity; no entity existed as “Kendale Pawn Shop”); and *Taylor v. Hospice of Henderson County, Inc.*, 194 N.C. App. 179, 668 S.E.2d 923 (2008) (amendment allowed where misnomer; plaintiff named none existent corporate entity that was fictitious name of proper defendant).

- Research also supports a low probability of success in advocating equitable estoppel as a bar to a statute of limitations plea if Defendant Hospital, Inc. was added and served with an amended complaint

B. The corporate veil of Defendant Hospital, Inc. should be pierced to hold its sole shareholder and parent, [Defendant Health Services], Inc., directly liable

- Posture
 - [Defendant Health Services], Inc. is parent and single shareholder of Defendant Hospital, Inc.
 - Dependent on discovery (both that pending and what could be supplemented)
- Demonstrating necessary fusion between [Defendant Health Services] and Defendant Hospital to satisfy mere instrumentality rule will likely be difficult
 - *See, e.g., Foster v. Unifz, Inc.*, No. 07-1016, 2008 N.C. App. LEXIS 986 (N.C. App. May 20, 2008) (unpublished opinion) (subsidiary not mere instrumentality of parent under normal circumstances); *Richardson v. Bank of Am., N.A.*, 182 N.C. App. 531, 547 643 S.E.2d 410, 421 (2007) (no piercing where overlapping board of directors, some employees received paychecks from other entity, and at least one management/officer person worked for both entities).

C. The doctrine of apparent agency supports holding [Defendant Health Services], Inc. liable for negligence of hospital staff because it holds the hospital staff out as its agents and plaintiff dealt with staff under the presumption they worked for [Defendant Health Services], Inc.

- Posture
 - Defendant Hospital, Inc. (d/b/a Defendant Hospital) is wholly-owned subsidiary of [Defendant Health Services], Inc. (d/b/a [Defendant Health Services])
 - Dependent on discovery (both that pending and what could be supplemented)
 - Defendant Hospital and staff seemed to be branded or held out as “[Defendant Health Services]”
 - Client believed he was dealing with [Defendant Health Services]
 - Therefore either:
 - Defendant Hospital is an apparent agent of [Defendant Health Services]
 - Nurses and staff work for Defendant Hospital, so therefore agents of [Defendant Health Services] as well
 - Nurses and staff appear to work directly for “[Defendant Health Services]” so the individuals themselves are agents
 - “Defendant Hospital” as entity would be irrelevant

- Apparent Agency
 - General concepts
 - “Apparent agency issues arise when an employer retains and independent contractor but creates the appearance that the contractor is acting as his servant. If the plaintiff deals with the independent contractor in the reasonable belief that she is dealing with the employer himself or his servants, she is entitled to hold the employer vicariously liable when she suffers physical harm at the hands of the independent contractor.” Prosser on Torts § 338
 - “To establish liability based on apparent agency, ‘a plaintiff must show that (1) the alleged principal has represented or permitted it to be represented that the party dealing directly with the plaintiff is its agent, and (2) the plaintiff, in reliance on such representations, has dealt with the supposed agent.’” *Thomas v. Freenway Foods, Inc.*, 406 F. Supp. 2d 610, 618 (M.D.N.C. 2005) (applying NC law) (quoting *Crinkley v. Holiday Inns, Inc.* 844 F.2d 156, 166 (4th Cir. 1988) (also applying NC law)).
 - Hospitals specifically
 - “Perhaps the hospital cases are stronger cases for vicarious liability, not so much because the holding out and reliance are different, but because of public policy concerns with health care. Some courts seem to have been influenced by policy considerations as well as by the appearance created by the hospital.” Prosser on Torts § 338
 - *Osborne v. Adams*, 550 S.E.2d 319 (S.C. 2001)
 - Applies section 429 of Restatement (Second) of Torts for apparent agency in hospital setting
 - Elements:
 - (1) hospital held itself out to public by offering to provide services
 - (2) plaintiff looked to hospital, rather than individual physician, for care
 - (3) person in similar circumstances reasonably would have believed that the physician who treated him or her was a hospital employee
 - affidavit of plaintiff satisfied element one when it stated that “through McLeod’s marketing efforts the representation was made to me that McLeod had first rate facilities, staff, equipment and supplies for its birthing center, including a Level 3 Neonatal Intensive Care Unit”
 - evidence of article in magazine extolling facilities and discussing neonatal care was helpful as well
 - affidavit of plaintiff satisfied element two when it stated: “I selected McLeod as the hospital where I planned to have my delivery, and obtain any incidental medical services related to my pregnancy, labor, delivery and newborn care At no time did I select these neonatologists to care for my baby. Rather, I selected McLeod as the

hospital to provide any and all healthcare needs which might arise incident to my labor and delivery and the newborn care for my son . . . I had no knowledge that these neonatologists were employed by their own professional association, as opposed to being employed directly by McLeod”

- magazine article supported element 3
- affidavit stated plaintiff did not recall noting any marketing drawing a distinction between hospital and non-hospital staff
- *Burless v. West Virginia University Hospitals, Inc.*, 601 S.E.2d 85 (W. Va. 2004)
 - Adopting vicarious liability through apparent agency similar to other jurisdictions
 - Good analysis
 - “The reliance prong of the apparent agency test is a subjective molehill.” *Id.* at 777.
 - Deposition testimony established: “They were all wearing their coats and name tags in the building, so, you know, you know they’re – they work there, they’re employees.”
 - Summary judgment reversed
- Helpful NC analysis: *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 628 S.E.2d 851 (2006)
 - Forsyth Medical Center is operated by “Forsyth Memorial Hospital, Inc.” (“FMH”), which is owned by Novant Health Triad Region, LLC (“NHTR”), which is owned by Novant Health, Inc. (“NHI”)
 - Court of Appeals analyzes apparent agency:
 - Detailed history of expansion of apparent agency in hospital setting
 - Persuaded that § 429 analysis is similar to North Carolina law and seemingly adopts it
 - For apparent agency, plaintiff must prove:
 - (1) hospital has held itself out as providing medical services,
 - (2) the plaintiff looked to the hospital rather than the individual medical provider to perform those services, and
 - (3) the patient accepted those services in the reasonable belief that the services were being rendered by the hospital or by its employees.
 - Court finds evidence in affidavits and existence of departments and titles of doctors within the hospital sufficient to create a genuine issue of material fact
 - Court reverses summary judgment as to FMH
 - Court affirms, however, as to Novant entities
 - Plaintiff argued these entities held themselves out as providing care

- “The record contains no evidence that NHTR and NHI, as opposed to the hospital, held themselves out as providing anesthesia services or that they, as opposed to the hospital, contracted to supply the services.”
 - In our case, if discovery shows that [Defendant Health Services] held itself out as providing healthcare services, the Court’s analysis could help create an issue of fact to withstand summary judgment.
- NC case to look out for: *Seagle v. Cross*, No. 08-911, 2009 N.C. App. LEXIS 1119 (N.C. App. July 7, 2009)
 - Did not address apparent agency; did address other theories of potential relation back or independent liability
 - However, several aspects could have a negative impact here
 - Factually:
 - “Mission Hospitals, Inc.” was entity that owned the hospital plaintiff allegedly was injured at
 - “Mission Health, Inc.” was parent and sole member of Mission Hospitals, Inc. and served as management for the subsidiary, but was not a health care provider
 - plaintiff sued Mission Health, Inc.
 - “As a result, the relevant corporate and regulatory documents unequivocally tend to show that Defendant and Mission Hospitals, Inc., are two separate and distinct corporate entities, that the hospital in which Seagle received care was owned by Mission Hospitals, and that Defendant was, at most, the member and manager of Mission Hospitals. The fact that Defendant may have been Mission Hospital’s sole member and that Defendant managed Mission Hospitals simply does not, standing alone, tend to show the existence of a health care provider to patient relationship between Seagle and Defendant of the type necessary to support a medical negligence action against Defendant. *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 298, 628 S.E.2d 851, 857 (2006).”
 - Plaintiff also argued medical records showing “Mission-Saint Joseph’s,” which was very close to Mission Health, Inc.’s (Defendant’s) former name, created a genuine issue of material fact regarding status as a health care provider.
 - Court rejects that—not on basis that it is not sufficient, just on basis that the records are not as clear as plaintiff argues and that the documents themselves did not show the necessary relationship
 - Here, we may have stronger evidence
 - Conclusion of Court of Appeals:

- “Although identifying the correct entity against which to file suit in this case was inevitably rendered difficult by the existence of many different, similarly-named, corporate entities that are somehow related to Mission Hospital and while the Court tends to agree with the comments of a Magistrate Judge in the United States District Court for the Western District of North Carolina to the effect that ‘confusion as to the proper name of the Defendant is understandable,’ we have no choice but to conclude that Plaintiff “sued the wrong corporation.’ *Franklin*, 117 N.C. App. at 35, 450 S.E.2d at 28. As a result, the trial court's rulings are hereby affirmed.

- **Pending Discovery**

- Interrogatories
 - Seeking proper name, if contending named incorrectly
 - Relationship between [Defendant Health Services] and Defendant Hospital (both companies and fictitious names)
 - Board of Directors at Defendant Hospital
 - Board of Directors at [Defendant Health Services]
 - Responsible for hiring and supervision of Defendant Hospital nurses
 - Who does billing for services at Defendant Hospital
 - “Why do medical records and billing records for patients receiving services at Defendant Hospital bear the name ‘[Defendant Health Services]’ rather than ‘Defendant Hospital’ or ‘Defendant Hospital, Inc.’”
- Production of Documents
 - Medical staff bylaws
 - Corporate bylaws
 - Audited financial statements
 - Evidence of legal relationship between [Defendant Health Services], Inc. and Defendant Hospital, Inc. (including those related to patient care)
 - All advertising about services at Defendant Hospital
 - Employment forms for nursing at [Defendant Health Services], Inc.

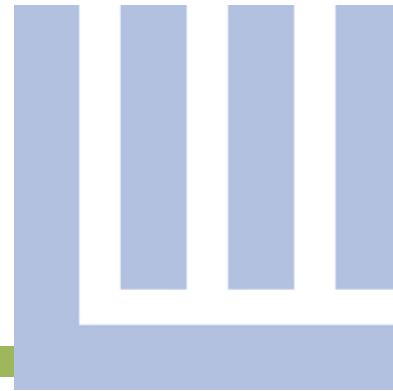
- **Advised Supplemental Discovery**

- Requests for Admission to [Defendant Health Services], Inc.
 - [Defendant Health Services], Inc. does business as “[Defendant Health Services]” in Savage County
 - [Defendant Health Services], Inc. was doing business as “[Defendant Health Services]” in Savage County during January 2007

- [Defendant Health Services], Inc. has not filed a fictitious name record in Savage County noting that it would do business under the name “Defendant”
 - “[Defendant Health Services]” appears on Mr. Plaintiff’s medical records and registration records
 - Nursing staff within the hospital at 123 Elm St. wear name badges with “[Defendant Health Services]” on them
 - Equipment within the hospital at 123 Elm St. is stamped with “[Defendant Health Services]”
 - “[Defendant Health Services]” appears on the exterior of the campus buildings at 123 Elm St., as well as numerous places within the hospital building at the same address
 - “[Defendant Health Services]” maintains a website available to the public at www.defendanthealth.com which states the following:
 - “[Defendant Health Services] has 400 beds . . . and treats nearly 20,000 inpatients each year.”
 - “More than 500 physicians are on the Defendant medical staff.”
 - “Defendant provides a variety of healthcare services throughout Savage County”
 - “When it comes to caring for your family, [Defendant Health Services] has the services you count on, when and where you need them. But don’t take our word for it. Just ask our patients, who prefer Defendant over any other hospital in Savage County.”
 - “[Defendant Health Services] encompasses a 400-bed acute care hospital”
 - Defendant Hospital, Inc. does business in Savage County under the name “Defendant Hospital”
 - “Defendant Hospital” maintains no public, independent website apart from that associated with, or appearing as “[Defendant Health Services],” found generally at www.defendanthealth.com
 - “Defendant Hospital” does not appear on the medical and registration records related to Mr. Plaintiff
 - The former legal name of [Defendant Health Services], Inc. was the “Trustees of Defendant Hospital, Inc.”
 - Defendant Hospital, Inc. is a wholly-owned subsidiary of [Defendant Health Services], Inc.
 - The registered agent for [Defendant Health Services], Inc. and Defendant Hospital, Inc. are the same: John Doe, who is the general counsel for [Defendant Health Services]
 - The principal place of business for [Defendant Health Services], Inc. and Defendant Hospital, Inc., according to records on file with the North Carolina Secretary of State, is 123 Elm St. in Savage, North Carolina
- Notice of Deposition for 30(b)(6) designee of [Defendant Health Services], Inc.

- Purposes
 - What does [Defendant Health Services], Inc. do
 - How is it the same as/different from Defendant Hospital, Inc.
- Topics:
 - Identify all uses of “[Defendant Health Services]” name
Get acknowledgment that:
 - “[Defendant Health Services]” is used to cover hospital services
 - Name on patient charts
 - Name on signs at hospital facility
 - Advertise virtues of hospital where/how/as what
 - Nurses and staff wear “[Defendant Health Services]” name tags
 - Any other uses they will identify
 - Corporate governance/organization
 - Identify Board of Directors
 - Senior management
 - Overlap between [Defendant Health Services] and Defendant Hospital, Inc.
 - Filings with Savage County regarding fictitious names
 - Management/supervision/control of Defendant Hospital, Inc.
 - Control of hospital
 - Do any Hiring/firing
 - Do any Credentialing/Privileging
 - Do any Training of nurses
 - Have any Control/Supervision of nurses/PACU
 - All services provided to Defendant Hospital by [Defendant Health Services]
 - Direct reporting
 - Organizational chart
 - Identification and responsibilities of management team
 - featured on www.defendanthealth.com
 - Jane Smith
 - Senior VP of Patient Care Services/Chief Nursing Officer
 - Jane Johnson, M.D.
 - VP of Medical Affairs/Chief Medical Officer
 - Use of the phrase “Defendant” apart from “Defendant Hospital” or “[Defendant Health Services]”
 - Any measures used to inform patients about difference between [Defendant Health Services] and Defendant Hospital
 - Signage
 - Disclaimers

- All facts supporting denial that [Defendant Health Services], Inc. is the correctly identified defendant
 - Identify insurance policies in effect in January 2007 for [Defendant Health Services], and all persons, entities covered by each policy
 - Any follow-up suggested by responses to previously served discover
- Subpoena to Defendant Hospital, Inc. for 30(b)(6) designee
 - Same as those for [Defendant Health Services]
 - Also topics covered in Interrogatories to [Defendant Health Services]
- Subpoena duces tecum to Defendant Hospital, Inc. for documents to be produced at 30(b)(6) deposition
 - Insurance policies in effect during January 2007
 - All documents surgical patients would see/sign regarding care received at Defendant Hospital, as opposed to another entity or fictitious name
 - Copies of all disclaimers regarding relationship between Defendant Hospital and [Defendant Health Services]
 - Sample medical records, forms, brochures, etc. currently in use, or in use during 2007, displaying, using, or stating “Defendant Hospital” and not “[Defendant Health Services]”
 - All documents requested of [Defendant Health Services] in prior requests to produce
 -
- Affidavit of Mr. Plaintiff
 - Follow generally affidavits used in *Diggs*, *Burless*, and *Osborne*
 - Chose [Defendant Health Services] because perceived good care before and after surgery
 - “[Defendant Health Services]” was everywhere—assuming this is true
 - Knew I was going to hospital, but believed the name of the company I was dealing with, including hospital, nurses, and staff, to be [Defendant Health Services]
 - Use of “Defendant” to me would mean “[Defendant Health Services]”



Emerging Ethics: Regulating the New 2.0 Frontier

MANUSCRIPT

ARTICLES

ETHICS OPINIONS



**LAWYERS
MUTUAL**

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Put Into Practice: Risk Management Tips for Your Firm 2011-2012 Series

Emerging Ethics: Regulating the 2.0 Frontier

New advertising models are pushing the limits of the Rules of Professional Conduct 7.1 – 7.3. Can we apply the rules designed for old school advertising to the internet, email, blogging and social media? Does this help or hurt the public? In this panel, we will discuss:

- Technology and communication issues before the ABA and state bars
- How to avoid violating bar rules

Virtual Law Practice / Unbundled Services

The number of online legal services available to the public has increased in recent years. Prospective clients of legal services are going online to search for affordable and convenient legal assistance. A virtual law practice provides a way for the legal profession to respond to the demand with high quality legal services from licensed attorneys. The NC State Bar is one of the first state bars to publish an opinion that allows for the delivery of online legal services, 2005 Formal Ethics Opinion 10, January 2006 “Virtual Law Practice and Unbundled Legal Services”.

Visit our website, www.lawyersmutualinc.com for two risk management handouts written by NC attorney Stephanie Kimbro, Virtual Law Practice and Unbundled Legal Services. Also, order Stephanie’s book written for the ABA, “Virtual Law Practice”.

Website

Law firm websites can be a static piece of advertising that provides telephone numbers, attorney bios and directions to your office. Or websites can provide value to your clients and potential clients through the use of video, FAQ’s and newsletters. You can take your website a step further by engaging your clients and potential clients through blog postings or live chat. The goal of web 2.0 is to increase interaction between you and your audience.

Benefits of Web Marketing Through Your Website

Recognition as a thought leader

Increased media exposure

Make hiring decisions easy after potential clients shop online

Web Video

Tell your story

Have clients tell their story

Legal Podcasting

A podcast offers potential clients a downloadable audio file and they chose the message they want to hear at a time convenient for them.

Blogging

The new and improved law firm newsletter, blogs allow you to develop your personal profile, build a voice in the legal community and show potential clients that you understand their business or that you are an expert in your field.

Social Media

Put Into Practice: Risk Management Tips for Your Firm 2011-2012 Series

How to guides

Twitter- <http://support.twitter.com/>

Facebook- <http://mashable.com/guidebook/facebook/>

LinkedIn- <http://learn.linkedin.com/>

Blog – www.wikihow.com/start-a-blog

Why – Benefits of Social Media

Establishes a brand and builds awareness

Awareness on what the competition is offering

Pitch legal services in a more human, interactive way

Bring attention to your services

Increase client loyalty and trust

Listen to your client's opinion

Conduct market research

Strengthen client service

Build your personal reputation

Display your resume

Showcase your talents and establish yourself as an expert

Enhance your business contacts and personal relationships

Share information with like-minded people

Issues for lawyers

Social media is labor intensive

Is anyone listening?

Are the right people listening?

Finding your voice

Privacy matters

Use to build relationships

Build a reputation of trust

Issues for business or law firms

Employee productivity

Improper use that harm's the company's reputation

Reveal confidential information

Result in claim for harassment or discrimination

Policies that law firms use need to recognize that social media can drive business and support professional development and business development efforts for individuals, as well as raise the law firm profile.

Policies should:

Stress employees are accountable for what they post

Remind employees about their right or lack of rights to privacy with regard to information written, sent or received on company computers

Tell employees what disclaimers are necessary

Tell employees whether they are able to provide recommendations

Put Into Practice: Risk Management Tips for Your Firm 2011-2012 Series

Tell employees what the repercussions are for violating policies and uniformly apply the social networking policy

Individuals should clearly identify whether speaking personally or on behalf of law firm

Author should be transparent (don't hide behind alias or anonymous)

Follow any other firm guidelines such as employee manual rules on communications

Learn the terms and conditions of use established by each venue you use

Obey the law

Never be false or misleading

Give proper credit

Guard against misusing client info

Fact check your posts

Correct your errors

Keep tone respectful

Potential conflicts / red flags

Avoid personal attacks

Get approval if necessary for negative post, posting recommendations

Understand your firm's media /communications / crisis policies if you receive media queries or if you are commenting on issues that fall within these categories

Make sure you are complying with ethics rules (testimonials, discussion of fees, recent cases or outcomes)

Careful about creating attorney-client relationships

How to Use Social Media

Twitter- share your blog postings, interact with legal world, monitor trends, listen to clients, answer questions

Blogs- Create posts to answer FAQs, establish thought leadership, stimulate discussion

Facebook- allows you to have a more personal connection with people

LinkedIn- allows you to connect professionally with colleagues, B2B interaction

Tools

Ping.fm – tool to link social media, one post sends to multiple locations

Istockphoto.com - Photos for use on blogs

Retailers and vendors rarely object to the use of their images when you're blogging about them and linking to them, i.e. such as career dressing posts or software/apps.

Some images, such as people in the news that are reproduced in a variety of places, might not be a problem if you link to the source.

Crisis Management

Be proactive – have a plan in place before the negative comments are posted or before you tweet from the wrong account

React quickly, but thoughtfully because you have a plan

Be apologetic if appropriate

React publicly first, then privately

Thank disgruntled client for their feedback personally rather than engaging in public war

Ask what you can do to fix the situation, then do it

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Pick your battles – is it a problem to have one negative review compared to ten positive ones? Maybe you don't try to get the offender to remove the post, but to acknowledge that the problem was fixed

Websites to monitor your progress

Websitegrader.com

Twittergrader.com

Google Analytics

Ping.fm

Example

Check out the MedLaw Legal Team Toning Shoes Injury Facebook page

Ethics

200 FEO 10 Virtual Law Practice and Unbundled Services

2010 FEO 14 Use of Search Engine "Adwords" to Advertise on the Internet

2011 FEO 4 Participation in Reciprocal Referral Agreement

2011 FEO 6 Subscribing to Software as a Service

2011 FEO 7 Using Online Banking to Manage a Trust Account

2011 FEO 8 Utilizing Live Chat Support Service on Law Firm Website

2011 FEO 10 Lawyer Advertising on Deal of the Day or Group Coupon Website

2011 FEO 14 Outsourcing Clerical or Administrative Tasks

The ABA Ethics 20/20 Commission was established in 2009 to consider the impact of technology and globalization on the professional conduct rules for lawyers. The Commission is seeking comments to the draft proposal which will be considered in August 2012 at the ABA 2012 annual meeting in Chicago. Learn more at the ABA website by searching for Commission on Ethics 20/20.

Recent Stories of Interest

"Don't Worry If You Don't Understand Social Media. Many Media Pros Do Not Have a Clue Either"

By: Jim Calloway, Law Practice Tips Blog January 10, 2011

Today's observation and rant is inspired by the *Columbus Dispatch*, a newspaper that quite literally changed a man's life and whose management then couldn't figure out how to leverage that accomplishment to its own advantage without looking petty. Have you heard about the homeless guy with the golden voice? Well, sure you have. Most everyone has by now: young people, old people, people without Internet connectivity, people who couldn't name the current Vice-President. It was an incredible feel-good story that saw a guy go from homelessness to appearing on most of the national news shows and signing lucrative voice-over recording contracts. I am one of many hoping that he makes best use of this opportunity.

And this all happened because a reporter from the *Columbus Dispatch* posted a short video of the man, Ted Williams, on YouTube that went viral. Millions of people watched it and the national media pounced. So after, this huge rush of attention, how did the *Columbus Dispatch* make use of its position

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in this hot media story? The *Columbus Dispatch* has issued a takedown order demanding YouTube remove the video, which it has apparently done.

I am not claiming to be an expert on social media. In fact I am generally wary of the term “social media expert.” Too many times this applies to someone who lost a job and had lots of time to play around on Facebook and Twitter while collecting unemployment or someone who is convinced that old media rules can simply be applied to social media. Here’s your tip for the day. Facebook, Twitter, Flickr and the rest didn’t get where they are today because they were complicated and challenging to use. Give them a try. Sure there are nuances and right/wrong ways to use them. But if you have a question, before you write some expert a check for ten grand, call your aunt who posts to Facebook ten times a week and see what she has to say. (She’s been dying to hear from her nephew, anyway.)

And here’s my non-expert advice to the *Columbus Dispatch*. I wouldn’t know of your paper’s name and Ted Williams would still be panhandling if not for YouTube. Dance with the one that “brung ya.” Instead of making the paper look like an old media company that just doesn’t get it, leverage your fifteen minutes of fame. Reach out to advertisers with “we made a homeless guy world famous, what can we do for your business?” See if Ted Williams will take your phone calls and keep doing follow up stories about how your reporter has changed this guy’s life. Link to the YouTube video. Don’t try to monetize it or move it exclusively to your site or whatever silly plan you have in mind.

It’s a good lesson to lawyers and their clients. Sometimes the legal remedy is not the best plan. There may be a back story, but so far today the *Columbus Dispatch* went from having a warm place in many hearts to looking a bit silly.

Akin Gump Chair Hits Partner’s Personal Blog Post on ‘Ugly’ Indian Prayer

ABA Journal.com Posted Jan 19, 2011

By Debra Cassens Weiss

An Akin Gump partner is apologizing for a blog post deemed “insensitive” by the managing partner of his law firm.

Writing at the Power Line blog, partner Paul Mirengoff criticized the delivery of an Indian prayer at a memorial for Tucson, Ariz., shooting victims. The original post has since been removed, but it lives on in cached form.

Mirengoff’s post commented on “the good, the bad and the ugly” of the prayer service. The good included scripture readings by Attorney General Eric Holder and Homeland Security chief Janet Napolitano, he wrote. The bad included praise for President Obama and “frequent raucous cheering” by the crowd.

“As for the ‘ugly,’ I’m afraid I must cite the opening ‘prayer’ by Native American Carlos Gonzales,” Mirengoff wrote. It “apparently was some sort of Yaqui Indian tribal thing, with lots of references to ‘the creator’ but no mention of God. Several of the victims were, as I understand it, quite religious in that quaint Christian kind of way (none, to my knowledge, was a Yaqui). They (and their families) likely would have appreciated a prayer more closely aligned with their religious beliefs.”

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Mirengoff later posted an apology on the Power Line blog, saying he failed to give the prayer the respect it deserves and apologizing to “the Yaqui tribe, to all tribal leaders and Indian people, and, specifically, to Carlos Gonzales who delivered the prayer.”

But he wasn’t the only one expressing regret. Akin Gump chairman Bruce McLean issued a statement emphasizing that the law firm isn’t affiliated with—and isn’t a supporter of—the Power Line blog. “We found his remarks to be insensitive and wholly inconsistent with Akin Gump’s values,” McLean said.

Akin Gump spokeswoman Kathryn Holmes Johnson tells the ABA Journal that the law firm is currently reviewing its social media policies.

ABAJournal.com – Lawyer posted Facebook photo of her escaped convict fiancé July 20, 2011

Police find lawyer lunching with escaped convict she hoped to marry. She had his name tattooed on her fingers and allegedly posted a Facebook photo of them walking away from the corrections facility the day before. Police found them eating lunch together at a restaurant. Attorney told police she thought he had been released. Police seized her iphone, allegedly used to post the FB photo.

The Hook (independent newspaper in Charlottesville, VA) – Lawyer accused of telling client to destroy evidence (Facebook photos) July 25, 2011

Well respected personal injury lawyer is accused of lying, withholding evidence and failing to disclose a family connection to the jury foreperson. Matt Murray, recent president of the Virginia Trial Lawyers Association and managing partner of Allen, Allen, Allen & Allen, has resigned from both firm and association, citing retirement as the reason.

Murray won a record \$10.6 million verdict for the surviving spouse of 25 year-old Jessica Lester who was killed when a concrete truck mixer lost control of his vehicle and rolled over crushing Jessica’s car. She died 8 days later of a fractured skull.

A year later, her husband posted a photo on his Facebook page showing him wearing a t-shirt that read “I (heart) hot moms and wearing a garter belt around his head. When defense attorneys requested a copy of the photo, Murray allegedly told his client that the easiest way to handle the request was to take down his Facebook page. The next day, it is alleged that Murray’s paralegal emailed Lester, “There are some other pictures that should be deleted.” “We do NOT want blow ups of other pics at trial, so please, please, please clean up your Facebook and myspace.”

Murray failed to turn over the emails until after the trial. He continued the cover-up by alleging another paralegal failed to produce the emails. When she denied the allegation, Murray admitted to lying about the emails.

The matter is set to be heard September 23. Counsel for the concrete company has asked the court to dismiss Lester’s claim, order a new trial and prohibit Allen & Allen from representing the plaintiff or slice the award to \$1 or \$2 million and prohibit Allen & Allen from collecting its contingency fee.

ABA Journal – Judge Dismisses Paralegal’s Suit against Facebook friend – August 2, 2011

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A Michigan judge dismissed a lawsuit brought by paralegal Cheryl Gray who claimed she was dumped and defamed by a Seattle man she met on FB. She wanted to collect \$8k for the gifts she bought Wylie Iwan, a man she met playing the Facebook game Mafia Wars.

ABA Journal – Missouri outlaws Teacher-Student Facebook Friendships – August 2, 2011

A new Missouri law set to take effect in August is aimed at more clearly defining teacher-student boundaries. It seems reasonable that paralegals and lawyers should be concerned about attorney – client boundaries in setting up social media relationships.

Avoiding Ethical Traps for Law Firm Websites

BY MIKE DAYTON

The internet is widely acknowledged to have been born in 1969, the year of Woodstock. However, not until the 1990s did the internet capture the imagination of the general public. The rapid rise in online users during that decade made it an inevitable marketing avenue for law firms.

Law firm websites made their first formal appearance on the State Bar's ethics radar in 1996, when the Ethics Committee issued RPC 239 (October 18, 1996). That opinion ruled law firms could display information about their firms on a "world wide website on the internet." The Bar concluded that many of the same ethical rules that govern print ads or radio and television commercials also applied to online marketing efforts. The current provisions are contained in Rules 7.1 through 7.5.

The online world continues to create new ethical challenges, and the Bar has done its best to keep pace through its rules and ethics opinions. If your firm is now online, here are some pointers to help you avoid ethical headaches.

Just the facts, Jack. Be sure that what appears on your website is factually correct. Rule 7.1, the guiding star for lawyer advertising, states that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." A communication is deemed to be false or misleading if it "...contains a material misrepresentation of fact or law...." It is the seemingly innocent factual statement, not the questions of law, that may cause problems, according to one Bar official. Suppose your site states: "We answer all of our phone calls within 24 hours." Your firm may be able to demonstrate this is true if you use an around-the-clock answering service. Even so,

be careful about making statements like that unless they can be verified.

If you include video clips, or even photographs that portray fictional persons or events, be aware that the same rules that apply to written text also apply to visualizations. For instance, if your website video is a dramatization, you must say so. *See* Rule 7.1(b). Avoid images, such as the handing over of a million-dollar check to a client, that might create unjustified expectations.

Avoid implied comparisons. Rule 7.1 states the comparison of a lawyer's services with those of his or her colleagues may be





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considered false and misleading "unless the comparison can be factually substantiated." Thus, a statement such as "service is our #1 objective" is not likely to raise objections, but eyebrows may be raised when you proclaim, "we are North Carolina's most experienced law firm in food poisoning claims." Perhaps your firm has handled a class action and represented 10,000 plaintiffs nationwide. But that statement invites comparison with other firms. If you can't back it up, think twice about including it on your site.

Take a close look at client endorsements. Quotes from satisfied clients may be the very thing that convinces a new client to sign up with your firm. That's why so many firms include them on their websites. General or "soft" endorsements typically do not raise ethical questions—for example, "XYZ Law Firm treated me with respect" or "They answered my phone call immediately" or "I needed help and they were there." The more specific endorsement of "XYZ Law Firm got me \$300,000 for my car accident" is skating on thinner ice. The problem is one of unjustified expectations. Comment 3 of Rule 7.1 states: "An advertisement that

truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case."

Rules about "no fee unless we recover" statements. Lawyers who handle personal injury matters on a contingent fee basis frequently include no-recovery, no-fee statements on their websites. Under ethics ruling 2004 FEO 8, statements like those may be potentially false or misleading if you don't charge a fee when there is no recovery but clients still have to repay costs. The bottom line from that ruling: "If the lawyer does not invariably waive the costs advanced, the advertisement must state that the client may be required to repay the costs advanced regardless of success of the matter."

Know your Super Lawyer rules. Congratulations—you've been named a Super Lawyer. Under 2007 FEO 14, you can advertise inclusion in a Super Lawyers listing on your website, subject to a few sim-

ple guidelines. Most importantly, do not simply state you're a "Super Lawyer" as that could be seen as an unsubstantiated comparison prohibited by Rule 7.1(a). Instead, make it clear the Super Lawyer designation is a listing in a publication by indicating the publication name in a distinctive typeface or italics, include the year you were honored, and link to the criteria for inclusion on the Super Lawyer website.

A word about advertising verdicts and settlements. For potential clients seeking an attorney, there may be no better selling point than your firm's past successes. The Bar is still sorting out the guidelines on this issue. In 2000 FEO 1, the Bar's Ethics Committee concluded that the posting of verdict and settlement amounts on websites had the potential to create an unjustified expectation about the results a lawyer could achieve. In 2000 FEO 1, the Ethics Committee ruled that putting verdicts or settlements in context lessened the likelihood that a website visitor would be misled. But the context requirements proved difficult to

CONTINUED ON PAGE 12

determine if you can reach your audience through Twitter. Use Twitter Search (search.twitter.com) to find people talking about your products or services. TweetScan (www.tweetscan.com) notifies you when your services or keywords are mentioned on Twitter, and Twollow (www.twollow.com) allows you to auto-follow people who are talking about your services. For instance, if you specialize in traffic violations, you should set a TweetScan alert for relevant keywords such as "speeding ticket" in your area. Using Twollow, you can automatically follow users who are talking about traffic violations. Following them will get you noticed, but they'll only follow back if you're sharing interesting information, so don't wait until you have a network to start tweeting.

Initiate conversation about your industry, offer tips, listen to what people are saying about your company, and be proactive in responding to @ replies and direct messages. Offer information that customers and other people in your network will find interesting—not just marketing and PR speak. Don't toot your own horn too much, or

bombard users with links and repetitive marketing messages. Just like any conversation, these common mistakes will make you boring or annoying to followers.

This is by no means a complete list of social media sites that can help promote business. There are hundreds of other sites and social networking tools. Social media marketing is like any other marketing; different tactics work for different businesses.

Spend some time exploring these websites to determine if they can work for you. Come up with a strategy for how to implement these tools and integrate them with your current marketing efforts. Be sure you're using a network that your target audience is using.

If you're unsure of where to begin, internet marketing consultants can help you come up with a strategy, set up your profiles, and learn to use these tools effectively, but in the end your success depends on your engagement. Designate someone within your company as the online "face" of your brand. Social media works best when it's used to connect people with people. Use a real person as the online persona of your

brand instead of a faceless logo. Your online profiles are an extension of your company, so make sure your company's online persona positively represents your brand.

After you've developed a strategy, built your profile, and joined a network, all that's left is the conversation. Initiate conversation with your customers about your industry and your brand, listen, and respond promptly to @ replies, blog comments, wall comments, and direct messages. Avoid excessive marketing and promotion of your brand, contribute to the community, and be interesting! ■

Mike Duncan is the CEO and creative director of Sage Island, a Wilmington marketing agency. Sage Island began as a custom programming company, but quickly expanded into commercial web design and eventually full-service marketing. Today, Sage Island has built a strong reputation through award-winning designs, brand strategy, and internet marketing services, including search engine optimization and pay-per-click advertising. Mike can be reached at mduncan@sageisland.com, www.sageisland.com.

Law Firm Websites (cont.)

meet. Among other things, firms were required to list favorable and unfavorable results within a specified timeframe, as well as the difficulty of the cases and whether there was clear liability.

This year, the Ethics Committee took a second look at the 2000 ruling. 2009 Formal Ethics Opinion 6, adopted by the Council on July 24, 2009, drops the most troublesome portion from the 2000 opinion—the requirement that favorable and unfavorable results be reported. The ethics ruling allows a case summary section on websites "if there is sufficient information about each case included on the webpage to comply with Rule 7.1(a)." The opinion states: "The summary should reference the complexity of the matter; whether liability and/or damages were contested; whether the opposing party was represented by legal counsel; and, if applicable, the firm's success in actually collecting the judgment. Providing specific information about the factual and legal circumstances of the cases

reported, in conjunction with the inclusion of an appropriate disclaimer, precludes a finding that the webpage is likely to create unjustified expectations or otherwise mislead a prospective client."

Be clear when advertising your firm's age. It's not uncommon for lawyers in a firm to add their years of experience together as a marketing strategy. When a firm says "put our 30 years of experience to work for you," potentially you have three lawyers in the firm that have each been licensed and practicing for ten years. In ethics ruling 2004 Formal Ethics Opinion 7, the Bar declared it was misleading to advertise the number of years of experience of the lawyers with a firm without indicating that it was the combined legal experience of all the lawyers. The solution is an obvious one—simply state you're talking about "combined legal experience" when you total the years of practice of the firm's attorneys.

Register your trade name. Rule 7.5(a) permits a law firm to use a trade name, provided it doesn't imply a connection to a government agency or a charitable legal services

organization and provided the name is not false or misleading. In ethics opinion 2005 Formal Ethics Opinion 8, the Bar concluded that the law firm's URL—the website's unique internet address—could qualify as a trade name. If the URL is more than a minor variation on the official firm name, it has to be registered with the State Bar. SmithJonesLaw.com, a variation of the firm's actual name, would not have to be registered, while a name such as NC-Worker-Injury-Center.com would. Instructions for registering the trade name can be found on the Bar's website at www.ncbar.gov/resources/forms.asp. ■

Michael Dayton is the content manager for Consultwebs.com, a Raleigh-based web design and consulting company for law firms. He is the former editor of North Carolina Lawyers Weekly and South Carolina Lawyers Weekly and co-author of a book on the history of Wake County lawyers, published in 2004.

Attorneys who have questions about their website content can contact the State Bar at 919-828-4620.

Internet Angst or I Went to Law School, Not MIT

By Suzanne Lever

I am just going to say it. As one of the ethics counsel at the North Carolina State Bar, I hate the Internet. Understanding the Internet is like raising a child. Just as soon as you think you have it figured out, something new gets thrown at you. Or maybe it is more like that mythological creature with all the heads where if you cut off one head, two more heads grow back in its place.

The Ethics Committee first encountered the beast that is the Internet in 1996. In RPC 239 (October 18, 1996), the Ethics Committee addressed the propriety of a law firm having its own website. The opinion provides that it is permissible for a lawyer to display information about his or her legal services on “a site on the World Wide Web which can be accessed via the Internet, a global network of interconnected computers.” (We were so young and naïve then.) RPC 239 provides that advertising on the Internet is permissible so long as the website does not contain information that is false or misleading, lists all jurisdictions in which the lawyers in the firm are licensed to practice law, and discloses the geographic location of the law firm’s principal office. Seems simple enough.

Oh, for the good old days. At the recent quarterly meeting, the Ethics Committee considered three agenda items dealing with the ever-changing, ever-technical, ever-incomprehensible landscape that is Internet advertising.¹ Proposed 2010 FEO 14 (Using search engine keywords to advertise on the Internet), an inquiry on utilizing live chat support services on a law firm website, and an inquiry on advertising on the Groupon website.

Prior to this deluge of inquiries pertaining to heretofore unheard of Internet offerings, the predominant issue surrounding Internet advertising was the permissible content on law firm websites. In 2000 FEO 1, the Ethics Committee determined that statements about a lawyer's or a law firm's record in obtaining favorable verdicts was permissible on a firm's website if the information was provided in a certain context. This opinion was recently overruled by 2009 FEO 16. The new opinion provides that a law firm may include a “case summary” section on its website, so long as the section contains factually accurate information accompanied by an appropriate disclaimer.

Okay, so it took a few drafts, but we ultimately got the whole “case summary sections” controversy settled. But now the Ethics Committee is faced with numerous inquiries pertaining to Internet advertising options that clearly were not even a twinkle in the eyes of the committee that revised the Rules of Professional Conduct in 2003.

In one inquiry, the Ethics Committee considers the ethical issues surrounding a lawyer advertising on a “deal of the day” or “group coupon” website. A consumer registers his or her email address and city of residence with the company’s website. The company emails local “daily deals” to registered consumers. The daily deals are generally for services such as spa treatments, tourist attractions, restaurants, etc. But now, lawyers would like to advertise legal services on these “deal of the day” websites as well. In connection with this inquiry, the Ethics Committee considered, among other issues, the potential for prohibited fee sharing with a

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nonlawyer, as well as possible refund and trust accounting issues. This opinion is going back to a subcommittee a second time for further head scratching.

In Proposed 2010 FEO 14, the Ethics Committee considered a lawyer's actions in connection with a search engine company's search-based advertising program. Apparently the program allows advertisers (in our case lawyers) to select specific words or phrases that should trigger their advertisements. When a "user" performs a search, the advertisements triggered by the relevant words *magically* appear, along with the search engine's main search results. The specific inquiry considered by the committee asked whether it is a violation of the Rules of Professional Conduct for one lawyer to select another lawyer's name as an advertisement trigger. So for example, if Attorney Joe Smith selects as his advertisement keywords "Attorney Jack Jones," when an Internet user then enters "Attorney Jack Jones" in the search engine, a link to Attorney Joe Smith's website appears as an advertisement. A link to Attorney Jack Jones' website would also appear in the main search results. This one is also going back to a subcommittee for further rumination. The inquiry always invokes a "lively" discussion from the members of the Ethics Committee. What do you think? Does this behavior rise to the level of deceptive conduct under Rule 8.4 or is it just clever marketing? Feel free to join the discussion.

In the third inquiry, the Ethics Committee considers whether a law firm may use a "live chat support service" on its website. Apparently, after downloading the applicable software program to the firm website, a "button" is displayed on the website which reads something like "Click Here to Chat Live." Once a visitor clicks on the button to request a live chat, the visitor will be able to have a typed-out conversation in real-time with an agent of the law firm. Depending on the software program purchased, in addition to the live chat "button" being displayed on the website, a pop-up window may also appear on the screen specifically asking visitors if they would like "live help." In another form of the service, a computer generated voice "speaks" to the visitor and asks if the visitor would like live assistance. At issue here is whether the live chat support service amounts to improper in-person solicitation. Relying on the fact that the public has become desensitized to the various interactive features of the Internet, and understands the right to ignore electronic communications, the Ethics Committee gave this technology its blessing and is publishing the opinion comment.

Okay people, what is next?? If I get an inquiry asking whether it is permissible for a lawyer's website to be programmed to project a hologram into a potential client's house, I might just lose it. (Please, please don't tell me this technology already exists.)

Suzanne Lever is assistant ethics counsel for the North Carolina State Bar.

Endnote

1. Not to mention the two opinions on "cloud computing" that were also on the agenda and are published for comment in this edition of the Journal.

Metadata 101: Beware Geeks Bearing Gifts

BY ERIK MAZZONE

There was a time when a lawyer who was uninterested in technology could happily and successfully run her practice without knowing her AOL from her elbow. (Readers under the age of 30: kindly consult Wikipedia on what AOL is.) Much like AOL's internet hey-day, those halcyon days of technology-free law practice are behind us. For good or ill, the practice of law has dragged

itself from the primordial sea and now walks on land, breathing air and pecking out emails on an iPhone.

For those attorneys of the tech nerd persuasion, this change (to call it an "evolution" would imply a qualitative improvement, at which, doubtless, many attorneys would take umbrage) is cause to rejoice. It gives hope to us nerds; hope that at long last, our colleagues at the bar may cease to roll their eyes and writhe in agony during our painstakingly (some might say, painfully) detailed dissertations on the relative merits of Windows 7 versus Windows XP. (This author has, sadly, not yet found this to be the case.)

For the rest of the bar—those of you who inexplicably prefer time with loved ones and

sunshine to blogs and the soft blue glow of a computer monitor—the increased role of technology in legal practice has often been cause for shrugged shoulders, deep sighs, and a collective murmur of, "great...what new thing do I need to worry about now?" We have learned to be wary of geeks bearing gifts—for every time-saving and practice-enhancing app we giddily load on our iPads, a new danger or frustration lurks around the next technological bend.

Over the past few years, perhaps no such technological danger has been less understood yet more commonly present in law

practice than that posed by metadata. Even the name itself is impenetrable, conjuring an unholy blend of metaphysics and data that probably makes you want to put down this article and turn on *Dancing with the Stars*. More frustrating still, a plea to our modern oracle—the internet—fails to provide any useful insight as to the nature of metadata. Merriam Webster helpfully defines it as "data that provides information about other data."

Well, that clears that up. Any questions?

What many of us do know, however, is that metadata is important enough that the North Carolina State Bar has issued a formal



Greg Hargreaves/images.com

ethics opinion (2009 FEO 1) on the topic. So, with the renewed clarity of purpose that only an existential threat to our law licenses can provide, let us tackle this topic of metadata and provide some measure of relief to our collectively furrowed brow.

Metadata: What Is It?

When one creates a digital document, the software used to create the document will often keep a log about the creation and editing of that document. Metadata, as the ethics opinion states, is embedded information in digital documents that can contain information about the document's history, such as the date and time the document was created, "redlined" changes, and comments included in the document during editing. In other words, long after a document has been finished, metadata about the process of creating and editing the document is left behind like fingerprints at a crime scene.

Unlike actual fingerprints (at least if the current crop of crime scene investigation television shows is to be believed) metadata is easy for an untrained, tech-novice to uncover. Searching Google for "how to find metadata in a Word document" will yield over 3 million results, including step-by-step instructions that any technophobe could easily follow. There is nothing objectively good or bad about metadata—it's just data. You've likely never wiped down a room for your fingerprints before (and this being the magazine of the State Bar, if, for some reason you routinely wipe down your prints, please keep that revelation to yourself) so too worrying about metadata in most facets of your life is unnecessary. The one facet of your life where you do, however, need to worry about metadata—where indeed you are duty-bound to worry about it—is in your practice.

Metadata: Why Do You Need to Care?

If you have never, in the course of your professional practice, created, edited, read, received, or sent a digital document, you may now skip to the next article in this magazine.

Still there?

As an attorney, you need to care about metadata because it is a client confidentiality time bomb hidden in the middle of your practice. As attorneys, we are prohibited from revealing confidential client information without the informed consent of the client by RPC 1.6(a). You know this. I know you know this. I further know that you

would never knowingly reveal client confidences purposefully. The very real possibility remains, though, that if in the course of your practice you have ever shared digital document with an opposing counsel, you may have unknowingly and inadvertently revealed confidential client information in the form of metadata.

Since you probably have your law license hanging on your office wall right now (as I do), I probably don't need to elaborate further on why you need to care about metadata. But to err on the side of caution I offer a syllogism that would make my old Jesuit logic professor reconsider my grade:

We have an ethical duty to maintain client confidences.

Metadata may contain client confidences.

Sending metadata which contains client confidences to an opposing counsel or party is a violation of our ethical duty.

Metadata: What Do You Do About It?

You now know what metadata is and why you, as an attorney, need to care about it. All that remains is to know what to do about it.

For the answer to that question and more, please send me a check or money order for \$19.95 to... just kidding. None of the foregoing matters much if you don't know what to do when you close this magazine and go back to your office.

If you have not yet read 2009 FEO 1 on metadata, reading that opinion is your first step. Go on; it's on the State Bar website. I'll wait.

Read it now? Great.

You now know that there are two primary questions surrounding your ethical duty relating to metadata: 1) what is your duty to prevent disclosing confidential client information in metadata; and, 2) if you receive digital information from opposing counsel, what may you do with any confidential client information contained therein?

Duty When Sending Digital Information

Your duty when sending digital information is to "take reasonable precautions to prevent the disclosure of confidential information, including information in metadata, to unintended recipients." (2009 FEO 1) The opinion goes on to state, "a lawyer must take steps to minimize the risks that confidential information may be disclosed in a communication." (2009 FEO 1 quoting RPC 215)

What steps and precautions would be considered reasonable will depend on the circumstances. So as not to leave you adrift wondering what you can do to satisfy this reasonable precaution standard, let me share with you the way I advise the members of the North Carolina Bar Association in the course of my work.

The obvious precaution to take is to remove the metadata from a digital document before sending it. There are several ways to do this, ranging from the free and clunky to the expensive and elegant. The best way to do this in my opinion (which, it should be noted, along with \$1.75 will buy you a cup of coffee and should under no circumstances be confused with a State Bar Ethics Committee Get Out of Jail Free card) is to purchase a stand-alone metadata removal product (often referred to as a "metadata scrubber"). It's not unlike redacting confidential information from a document.

If you work at a law firm with an IT department, chances are you already have a metadata scrubber product in place. If, however, you are one of the many lawyers in North Carolina who works at a firm without an IT department I would suggest looking at Payne's Metadata Assistant (\$89 at www.payneconsulting.com). Payne's Metadata Assistant removes metadata from Microsoft Word, Excel, and PowerPoint. It integrates nicely with Microsoft Outlook (as well as GroupWise and Lotus Notes) and pops up helpful reminders just before you send an email with a digital document attached.

If the purchase of a stand-alone product is not in your budget, the word processing programs Microsoft Word and Corel WordPerfect each contain metadata removal tools or settings, as well. For WordPerfect users, using the included metadata removal tools is likely to be your best option—Payne's Metadata Assistant does not work for WordPerfect. For Microsoft Word users, though, for \$80 you can purchase a product whose sole function is to remove metadata—it may not be a Get Out of Jail Free card, but it certainly ought to help demonstrate that you took reasonable precautions to prevent the disclosure of confidential information.

For the sake of completeness, I'll briefly address some other possible solutions. One less elegant and less green but nevertheless effective solution: printing out documents and scanning them back in as PDF files.

CONTINUED ON PAGE 15

thing—happened. Our citizens deserve a government that investigates allegations of crime to both thwart frivolous charges and to adequately prosecute meritorious cases.

North Carolina should consider eliminating private warrants and provide law enforcement with the necessary resources to investigate and charge—or not charge—under these circumstances. Perhaps the law should permit a citizen to petition the district attorney to bring charges if law enforcement declines to act. While eliminating private warrants would increase the burden on law enforcement, simply allowing folks to file charges without an independent law enforcement investigation is even more burdensome to the justice system and the public.

Should Magistrates Set Bonds in Domestic Violence Cases?

Historically, magistrates set bonds in all cases except murder. About 15 years ago, the General Assembly established a new general rule requiring that district court judges set bonds in domestic violence cases. N.C.G.S. Section 15A-534.1. The rule provides that once a defendant is arrested in a domestic violence case, he or she is supposed to be brought before a district court judge for consideration of bond. If court is not in session, then the defendant will likely be held overnight and brought before a judge the next morning when court resumes. If there is not a session of court within 48 hours after the defendant's arrest (during the weekend, for example), then a magistrate sets the bond after the 48 hour period expires. *State v. Thompson*, 349 N.C. 483 (1998).

No doubt the change in the law is supposed to provide an added measure of protection to victims of domestic violence based upon the assumption that district court judges are better at setting bonds than magistrates. Observing this rule in practice, however, raises two concerns: (1) a magistrate is structurally better positioned than a district court judge to get accurate information to set a bond and (2) when court is not in session, everyone in a domestic relationship is in jeopardy of spending an extended period of time—up to 48 hours—in jail based upon a false charge.

First, a magistrate is in a better position to get accurate information because a magistrate speaks to the victim or the law enforcement officer when the case is charged. Also, the same magistrate is often on duty and

speaks to the defendant when he or she is arrested. Instead of the magistrate setting the bond with information from both sides of the case, under current law the case is now likely added onto a crowded docket either that day or the next day that court is in session. In ten years of setting bonds in these cases, I can only remember a handful of times when either the law enforcement officer or the alleged victim in one of these cases appeared in the courtroom when I set the bond. Instead of having information from both sides of the case, all the district court judge has to rely on in setting the bond is the written charge, the defendant's version of events, the defendant's record, and perhaps, some notes or recommendation from the magistrate. It seems to me that divorcing the responsibility for setting the bond from best information is a poor practice.

Second, since this rule also applies in private warrant cases, too often the actual victim of domestic violence is charged by the perpetrator, and must wait overnight or longer until his or her bond is set. If a false charge is brought Friday after court has concluded, then the innocent defendant (the actual victim) will likely spend 48 hours in jail before his or her bond is set. Thus, the law, in these instances, has terrible consequences for those it was intended to help.

Should North Carolina Establish a Legal Retreat?

Science, for example, has been advanced by leading scientists gathering for informal retreats to discuss problems and ideas in their fields. A similar small gathering of legal community leaders—judges, lawyer-legislators, prosecutors, private practitioners, magistrates, and legal educators—would likely produce improvements in our law and judicial system. How our various statutes fit together, problem areas in the law such as the two I have mentioned above, funding for the judiciary, judicial selection, and other topics could be explored with collective input from leaders with broad perspectives to help the participants move beyond preconceived notions. It would provide a forum to not only identify and discuss problems, but it would also develop relationships necessary to collaboratively address them.

As most readers know, the UNC School of Government does an outstanding job providing formal training to governmental

employees and informally answering their questions on an as needed basis. The school could plan an excellent continuing legal education retreat that would benefit all North Carolinians. I would welcome the opportunity to volunteer to help in any capacity. ■

Martin B. (Marty) McGee has served as a district court judge in Cabarrus County since October 6, 2000. He resides in Concord with his wife, Debin, and their two daughters.

Metadata 101 (cont.)

Proponents of this approach often choose it based on cost, though given the cost of paper and printer ink, I'm not convinced it is more economical. Printing a word processing document into a PDF document will remove much of the metadata as well. If it were my license at stake though, I'd purchase a stand-alone metadata scrubber and some piece of mind.

Duty When Receiving Digital Information

2009 FEO 1 is clear and straightforward on this point: a lawyer may not search for metadata (often referred to as "mining" for metadata—a description which belies the relative ease with which it can be done). If a lawyer unintentionally views another party's confidential information within the metadata of a given document, she must notify the sender and may not use the information without consent of the other lawyer or party.

Conclusion

Not nearly as thorny and difficult to grasp and deal with as its name would imply, metadata is a fact of life in the modern law office. You now know what it is, why you need to care about it, and what to do about it. Purchase a metadata scrubber or otherwise put into place a procedure to deal with metadata in your practice. Then unfurrow your brow, and go back to enjoying time with your loved ones and sunshine. And, of course, your iPhone. ■

Erik Mazzone is the director of the Center for Practice Management at the North Carolina Bar Association.

Social Networking—Blogging, and Facebook, and Twitter, Oh My!

BY MICHAEL DUNCAN

This article on using social networking to market a business was not written specifically for lawyers. Although the advice is topical and useful, lawyers are reminded of their paramount duties under the Rules of Professional Conduct. The prohibitions on in-person solicitation and targeted mail may, in particular, limit the use of social networking for marketing a law practice. Before engaging in social networking as a marketing tool, contact ethics counsel at the North Carolina State Bar for advice.

Facebook, Twitter, blogging...in the past year, these social networking tools have shifted from kid stuff to major marketing tools. If you're wondering how to use these tools to connect with potential clients, you're not alone.

Social media is an easy way to connect with people on a personal level. If your website serves as your online business card, then social media can be a form of online greeting card, providing you with a more personal presence on the internet and allowing you to interact with clients individually.

When done properly, social media is a fun, targeted way to reach your audience on a personal level with a wide range of positive results for marketing, search engine rankings, and traffic.

Don't stumble blindly into social networking for your business. Whether you're blogging or using social networking sites like Facebook and Twitter to connect with your clients, you need a strategy. Decide what you want to accomplish through social media. Connection with customers? Web site traffic? Reputation management? Your ultimate goal will determine the tactics you use and the networks you join. Here's a basic overview of the most popular methods and how to use them.

Blogging

If you want to inform your customers with industry and company news and you're prepared to devote time to quality content development, then you should start a blog. Adding a blog to your website provides a personal voice to your business and allows you to offer your audience useful information. It can even help your website rank better in search engines. It's also the most time consuming method of social media and the most difficult.

Before starting a blog, come up with a plan. What kind of information do you want to provide to your visitors? Will you have time to write original content for your blog several times a week? Are you or someone on your staff comfortable enough writing to develop quality content? If the answer to these questions is yes, then a blog is a perfect start for your social media campaign.



The key to building a successful blog isn't promotion; it's quality content development. Your blog is not the place to sell your services. It's a place to share information that is helpful and interesting to your readers. Promotion can help you build a network, though. Promote your blog to your client base by adding it to your email signature, website, and promotional materials. Connect with other bloggers in your industry by linking to them, commenting on their posts, and submitting your content to social

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If you're ready to build your blog, keep these guidelines in mind: don't blog from an outside website like WordPress or Blogger. Your blog should be a part of your website (<http://www.yourdomain.com/blog>), not part of an outside website (<http://yourdomain.blogspot.com>). By placing the blog on your website, you're placing all of the content from your blog directly on your site. Search engines love websites that are updated frequently, so blogging directly on your site allows you to reap the search engine benefits of keyword-rich blog content. Write fresh, original posts regularly (at least three times a week), and try to keep them under 500 words each for better readability for your visitors.

Facebook

If you want to create a social media hub for your business with content, photos, video, and networking capabilities, a Facebook page is what you need. Facebook is

the largest social network on the web. The website boasts more than 200 million active users with more than half of them logging on at least once a day. And it's not just kids, either. More than two-thirds of users are out of college, and the fastest growing demographic is 35 years and older. If you're not already a part of this huge community, now is the time to join.

The way Facebook differentiates between people and businesses can be confusing. Facebook does not allow businesses to build personal profiles. You have two options for promoting your business: building a business profile page and creating a group for your business. Use the page as a central hub for information about your business on Facebook, and use the group as a forum where fans and friends can interact with you and each other.

Remember, profiles are for people; pages are for businesses. Your business page will need to be connected to a personal profile if you want to reap all of the benefits of Facebook. Build your personal profile first, and keep it business appropriate. Then connect a business page to your profile.

Facebook is people oriented. The only way it's going to work is if you're willing to get involved in the conversation. Build a personal profile, seek out friends in your target audience, and participate in groups related to your profession.

For more information on Facebook pages, read Facebook's help section for businesses at <http://www.facebook.com/advertising/#/advertising/?pages>.

Twitter

To converse with your customers and monitor what they're saying about you in real time, consider Twitter. Twitter (<http://www.twitter.com>) has quickly grown to become one of the most powerful social networking tools on the web. According to data compiled by Neilson Online, Twitter reaches more than 13 million people in the United States each month. It's also the social networking tool that many novices have the hardest time using. Twitter allows users to broadcast short, 140-word messages to other users who "follow" them.

It's no use if your target demographic isn't using Twitter. Do some research to

determine if you can reach your audience through Twitter. Use Twitter Search (search.twitter.com) to find people talking about your products or services. TweetScan (www.tweetscan.com) notifies you when your services or keywords are mentioned on Twitter, and Twollow (www.twollow.com) allows you to auto-follow people who are talking about your services. For instance, if you specialize in traffic violations, you should set a TweetScan alert for relevant keywords such as "speeding ticket" in your area. Using Twollow, you can automatically follow users who are talking about traffic violations. Following them will get you noticed, but they'll only follow back if you're sharing interesting information, so don't wait until you have a network to start tweeting.

Initiate conversation about your industry, offer tips, listen to what people are saying about your company, and be proactive in responding to @ replies and direct messages. Offer information that customers and other people in your network will find interesting—not just marketing and PR speak. Don't toot your own horn too much, or

bombard users with links and repetitive marketing messages. Just like any conversation, these common mistakes will make you boring or annoying to followers.

This is by no means a complete list of social media sites that can help promote business. There are hundreds of other sites and social networking tools. Social media marketing is like any other marketing; different tactics work for different businesses.

Spend some time exploring these websites to determine if they can work for you. Come up with a strategy for how to implement these tools and integrate them with your current marketing efforts. Be sure you're using a network that your target audience is using.

If you're unsure of where to begin, internet marketing consultants can help you come up with a strategy, set up your profiles, and learn to use these tools effectively, but in the end your success depends on your engagement. Designate someone within your company as the online "face" of your brand. Social media works best when it's used to connect people with people. Use a real person as the online persona of your

brand instead of a faceless logo. Your online profiles are an extension of your company, so make sure your company's online persona positively represents your brand.

After you've developed a strategy, built your profile, and joined a network, all that's left is the conversation. Initiate conversation with your customers about your industry and your brand, listen, and respond promptly to @ replies, blog comments, wall comments, and direct messages. Avoid excessive marketing and promotion of your brand, contribute to the community, and be interesting! ■

Mike Duncan is the CEO and creative director of Sage Island, a Wilmington marketing agency. Sage Island began as a custom programming company, but quickly expanded into commercial web design and eventually full-service marketing. Today, Sage Island has built a strong reputation through award-winning designs, brand strategy, and internet marketing services, including search engine optimization and pay-per-click advertising. Mike can be reached at mduncan@sageisland.com, www.sageisland.com.

Law Firm Websites (cont.)

meet. Among other things, firms were required to list favorable and unfavorable results within a specified timeframe, as well as the difficulty of the cases and whether there was clear liability.

This year, the Ethics Committee took a second look at the 2000 ruling. 2009 Formal Ethics Opinion 6, adopted by the Council on July 24, 2009, drops the most troublesome portion from the 2000 opinion—the requirement that favorable and unfavorable results be reported. The ethics ruling allows a case summary section on websites "if there is sufficient information about each case included on the webpage to comply with Rule 7.1(a)." The opinion states: "The summary should reference the complexity of the matter; whether liability and/or damages were contested; whether the opposing party was represented by legal counsel; and, if applicable, the firm's success in actually collecting the judgment. Providing specific information about the factual and legal circumstances of the cases

reported, in conjunction with the inclusion of an appropriate disclaimer, precludes a finding that the webpage is likely to create unjustified expectations or otherwise mislead a prospective client."

Be clear when advertising your firm's age. It's not uncommon for lawyers in a firm to add their years of experience together as a marketing strategy. When a firm says "put our 30 years of experience to work for you," potentially you have three lawyers in the firm that have each been licensed and practicing for ten years. In ethics ruling 2004 Formal Ethics Opinion 7, the Bar declared it was misleading to advertise the number of years of experience of the lawyers with a firm without indicating that it was the combined legal experience of all the lawyers. The solution is an obvious one—simply state you're talking about "combined legal experience" when you total the years of practice of the firm's attorneys.

Register your trade name. Rule 7.5(a) permits a law firm to use a trade name, provided it doesn't imply a connection to a government agency or a charitable legal services

organization and provided the name is not false or misleading. In ethics opinion 2005 Formal Ethics Opinion 8, the Bar concluded that the law firm's URL—the website's unique internet address—could qualify as a trade name. If the URL is more than a minor variation on the official firm name, it has to be registered with the State Bar. SmithJonesLaw.com, a variation of the firm's actual name, would not have to be registered, while a name such as NC-Worker-Injury-Center.com would. Instructions for registering the trade name can be found on the Bar's website at www.ncbar.gov/resources/forms.asp. ■

Michael Dayton is the content manager for Consultwebs.com, a Raleigh-based web design and consulting company for law firms. He is the former editor of North Carolina Lawyers Weekly and South Carolina Lawyers Weekly and co-author of a book on the history of Wake County lawyers, published in 2004.

Attorneys who have questions about their website content can contact the State Bar at 919-828-4620.

2005 Formal Ethics Opinion 10

January 20, 2006

Virtual Law Practice and Unbundled Legal Services

Opinion addresses ethical concerns raised by an internet-based or virtual law practice and the provision of unbundled legal services.

Inquiry #1:

Law Firm markets and provides legal services via the internet under the name Virtual Law Firm (VLF). VLF plans to offer and deliver its services exclusively over the internet. All communications in the virtual law practice are handled through email, regular mail, and the telephone. There would be no face-to-face consultation with the client and no office in which to meet.

May VLF lawyers maintain a virtual law practice?

Opinion #1:

Advertising and providing legal services through the internet is commonplace today. Most law firms post websites as a marketing tool; however, this opinion will not address passive use of the internet merely to advertise legal services. Instead, the opinion explores use of the internet as an exclusive means of promoting and delivering legal services. Many lawyers already use the internet to offer legal services, answer legal questions, and enter into client-lawyer relationships. While the Rules of Professional Conduct do not prohibit the use of the internet for these purposes, there are some key concerns for cyberlawyers who use the internet as the foundation of their law practice. Some common pitfalls include 1) engaging in unauthorized practice (UPL) in other jurisdictions, 2) violating advertising rules in other jurisdictions, 3) providing competent representation given the limited client contact, 4) creating a client-lawyer relationship with a person the lawyer does not intend to represent, and 5) protecting client confidences.

Advertising and UPL concerns are endemic to the virtual law practice. Cyberlawyers have no control over their target audience or where their marketing information will be viewed. Lawyers who appear to be soliciting clients from other states may be asking for trouble. *See* South Carolina Appellate Court Rule 418, "Advertising and Solicitation by Unlicensed Lawyers" (May 12, 1999)(requiring lawyers who are not licensed to practice law in South Carolina but who seek potential clients there to comply with the advertising and solicitation rules that govern South Carolina lawyers). Advertising and UPL restrictions vary from state to state and the level of enforcement varies as well. At a minimum, VLF must comply with North Carolina's advertising rules by including a physical office address on its website pursuant to Rule 7.2(c). In addition, VLF should also include the name or names of lawyers primarily responsible for the website and the jurisdictional limitations of the practice. Likewise, virtual lawyers from other jurisdictions, who actively solicit North Carolina clients, must comply with North Carolina's unauthorized

practice restrictions. *See* N.C. Gen. Stat. §84-4. 2.1. In addition, a prudent lawyer may want to research other jurisdictions' restrictions on advertising and cross-border practice to ensure compliance before aggressively marketing and providing legal services via the internet.

Cyberlawyers also tend to have more limited contact with both prospective and current clients. There will rarely be extended communications, and most correspondence occurs via email. The question becomes whether this limited contact with the client affects the quality of the information exchanged or the ability of the cyberlawyer to spot issues, such as conflicts of interest, or to provide competent representation. *See generally* Rule 1.1 (requiring competent representation); Rule 1.4 (requiring reasonable communication between lawyer and client). Will the cyberlawyer take the same precautions (i.e., ask the right questions, ask enough questions, run a thorough conflicts check, and sufficiently explain the nature and scope of the representation), when communications occur and information is exchanged through email?

While the internet is a tool of convenience and appears to respond to the consumer's need for fast solutions, the cyberlawyer must still deliver competent representation. To this end, he or she should make every effort to make the same inquiries, to engage in the same level of communication, and to take the same precautions as a competent lawyer does in a law office setting.

Next, a virtual lawyer must be mindful that unintended client-lawyer relationships may arise, even in the exchange of email, when specific legal advice is sought and given. A client-lawyer relationship may be formed if legal advice is given over the telephone, even though the lawyer has neither met with, nor signed a representation agreement with the client. Email removes a client one additional step from the lawyer, and it's easy to forget that an email exchange can lead to a client-lawyer relationship. A lawyer should not provide specific legal advice to a prospective client, thereby initiating a client-lawyer relationship, without first determining what jurisdiction's law applies (to avoid UPL) and running a comprehensive conflicts analysis.

Finally, cyberlawyers must take reasonable precautions to protect confidential information transmitted to and from the client. RPC 215.

Inquiry #2:

VLF offers its legal services to *pro se* litigants and small law firms seeking to outsource specific tasks. VLF aims to provide more affordable legal services by offering an array of "unbundled" or discrete task services. Unbundled services are legal services that are limited in scope and presented as a menu of legal service options from which the client may choose. In this way, the client, with assistance from the lawyer, decides the extent to which he or she will proceed *pro se*, and the extent to which he or she uses the services of a lawyer. Examples of unbundled services include, but are not limited to, document drafting assistance, document review, representation in dispute resolution, legal advice, case evaluation, negotiation counseling, and litigation coaching. Prior to representation, VLF will ask that the prospective client sign and return a limited scope of representation agreement. The agreement will inform the prospective client that VLF will not be monitoring the status of the client's case, will only handle those matters requested by the client, and will not enter an appearance on behalf of the client in his or her case.

May VLF lawyers offer unbundled services to clients?

Opinion #2:

Yes, if VLF lawyers obtain informed consent from the clients, provide competent representation, and follow Rule 1.2(c). The Rules of Professional Conduct permit the unbundling of legal services or limited scope representation. Rule 1.2, Comment 6 provides:

The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client⁸⁵. A limited representation may be appropriate because the client has limited objectives for the representation. In addition the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

Rule 1.2, comment [7], however, makes clear that any effort to limit the scope of representation must be reasonable, and still enable the lawyer to provide competent representation.

Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely.

VLF's website lists a menu of unbundled services from which prospective clients may choose. Before undertaking representation, lawyers with VLF must disclose exactly how the representation will be limited and what services will not be performed. VLF lawyers must also make an independent judgment as to what limited services ethically can be provided under the circumstances and should discuss with the client the risks and advantages of limited scope representation. If a client chooses a single service from the menu, e.g., litigation counseling, but the lawyer believes the limitation is unreasonable or additional services will be necessary to represent the client competently, the lawyer must so advise the client and decline to provide only the limited representation. The decision whether to offer limited services must be made on a case-by-case basis, making due inquiry into the facts, taking into account the nature and complexity of the matter, as well as the sophistication of the client.¹

Endnote

1. The ABA Standing Committee on the Delivery of Legal Services has created a website encouraging the provision of "unbundled" legal services and assisted *pro se* representation. The Standing Committee believes unbundling is an important part of making legal services available to people who could not otherwise afford a lawyer. The website has also compiled a list of state ethics opinions addressing limited scope representation. See www.abanet.org/legalservices/deliver/delunbund.html

Proposed 2010 Formal Ethics Opinion 14
Use of Search Engine Company's Keyword Advertisements
Subcommittee Revision (Carlyn G. Poole, Eric L. Muller, Margaret J. McCreary)

March 14, 2011

Proposed opinion rules that it is not a violation of the Rules of Professional Conduct for a lawyer to select another lawyer's name as a keyword for use in a search engine company's search-based advertising program.

Attorney A participates in a search engine company's search-based advertising program. The program allows advertisers to select specific words or phrases that should trigger their advertisements. An advertiser does not purchase the exclusive rights to specific words or phrases. Specific words or phrases can be selected by any number of advertisers. An advertiser indicates the price they are willing to pay for each word or phrase. The highest "bidder" gets the highest placement in the advertisement section when those words or phrases are entered into the search engine. For advertisers that bid the same amount for certain words or phrases, the search engine rotates the placement of the advertisements displayed.

When a user performs a search using the search engine, the advertisements triggered by the relevant words are generally shown in a designated area separate from the search engine's main, unpaid search results. Those advertisements may be on one side of the screen or above the main search results and may be labeled "sponsored links," "sponsored results," "search partners," "ads," or something similar. The purchase of search-based advertising does not influence the main search results or alter the way an advertiser's website appears in the main search results.

One of the keywords selected by Attorney A for use in the search-based advertising program was the name of Attorney B, a competing lawyer in Attorney A's town with a similar practice. Attorney A's keyword advertisement caused a link to his website to be displayed on the search engine's search results page any time an Internet user searched for the term "Attorney B" within the search engine. Attorney A's advertisement may appear to the side of or above the unpaid search results, although Attorney A's advertisement does appear in an area designated for "ads" or "sponsored links."

Attorney B never authorized Attorney A's use of his name in connection with Attorney A's keyword advertisement, and the two lawyers have never formed any type of partnership or engaged in joint representation in any case.

Inquiry:

Does Attorney A's selection of a competitor's name as a keyword for use in a search engine company's search-based advertising program violate the Rules of Professional Conduct?

Opinion:

No. Pursuant to Rule 8.4(c), it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” At issue here is whether Attorney A’s conduct amounts to conduct involving deceit or misrepresentation. We conclude that it does not.

Attorney A is not attempting to “trick” the potential client into clicking on Attorney A’s website link by mistake or attempting to misrepresent the relationship between Attorney A and Attorney B. Rather, Attorney A is attempting to compete with Attorney B through strategic advertisement placement.

Attorney A’s link/advertisement appears in a section of the search results page that is designated as advertising. Presumably, nothing in Attorney A’s displayed link/advertisement implies that Attorney A is associated with Attorney B.

Just like a driver going to a particular lawyer’s physical office, an Internet searcher is trying to get to a particular lawyer’s virtual office. The searcher knows the lawyer he wants to consult with and he is already heading that way by using the lawyer’s name as a search term. If Attorney A has asked a search company to place his advertisement on the virtual road to Attorney B’s office, a consumer may see that advertisement, but, just like a billboard, the consumer can easily recognize that it is an advertisement for a competitor.

Provided that Attorney A’s advertisement appears in a space clearly designated as a paid advertisement that is clearly separate from Attorney B’s listing, does not include the name or web address of Attorney B, does not imply a relationship to Attorney B, and does not purport to link to Attorney B’s website, there is no attempt to deceive a potential client, but merely an attempt to compete for the potential client’s business.

Proposed 2011 Formal Ethics Opinion 4

Participation in Reciprocal Referral Agreement

January 20, 2011

Proposed opinion rules that a lawyer may not participate in a reciprocal referral agreement with a broker who has an ownership interest in a title insurance agency.

Inquiry #1:

Attorney has a relationship with Broker who, over time, has referred many real estate closings to Attorney's office. Attorney desires to maintain this working relationship with Broker. Broker has an ownership interest in Title Insurance Agency. Attorney is aware of Broker's ownership interest.

Broker asks that Attorney procure title insurance with Title Insurance Agency on each transaction referred to Attorney by Broker's office. Broker receives compensation for brokerage services and as a shareholder of Title Insurance Agency.

Guided by Broker's referral, Client engages Attorney to represent him at a real estate closing. Client desires title insurance protection or is required to procure title insurance for the lender's protection.

May Attorney acquire Client's title insurance from Title Insurance Agency?

Opinion #1:

Attorney may not enter in to a "reciprocal referral agreement" with Broker. The Illinois State Bar Association recently addressed such arrangement in Ill. State Bar Assn., Advisory Op. No. 10-02 (October 2009). The Illinois Bar Association considered whether a lawyer could agree to exclusively use a particular title company in order to continue to receive referrals from its affiliated real estate company. The Association concluded that such an exclusive relationship: (1) will inevitably impair the lawyer's ability to provide truly independent professional judgment; (2) is an improper provision of a thing of value for recommendation of the lawyer's services; and (3) creates a conflict that a reasonable lawyer would likely conclude imposes a material limitation on the representation of real estate clients.

We agree that the arrangement outlined in the fact scenario is prohibited under the Rules of Professional Conduct. Such an arrangement would impair Attorney's ability to provide independent professional judgment in violation of Rules 2.1 and 5.4(c). In addition, the arrangement amounts to an improper payment for referrals in violation of Rule 7.2(b). Finally, such an arrangement creates a nonconsentable conflict of interest between the lawyer and the client. *See* Rule 1.7.

Attorney may only acquire Client's title insurance from Title Insurance Agency if it is in Client's best interest. If Attorney is aware of other title insurance options that are more

suitable or economical for Client's needs, Attorney may not procure the insurance from Title Insurance Agency. If the title insurance offered by Title Insurance Agency is a good fit for Client, there is no ethical prohibition on Attorney procuring the insurance from Broker's agency despite the fact that Attorney has a regular and ongoing working relationship with Broker provided, as stated previously, there is not an agreement to refer clients to Attorney in exchange for procuring insurance from Title Insurance Agency.

Inquiry #2:

Upon becoming aware of another lawyer participating in a reciprocal referral agreement such as the one described above, is Attorney under an ethical obligation to report and refer the same to the State Bar?

Opinion #2:

Rule 8.3(a) requires a lawyer to inform the State Bar if the lawyer knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer. Attorney should communicate his concerns to the other lawyer and recommend that the lawyer contact the State Bar for an ethics opinion as to his continuing participation in the reciprocal referral agreement. After this communication, if Attorney believes that the lawyer has continued his participation in the reciprocal referral agreement, Attorney must report the lawyer to the State Bar.

Proposed 2011 Formal Ethics Opinion 6
Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property

April 21, 2011

Proposed opinion rules that a law firm may contract with a vendor of software as a service provided the lawyer uses reasonable care to assure that the risks that confidential client information may be disclosed or lost are effectively minimized.

Inquiry #1:

Much of software development, including the specialized software used by lawyers for case or practice management, document management and billing/financial management, is moving to the “software as a service” (SaaS) model. The American Bar Association’s Legal Technology Resource Center explains SaaS as follows:

SaaS is distinguished from traditional software in several ways. Rather than installing the software to your computer or the firm's server, SaaS is accessed via a web browser (like Internet Explorer or FireFox) over the Internet. Data is stored in the vendor's data center rather than on the firm's computers. Upgrades and updates, both major and minor, are rolled out continuously.... SaaS is usually sold on a subscription model, meaning that users pay a monthly fee rather than purchasing a license up front.¹

SaaS for law firms may involve the storage of a law firm’s data, including client files, billing information, and work product on remote servers rather than on the law firm’s own computer and, therefore, outside the direct control of the firm’s lawyers. Lawyers have duties to safeguard confidential client information, including protecting that information from unauthorized disclosure, and to protect client property from destruction, degradation or loss (whether from system failure, natural disaster, or dissolution of a vendor's business). They also have a continuing need to retrieve client data in a form that is usable outside of a vendor's product.² Given these duties and needs, may a law firm use SaaS?

Opinion #1:

Yes, provided steps are taken effectively to minimize the risk of inadvertent or unauthorized disclosure of confidential client information and to protect client property, including the information in a client’s file, from risk of loss.

The use of the Internet to transmit and store client information presents significant challenges. In this complex and technical environment, a lawyer must be able to fulfill the fiduciary obligations to protect client information and property from risk of disclosure and loss. The lawyer must protect against security weaknesses unique to the Internet, particularly “end-user” vulnerabilities found in the lawyer’s own law office. The lawyer

must also engage in continuous education about ever-changing security risks presented by the Internet.

Rule 1.6 of the Rules of Professional Conduct states that a lawyer may not reveal information acquired during the professional relationship with a client unless the client gives informed consent or the disclosure is impliedly authorized to carry out the representation. Comment [17] explains, “A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.” Comment [18] adds that, when transmitting confidential client information, a lawyer must take “reasonable precautions to prevent the information from coming into the hands of unintended recipients.”

Rule 1.15 requires a lawyer to preserve client property, including information in a client’s file such as client documents and lawyer work product, from risk of loss due to destruction, degradation or loss. *See also* RPC 209 (noting the “general fiduciary duty to safeguard the property of a client”); RPC 234 (requiring the storage of a client’s original documents with legal significance in a safe place or their return to the client); and 98 FEO 15 (requiring exercise of lawyer’s “due care” when selecting depository bank for trust account).

Although a lawyer has a professional obligation to protect confidential information from unauthorized disclosure, the Ethics Committee has long held that this duty does not compel any particular mode of handling confidential information nor does it prohibit the employment of vendors whose services may involve the handling of documents or data containing client information. *See* RPC 133 (stating there is no requirement that firm’s waste paper be shredded if lawyer ascertains that persons or entities responsible for the disposal employ procedures that effectively minimize the risk of inadvertent or unauthorized disclosure of confidential information). Moreover, while the duty of confidentiality applies to lawyers who choose to use technology to communicate, “this obligation does not require that a lawyer use only infallibly secure methods of communication.” RPC 215. Rather, the lawyer must use reasonable care to select a mode of communication that, in light of the circumstances, will best protect confidential communications and the lawyer must advise effected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality. *Id.*

Furthermore, in 2008 FEO 5, the committee held that the use of a web-based document management system that allows both the law firm and the client access to the client’s file is permissible:

provided the lawyer can fulfill his obligation to protect the confidential information of all clients. A lawyer must take steps to minimize the risk that confidential client information will be disclosed to other clients or to third parties. *See* RPC 133 and RPC 215....A security code access procedure that only allows a client to access its own confidential information would be an

appropriate measure to protect confidential client information....If the law firm will be contracting with a third party to maintain the web-based management system, the law firm must ensure that the third party also employs measures which effectively minimize the risk that confidential information might be lost or disclosed. *See* RPC 133.

In a recent ethics opinion, the Arizona State Bar's Committee on the Rules of Professional Conduct, concurred with the interpretation set forth in North Carolina's 2008 FEO 5 by holding that an Arizona law firm may use an online file storage and retrieval system that allows clients to access their files over the Internet provided the firm takes reasonable precautions to protect the security and confidentiality of client documents and information.³

In light of the above, the Ethics Committee concludes that a law firm may use SaaS if reasonable care is taken effectively to minimize the risks to the disclosure of confidential information and to the security of client information and client files.

No opinion is expressed on the business question of whether SaaS is suitable for a particular law firm.

Inquiry #2:

Does "reasonable care" require any specific practices?

Opinion #2:

Yes. Reasonable care requires, at a minimum, the security measures listed below. Note, however, that these are only minimum requirements. Lawyers are advised to consult with a security professional when determining what additional steps should be taken. See also opinion #3 below.

- An agreement on how confidential client information will be handled in keeping with the lawyer's professional responsibilities must be included in the SaaS vendor's Terms of Service or Service Level Agreement, or in a separate agreement that states that the employees at the vendor's data center are agents of the law firm and have a fiduciary responsibility to protect confidential client information and client property.
- The agreement with the vendor must specify that firm's data will be hosted only within a specified geographic area. If by agreement the data is hosted outside of the United States, the law firm must determine that the hosting jurisdiction has privacy laws, data security laws and protections against unlawful search and seizure that are as rigorous as those of the United States and the State of North Carolina.
- If the lawyer terminates use of the SaaS product, the SaaS vendor goes out of business or the service otherwise has a break in continuity, the law firm must have a method for retrieving the data, the data must be available in a non-proprietary

format that is compatible with other firm software or the firm must have access to the vendor's software or source code, and data hosted by the vendor or third party data hosting company must be destroyed or returned promptly.

- The law firm must be able get data "off" the vendor's or third party data hosting company's servers for lawyers' own use or in-house backup offline.
- Employees of the firm who use SaaS receive training on and are required to abide by end-user security measures including, but not limited to, the creation of strong passwords and the regular replacement of passwords.

Mandated security measures have the potential to create a false sense of security in an environment where the risks are continually changing. Therefore, due diligence and perpetual education as to the security risks of SaaS are required.

Inquiry #3:

Are there other ways to minimize risk of loss or unauthorized disclosure of client property or confidential information that a law firm should consider when contracting with a SaaS vendor?

Opinion #2:

Yes, the list⁴ below provides some ways to minimize the security risks of SaaS⁵. The list is not all inclusive and consultation with a security professional competent in the area of online computer security is recommended when contracting with a SaaS vendor. Moreover, given the rapidity with which computer technology changes, what constitutes reasonable care may change over time and a law firm should employ or periodically consult with such a professional.

- The financial history of the SaaS vendor has been investigated and indicates financial stability.
- A lawyer for the firm has read and understood the user or license agreement, including the security policy, and understands the meaning of the terms.
- The measures for safeguarding the physical and electronic security and confidentiality of stored data of the SaaS vendor or any third party data hosting company, including but not limited to firewalls, encryption techniques, socket security features, and intrusion-detection systems⁶, have been evaluated by the law firm or a security professional and are satisfactory.
- The law firm, or a security professional, has reviewed copies of the SaaS vendor's security audits and found them satisfactory.
- To safeguard against natural disaster, the SaaS vendor regularly backs up the firm's data to multiple data centers in different locations within the specified geographic area
- The agreement with the vendor confirms that access to the firm's data will be limited to those employees of the vendor or any third party data hosting company who are informed of the fiduciary responsibility to protect client information.
- The agreement with the vendor provides that the law firm owns the data.

- Clients with access to shared documents are aware of the confidentiality risks of showing the information to others. *See* 2008 FEO 5.
- The law firm has a back-up for shared document software in case of service interruption such as an outside server going down.
- The firm lawyers are educated on the risks of utilizing the Internet to transmit and store client information and are trained on security measures including, but not limited to, creating strong passwords and regularly changing the passwords.
- Security software is installed on the computers at the law firm to ensure that the user is connected to the SaaS vendor website and the computer is protected against malware, viruses and hacker attacks.

¹ FYI: *Software as a Service (SaaS) for Lawyers*, ABA Legal Technology Resource Center <
<http://www.abanet.org/tech/ltrc/fyidocs/saas.html>>.

² Id.

³ Paraphrasing the description of a lawyer's duties in Arizona State Bar Committee on Rules of Professional Conduct, Opinion 09-04 (Dec. 9, 2009).

⁴ List derived from the recommendations of Erik Mazzone, Director of Center for Practice Management, North Carolina Bar Association (in email communications with counsel to the Ethics Committee, 3/30/10 and 3/31/10) and ABA Legal Technology Resource Center, see fn. 2.

⁵ Standards for better storage and transmission of client data were recently proposed by the International Legal Technology Standards Organization, a non-profit organization. These can be found at <http://www.iltso.org>.

⁶ A firewall is a system (which may consist of hardware, software or both) that protects the resources of a private network from users of other networks. Encryption techniques are methods for ciphering messages into a foreign format that can only be deciphered using keys and reverse encryption algorithms. A socket security feature is a commonly-used protocol for managing the security of message transmission on the Internet. An intrusion detection system is a system (which may consist of hardware, software or both) that monitors network and/or system activities for malicious activities and produces reports for management. Definitions and additional information may be found at <http://www.iwebtool.com>; <http://www.numatek.com>; <http://www.whatis.com>; <http://www.wikipedia.org>; and <http://www.wisegeek.com>.

Proposed 2011 Formal Ethics Opinion 7

Using On-line Banking to Manage a Trust Account

April 21, 2011

Proposed opinion rules that a law firm may use on-line banking to manage its trust accounts provided the firm's managing lawyers are regularly educated on the security risks and actively maintain end-user security.

Inquiry:

Most banks and savings and loans provide “on-line banking” which allows customers to access accounts and conduct financial transactions over the Internet on a secure website operated by the bank or savings and loan. Transactions that may be conducted via on-line banking include account-to-account transfers, payments to third parties, wire transfers and applications for loans and new accounts. On-line banking permits users to view recent transactions and view and/or download cleared check images and bank statements. Additional services may include account management software.

Financial transactions conducted over the Internet are subject to the risk of theft by hackers and other computer criminals. Given the duty to safeguard client property, particularly the funds that a client deposits in a lawyer's trust account, may a law firm use on-line banking to manage a trust account?

Opinion:

Yes, provided steps are taken effectively to minimize the risk of loss or theft specifically including the regular education of the firm's managing lawyers on the ever-changing security risks of on-line banking and the active maintenance of end-user security.

As noted in [proposed] 2011 FEO 6, *Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property*, the use of the Internet to transmit and store client data (or, in this instance, data about client property) presents significant challenges. In this complex and technical environment, a lawyer must be able to fulfill the fiduciary obligations to protect client information and property from risk of disclosure and loss. The lawyer must protect against security weaknesses unique to the Internet, particularly “end-user” vulnerabilities found in the lawyer's own law office. The lawyer must also engage in continuous education about ever-changing security risks presented by the Internet.

Rule 1.15 requires a lawyer to preserve client property, to deposit client funds entrusted to the lawyer in a separate trust account, and to manage that trust account according to strict recordkeeping and procedural requirements. *See also* RPC 209 (noting the “general fiduciary duty to safeguard the property of a client”) and 98 FEO 15 (requiring a lawyer to exercise “due care” when selecting depository bank for trust account). The rule is silent, however, about on-line banking.

On-line banking may be used to manage a client trust account if the fiduciary obligations in Rule 1.15 can be fulfilled. To do this, a lawyer who is managing a trust account must use reasonable care to effectively minimize the risks to client funds on deposit in the trust account by remaining educated as to the dynamic risks involved in on-line banking and insuring that the law firm invests in proper protection and multiple layers of security to address those risks. *See* [proposed] 2011 FEO 6.

A lawyer who is managing a trust account has affirmative duties to regularly educate himself as to the security risks of on-line banking; to actively maintain end-user security at the law firm through safe practices such as strong password policies and procedures, the use of encryption and security software, and the hiring of an information technology consultant to advise the lawyer or firm employees; and to insure that all staff members who assist with the management of the trust account receive training on and abide by the security measures adopted by the firm. Understanding the contract with the depository bank and the use of the resources and expertise available from the bank are good first steps toward fulfilling the lawyer's fiduciary obligations.

This opinion does not set forth specific security requirements because mandatory security measures would create a false sense of security in an environment where the risks are continually changing. Instead, due diligence and perpetual education are required. A lawyer must fulfill his fiduciary obligation to safeguard client funds by applying the same diligence and competency to manage the risks of on-line banking that a lawyer is required to apply when representing clients.

2011 Formal Ethics Opinion 8

Utilizing Live Chat Support Service on Law Firm Website

July 15, 2011

Opinion provides guidelines for the use of live chat support services on law firm websites.

Inquiry:

A law firm would like to utilize a live chat support service on its website. Typically, such a service requires the law firm to download a software program to the firm website. After the software is downloaded, a “button” is displayed on the website which reads something like “Click Here to Chat Live.” The button is often accompanied by a picture of a person with a headset. Once a visitor clicks on the button to request a live chat, the visitor will be able to have a typed out conversation in real-time with an agent identified as perhaps a “law firm staff member” or an “operator.” The agent will guide the visitor through a series of screening questions through the use of a script. Typically, the agent will learn about the facts of the potential case. The agent will also obtain contact information for the visitor. The agent then emails a transcript of the “chat” to the law firm. In some instances, the law firm pays only for the transcripts of “chats” in which the visitor provides a way for the law firm to contact him or her.

Depending on the software program purchased, in addition to the live chat “button” being displayed on the website, a pop up window may also appear on the screen specifically asking visitors if they would like “live help.” The window may contain a picture of a person with a headset and reads something like, “Hi, you may just be browsing but we are here to answer your questions. Please click ‘yes’ for live help.” The pop up window is software generated. It is only after the visitor clicks on the button that the live agent is engaged.

In another form of the live chat support service, the “button” and pop up window showing a picture of a person with a headset is displayed on the website and a voice says something like, “Hi, we are here to answer your questions. Please click ‘yes’ for live help.” These statements are presumably software generated. It is only after the visitor clicks on the “yes” button that the live agent is engaged.

Is the utilization of these types of live chat support services a violation of the Rules of Professional Conduct?

Opinion:

No. Rule 7.3(a) provides that a lawyer, shall not by “in-person, live telephone or real-time electronic contact” solicit professional employment from a potential client unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or

interactive communication. The interactive typed conversation with a live agent provided by the live chat support service described above constitutes a real-time electronic contact.

It is important to note that the prohibition in Rule 7.3(a) applies only to lawyer-initiated contact. Rule 7.3 does not prohibit real time electronic contact that is initiated by a potential client. In each of the instances described above, the website visitor has made the initial contact with the firm. The visitor has chosen to visit the law firm's website, indicating that they have some interest in the website's content. It is appropriate at this juncture for the law firm to offer the website visitor live assistance.

In addition to the fact that the potential client has initiated the contact with the law firm, the circumstances surrounding this type of real time electronic contact do not trigger the concerns necessitating the prohibition set out in Rule 7.3. Comment [1] to Rule 7.3 explains the policy considerations behind the prohibition:

There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

The use of a live chat support service does not subject the website visitor to undue influence or intimidation. The visitor has the ability to ignore the live chat button or to indicate with a click that he or she does not wish to participate in a live chat session.

The Philadelphia Bar Association recently issued an opinion that allows certain real-time electronic communications, including communications through blogs, chat rooms, and other social media. Philadelphia Bar Ass'n. Prof'l. Guidance Comm., Op. 2010-6 (2010). The opinion states that Rule 7.3 does not bar the use of social media for solicitation where a prospective client to whom the lawyer's communication is directed has the ability "to 'turn off' the soliciting lawyer and respond or not as he or she sees fit." The Philadelphia Bar Association opined that "with the increasing sophistication and ubiquity of social media, it has become readily apparent to everyone that they need not respond instantaneously to electronic overtures, and that everyone realizes that, like targeted mail, e-mails, blogs and chat room comments can be readily ignored, or not, as the recipient wishes."

Although the use of this type of technology is permissible, the practice is not without its risks and a law firm utilizing this service must exercise certain precautions. The law firm must ensure that visitors who elect to participate in a live chat session are not misled to

believe that they are conversing with a lawyer if such is not the case. While the use of the term “operator” seems appropriate for a nonlawyer, a designation such as “staff member,” or something similar, would require an affirmative disclaimer that a nonlawyer staff member is not an attorney. The law firm must ensure that the nonlawyer agent does not give any legal advice.

The law firm should be wary of creating an “inadvertent” lawyer client relationship. In addition, the law firm should exercise care in obtaining information from potential clients and be mindful of the potential consequences/duties resulting from the electronic communications. Rule 1.18 provides that a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client and that, even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client may generally not use or reveal information learned in the consultation. Furthermore, Rule 1.18(c) prohibits a lawyer from representing a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter. Therefore, acquiring information from a prospective client via the live chat service could create a conflict of interest with a current client that would require withdrawal.

Proposed 2011 Formal Ethics Opinion 10

Lawyer Advertising on Deal of the Day or Group Coupon Website

July 14, 2011

Proposed opinion rules that a lawyer may advertise on a website that offers daily discounts to consumers where the website company's compensation is a percentage of the amount paid to the lawyer if certain disclosures are made and certain conditions are satisfied.

Inquiry:

Lawyer would like to advertise on a “deal of the day” or “group coupon” website. To utilize such a website, a consumer registers his email address and city of residence on the website. The website company then emails local “daily deals” or coupons for discounts on services to registered consumers. The daily deals are usually for services such as spa treatments, tourist attractions, restaurants, photography, house cleaning, etc. The daily deals can represent a significant reduction off the regular price of the offered service. Consumers who wish to participate in the “deal of the day” purchase the deal online using a credit card that is billed.

The website company negotiates the discounts with businesses on a case-by-case basis; however, the company's fee is always a percentage of each “daily deal” or coupon sold. Therefore, the revenue received by the business offering the daily deal is reduced by the percentage of the revenue paid to the website company.

May a lawyer advertise on a group coupon website and offer a “daily deal” to users of the website subject to the website company's fees without violating the Rules of Professional Conduct?

Opinion:

Yes. Although the website company's fee is deducted from the amount paid by a purchaser for the anticipated legal service, it is paid regardless of whether the purchaser actually claims the discounted service and the lawyer earns the fee by providing the legal services to the purchaser. Therefore, the fee retained by the website company is the cost of advertising on the website and does not violate Rule 5.4(a) which prohibits, with a few exceptions, the sharing of legal fees with nonlawyers. The purpose for the fee-splitting prohibition is not confounded by this arrangement. As noted in Comment [1] to the rule, the traditional limitations on sharing fees prevent interference in the independent professional judgment of a lawyer by a nonlawyer. There is no interaction between the website company and the lawyer relative to the legal representation of purchasers at any time after the fee is paid on-line other than the transfer of the proceeds of the “daily deal” to the lawyer. Rule 7.2(b)(1) allows a lawyer to pay the reasonable cost of advertisements. As long as the percentage charged against the revenues generated is reasonable compensation for the advertising service, a lawyer may participate. *Cf.* 2010 FEO 4 (permitting participation in a barter exchange program in which members pay a cash transaction fee of ten percent on the gross value of each purchase of goods or services). There are, however, professional responsibilities that are impacted by this type of advertising.

First, a lawyer may not engage in misleading advertising. Rule 7.1. Therefore, the advertised discount may not be illusory: the lawyer must have an established, standard fee for the service

that is being offered at a discount. Moreover, the lawyer's advertisement on the website must include certain disclosures. Clients should not make decisions about legal representation in a hasty manner. The advertisement must explain that the decision to hire a lawyer is an important one that should be considered carefully and made only after investigation into the lawyer's credentials. In addition, the advertisement must state that a conflict of interest or a determination by the lawyer that the legal service being offered is not appropriate for a particular purchaser may prevent the lawyer from providing the service and, if so, the purchaser's money will be refunded (see below for explanation of the duty to refund).

Second, a lawyer must deposit entrusted funds in a trust account. Rule 1.15-2(b). The payments received by the lawyer from the website company are advance payments¹ of legal fees that must be deposited in the lawyer's trust account and may not be paid to the lawyer or transferred to the law firm operating account until earned by the provision of legal services.

Third, a professional relationship with a purchaser of the discounted legal service is established once the payment is made and this relationship must be honored. The lawyer has offered his services on condition that there is no conflict of interest and the service is appropriate for the purchaser, and the purchaser has accepted the offer. At a minimum, the purchaser must be considered a prospective client entitled to the protections afforded to prospective clients under Rule 1.18.

Fourth, a lawyer may not retain a clearly excessive fee. Rule 1.5(a). If a prospective client fails to claim the discounted legal service within the designated time (before the "expiration date"), one might consider the advance payment forfeited. Even if it is assumed that this is a risk that is generally known to consumers, however, it does not justify the receipt of a windfall by the lawyer. As a fiduciary, a lawyer places the interests of his clients above his own and may not accept a legal fee for doing nothing. Such a fee is inherently excessive. Therefore, if a prospective client does not claim the discounted service within the designated time, the lawyer must refund the advance payment on deposit in the trust account for the prospective client or, if the prospective client still desires the legal service, the lawyer may charge his actual rate at the time the service is provided but must give the prospective client credit for the advance payment on deposit in the trust account.

Last, a lawyer has a duty of competent representation pursuant to Rule 1.1. The lawyer must consult with each prospective client to determine what service the prospective client actually requires. If competent representation requires the lawyer to expend more time than anticipated to satisfy the advertised service, the lawyer must do so without additional charge. Similarly, if upon consulting with a prospective client the lawyer determines that the prospective client does not need the legal service or that a conflict of interest prohibits the representation, the lawyer must refund the prospective client's entire advance payment, including the amount retained by the website company, to make the prospective client whole.

Endnote

1. In light of the many uncertainties of a legal representation arranged in the manner proposed, a lawyer may not condition the offer of discounted services upon the purchaser's agreement that the money paid will be a flat fee or a minimum fee that is earned by the lawyer upon payment. *See* 2008 FEO 10.

Proposed 2011 Formal Ethics Opinion 14

Outsourcing Clerical or Administrative Tasks

July 14, 2011

Proposed opinion rules that lawyer must obtain client consent before outsourcing its transcription and typing needs to a company located in India.

Inquiry:

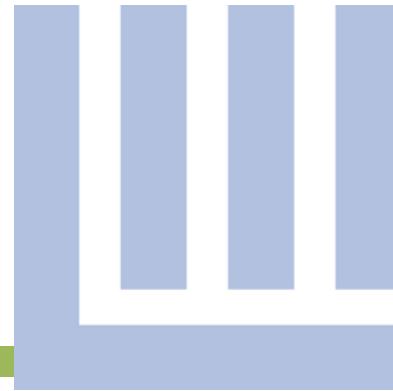
Law Firm would like to outsource its transcription and typing needs to a company located in India. Specifically, voice files would be sent via email and some documents would be scanned to the company via email. The communications would, in turn, be transcribed to paper. The files would include information about client matters and work product regarding client matters. Law Firm investigated the security measures the company utilizes and found them to be extensive.

Is Law Firm required to disclose the outsourcing of these clerical tasks to its clients and obtain their informed written consent as contemplated by 2007 FEO 12?

Opinion:

Yes. 2007 FEO 12 provides that a lawyer has an ethical obligation to disclose the use of foreign, or other, legal assistants and to obtain the client's written informed consent to the outsourcing. The opinion notes that, in the absence of a specific understanding between the lawyer and client to the contrary, the reasonable expectation of the client is that the lawyer, using resources within the lawyer's firm, will perform the requested legal services. 2007 FEO 12 (citing 2002 FEO 9; San Diego County Bar Ass'n. Ethics Opinion 2007-1).

2007 FEO 12 does not differentiate between administrative support services and legal support services in finding a duty to disclose the use of foreign assistants and to obtain client consent. Based on concerns as to confidentiality, ABA Formal Opinion 08-451 (2008) similarly provides that "where the relationship between the firm and the individuals performing the services is attenuated, as in a typical outsourcing relationship, *no information protected by Rule 1.6* may be revealed without the client's informed consent" (emphasis added). The bar associations of New York and Ohio have reached similar conclusions. NY State Bar Ass'n. Comm. on Prof'l Ethics, Op. 2006-3 (2006); Ohio Ethics Op. 2009-6 (2009). *But see* VA State Bar Standing Comm. on Legal Ethics, Op. 1850 (2010)(certain "rudimentary functions" that are truly clerical or administrative can be outsourced without client consent).



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Erik Mazzone (<http://nclawblog.com>)

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1. Typingweb (<http://www.typingweb.com/>) Practicing law is more computer-centric than ever before and far too many lawyers have their efficiency hampered by hunt and peck typing skills. Typing Web offers free typing classes on the web.
2. Libre Office (<http://libreoffice.org>) LibreOffice is a free alternative to Microsoft Office. The word processor and spreadsheet programs are easily compatible with Microsoft versions without the price tag. Especially attractive for Mac and Linux users whose computers did not come bundled with Microsoft Office.
3. Bates Style numbering acrobat article – (<http://lawyerist.com/bates-style-numbering-in-acrobat>) Most lawyers know and use Adobe Reader to read PDFs. What they may not know is that Adobe Acrobat is a powerful software program that can help them create and edit fillable forms, assemble PDF portfolios and even bates label documents.
4. Zoho (<http://www.zoho.com>) Mail, chat, CRM, docs, projects, wiki, recruit, spreadsheet, HR, invoicing, presentations, note taking, project planning and reporting and more, all web-based.
5. FreeConferenceCall.com and FreeScreenSharing.com (<http://freeconferencecall.com>) It is what it says it is and it's really free. Get your own dial in number that accommodates up to 96 callers for calls lasting up to 6 hours. Toll-free dialing and other services are available for an extra charge. Screen sharing is now free as well.
6. Magic Cube Keyboard – www.celluon.com/products/laserkey1 Ultraportable, full-sized virtual computer keyboard.
7. TextFlow (<http://www.nordicriver.com/>) This product is track changes on steroids. It's much better than the feature built in to Microsoft Word. Compares Word documents as well as PDFs. Compares changes by more than two parties and provides detailed information. Costs \$48 per year, per user.
8. Square (<http://squareup.com>) Free device for accepting payment by credit card via smartphone. \$1.99 app for iPhone. Accept MC and Visa. Small fee.
9. Wunderlist (<http://www.wunderlist.com/>) One of the basic risk management strategies that lawyers ought to take better advantage of is redundancy - of calendaring, of task lists, and of digital information generally. Wunderlist helps achieve this by offering a simple, elegant task manager that works across all of the major computing platforms.
10. Pathagoras (<http://www.pathagoras.com/>) As technology continues its march into law offices, one of the coming advances is doubtless going to be widespread adoption of

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document automation. When you can delegate the creation of routine documents to staff, accuracy improves and costs for clients diminish.

11. Using Facebook to Search for Evidence (<http://onion.com/bRxuTK>) Particularly for family lawyers, social media in general and Facebook in particular have become a treasure trove of information that may become evidence in litigation.
12. Client Communication: Automated Follow Up (<http://followupthen.com>) Automate your follow up with clients on a variety of topics from important dates, to documents for review to replenishing a retainer. Follow Up Then allows you to customize your messages and stay on top of your key client issues automatically.
13. Hipmunk (<http://hipmunk.com>) It's a better place to search for flights. Most of these sites haven't changed in years. This one gives you better results with filtering based on your needs. No more paging through hundreds of results. Rank order results based on agony, price stops, departure and arrival time or duration.
14. ScreenSteps Desktop (<http://bluemangolearning.com>) Create systems documentation on your desktop quickly and easily. Screensteps makes it simple to grab screen shots and annotate them with instructions so you can create a visual and effective office procedures manual. It's \$39.95 for the Mac or Windows.
15. RunPee (<http://runpee.com/>) Sometimes a paralegal has got to blow off some steam from a stressful job, and one great way to do that is to go to the movies. Figure out how to never miss an important point in a movie again because you had to run to the bathroom. RunPee.com tells you the best time to run to the bathroom during a movie and what you missed. Also available for iPhone.
16. PhoneTag (<http://phonetag.com>) No more listening to voicemail. PhoneTag takes your voicemail, transcribes it and emails it to you. You can sneak a peak, under the table, while your meeting drones on.
17. Dialawg (<https://www.dialawg.com/>) Email is insecure and disorganized. Dialawg provides 128 bit SSL security for your email in transit and 256 bit AES encryption for your stored mail. Free for a basic account.
18. Lojack for Laptops (<http://lojackforlaptops.com>) One of the biggest security risks for laptops is plain old physical theft of the machine itself. In general, when your machine is stolen, the odds of retrieving it (or protecting the confidential client information contained within) are not good. Lojack for Laptops works similarly to Lojack for cars - the next time the thief turns on the computer and connects to the internet, Lojack silently sends back a signal to the main site so that authorities can be notified and you can reclaim your machine.
19. Payne Metadata Assistant (<http://www.payneconsulting.com/>) Safely dealing with metadata is not just a good idea, it is also an ethical duty. Payne's Metadata Assistant makes it fast and easy. \$80.

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20. Sit or Squat (<http://www.sitorsquat.com/>) Sometimes law practice takes us out of our home jurisdiction and creates various logistical difficulties. Fix one with this app and find a toilet or restroom anywhere in the world instantly.
21. DBAN (www.dban.org) Before you get rid of that computer, make sure you've securely deleted all of the confidential client data (not to mention your own). Darik's Boot and Nuke is an open source program to securely erase all the data from your machine.
22. Ribbon Hero (www.ribbonhero.com) If you never thought learning the new version of Microsoft Office could be fun, it turns out you were wrong.
23. SquareSpace (<http://www.squarespace.com/>) Simply the easiest way to build and host a blog or website and make it look professional without spending a lot of money. From \$8 per month, SquareSpace provides easy to use tools that any lawyer can use to create a professional looking blog or website in no time.
24. Minus (<http://minus.com/>) It's ridiculously easy and free file sharing for when you can't email the file because it's too big for your system. Ge.tt allows you to drag and drop the files and instantly share them with others.
25. PDFescape (<http://pdfescape.com>) Free PDF reader, editor, filler form designer all without downloading and installing any software. They charge for creating fillable PDFs. Many of the features of Adobe Acrobat Professional for free or a very low fee. Move and delete pages, encrypt, add annotations, create links, etc.
26. Right Signature (<http://rightsignature.com/>) Send a document to your client, have them sign it online and send it back. We use it for all our client agreements. No more print it, scan it and send it back. They offer a free account for one user.
27. LastPass (<https://lastpass.com/>) LastPass is a free, online password manager and form filler. Using a password manager and form filler greatly enhances your security while on the web. LastPass will create strong passwords for you, allow you to click into your password protected sites with one click and complete online purchases without having to grab your credit card every time. Works for Windows, Mac or Linux.
28. Tungle.me (<http://tungle.me>) The end of emailing back and forth with a group trying to find a time for a meeting. Post a bunch of possible dates and times to TungleMe site and let the attendees help find an agreeable time. Integrates with Google Calendar. It's free.
29. Parents on Facebook (<http://myparentsjoinedfacebook.com/>) Every child's dream.
30. Center for Practice Management (<http://lawpracticematters.com>) Erik Mazzone's site with great articles and resources for the management of your practice. Updated frequently. Very practical advice that you can put to work in your practice. Also, use him as a consultant - it's free for North Carolina Bar Association members.

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31. Evernote (<http://evernote.com/>) Evernote is note taking software for Mac and Windows. It allows you to easily capture information in any environment or platform and organize it in one searchable, accessible interface.
32. ActiveWords or TextExpander (<http://www.activewords.com/>) or (<http://www.smileonmymac.com/TextExpander/>) These abbreviation expanders allow you to type a few characters which are then, automatically, expanded into full words, phrases, sentences or paragraphs.
33. GoogleVoice (<http://voice.google.com/>) GoogleVoice is a free service from Google that allows you to use your existing phones better. GoogleVoice features simultaneous ring, online voicemail, and transcription of voicemail to text. Integrates with GMail Contacts. Many of the features of expensive phone systems for free. With number portability so you can use your existing cell phone number.
34. I-Ecko USB Drive: USB drives are only good if you have one when you need one. Make sure you never forget yours by picking a drive that does double duty and serves some other essential function.
35. Let me Google That for You (<http://imgtfy.com/>) For all those people who find it more convenient to bother you with their question rather than google it for themselves.
36. Read It Later (<http://readitlater.com/>) when you see a headline, opinion or article on the web that is important but that you don't have time to read in full at the moment, don't bookmark or print it out. Read It Later and its counterpart, Instapaper, will store these articles for you and keep them until you are ready to read them.
37. Tripit: Tripit is a free online resource for keeping track of and making your travel plans. It neatly organizes flights, hotel reservations, rental car information and all of the ephemera related to travel. Tripit has terrific mobile apps, connects to the major social networks and can even read your email for you to automatically create new itineraries when you receive a flight confirmation. Free, additional cost for premium features.
38. SimpleCertifiedMail (<http://simplecertifiedmail.com>) The most efficient way to manage certified, priority and express mail. Prepare your mail in seconds, send it from any mailbox and save money, too.
39. Divorce Discourse (<http://www.divorcediscourse.com>) The best website available on how to build and run a successful small law practice.
40. TimeSolve (<http://timesolv.com/>) hosted time and billing and project management software geared specifically to solo practitioners and small firms.
41. Awkward Family Photos (<http://awkwardfamilyphotos.com/>) You thought yours were bad?
42. Ruby Receptionist (<http://www.callruby.com/>) Don't let important client calls go to voicemail. Between answering your own phone calls for every call to your office and

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paying for a receptionist who is only busy 1 hour of the day, there is Ruby Receptionist - a virtual receptionist to keep your payroll low and efficiency high.

43. Reputation.com (<http://www.reputation.com/>) Take control of your online reputation before someone else does. Find and remove your personal information from websites that sell it. Easily remove private data from people-search sites like Spokeo and PeopleSmart.
44. Greplin (<https://www.greplin.com/>) Search everything from one place. This smart tool auto-detects important information from your files and messages and creates links. Greplin will organize contacts from your social media, upcoming events, notes on shared projects and search documents stored online. Greplin can be used to search files to avoid conflicts, or to help manage electronic client files.
45. HanderPants (www.handerpants.com) Don't let your productivity be sidelined by cold hands.
46. GroupZap (<http://www.groupzap.com/>) GroupZap is a brainstorming tool. Create a unique URL for your group project and allow members to share text, pictures and ideas easily through a visual medium. The site is ideal for conference calls, or as a stand alone channel for finding solutions.
47. Forgotten Attachment Detector (<http://www.officelabs.com/projects/forgottenattachmentdetector>) FAD helps you avoid the risk of forgotten email attachments, saving you time and embarrassment. Free.
48. Topsy (<http://topsy.com/>) Topsy can show you what is trending on social media and influential posts seconds after publication. Applying sophisticated algorithms to social data, Topsy helps business interpret the market using from census-based data sets and impressive precision.
49. Anti-Theft Lunch Bags (<http://www.thinkofthe.com/product.php?name=anti-theft-lunch-bags>) We work with thieves. Protect your luncheon investment with anti-theft lunch bags. Throws would-be lunch thieves off the trail. \$8.
50. LucidChart (<https://www.lucidchart.com/>) With easy to use, all-browser-friendly software, LucidChart makes creating graphs and charts simple. Invite multiple collaborators, publish to a variety of mediums, and create attractive, colorful resources for your business.
51. TechnoLawyer (www.technolawyer.com) The best source on technology for law firms, this free newsletter covers everything you need to know, delivered right to your inbox.
52. Vocalocity (www.vocalocity.com) If you are still struggling with a POTS (plain old telephone system), now is the time to start thinking about switching to VoIP. It's efficient, makes it simple for clients to contact you anywhere (thanks to the great mobile app) and offers all of the features that used to be relegated to phone systems costing much, much more.

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53. Online OCR (<http://www.onlineocr.net>) Optical Image Recognition software recognizes and converts text from PDFs, photographs, and faxes into editable documents. Converted documents will look exactly like the original. The software recognizes 32 languages.
54. Google Apps – Mail (www.googleapps.com) This is simply the best email program available, bar none.
55. Dropbox (www.dropbox.com) Dropbox is the simplest, easiest web-based storage there is. Works across all platforms and devices. 2 GB free storage.
56. YippieMove (www.yippiemove.com) If you've been putting off moving your email to Gmail or another cloud-based product because it seems complicated and difficult, YippieMove will do all the work for you for \$14.95.
57. IFTTT (<http://ifttt.com>) If This Then That, or IFTTT, is a free service that ties together your web services that you use. By using simple if then logic, you can easily and quickly create automatic connections to save you time and work. For example, you can use IFTTT so that if you change your photo on your Facebook profile, IFTTT automatically changes it on your LinkedIn profile as well.
58. ContactMe (<http://contactme.com>) In difficult economic times, the attorneys who come out on top are the ones with the most robust network of referral sources sending them business. As sales people know, the best way to keep track of referral sources and other contacts is through CRM (customer relations management software). ContactMe is a simple, web-based CRM, available free for light users and \$7.42 per month for heavy users.
59. Polish My Writing (<http://www.polishmywriting.com/>) is a spelling, grammar and writing style checker for anything you put on the web. Readers, clients, fellow attorneys and potential clients will form opinions about you based on the information you put on your firm website. Make sure you put your best foot forward.
60. Dry All (<http://dry-all.com/>) Ever drop your cell phone in a sink full of water? Dry-all to the rescue. Dry-all is a “molecular dehumidifier” – and takes the sting (and the moisture) out of some of life's little catastrophes. \$20



Speaker Biographies

DEANNA BROCKER

DOUG BROCKER

PEGEEN TURNER

ERIK MAZZONE

LEE ROSEN

LAWYERS MUTUAL



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Douglas J. Brocker and his wife, **Deanna S. Brocker**, are the principals in The Brocker Law Firm, P.A. They concentrate their practice in professional ethics, licensing and disciplinary matters, including representing professionals in disciplinary matters before their respective licensing boards. They both speak and publish articles regularly on ethical and professionalism issues.

Doug formerly was trial and UPL counsel at the North Carolina State Bar, where he investigated and prosecuted disciplinary matters for approximately 6 years. Deanna served as Assistant Ethics Counsel to the North Carolina State Bar for more than 10 years, where she answered ethics questions from attorneys all over the state. Doug has been retained to act as special prosecutor by several professional licensing boards in a number of high-profile disciplinary cases, such as State Bar v. Nifong.



Pegeen Turner has more than 14 years of experience in the legal technology field. After working as an internal IT person for large and small law firms, she launched her own legal IT consulting firm, Turner IT Solutions in June of 2010. Her firm works with small and medium-sized firms as they start-up as well as firms that need help maintaining and integrating technology into their practice. In addition, she helps firms understand the risks of cloud computing and how to incorporate cloud computing into their practice.

NORTH CAROLINA BAR ASSOCIATION

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Erik Mazzone is the Director of the North Carolina Bar Association's Center for Practice Management (CPM). CPM helps lawyers improve efficiency in delivering legal services and implement systems to reduce risk and improve client relations. Erik graduated from Boston College and Boston College Law School. After practicing law and operating a law practice management consultancy for 12 years, he joined the North Carolina Bar Association in 2008.



Lee Rosen practices family law and has offices in Raleigh, Durham and Charlotte. Rosen is a graduate of Wake Forest University School of Law and the University of North Carolina at Asheville. Rosen served as a former Chairperson of the North Carolina Bar Association Law Practice Management Section. He is the Law Practice Management editor of the A.B.A. Family Advocate. Rosen writes extensively on law practice management, marketing, technology and finance issues and is frequently published by leading legal trade publications. He writes a practice management blog at DivorceDiscourse.com. His firm website is Rosen.com.

Warren Savage joined the Lawyers Mutual as claim counsel in 2005. He focuses on litigation, appellate advocacy, criminal matters and professional responsibility in his work with Lawyers Mutual. A former partner with the law firm of Bailey & Dixon, Warren graduated from the University of Virginia and earned a Master of Arts in Teaching at the University of North Carolina at Chapel Hill before graduating magna cum laude from Campbell University School of Law. He spent several years as a high school English teacher and junior varsity basketball coach before entering the legal profession.

Mark Scruggs came to Lawyers Mutual as claims counsel in 2001. His work with Lawyers Mutual focuses on litigation, workers compensation and family law matters. As a partner with Spears, Barnes, Baker, Wainio & Scruggs, he concentrated his practice in insurance defense litigation. Prior to that, Mark worked with Aetna Life and Casualty as both a claims supervisor and a claims representative. He graduated from Bluefield College and Campbell University School of Law (cum laude). He served as chair of the North Carolina Bar Association's Law Practice Management section in 2005-2006. Mark is also active in his community, serving as president of the Kiwanis Club of Durham (1994-1995) and as a deacon and trustee for the Yates Baptist Church. An avid runner, he participates in 10K races and half-marathons.

Camille Stell served as risk management paralegal for Lawyers Mutual from 1994 to 2000. She returned in 2009 as Director of Client Services. She previously worked at the law firms of K&L Gates; Kennedy, Covington, Lobdell & Hickman and Young, Moore & Henderson as both a paralegal and as a recruiting and marketing professional. An accomplished speaker and author, she has spoken for legal professionals on a local, state and national level. Camille graduated from Meredith College and the Meredith College Paralegal Program. A past Chair of the Law Practice Management Section of the North Carolina Bar Association, she has served on the editorial board for *Legal Assistant Today* magazine, *Women's Edge* magazine, *Carolina Paralegal News* and as Supplements Editor for *North Carolina Lawyers Weekly*.

Dan Zureich was welcomed to Lawyers Mutual as President in 2010. He previously served as a Senior Managing Director of Aon Benfield, a reinsurance intermediary, and as Vice President of Insurance Operations for The Bar Plan, a Missouri Bar sponsored insurance company. In private practice, he concentrated his work on defending FELA, product liability, and civil rights claims. Dan graduated from the University of Missouri and the University of Missouri School of Law.